

EVIDENCE

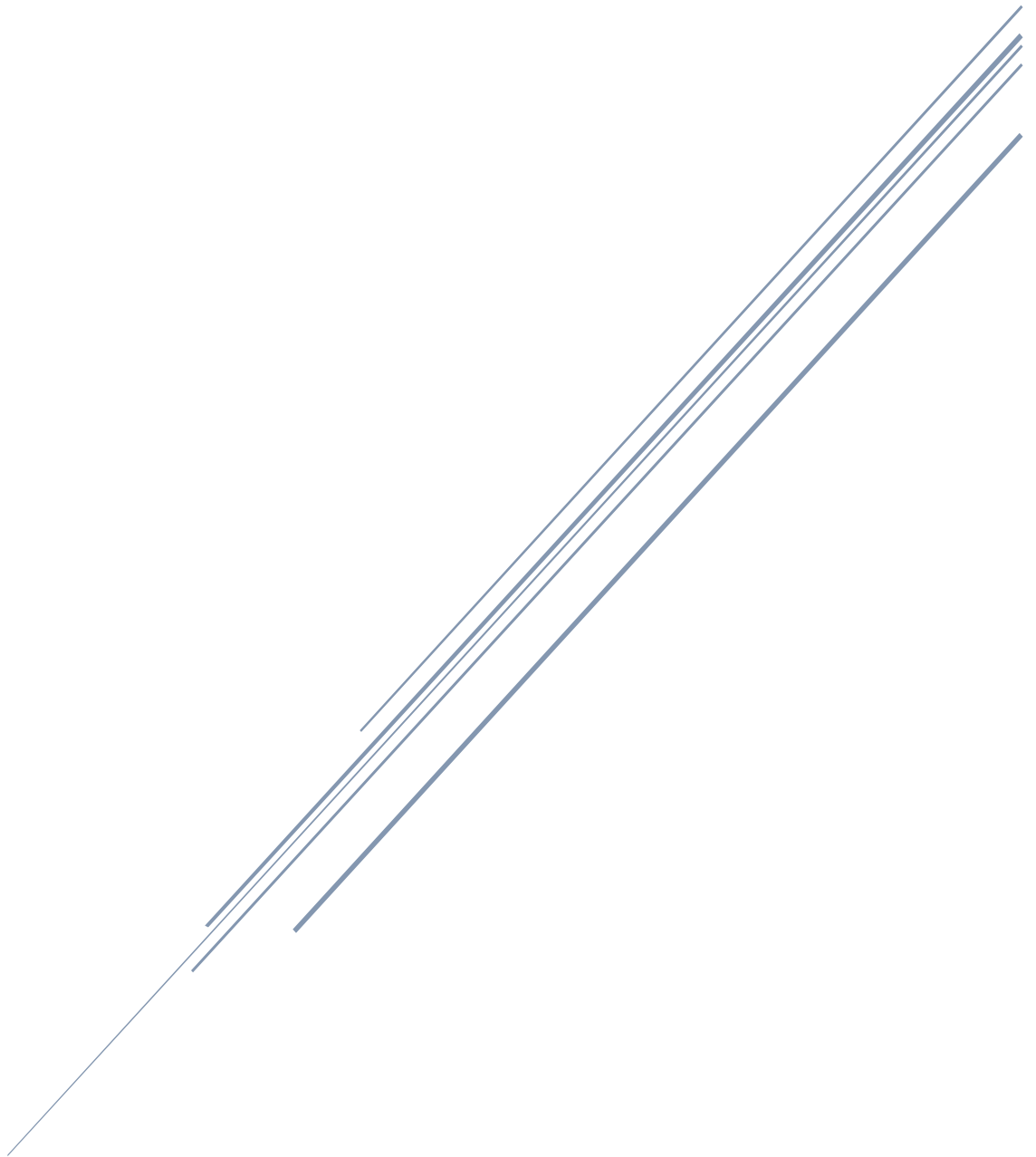


Table of Contents

Introduction to Evidence (Proof and Presumptions)	7
Proof.....	7
Burden of Proof.....	7
Evidential burden v Legal burden	8
Standard of Proof.....	8
Civil Cases.....	8
Criminal Cases	9
Judicial Notice	9
.....	10
Uniform Evidence Law	Error! Bookmark not defined.
EVIDENCE ACT 1995 - SECT 55: Relevant evidence	Error! Bookmark not defined.
EVIDENCE ACT 1995 - SECT 56: Relevant evidence to be admissible	Error! Bookmark not defined.
EVIDENCE ACT 1995 - SECT 135: General discretion to exclude evidence ...	Error! Bookmark not defined.
EVIDENCE ACT 1995 - SECT 136: General discretion to limit use of evidence....	Error! Bookmark not defined.
EVIDENCE ACT 1995 - SECT 137: Exclusion of prejudicial evidence in criminal proceedings	Error! Bookmark not defined.
EVIDENCE ACT 1995 - SECT 138: Exclusion of improperly or illegally obtained evidence ...	Error! Bookmark not defined.
Relativity of relevance	Error! Bookmark not defined.
Summary	Error! Bookmark not defined.
Documents, Real Evidence and Witness.....	Error! Bookmark not defined.
Real Evidence	Error! Bookmark not defined.
Kinds of Evidence	Error! Bookmark not defined.
EVIDENCE ACT 1995 - SECT 11: General powers of a court.....	Error! Bookmark not defined.
Part 2.2. Documents	Error! Bookmark not defined.
Documents Generally	Error! Bookmark not defined.
Proof of contents of documents	Error! Bookmark not defined.
Definition of ‘document’	Error! Bookmark not defined.
Definition of ‘unavailable’	Error! Bookmark not defined.
<i>R v Cassar & Sleiman (No 28)</i> [1999] NSWSC 651	Error! Bookmark not defined.
Section 48: Proof of Contents of Documents	Error! Bookmark not defined.
Real Evidence	Error! Bookmark not defined.
PART 2.3 - OTHER EVIDENCE	Error! Bookmark not defined.

Conduct of View	Error! Bookmark not defined.
Witnesses.....	Error! Bookmark not defined.
Failure to give or call evidence	Error! Bookmark not defined.
Section 189: The voir dire	Error! Bookmark not defined.
Section 12: Competence and compellability	Error! Bookmark not defined.
Section 13: Competence: lack of capacity	Error! Bookmark not defined.
Section 21: Sworn evidence to be on oath or affirmation	Error! Bookmark not defined.
Exceptions to Compellability.....	Error! Bookmark not defined.
Child Witnesses	Error! Bookmark not defined.
Compellability of Spouses	Error! Bookmark not defined.
Control by the Court	Error! Bookmark not defined.
Seeking Leave	Error! Bookmark not defined.
Examination of Witnesses (s. 27-s. 29)	Error! Bookmark not defined.
Credibility of Witness.....	Error! Bookmark not defined.
What is Credibility?	Error! Bookmark not defined.
Credibility under the Evidence Act	Error! Bookmark not defined.
Exceptions to Credibility Rule	Error! Bookmark not defined.
SUMMARY – Attacking the credibility of your own witness	Error! Bookmark not defined.
Privilege.....	Error! Bookmark not defined.
The Concept of Privilege	Error! Bookmark not defined.
Client Legal Privilege	Error! Bookmark not defined.
Advice (s118)	Error! Bookmark not defined.
Litigation (s119)	Error! Bookmark not defined.
Definitions (s 117)	Error! Bookmark not defined.
Dominant Purpose Test.....	Error! Bookmark not defined.
General	Error! Bookmark not defined.
Professional Confidential Relationship Privilege	Error! Bookmark not defined.
Loss of PCR.....	Error! Bookmark not defined.
Sexual Assault Communications Privilege	Error! Bookmark not defined.
<i>R v Young</i> (1999) 46 NSWLR 681.....	Error! Bookmark not defined.
General	Error! Bookmark not defined.
Privilege Against Self-Incrimination	Error! Bookmark not defined.
Religious Confessions	Error! Bookmark not defined.
Public Interest Immunities	Error! Bookmark not defined.
Hearsay	Error! Bookmark not defined.
Debunking the myths about Hearsay	Error! Bookmark not defined.

Hearsay – 3 Steps	Error! Bookmark not defined.
s59 The Hearsay Rule-Exclusion of Hearsay Evidence	Error! Bookmark not defined.
The Hearsay Rule	Error! Bookmark not defined.
Representation	Error! Bookmark not defined.
Previous Representation	Error! Bookmark not defined.
Maker of Representation	Error! Bookmark not defined.
Fact Intended to be Asserted	Error! Bookmark not defined.
Implied Assertions & Intention	Error! Bookmark not defined.
Process so far	Error! Bookmark not defined.
Exceptions to Hearsay Rule	Error! Bookmark not defined.
First Hand and More Remote Hearsay	Error! Bookmark not defined.
Maker Available	Error! Bookmark not defined.
Fresh in the Memory	Error! Bookmark not defined.
Documentary exceptions	Error! Bookmark not defined.
Non-Hearsay Purpose & Admissions	Error! Bookmark not defined.
Hearsay Evidence Revisited	Error! Bookmark not defined.
Hearsay & Multi-Purpose Evidence.	Error! Bookmark not defined.
s60 – Hearsay Exception	Error! Bookmark not defined.
<i>Lee v The Queen</i> (1998) 195 CLR 594	Error! Bookmark not defined.
Admissions	Error! Bookmark not defined.
Overview of Admissions	Error! Bookmark not defined.
Part 1 Definitions:	Error! Bookmark not defined.
Admissions	Error! Bookmark not defined.
Overview of Admissions	Error! Bookmark not defined.
s81 Hearsay and Opinion Rules: exception for Admissions and related representations... Error!	Bookmark not defined.
Part 1 Definitions:	Error! Bookmark not defined.
Types of Admissions	Error! Bookmark not defined.
Exclusionary Rules Relating to Admissions	Error! Bookmark not defined.
s90 Discretion to Exclude Admissions	Error! Bookmark not defined.
Opinion	Error! Bookmark not defined.
Nature of Opinion Evidence	Error! Bookmark not defined.
Problems with Opinion Evidence	Error! Bookmark not defined.
s76 Opinion Rule	Error! Bookmark not defined.
Exceptions to s 76	Error! Bookmark not defined.
Lay Witness	Error! Bookmark not defined.

Expert Witness.....	Error! Bookmark not defined.
Lithgow City Council v Jackson [2011] HCA 36	Error! Bookmark not defined.
Opinion Evidence & Identification.....	Error! Bookmark not defined.
s79 Specialised Knowledge Exception	Error! Bookmark not defined.
S79 Exception: opinions based on specialised knowledge	Error! Bookmark not defined.
Amendment 78A: Aboriginal and Torres Strait Islander traditional laws and customs	Error! Bookmark not defined.
Breaking it down: determining whether a s 79 exception applies or not? ..	Error! Bookmark not defined.
Problems with Expert Evidence	Error! Bookmark not defined.
R v Wood [2012] NSWCCA 21	Error! Bookmark not defined.
R v Morgan [2011] NSWCCA 257	Error! Bookmark not defined.
Discretionary Exclusion of Opinion Evidence.....	Error! Bookmark not defined.
Hallmarks of Admissible Opinion Evidence.....	Error! Bookmark not defined.
s77 Admissibility of Opinions for a Non-Opinion Purpose	Error! Bookmark not defined.
The Ultimate Issue.....	Error! Bookmark not defined.
Tendency & Coincidence.....	Error! Bookmark not defined.
Inferential Reasoning	Error! Bookmark not defined.
Process of examining evidence	Error! Bookmark not defined.
General Principles of Tendency & Coincidence	Error! Bookmark not defined.
Tendency.....	Error! Bookmark not defined.
Coincidence.....	Error! Bookmark not defined.
s97 Tendency Rule	Error! Bookmark not defined.
ES v R (No 1) [2010] NSWCCA 197	Error! Bookmark not defined.
Significant Probative Value	Error! Bookmark not defined.
Evidence for Other Purposes	Error! Bookmark not defined.
R v OGD (No 2) (2000) 50 NSWLR 433.....	Error! Bookmark not defined.
Relationship Evidence.....	Error! Bookmark not defined.
R v Lock (1997) 91 A Crim R 356.....	Error! Bookmark not defined.
s98 Coincidence Rule.....	Error! Bookmark not defined.
s101 Further Requirements on Prosecution.....	Error! Bookmark not defined.
IMM v The Queen [2016] HCA 14	Error! Bookmark not defined.
Concocted or Contaminated Evidence	Error! Bookmark not defined.
Hoch v R (1988) 165 CLR 292	Error! Bookmark not defined.
Pfennig v R (1995) 182 CLR 461.....	Error! Bookmark not defined.
R v Ellis [2003] NSWCCA 319	Error! Bookmark not defined.

Exclusion of Evidence: Warnings, Comments & Directions	Error! Bookmark not defined.
Discretionary / Mandatory Rules	Error! Bookmark not defined.
Section 135	Error! Bookmark not defined.
Section 136	Error! Bookmark not defined.
Section 137	Error! Bookmark not defined.
Section 138	Error! Bookmark not defined.
s135 Discretionary Rule	Error! Bookmark not defined.
s137 Mandatory Rule	Error! Bookmark not defined.
s138 Discretionary Rule	Error! Bookmark not defined.
s136 Discretionary Rule	Error! Bookmark not defined.
Comments	Error! Bookmark not defined.
Warnings and Directions	Error! Bookmark not defined.
EA Warnings	Error! Bookmark not defined.
BAIL ACT 2013	Error! Bookmark not defined.
Summary	Error! Bookmark not defined.
Exam Tips	Error! Bookmark not defined.
Evidence Act	Error! Bookmark not defined.
2011 Autumn Exam Paper	Error! Bookmark not defined.
Question 1	Error! Bookmark not defined.
Question 5	Error! Bookmark not defined.
Question 6	Error! Bookmark not defined.

Introduction to Evidence (Proof and Presumptions)

- Freedom's enquiry inquired into encroachments on...
 - Privilege against self-incrimination: protecting individuals from incriminating themselves
 - Legal professional privilege/client legal privilege: privilege protecting the lawyer and client relationship

Proof

- The "common law adversarial system of legal procedure is not directed to the establishment of truth." The adversarial system is concerned with "procedural truth" or "legal truth" (Former CJ Spigelman, *Bar News*, Winter 2011, 101).
 - He cites Viscount Simon, "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". (Viscount Simon LC in *Hickman v Peacey* [1945] AC 304, cited in Spigelman).
 - In law we refer to this type of truth as "proof"
 - We prove claims in law through evidence and is the process & technique we use for evaluating evidentiary material
 - Not everything that is true can be proven with admissible evidence
- Refers to the fact-finding process in litigation

Burden of Proof

- Generally the party who brings, starts or prosecutes the matter, they have the burden of adducing specific evidence to meet the standard of proof (dependent on civil or criminal litigation)
- In civil cases, the plaintiff bears the burden as they have brought the matter
 - A plaintiff bears the burden that their claim can be proven with evidence
 - If the evidence cannot be made out, the plaintiff must discharge their duty
- In criminal cases, the Crown bears the burden
 - *Woolmington v DPP*
 - Lord Sankey: "Throughout the web of the English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt"
- If defendant wants to argue insanity, provocation, intoxication they must discharge their defence to the relevant standard and sometimes burden is shifted based on statutory enactment (NSW- Drugs Misuse and Trafficking Act) as it deems what constitutes an offence based on the characteristics (i.e. quantity) → statute establishes type of offence/conduct and can shift the burden
- *The Queen v Khazaal* [2012] HCA 26
 - Facts: Khazaal accused of knowingly making a document connected with terrorist act, contrary to s 101.5(1) of the Criminal Code (Cth). Khazaal relied on evidence adduced by the prosecution concerning his status as an accredited journalist and researcher with an academic interest in Islam – he claimed that this is why he made the e-book. Khazaal argued that this evidence suggested a reasonable possibility that the making of the e-book was not intended to facilitate assistance in a terrorist act.
 - Held: HCA held that evidence relied on was not inconsistent with the alleged purpose of facilitating violence and that there was insufficient evidence to support his contentions (defence). Basically he failed to meet the evidentiary burden of Proof that was placed on him. The HC was not satisfied that he had discharged that burden

Evidential burden v Legal burden

- Legal burden – the party who bears 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.

Legal Burden of Proof

- In a criminal case it is the Prosecution that bears the onus of proving the guilt of the accused.
 - It is not up to the Accused to prove his / her innocence.
- Refers to the obligation of proving all elements of the offence / action.
- The case that must be made by the Prosecution so as to persuade the Court that the Accused is guilty.
- In a civil matter it is the party who makes the assertion (in their pleadings) who must prove that assertion.

Evidential Burden of Proof

- The burden a party must meet to demonstrate to the Court that an allegation / assertion / defence has sufficient foundation for evidence to be taken on that particular issue.
- It is the obligation to produce sufficient evidence on a particular proposition to render that issue worthy of consideration by the Court.

- Normally operates when the Accused raises a defence to the crime.
- If the Judge determines that insufficient evidence has been presented, the Judge will not allow the Jury to consider the issue as part of the evidence.

Distinction between LBP & EBP considered in...

- *Strong v Woolworths Ltd* [2012] HCA 5, per Heydon J at [50]-[54]
- *Braysich v The Queen* 243 CLR 434, [2011] HCA 14 at [33]-[36]

Standard of Proof

- Civil – “on the balance of probabilities” i.e. ‘more likely than not’ (EA s. 140)
- Criminal – “beyond reasonable doubt” (EA s. 141)
- The jury decides the meaning of these terms, the judge is not supposed to help the jury with understanding and applying these terms
- For Evidential Burdens, the Standard of Proof is the lower standard of ‘on the balance of probabilities’ – ie more likely than not.

Civil Cases

- The seriousness of the claim reflects the extent to which the perception of the balance shifting must be demonstrated
- In civil matters, the strength of the evidence that is required to make a case “on the balance of probabilities” will really depend on the type of case it is.
- The “balance” of probabilities must have actually shifted so that the trier of fact must feel an “actual persuasion” of the occurrence or existence of particular facts before they can be found.
- The standard of proof must be met “clearly” or “strictly” or “with certainty”.
- *Briginshaw v Briginshaw* (1939) 60 CLR 336 – this case involved a petition for divorce based on adultery. Adultery was not a crime (although it was characterised as quasi-criminal behaviour) but a presumption of innocence applied.
- *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 – this case involved deceit over the worth of a business and the subsequent rescission of a contract.

Criminal Cases

- Resistance by courts to give legal meaning to phrase “beyond reasonable doubt” which is said to be interpreted in its ordinary, natural meaning. see *Green v The Queen*
- There is longstanding authority for the proposition that, except in certain limited circumstances, no attempt should be made to explain or embellish the meaning of the phrase “beyond reasonable doubt”: see *Green v The Queen* (1971) 126 CLR 28
- Generally, for Circumstantial Evidence cases there is no requirement for each piece of circumstantial evidence to be proven beyond reason doubt - the evidence must be considered as a whole and not by a piecemeal approach to each particular circumstance (unless the circumstantial fact is so fundamental to the reasoning process. : see *Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56, per Dawson J at 578

Judicial Notice

- “common knowledge” (EA s. 144) also sometimes referred to as “notorious facts”
- Judicial notice without inquiry
- Judicial notice after inquiry
- Judicial notice and statistics: *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, per McHugh J at [60]

- Where the court thinks something is common knowledge, they will not require any evidence to be adduced about it, and can take judicial notice of that fact
- *Australian Communist Party v Cwlth* (1951) 83 CLR 1
 - Court took Judicial notice took judicial notice of Marxist Leninism. Court held that no evidence needed to be called to prove what political and economic principles Marx and Lenin stood for. The court also took judicial notice of certain events in the history of communism.
- *R v Zundel (No 2)* (1990) 53 CCC (3d) 161
 - Facts: Z wrote and published many facts denying the events of Holocaust (some he wrote, some he published and distributed). Court took judicial notice of the Holocaust. Z appealed this because he denied the Holocaust and said that the existence and events of the Holocaust is being assumed then this breaches his constitutional rights as he denied the Holocaust.
 - Held: the court upheld this which removed the judicial notice. Regardless, he was convicted of being a Holocaust denier.
- *Irving v Penguin Books Ltd* [2000] All ER (D) 523
 - Facts: David Irving is a historian of the 3rd Reich and is a Holocaust denier. Took actions against Debra Lipstadt's book published by Penguin, *Denying the Holocaust*. He brought action against her for defamation. A defence in defamation is truth which several expert witnesses proved evidence and testimonies for.
 - Held: Penguin's defence was upheld in court and there Irving was unsuccessful.

