Topic 1 - The nature of Evidence Law, Its Historical Foundations and the Uniform Evidence Acts

- **Evidence law:** defines the type of information that fact-finders can and cannot be received by a decision maker (whether a judge alone or member of the jury) to resolve factual issues in dispute in civil and criminal proceedings.
    - Evidence law ensures accuracy of evidence- e.g. important for hearsay evidence.
    - Ensures efficiency of trial

Introduction to the *Uniform Evidence Acts*

- The *Victorian Evidence Act* 2008 is based on legislation that has been operational in NSW and Federal courts since 1995. It has only been operational in Victorian courts since January, 2010. The legislation extinguishes most of the common law rules with the goal of uniform evidential rules in all state, territorial and federal courts.

- Needless to say there are many similarities between the common law evidential rules and the legislative evidential rules that we look at. Can look at common law cases if such cases help to clarify the meaning or application of a provision in the Act.

- The *Victorian Evidence Act* 2008 is a work in progress as is the mirror legislation that has been in operation for 14 years. As with all legislation there have been occasions when the provisions are unclear and as a result there is an emerging body of case law that attempts to clarify the meaning and operation of the Act. There is a rapidly expanding body of Victorian cases that deal with provisions of the *Evidence Act* since it began operating in 2010.

- Some sections of the *Evidence Act* are straightforward whilst others not, e.g. s62. It attempts to define first hand hearsay. It is an unnecessarily complex definition of a simple concept.

S62 Restriction to "first-hand" hearsay
(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

- There are other provisions that have been and still are a source of confusion for students, legal practitioners and judges. Sections 97 and 98 are excellent examples.
    - These sections deal with what used to be called similar fact evidence, but now separated out as tendency evidence and coincidence evidence.
        - If you remember that the *Evidence Act* is a work in progress you can have realistic expectations and avoid frustration.
- The cases that we look at will help clarify the meaning of the provisions and more importantly offer an example of their application. You will notice that many of the cases in the textbook and some to which we refer in the lectures are NSW decisions or Federal Court decisions. Since the NSW *Evidence Act*, the Commonwealth *Evidence Act*, the Tasmanian *Evidence Act* and the Victorian *Evidence Act* are (almost entirely) uniform, it is acceptable to reference cases from any of the jurisdictions with the uniform legislation.

- The Victorian Courts in particular the Supreme Court and Court of Appeal are rapidly accumulating case law that explores the provisions in the *Evidence Act 2008* (Vic). In these decisions, judges do refer to NSW decisions as authority for various principles. We will refer to a small number of these cases in various topics throughout the course.

Topic 2 - Overarching Concepts: Role of Judge and Jury, Burden and Standard of Proof and Types of Evidence

Overarching concepts: evidence in the courtroom

- The best place to start with the *Evidence Act 2008* is with the various types of evidence that are dealt with by the legislation and the overall scheme of the legislation.

The legislation deals with three types of evidence:

1. Witness testimony
2. Physical objects or exhibits
3. Documents

Witness Testimony

- Witness testimony is usually called oral evidence or viva voce evidence in practice – testimony is more of an American usage.
- In court testimony by persons (oral evidence or viva voice)
- Of the three types of evidence, oral evidence is the most problematic. It is problematic since it based on the perceptions and memory of a human being.
    - Human beings are bizarre, unpredictable, fallible and potentially dishonest.
    - When you examine a witness you never know exactly what will come out of his or her mouth - particularly during cross-examination.

However, the evidence that the witness gives will fall into one of these three types:

1. It will be honest evidence
2. It will be dishonest evidence
3. It will be honest but mistaken evidence

- Working out what type of evidence is being given is in part derived from the person giving the evidence.
- Believability- what to believe and what not to believe is the function of the jury or judge/magistrate depending on the type of hearing.
    - However, a reliable guide as to a person's honesty or otherwise is elusive.
    - Facial micro expressions, polygraph tests and brain fingerprinting are not accepted by the courts as being conclusive techniques that detect dishonesty in a person.
    - The fact is that people do lie despite taking an oath. If they did not, the offence of perjury would be unnecessary.

- Cross-examination is about testing a witness - not only for honesty but for accuracy (both fall within the concept of 'reliability'). If a witness is lying or mistaken, then it will be desirable (and theoretically possible) to expose this by way of cross-examination.
- The assessment of a witness in terms of his or her reliability will be heavily influenced by their performance under cross-examination.
    - Prosecution leads the questions- as the burden of proof is on the prosecution to prove the defendant is guilty.
    - Direct examination is the lawyer examining their own witness. Cross examination is when the opposing party examines the other parties witness. Then conclude with another re-direct examination (second direct examination).

- John Henry Wigmore, the original author of the leading American text on evidence, wrote: "Cross-examination is the greatest legal engine ever invented for the discovery of truth." However, that comes with an important qualification: "You can do anything with a bayonet except sit on it. A lawyer can do anything with cross-examination if he is skillful enough not to impale his own cause upon it."
    - Despite the problems with witnesses, their evidence is still usually the most important evidence in most cases.
    - It is hard to imagine a criminal trial in which no witness is called by either the prosecution or defence. Most of the rules of evidence that we examine in this course deal with witnesses in one way or another.

Exhibits

- There is a large array of potentially relevant items recovered from a crime scene or accident scene that might be used (adduced) as evidence in a trial.
    - Note: exhibits or physical objects are often referred to as real evidence.

- It might be a murder weapon such as a rifle that is owned by the accused. Or it could be a serum sample such as blood or saliva recovered from the crime scene. It might be a glass cup from which a fingerprint is collected.

- Exhibits from a crime scene will usually do no more than create suspicious circumstances. It is possible that an innocent explanation will account for the physical evidence collected from a crime scene.
    - In most cases, if not all, exhibits will be treated as circumstantial evidence.
    - Exhibits generally cannot lie, however can be misleading.
    - The accused might be the registered owner of the rifle used to murder the victim but that alone does not reveal that they are guilty.
    - A fingerprint recovered from the crime scene that belongs to the accused will place them at the crime scene - but alone it is not enough to found a guilty verdict.
        - Perhaps the accused installed insulation in the roof of the victim's house shortly before the victim was murdered and accepted a drink before leaving.

Documents

- Documents are a very common source of evidence particularly in commercial litigation
- In fraud and tax evasion cases there can be a very large number of documents that will be admitted as evidence.

- A document might include such things as an airline ticket that is introduced to support an alibi. Or it might be a sales receipt for a large quantity of potassium or nitric acid. Both are ingredients that can be used to make a bomb.
    - Bear in mind that the presence of online transactional databases leads to an enormous amount of information being generated from online transactions. This is becoming a very common source of documentary evidence.

Direct Relevance, Indirect Relevance and Circumstantial Evidence

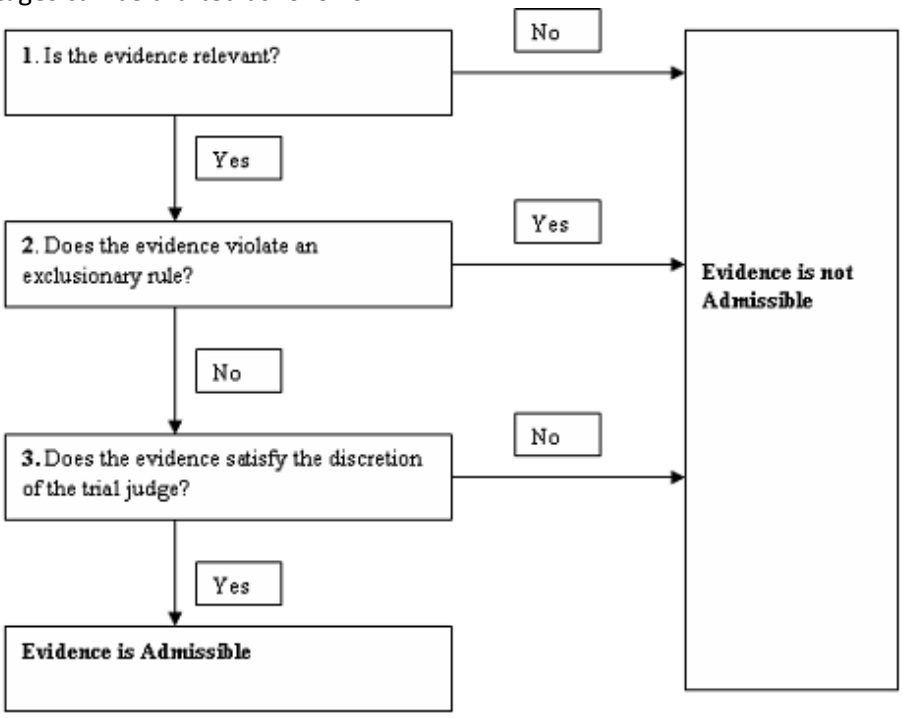
- The terms direct and indirect are used in the EA, especially dealing with relevance.
- Indirect evidence- e.g. gun with a finger print, it can't tell us a story, just put the accused at the crim scene.

- Witness testimony- can be direct and indirect evidence.
    - E.g. 'I saw the accused shooting the victim'- direct evidence, relevant to the elements of the crime.
    - *Corey Travis Fuller- Lyons v The State of New South Wales* (2015) HC: C was traveling by train with his brothers. C fell from the train and was badly wounded. C then sued the state of NSW. Argued conductor should of seen him trapped between doors of train and not started the train. HELD: Case based on inferential evidence and expert evidence. NSW was ruled to be negligent and C awarded 1 million dollars.
- Inferential fact-finding: e.g. from the way the bullet entered the skin, can infer where the attacker was standing at the crime scene and whether left or right handed.
- Most people have an intuitive understanding of circumstantial evidence. Circumstantial evidence is often quite common in a criminal trial.
- Direct evidence does not involve any inferences or implications
- Circumstantial evidence always requires the drawing of an inference from one fact to another. Normally more than one possible explanation for the evidence.

Outline of the *Evidence Act*

- The evidence act which is a collection of rules. The individual rules can be complex however the overall scheme of the act is not. The Act creates three stages that any item of evidence (witness, exhibit or document) must survive before it can be admitted. If an item of evidence fails to survive a single stage it will be excluded.

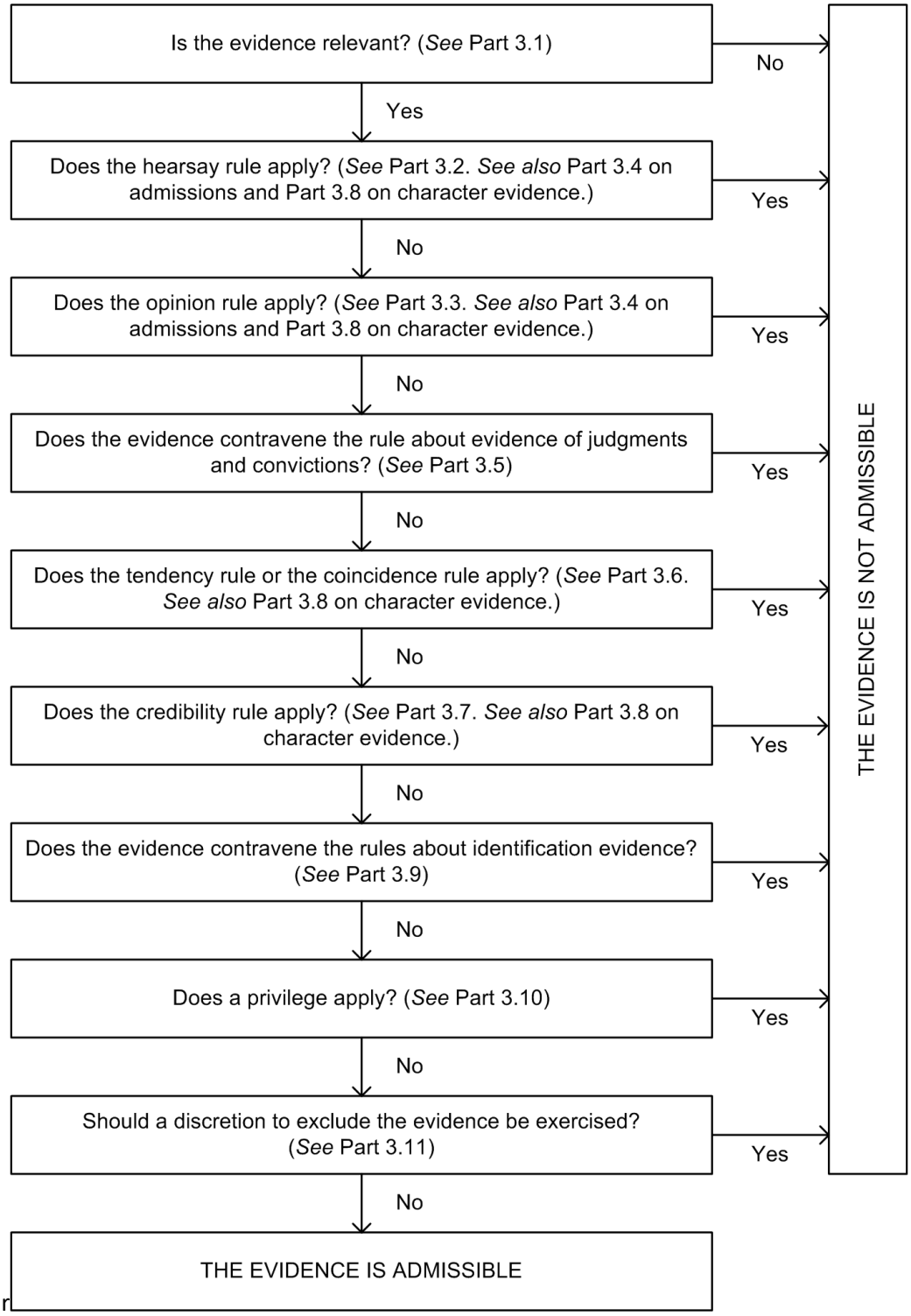
**If the evidence survives all the stages, it will be admitted. A simple diagram that represents the 3 stages can be drafted as follows:



- <u>A complete answer would recognise that all three stages must be satisfied as opposed to focusing exclusively on a single exclusionary rule and overlooking the requirement of relevance and discretion.</u>
    - Relevance- anything relevant in relation to the crime and the elements of the crime.
    - Exclusion- such as hearsay, privileges, protections for spouses.

- If relevance and trial discretion are not the focus of the question you need only mention the requirements in passing. In most problems that we look at the question will focus on the exclusionary rule.

A more detailed diagram appears in the Act itself:



Bur

Burden of Proof- Relationship between evidence and the burden of proof.

- The burden of proof is not regulated by the *Evidence Act*. The burden of proof is regulated by common law principles.
- The general rule is that the party which asserts a claim, whether a charge or a cause of action, has the obligation to prove it. If the party fails to prove the claim, then the charge or cause of action will fail.
    - In civil cases there is a presumption of no wrong doing.
    - In criminal cases there is a presumption of innocence.

- Trials never begin with facts. Trials always begin with an allegation such as the Crown's allegation that the accused has committed a crime or the plaintiff's allegation that the behaviour of the defendant was negligent. These allegations will not be accepted as fact unless evidence is introduced to support and prove them.
    - The prosecutor and accused in a criminal trial or plaintiff and defendant in a civil trial have to collect evidence and present it in court.
    - Burden of providing evidence that is used to prove an allegation will either be on the prosecution or the accused in a criminal trial or plaintiff and defendant in a civil trial.
        - In addition to the need to introduce evidence the burden of proof also requires that the evidence must form a persuasive argument.

- Although it is possible that both parties will introduce evidence in relation to an allegation or issue that must be proved it is usually only one party who will be obligated to introduce evidence. For the other, it is optional.
    - For example: if the prosecution alleges that the defendant has murdered their wife then the prosecution will have to introduce evidence that supports the allegation. The defendant may introduce or adduce evidence that refutes the prosecutions allegation however as a general rule they are not under an obligation to adduce evidence.

Who is under an obligation to support the allegation or facts in issue with relevant evidence?

- The prosecution makes the allegations in a criminal trial, therefore it is generally the prosecution that bears the burden of proof. There are however some exceptions as we shall see. It is possible that the burden of proof will also place the defence under an obligation to provide relevant evidence.

Legal and evidential Burdens

- The burden of proving each allegation or fact in issue in a criminal or civil dispute to the required legal standard or proof is <u>divided into two stages or requirements</u>.
    1. Is there sufficient evidence to make out a case (**evidential burden**)?
    2. Does the evidence yield a persuasive argument to prove the case (**legal burden**)?
- Both questions have to be addressed before the burden of proof can be discharged.
    - If the prosecution's evidence is sufficient and persuasive then the jury will arrive at a guilty verdict.

<u>Evidential burden:</u>

- Is there sufficient material upon which the Ct can do something.

- There is an **evidential burden** that relates to the sufficiency of evidence introduced to make out the claim.
    - The lower level of poof that must be established in order for the relevant issue to be left to the jury.
    - 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.
    - After the prosecution has finished presenting its evidence the defence may make a 'no case' submission.
        - The judge determines whether the evidentiary burden was met.
        - If the judge finds that the prosecution has adduced insufficient evidence, then the case is over.
- The evidential burden is simply a question of looking at the volume and weight of evidence (witnesses, documents and exhibits) **and deciding whether there is enough**.
    - Enough evidence for the jury to deliberate on.
    - If there isn't enough evidence the defence can argue no case to answer and the judge can dismiss the jury.
        - E.g. evidence for each element of the crime.

Legal burden:

- Onus and standard of proof; the standard being different if the matter is civil or criminal.
- The party who advances the cause has the burden of proving the matter on the balance of probabilities (Civil proceeding)
- The Crown/Prosecution/R/DPPP etc. has the burden of proving the matter beyond a reasonable doubt, until or unless the Defence has burden of proof (ie. if matter shifts to a defence; the defence needs to prove on balance that there is a defence, the prosecution then needs to prove there is no defence beyond reasonable doubt).
    - Three reasons the Prosecution must prove beyond reasonable doubt include:
        - Innocent until proven guilty
        - Crown/Prosecution has more resources
        - High standard of proof needed as consequences of findings severe
    - The legal burden relates to the persuasiveness of the evidence.

- There is a **legal burden** that relates to the persuasiveness of the evidence.
    - The legal burden is not as clear as the evidentiary burden.
    - The level of persuasion the evidence must reach in order for it to success in a case.
- The legal burden is to be decided by the jury or judge if there is no jury. It only arises if the evidential burden is satisfied first.
    - The legal burden is very closely connected to the closing address that each party delivers at the end of the trial after all the evidence has been presented.
    - In their closing argument the prosecution will review the evidence and tell the jury that it leads to one conclusion: the accused is guilty.
    - The jury will listen to the argument and decide whether it is persuasive. If it is persuasive they will accept it, if not they will reject it.

Prosecution

In criminal proceedings it is usually the prosecution that must discharge the **evidential burden** in relation to the facts in issue they have alleged and discharge the legal burden.

1. The prosecution must introduce sufficient evidence to support each element of the alleged crime.
2. If the evidential burden is met, the judge will allow the evidence to be considered by the jury.
3. The jury will decide whether or not the legal burden has been satisfied by the prosecution.

- If they decide that the prosecutions argument (the accused is guilty) and evidence is persuasive they will arrive at a guilty verdict.
- The prosecutions argument (accused is guilty) is persuasive in a criminal context if it proves the case beyond a reasonable doubt.

Defence

- In relation to the defence the general rule is that the defence does not have to prove anything.
    - A fundamental assumption in the criminal justice system is that the accused is innocent unless the prosecution can prove otherwise.
- Exceptions:
    - Insanity plea- shifts both evidentiary and legal burdens to the defence
    - Defences- self- defence, provocation, duress- shift only the evidentiary burden to the defence > the prosecution has to convince the jury that the evidence is not persuasive (legal burden).
        - E.g. the prosecutor might make the following statement during their closing address: "The evidence introduced by the accused cannot lead to the conclusion the he was acting in self-defence, for the following reasons..."

Civil proceedings

- The evidential and legal burden will be upon the party making a claim which will be the plaintiff or the party making a defence which will be the defendant. (Not of concern in this course).

Standard of Proof

- The standard of proof, unlike the burden of proof, does appear in the EA.
- The burden of proof determines who bears the responsibility for proving an allegation. The standard of proof provides jurors with a guideline that is supposed to help them determine if an allegation has been proven.
    - There is overlap between the standard of proof and the legal burden. An argument about a fact in issue is considered persuasive if it satisfies the standard of proof.

- Both standards are defined in the *Evidence Act*:
    - Civil Standard: balance of probabilities; section 140
        - Greater than 50% satisfaction
    - Criminal Standard: beyond reasonable doubt section 141

- There can be different standards imposed on the prosecution and the defence.
- The obvious difference is the distinction between beyond a reasonable doubt and the balance of probabilities.
    - To understand when the different standards apply we need to return to the legal burden of proof which overlaps with the standard of proof.

        - If the legal burden of proof is on the defendant as it is when you plead insanity then the persuasiveness of the insanity claim must be beyond the balance of probabilities. (over 50% likely)
            - But for other defences such as self-defence- the accused just has to prove that reasonable.
        - The legal burden on the prosecution is stricter. The claims or allegations they make must be beyond reasonable doubt (no reasonable doubt).

'Beyond a reasonable doubt'

- In a criminal trial there is only one ultimate issue that a jury has to decide. Has the Crown proved the guilt of the accused beyond reasonable doubt? If the answer is 'yes', the appropriate verdict is 'guilty'. If 'no', then 'not guilty'.
    - However, the Crown does not have the burden of proving beyond reasonable doubt every single fact that arises from the evidence and is in dispute. The obligation that rests upon the Crown is to prove the elements of the charge; that is the essential facts that go to make up the charge, and must prove those facts beyond reasonable doubt- overall whether 'beyond reasonable doubt'
    - Must also disprove the existence of each defence (which is raised by the accused) beyond reasonable doubt.
        - The defence will aim to raise a reasonable doubt.
- When the legal burden rests on the accused, such as when the accused pleads guilty on the grounds of mental impairment- the burden of proof is lower- 'balance of probabilities'
- The jury will usually have to reckon with conflicting versions from the prosecution and defence and they will have to choose between the two. This can be quite a difficult choice.
    - Additionally, people when faced with a fact in issue or allegation and evidence to support it will arrive at different conclusions.
        - This happens because people have different standards in relation to proof. Some people are more easily convinced than others. Others are more sceptical and harder to convince.
    - The courts are aware of the differences between people's ideas about proof so they have tried to create some guidelines. The purpose of the guidelines is to promote consistency amongst jury members and judges so that they apply a similar standard of proof.

'Beyond a reasonable doubt'- what does this phrase mean?

- There is no answer to this question- not quantifiable (no percentage to indicate)

- The question of whether there is a reasonable doubt is a subjective one to be determined by each individual juror: *Green v The Queen* at [32–33];
- The position under the common law was that, except in certain limited circumstances, no attempt should be made to explain or embellish the meaning of the phrase 'beyond reasonable doubt': *Green v The Queen* (1971) 126 CLR 28 at 32–33;
    - However, pursuant to section 64 of the *Jury Directions Act 2015* (Vic), Judges now have the power to elaborate somewhat on this difficult question. If so asked by a jury, a Judge can properly instruct a jury that an imaginary or fanciful doubt or an unreal possibility is not a 'reasonable doubt'. (See also at common law: *Green v The Queen* at [33];

    - A Judge can also adapt his or her explanation of the phrase 'proof beyond reasonable doubt' in order to respond to the particular question asked by the jury: section 64 of the *Jury Directions Act 2015* (Vic).
- Newman J said in *R v GWB* [2000] NSWCCA 410 at [44] the words 'beyond reasonable doubt' are words in the ordinary English usage and mean exactly what they say.'

- *Henry Keogh* (1994)- A prominent Australian lawyer was found dead in the bathtub. Body was found by the fiancé. 2 months later H was arrested for murder. Prosecution presented several pieces of evidence of the murder, including 5 different insurance policies for her life. Evidence that the lawyer was found bruised, which was argued to be due to forced drowning by H. Appeal was denied. Sentenced to 26 years in prison. However recently conviction was set aside and new trial ordered. Scientific evidence held not to be beyond reasonable doubt.

- In Criminal law, the committal hearing is the analogous position with civil proceedings' strike out of claims at which the test is placed to decide whether the case will be pushed forward.

Matters of common knowledge

- Facts that do not have to be proved in court:
    - Common knowledge (s 144 EA)
        - Facts which are not reasonably open to question.
        - E.g. the sun rises each morning.
    - Matters of law (s 143 EA)
        - Laws, regulations, proclamations, orders

How does a criminal trial commence?

Process

- The charge will set out the factual basis and demonstrate what the prosecution seek to prove.

- Defendant can plead guilty, not guilty or plead insanity - which is the middle ground between guilty and not guilty.

Arraignment

- The formal statement read in front of the jury, with which the defendant must plead not guilty.
    - The criminal trial has now commenced.

How is evidence kept away from the jury?

1. If evidence is known, can ask judge to rule upon its admissibility or inadmissibility.
- Lawyers can agree that evidence has no probative value and is prejudicial.
- However, if they do not, the matter is put forward to the judge.

Voir Dire - the process at which the court rules on the admissibility of evidence when it is alleged.

- Opening Address - The prosecution will commence their opening first.
    - The defence can then provide a response to the prosecution opening.
    - The prosecution then provides their first witness, an important witness. The witness gives oral evidence ' '. This witness is first examined in chief. This is the first time that the charges will be heard, this must occur at the least polluting way possible. The goal of examination in chief, ideally, is to not lead the witness. The evidence must be non-leading.
        - The objective to find the truth in that questions must be non-leading so that the witness can provide the truth, clean and pure evidence.
        - The evidence in chief takes that form.

- A question that invites a yes or no answer will generally be leading. However, there can be leading in agreement. Where the evidence or questions are not contentious.

- The sovereign cannot be compelled to give evidence. It is from the sovereign that the Ct system is founded.

- After the examination in chief of the Prosecution's first witness, cross-examination occurs.

Cross-examination by Defence

- Purpose of cross-examination is to dispose dishonest evidence, honest but mistaken evidence or honest and accurate evidence.

- Cross-examination is the tools put forward to the witness that they are mistaken or intentionally lying etc.

- After cross-examination, re-examination takes place. Here, matters that were not discussed in cross-examination or new evidence is not permitted.

- After this, the Prosecution then provides other subsequent witnesses. They can provide physical evidence, documents etc.

Forms of evidence that can be seen:

- Physical viewing
- Demonstration

If there is no case to answer

What one can say:

- You haven't proven your case. There is no evidence upon which a jury can be moved to be satisfied that, for instance, it can be proved that defendant committed (ie. Murder) beyond reasonable doubt.

Closing Submissions - both by Prosecution and Defence

- This is the last part of a criminal trial. In terms of evidentiary purposes, this is an important stage as the judge will fill the jury in with information regarding the evidence itself.

For example:

- If the evidence is circumstantial
- Nature of the charges

What jury can do with the evidence they have actually heard.

- Circumstantial evidence - can reason circumstantially if it is reasonable to do so. The judge provides jury with basic instructions in reasoning.
    - Using Qantas analogy.
- The jury are sent away to come to a decision.
- The jury can ask questions. Generally, the question is provided to the judge and read out to the barristers, a reasonable response is articulated. The answer is then provided to the jury, however they must be present in Ct.