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General Rules of Evidence (TOPIC 1):

- Evidence law = the rules that define the type of information that can be considered by judges and juries to resolve disputes about facts in civil and criminal proceedings.
 - Purpose = to advance accuracy, flexibility, consistently, predictability.

Why do we exclude evidence?

1. Reliability principle:
 - Quality of decision is determined by the quality of the evidence that goes before the trier of fact – exclude evidence that is unreliable (eg hearsay, because the evidence cannot be tested in cross-examination).
2. Libertarian/Protective principle; and
 - Evidence excluded to redress potential unfairness in a contest between an individual and the State (eg privilege against self-incrimination).
3. Disciplinary principle:
 - Discretion to exclude illegally obtained evidence (the court will not eat the fruit of the poisoned tree).

Evidence Act 2008 (Vic):

- Applies to all proceedings in a Victorian court: [s 4](#).
- 'Victorian court' means =
 - (a) "the Supreme Court; or
 - (b) any other court created by Pmt— and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence" ([s 3](#)).
- The Act is not a code.
- Rules and principles of common law and equity ([s 9](#)) as well as the courts' general powers ([s 11](#)) continue to apply, except to the extent the Act provides otherwise expressly or by necessary intendment.
- There is some authority that [Chapter 3 \(admissibility\)](#) effectively operates as a code; abrogating the common law: **McNeill v R**.
 - "Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding": [s 56](#).
 - It is only admissible if the Act provides.

Burden and Standard of Proof:

- Standard of Proof: The degree to which an issue must be proved (balance of probabilities, or beyond reasonable doubt).
 - ie persuasiveness of the evidence.
- Burden of Proof: Who has the onus of proving a particular issue?
 - Evidential burden: Is there sufficient evidence for the issue to go before the jury?
 - The party who makes the claim must provide sufficient evidence that supports it.
 - A matter of law undertaken by the judge.
 - In a criminal trial, the prosecution must bring evidence that has the potential to prove every element of the crime in order for the judge or jury to consider the question of guilt.
 - The judge determines whether the evidentiary burden was met (if a "no case" submission was made by the defence).
 - Where there is no case for the accused to answer, the Crown has not satisfied its evidentiary burden.
 - Legal burden: Has the issue been proved to the requisite standard? (ie persuasiveness of evidence - is it convincing?).

- In a criminal trial, the persuasiveness of the evidence relates to the arguments made by the prosecution – is the evidence presented strong and persuasive enough to prove the case? This is decided by the jury or judge if there is no jury.
- Standard of proof: an argument about a fact in issue is considered persuasive if it satisfies the standard of proof: [ss 140-142 Evidence Act](#).

Criminal proceedings:

- Prosecution opens.
- Who has the burden in relation to...?
 - Elements of the offence: prosecution bears *both* the evidential and legal burden.
 - The general rule is that the defence does not have to prove anything.
 - General defences (eg self-defence, provocation, duress): defence bears evidential burden, but prosecution bears legal burden. ie shift only the evidentiary burden to the defence → the prosecution has to convince the jury that the evidence is not persuasive.
 - Prosecution standard of proof is BRD: [s 141\(1\)](#).
 - “The words ‘beyond reasonable doubt’ are words in the ordinary English usage and mean exactly what they say.”: **R v GWS [2000] NSWCCA 410** per Newman J.
 - This is unquantifiable and subjectiveness of certainty within reason.
 - An imaginary or fanciful doubt or an unreal possibility is not a “reasonable doubt”: [s 64 of the Jury Directions Act 2015 \(Vic\)](#).
 - Circumstantial evidence: guilt as the only rational conclusion.
 - Defence evidence: not reasonably possibly true.
 - For example: **Henry Keogh murder trial**.
 - Affirmative defences (eg mental impairment/insanity plea): defence bears *both* the evidential and legal burden (defence standard of proof is on BOP: [s 141\(2\)](#) ie 51-49%) – shifts from prosecution because bringing a new claim.
- Party who makes claim under obligation to bring supporting evidence before the court.
- Process:
 - a. The prosecution must introduce sufficient evidence to support each element of the alleged crime.
 - b. If the evidential burden is met, the judge will allow the evidence to be considered by the jury.
 - c. The jury will decide whether or not the legal burden has been satisfied by the prosecution.

Civil proceedings:

- The evidential and legal burden are upon the party making a claim (the plaintiff) or the party making a defence (the defendant).
- Standard is on BOP: [s 140\(1\)](#). ie 51-49%.

Categories of evidence:

Witness testimony:

- For example: in-court testimony by persons (oral evidence or viva voce).
- Main challenge: Believability.
- Cross-examination = main tool to ascertain/discover truth. Attempts to discredit witness by over-zealous defence lawyers may ironically distort the truth.

Physical objects or exhibits:

- For example: murder weapons, objects containing fingerprints and samples of blood or saliva etc.
- Main challenge: contamination through development of science, indirect/circumstantial evidence – doesn't tell the entire truth.

Documents:

- For example: airline tickets, phone records, diary, or journals.
- Support of verbal evidence.

Methods of proof:

1. Direct Evidence = of itself directly prove facts. For example: eye-witness account of fact opinion of a witness in certain circumstances (eg expert witnesses).
2. Indirect Evidence, Inferential Fact-finding, Circumstantial Evidence = does not directly prove any of the facts in issue. May require expert interpretation. For example: **Corey Travis Fuller-Lyons v The State of New South Wales, High Court of Australia, 2015.**
 - It allows the drawing of inferences: **R v Plomp** (Murder of wife in surf—circumstantial evidence: no danger in surf; wife good swimmer, familiar with conditions; husband had promised to marry another woman, introduced to children as new mother. Could infer intent | appeal dismissed).
 - An appeal should be allowed if primary evidence is unsafe: cf **R v Chamberlain** ('dingo ate my baby' case—circumstantial evidence only | evidence of foetal biologist of blood on car seat found unreliable on appeal. There is sufficient evidence for reasonable jury to deliver guilty verdict ← inconsistent accounts of disappearance; despite good character, lack of motive etc).
 - Includes acts before death: **Lang v R** (murder of husband—bought black dress before death, discussion with shop assistant that for husband's funeral).