

## TYPES OF EVIDENCE

### Q. Is the evidence oral, documentary or real?

**Oral:** verbal testimony in court, can be direct or circumstantial, increasing use of affidavits

**Documentary:** anything in *sch 3 EA*.

[1] **Real evidence** – contents of writing not important, bank card stolen from wallet

[2] **Legal transaction or disposal of property** – receipts, title certs, transaction slips from ATM

[3] **Relevant events** – business contract, likely hearsay evidence, original must be produced

[4] **Purpose crucial to admissibility** – label on blood jar real evidence, not for truth of contents (*Railways v Young*), document can overcome best evidence rule, fish couldn't be kept as real evid. for long (*Godfreys*)

**Real evidence** – stolen property, murder weapon, DNA samples, significance made clear by oral testimony

### Q. Is the evidence direct or circumstantial?

**Direct:** leads directly to proof of fact in issue

**Circumstantial:** fingerprints, handwriting, dental impressions, character evidence, previous convictions.

Jury must find the circumstance raised a more probable inference in favour of what is alleged (*Chamberlain*).

Jury must find the circumstance to have excluded any reasonable hypothesis consistent with innocence (*Chamberlain*) Crim conviction can be solely based on circumstantial evid. (*Plomp*; murder wife at beach).

### Q. Is the evidence primary or secondary? (best evidence rule)

**Primary:** best form one can adduce for proof of fact in issue

**Secondary:** no degrees, turn to hearsay analysis, exceptn for orig. doc-birth, death, company, texts (*EA tabs*)

## RELEVANCE

There is/isn't a logical & probative connection between **XX** & the facts in issue (*R v Stephenson*). To prevent the courts being bogged down w cases, apply a **sufficiently reasonable test**. See *R v Buchanan*: earlier driving offence related bc alcohol consumption & *R v Horvath*: defence falling asleep at the wheel so no connection to prior conduct & *R v Tarek Abdallah*: gunshot murder, A not denying being shooter, evidence of tattooed body irrelevant & *WA v Bilos*: relevant if witness in a better position to identify than jury.

**Civil facts in issue:** material facts that constitute claim of action, may be defined as the set of facts to which the law attaches the legal consequence that the claimant asserts, includes justification/excuse (*Goldsmith v Sandilands*: police officers, injury caused at cricket or car?)

**Criminal facts in issue:** elements of a crime that prosecution needs to prove, ALRC report - referring to the issues in the proceedings defined by substantive law and pleadings

## NO CASE TO ANSWER

The courts will apply two tests when considering a no case to answer submission.

[1] The **legal sufficiency** of the evidence when there is no evidence at all in support of the party's case, accepting the evidence at its face value (*Protean v American Home Assurance*)

[2] The **quality test** (*Jones v Dunkel*) whereby the judge will give a commentary on the quality of the evidence before D leads, sometimes meaning D doesn't lead evidence, is less common. (*TPC v George Western*; *JCorp v Aus Builders*)

At close of Pros case, accused given opp. to indicate whether they intend to lead evidence personally or calling witness (*CC s 618*). An unrep accused must be informed of right to not testify, however no indication that no adverse inferences cannot be promised. (*MacPherson*). **Insufficiency test** applies – the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted, is a question of law'. (*May v O'Sullivan*) Evidence is to be put at its highest. Not **guilty verdict** may be directed if defect in evidence will not sustain guilty verdict. (*Doney*, applied in *DPP v Stein*)

## PROOF WITHOUT EVIDENCE

### PRESUMPTIONS OF FACT

Court draws certain inferences from certain basic facts that have been established by the evidence. Mere entitlement to the court. Not an obligation. Circumstantial evidence only.

**Possession of recently stolen property:** In the absence of any rebutting evidence, accused involved in some way. (*Maslin v Searle*)

**Continuance:** Recognition of the fact that in an ordinary human experience, state of affairs that existed earlier is likely to have remained in existence for time in question. See *R v Buchanan*: way car was driven before accident has presumptive bearing & *Carlan v Elton*: motorbike carrying C and E hit a tree, C = driver, based on arrangement when first left & *Mason v Tritton*: ATSI tradition shown in 1880 but presumed back to 1788.

**Res ipsa loquitur:** A process of reasoning & inference from circumstantial evidence. See *Scott v London (UK)*: sugar fell on head, under management of defendant + absence of explanation, not in the ordinary course of things & *Anchor Products v Hedges (Aust)*: depends on circumstances, used to infer neg.

## REBUTTABLE PRESUMPTIONS OF LAW

**CL innocence:** Anyone accusing another to prove it, the who asserts must prove (*Briginshaw*)

**CL regularity:** Purporting to act in public office, duly appointed, any action is valid i.e. police executing warrant, marriage celebrant. See *Dixon v Lekich*: police commissioner validly delegated statutory powers & *s 160 EA (Cwth)*: article properly stamped in post, received after 4 working days of posting

**CL legitimacy:** Absence of cogent proof to contract, legitimacy granted to any child born in wedlock to parents proven to have access to each other at time of conception

**Accuracy of scientific instrument:** Use when instrument is notorious in sense that it's used daily. See *s 80(16F) Transportation Op (Qld)*: accuracy of blood alcohol reading cf. *R v Anderson*: BAC certificate not conclusive of fact driver was adversely affected, amount only.

**Lack of crim capacity <14yrs:** Unless proved at time, capacity to know it was wrong (*CC s 28(2)*). See *BP v The Queen*: onus on pros. to prove beyond reasonable doubt that child knew was seriously wrong, not just naughty or mischievous.

**Involuntary confession following threat or inducement:** Won't be received in court, even confession made after threat or promise induced unless contrary shown (*s 10 Crim Amend*)

**Sanity:** See *CC s 26*, doesn't involve proof of any basic fact from which other facts presumed.

## IRREBUTTABLE PRESUMPTIONS OF LAW

See *MacCormick v FCT*: dangerous, prevent judicial investigation **Eq.** child < 10 not crim resp. (*CC s 29(1)*)

## PRESUMPTIONS FROM PREVIOUS PROCEEDINGS

**S 79 EA:** Rebuttable presumption, in civ proceedings, person convicted of crim offence by previous court actually committed act **BUT S 80 EA:** If defamation, commission of act must be conclusively presumed by the later court. See *Helton v Allen*: fact that def. has been acquitted of an offence is of no evidentiary value. See *R v Kirby*: A's previous conviction is not evidentially significant in subsequent trial of B, even for related offence i.e. if 3<sup>rd</sup> party convicted still have to go ahead with trial (*Hollington v Hewthorne*) & *Jacobson v Suncorp*: D's conviction for driving on the wrong side of the road (dangerous driving) was admitted as evidence that he had been the driver but D could still have maintained that the other driver was contributory negligent.

## JUDICIAL NOTICE

When court takes judicial notice of a fact, it declares that it will find the fact exists, or direct the jury to do so, although the existence of fact has not been established by evidence

**Without enquiry:** Cwth cases – fact taken to be proven if common knowledge (*s144(1) EA (Cth)*) cf. CL

position that parties should be given opp. to argue (*s 144(1) EA (Cth)*). See *Warren v Pilkington*: time the sun set; *Simpson v Fraser*: existence of hotel; *Re Oxford Poor Rates*: uni=learning; *Nye v Niblett*: cats=domestic pets; *Clayton v Hardwick*: children need more protection than adults; *Mutemeri v Cheeseman*: syndrome was life threatening.

**With enquiry:** CrT refreshing memory, point capable of immediate accurate demonstration by readily accessible source (*Munro*).

• Reference texts (*Aust Communist Party*)

• Encyclopedia (*Horman*)

• Extent of nervous shock (*Jaensch*).

**Under statute:** **Eq.** territorial limits-maps, charts (*s 65*); astronomical phenomena-proof of cert (*s 66*); duty on all judges in Aust. (*s 143(5)*); state public seal (*s 41*).

## FORMAL ADMISSIONS

Can't be used in later proceedings, subject to any explanations & qualifications, effect is to relieve other party from need to lead evidence on **XX** issue.

If party admits allegation of fact by the other party, or fail to deny it, admitted w/o further proof (*s166 UCPR*). Proof not needed if parties agree on fact, need lawyers to sign doc, or orally between parties (*s191 EA Cth*).

**Eq.** interrogatories-questions in writing, answered under oath (*Gannon*); notice to admit fact (*UCPR*)

Always open to act, to formally admit certain facts not essential to defence + Crown can admit certain facts if benefit to accused (*CC s 644*) Reg. No written pleadings, FA's read to jury, acc. must have taken legal advice (*s144 EA Cth*). **Eq.** guilty plea (*R v McGuire*). Withdrawal: leave of court, been placed on rec. (*Coop. Brew*)

## ESTOPPEL

Procedural device, stops crts from being clogged with rehearing matters that have already been litigated.

Need same parties + same matter + same legal capacity.

**Cause of action:** Defn= where an action has been bought & judgment entered, no other proceedings on the same COA (*Jackson v Goldsmith*) **Why?** Party raising COA should ensure everything reasonably expected is included at first instance, immaterial if underestimated loss (*Conquer v Boat*) See *Anshun*: new claim so closely connected, neg over operation of crane, rigid application of test, 2<sup>nd</sup> action estopped of 'a judgment for claimant would conflict or be inconsistent with the 1<sup>st</sup>', slightly different bc traversing action, contrib neg v wholly demitted. **Exception:** 1<sup>st</sup> time, couldn't in law have claimed the full balance/damages (*O'Farrell*) **Issue:** Can't raise judicially decided issue (*Blair v Curran*).

[1] **Issues identical**, no estoppel if different duty of care or area of law (*Jackson v Goldsmith*, *Miller v UNSW*)

[2] Previous issue = **ultimate issue**, part of final judgment (*Rogers*). See *Theo v Official Trustee*; reargued small issues re bankruptcy.

[3] **Same legal capacity. Exceptions:** can bring CL & statutory issue (*Finn v Lerner*) or state & private pros issue (*Owen*) or companies, shareholders and directors (*Effem Foods*)

**Cause of action:** Autrefois convict or acquit. Can't be prosecuted for 2<sup>nd</sup> time if alt. to 1<sup>st</sup> trial. **Notes:** limited scope, stops multiple convictions from same wrongful act, doesn't prevent retrials after appeal.

**Double jeopardy:** COA estoppel is 1 example. *s 17 CC Amend*: Acc. can't be retried of any offence of which they might have been convicted with at previous trial OR a more serious charge arising out of action already been subject to verdict. **Exceptions:** (as of 2007) retrial for murder, need fresh & compelling evid. (*s 678B CC Amend*) & tainted acquittal for 27yr offence, for perjury, conspiring, corrupt witness (*s 678C CC Amend*). See *El Zanw 1991*: murder wife charge, acquitted based on perjured alibi, Crown estopped bc abuse of process & double jeopardy & *Carroll 2002*: exceptn for fresh evid. removes encouragement for thorough investigation – Gaudron/Gummow.

**Issue:** Rare. Only if during course of new trial between A & B, A seeks to rely on fact favouring A in respect of issue arising at previous action between A & B. See *Rogers*: charged separate indictments, 1<sup>st</sup> tried in 1989, 2<sup>nd</sup> tried in 1992, abuse of process for Crown to tender previously rejected confession, not ultimate issue & *Storey*: issue of S's guilt of abduction fully litigated, facts relating to abduction relevant, not essential, allowed but made clear to jury that prior acquittal cannot be challenged.

## USING PHOTOGRAPHS

Function is to allow the court to see something significant. Entire question of whether or not to allow a view or reconstruction appears to be one of judicial discretion (*R v Alexander*). See *R v Ireland*: photo used of acc. hand showing he'd been in a fight & *R v Ames*: photo of corpse wound showing blood splatter pattern.

## DEMONSTRATIONS

Can be ordered by trial judge (*s 53 EA (Cth)*). Parties allowed reasonable opportunity to be present + will it assist the court in resolving facts in issue? See *Evans*: security camera demo unfairly prejudicial, *Hawi*: view of airport after riot would assist jury b/c 140 witnesses with diff. vantage points, *Chalmers*: police filming themselves digging grave while timed could mislead jury.

## LIMITING JURY EXAMINATION OF EXHIBITS

Judicial discretion to refuse the jury to examine (*Dnscoil/s130*) Need careful judgment/directions (*Le/Murray*).

## COMPETENCE AND COMPELLABILITY

General rule that everyone, including a child (*s9(1)*) is a competent and compellable witness, either under oath or not, unless a **statutory exception** applies (*Hosken v Metro Police*). Issues are dealt with in voir dire or at pre trial (*CC s 590AA*). Competency may be challenged if can't give 'intelligible account of events' (*s9A(1)*) - Does it infringe ability to see, hear, recall events? (*R v Hill*: intellectual disability not sufficient).

**Children:** Ask whether they understand the solemnity of the occasion & importance of telling the truth. See *Williams 1989*: 10yo, illiterate, competent, knew he'd be in trouble if he didn't tell the truth, *Williams 1990*: 8yo, incompetent, couldn't name home address, *Drover*: young girl reciting, not recalling. *Mackie*: young girl coached by mother NB. can have expert witness to comment on child's memory independent or not (*R v D*).

**Under oath:** witness must understand testifying is a serious matter & has a duty to tell truth above ordinary duty (*s9B(2)*). If a **problem**: unsworn if crt explains duty of speaking the truth, still protects the rights of the accused (*s9B(3/R v BBR)*).

**Safeguards:**

[1] Expert evidence allowed relating to witness' level of intelligence, including 'powers of perception, memory and expression' (*s9C*) Use for all witnesses with handicap. See *R v Whitehead*: witness=deaf mute.

[2] Unsworn evidence carries no less weight (*s9D(2)(a)*)

[3] Unsworn witness can still be convicted of perjury (*s9D(2)(c)*)

[4] Acc. can still be convicted on uncorroborated on unsworn evidence (*s9D(2)(b)*) TJ still needs to warn jury about desirability for corroboration (*R v M/Robinson v The Queen*)

## TACTICAL BURDENS ON A PARTY TO TESTIFY

Parties to a civil action and their spouses are both competent & compellable to testify (*s7*). The jury is entitled to see failure to give evidence as a weakness in D's case & following direction to be given (*Jones v Dunkel*)

[1] Absence of D can't be used to make up deficiency in evidence

[2] Evidence that may be contradicted by D can be accepted more readily if D doesn't give evidence

[3] Where inference is open from facts & D could have clarified, can draw inference from circumstance

Also applies when:

[1] Party fails to call material witness when it would have been reasonably expected (*Baker v Norcross*: personal injury at work, didn't call supervisors who were available)

[2] Party fails to produce a material document/significant item of real evidence (*Jones v MSS*: chair → injury)

**But:** don't want over exuberant application of J v D b/c can force tedious tender of witnesses (*Liaweena*)

Accused is competent, but not compellable (*s8*) TJ & Pros can make adverse comments on acc. failure to testify, but no prejudicial comments.

**Azzopardi direction:** *Direction 28A.1 Qld Benchbook*. Fact that acc. didn't give evidence is not evidence against them. Doesn't prove guilt & can't be used to fill in gaps & burden still on Pros to show BRD. See *Hartfield*: QCA overturned conviction b/c no direction given.

**Weissensteiner comment:** When only the acc. can shed light onto what happened & is withholding info. "it is only when the failure of the acc. to give evid. is a circumstance which may bear on the probative value of the evid. which has been given & which the jury is entitled to consider, that they may take it into account only for the purpose of evaluating that evid." → not drawing inference of guilt, drawing inference from facts is made easier because of acc. failure to give evid. consistent with innocence. See *R v Cooper*: W comment given b/c G turned hostile, originally gave evid. against him, he made no comment, inference can be safely drawn. *R v Miller*: W comment given in absence of evid. from D to draw the inference that D knew identity of PO he assaulted, would have expected D to adduce. Doesn't apply if:

[1] Not information accused knew (*R v Peel*: fingerprints being on the bottles)

[2] Accused gave an explanation to someone like police officer (*R v Ryan*)

**Calling witnesses:** Doesn't extend to failure of D to call witnesses, jury isn't to speculate about evidence about evid. that might've been given by those called (*Dyres* confirmed in *Marmood v WA/Roberts v WA*)

**Crown witnesses:** Crown not required to call a witness & can't be directed to do so (*Apostilides*) however, must be a sufficient reason to do so, not just that they may give inconsistent/unreliable statement (*Dyres*) Can materially affect D's case, where statement made to PO doesn't assist Crown theory of the case but no negative inference/comment can be made (*R v T*: daughter made no report of assault, *Best v The Queen*: no adverse statement made about mother not interviewed)

**Co accused:** No restriction placed on CA against commenting on acc. failure to testify (*Wickham*). D is competent but not compellable witness for CA (*s8(1)*) BUT may not be called against CA b/c prejudicial effect UNLESS no longer person charged – if testifying against former accomplice evid. doesn't require corroboration (*CC s 632(2)*). See *R v Payne*: CA not competent for Crown against other CA, *R v Boal*: once 2 parties cease to be CA, competent & compellable.

**Spouse of accused:** Competent & compellable for both Crown & D, but not if CA (*S8(2) & (3)*).

## AT TRIAL

Same as crim below. P normally lead witnesses w/o opening address.

Always consider at **what stage in the trial** is the issue arising. Indictment→C opening address→C witnesses

→D leads evidence: opening address→witnesses→XE by C

→D doesn't lead evidence: C sums up case

Then: J sums up evidence **No case to answer:** In between C witnesses & D opening. (*CC s 590-631*)

## EXAMINATION IN CHIEF

**No leading q's:** Suggests wether desired answer or assumes fact (*s 95/Shaw*)

**Prior consistent statements:** Assumed W is telling truth under oath, generally no purpose in asked the W if they have always maintained that version of events, cant increase credibility by drawing inference from prior consistent statement (*R v Conolly*) **Exceptions:** ...