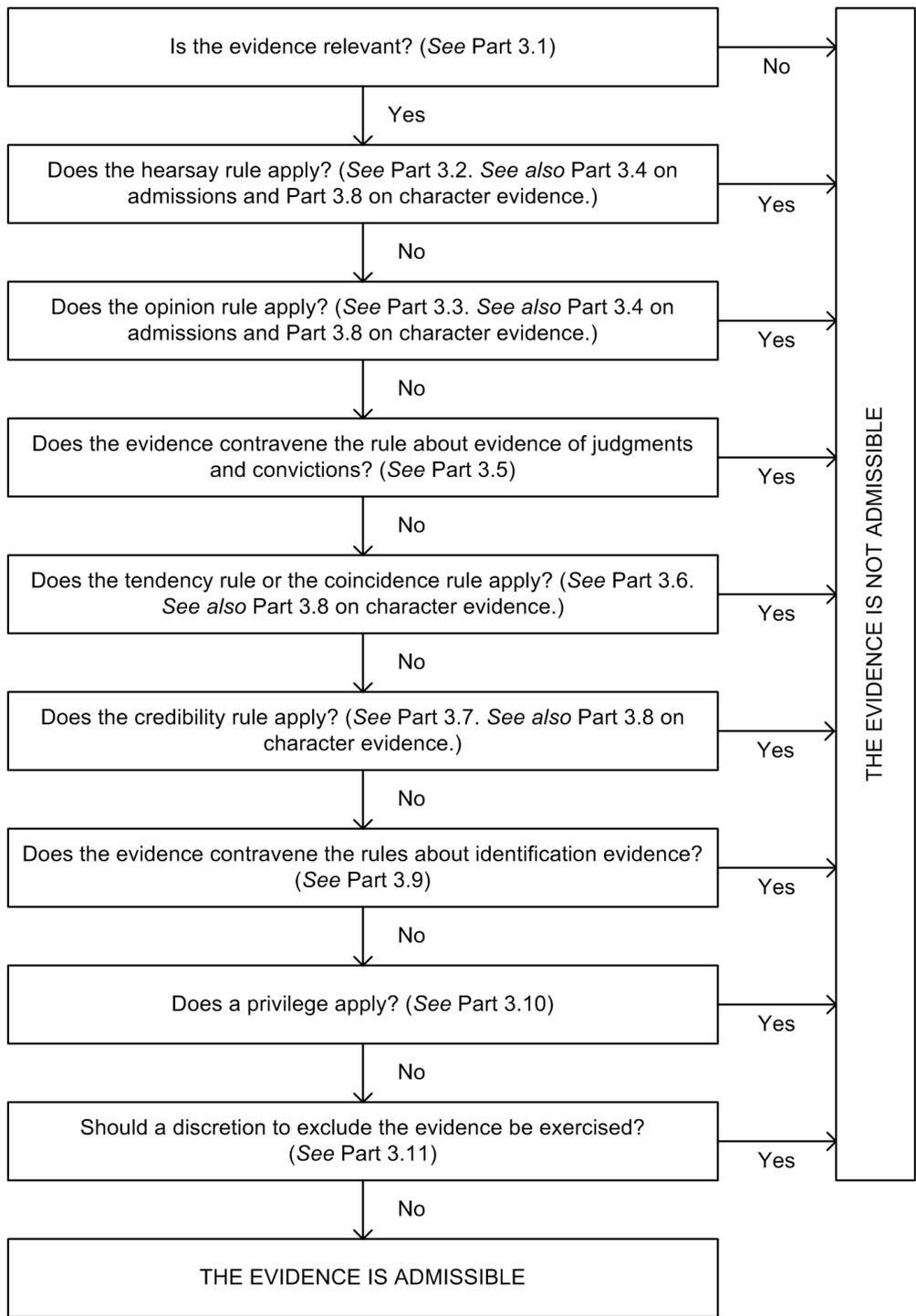


70109 EVIDENCE

SEMESTER ONE, 2017

UNIVERSITY OF TECHNOLOGY, SYDNEY



PROOF AND PRESUMPTIONS

PROOF

- What really happened?
- Who can we believe?
- How do we know if something is true?
- Proof in the adversarial legal system: system concerned with 'procedural truth' or legal truth.
- *Hickman v Peacey* [1945]: "A court of law is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it."

Evidence law lays down two sets of rules in regards to proof:

- The *burden* of proof: who proves what
- The *standard* of proof: to what standard must the evidence prove liability

Evidential burden vs. Legal burden

- Legal burden: the party who bears the risk of non-persuasion on a given proposition
- Evidential burden: the obligation to produce sufficient evidence on a particular proposition to render that issue worthy of consideration
- See:
 - *The Queen v Khazaal* [2012]
 - *Strong v Woolworths Ltd* [2012]
 - *Braysich v The Queen* (2011)

Burden of proof: criminal cases

- Prosecution bears the burden of proving each and every element of the offence beyond reasonable doubt.
- *Woolmington v DPP* (1935): "one golden thread always seen: duty of prosecution to prove the prisoner's guilt"
- *The Queen v Khazaal* [2012]

Standard of proof is 'on the balance of probabilities' in *civil* cases and 'beyond reasonable doubt' in *criminal* cases.

Standard of proof: civil cases

- In more serious civil cases, the standard of proof may be higher than mere satisfaction of the balance of probabilities.
- *Briginshaw v Briginshaw* (1938): petition for divorce, based on adultery – adultery was not a crime (although characterized as quasi-criminal behaviour), but presumption of innocence applied
- *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992): deceit over worth of business, subsequent rescission of contract.

Standard of proof: criminal cases

- The prosecution must prove its case beyond reasonable doubt (s 41(1) EA)
- *Green v The Queen* [1971]:
 - Facts: Trial judge attempt to explain to jurors meaning of ‘beyond reasonable doubt’ – said if they had nagging doubt, need to identify and decide whether it stems from reason or prejudice – that is, if the doubt does not stem from reason, it is not a reasonable doubt.
 - Issue: was this a misdirection?
 - Held: Yes – the jury themselves should decide what the expression means, jurors do not have the task to analyse their own mental processes.
- The defendant must prove their case on the balance of probabilities (s 141(2) EA).
- Circumstantial cases:
 - *Shepherd v The Queen* (1990)
 - *Black v R* (1993)

JUDICIAL NOTICE

- Some matters that the Court can be taken as proven without the need for evidence, if they are ‘not reasonably open to question’ and are ‘common knowledge’, or can otherwise be verified by an unquestionable authority
- Court will thereby take *judicial notice* of such matters

S 144: Matters of common knowledge

(1) Proof is **not required** about knowledge that is **not reasonably open to question** and is:

- (a) **Common knowledge** in the locality in which the proceeding is being held or generally, or
- (b) Capable of verification by reference to a document the authority of which cannot reasonably be questioned.

(2) The judge may acquire knowledge of that kind in any way the judge thinks fit.

(3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account. (4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

- *Woods v Multi-Sport Holdings Pty Ltd* (2002):
 - Facts: P brought action against D after injuring eye while playing cricket, trial judge took notice of no. of injuries in recreational sport. McHugh J (dissenting) took notice of ABS statistics regarding prevalence of sport-related injury to underpin decision, referred to this as ‘legislative fact’ – fact that can assist w/ policymaking that is not individual to particular party in case
 - Issue: Could judicial notice be taken of this fact?
 - Held: Must take caution in taking judicial notice of unproved matters – judges may take account of current conditions/society as basis for decisions, however resort to statistics here was not appropriate to take judicial notice of. Info provided was not accurate account of modern conditions, particularly with

reference to facts of the case. Statistics would also not have been admissible if adduced as evidence, as appellate courts will not accept new evidence.