

EVIDENCE

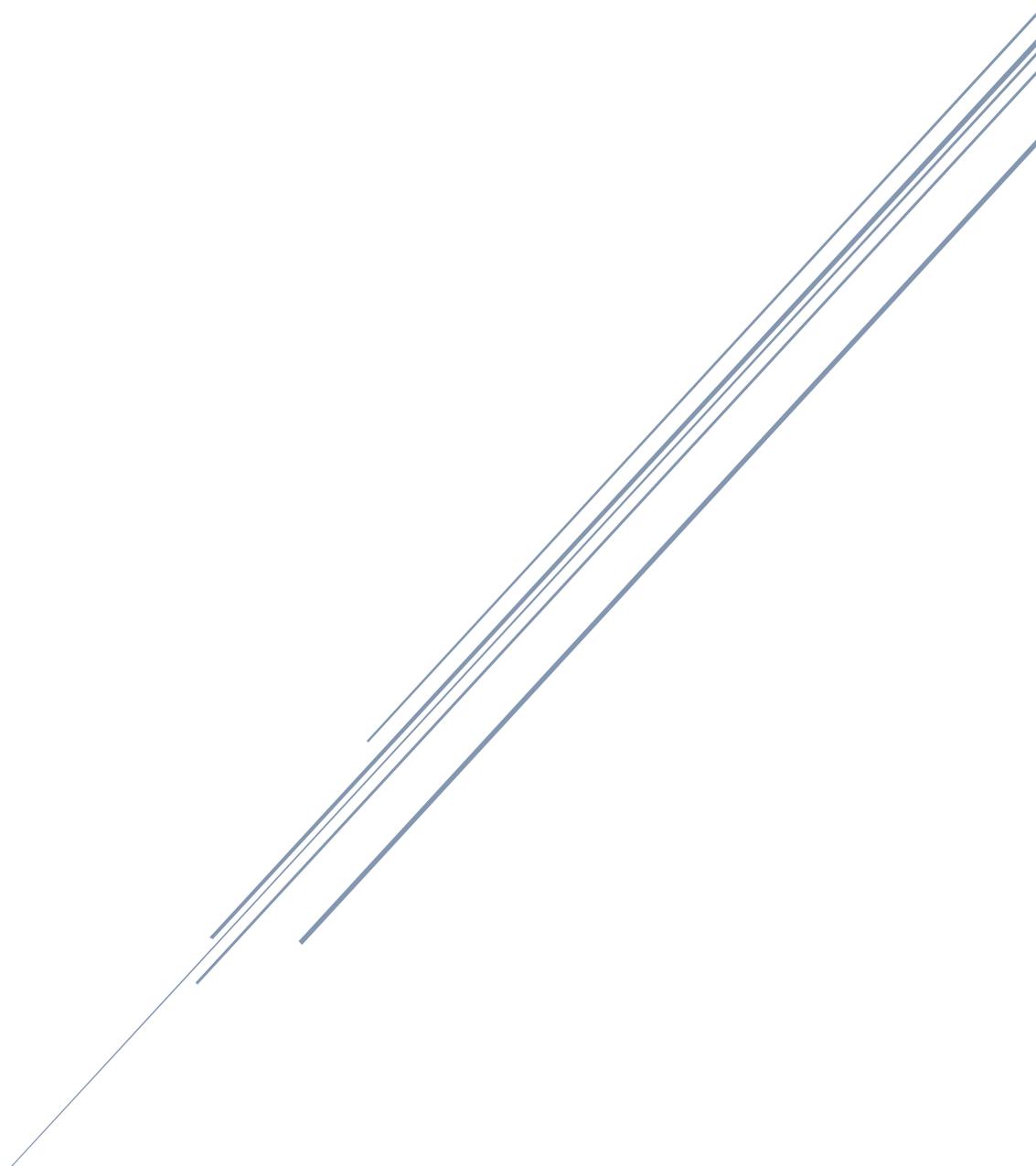


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Introduction to Evidence (Proof and Presumptions)

- 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 reasonable 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.

