

## TOPIC 1: INTRODUCTION

### BURDEN AND STANDARD OF PROOF

- Standard of Proof= The degree to which an issue must be proved/ the standard to be applied as to whether the evidence expresses a material fact/allegation
- Burden of Proof= Party who has the onus of proving a particular issue
- Evidential burden= Party which must adduce sufficient evidence to persuade the fact-finder (judge or jury) of the existence of facts in issue
- Legal burden= Party which must prove the issue to the requisite standard/ party which loses if the burden is not satisfied

### CIVIL PROCEEDINGS:

- LEGAL AND EVIDENTIAL BURDEN:
  - P bears both the legal and evidential burden for establishing a cause of action
  - D may have the evidential burden in relation to a defence
- STANDARD OF PROOF: is 'balance of probabilities' (s.140(1) EA)
  - 50% +1= more likely than not
  - In determining whether satisfied consider: (s.140(2) EA)
    - Nature of the cause of action
    - Nature of the subject matter of the proceeding
    - Gravity of matter alleged (NB: compelling evidence is often required to satisfy this standard if the pleaded allegations are serious eg. civil fraud)

### CRIMINAL PROCEEDINGS:

- LEGAL AND EVIDENTIAL BURDEN:
  - P bears both the evidential and legal burden in relation to the elements of the offence
  - D bears the evidential burden in relation to the general defences; but P still bears the legal burden
  - In the case of some affirmative defences eg. mental impairment, the D bears both the evidential and legal burden
- STANDARD OF PROOF: is 'beyond reasonable doubt' (s.141(1) EA)
  - No reasonable doubt of guilt of accused- no reasonable explanation consistent with D's innocence
  - In the case of some affirmative defences, the standard of proof is 'on the balance of probabilities' (s.141(2) EA)

### PRELIMINARY QUESTIONS: VOIR DIRE

Judge determines admissibility of evidence in the absence of the jury (to prevent prejudice)

Admissibility of evidence: (s.142 EA)

- (1) Question of whether evidence should be admitted is to BoP
- (2) Evidence is heard and judge decides if admissible based on-
  - (a) the importance of the evidence; and
  - (b) gravity of the matter alleged in relation to the question

Voir Dire: (s.189 EA)

- Preliminary questions as to:
  - Whether evidence should be admitted
  - Evidence can be used against a person
  - A witness is competent or compellable
  - Whether particular evidence is evidence of an admission or evidence that has been illegally obtained
  - If evidence of an admission or evidence illegally obtained should be admitted
- Decided in the absence of the jury (s.189(4) EA)

s.192A: Court may give an advance ruling/ finding as to:

- (a) admissibility or use of evidence

## JUDICIAL NOTICES AND FACILITATION OF PROOF

**s.144(1)(a):** No evidence is required to prove common knowledge

- eg. date of Christmas day

## LEAVE, PERMISSION AND DIRECTIONS

**s.192 EA: LEAVE**

(1) If the Act permits, a court may give any leave, permission or direction on such terms as the court thinks fit.

(2) Facts to be taken into account:

- (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and
- (b) the extent to which to do so would be unfair to a party or to a witness; and
  - Is the evidence unproven? Eg. an unproven allegation?
  - Would the evidence undermine the presumption of evidence?
- (c) the importance of the evidence in relation to which the leave, permission or direction is sought; and
  - What kind of evidence is it?
    - Circumstantial evidence (eg. hearsay)
  - What other evidence is there?
    - Does P or D have an abundance of other evidence?
  - What is the strength of the evidence?
    - Corroborates another's statement
    - They are the only other witness?
    - Did they see the crime? Or merely hear?
  - If relatively insignificant as per **Stanovski** 'feather weight' unlikely to grant leave
- (d) the nature of the proceeding; and
  - Is this a minor offence? Or serious?
- (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

**s.192A:** Court may give an advance ruling/finding as to:

- (c) the giving of leave

## UNDER THE JDA

**s.14(1) JDA:** Judge MUST give a requested direction unless there are good reasons for not doing so

**s.14(2) JDA:** In determining whether there are good reasons, the judge MUST have regard to:

- (a) the evidence in the trial
- (b) the manner in which the prosecution and the accused have conducted their cases- including
  - (i) whether the direction concerns a matter not raised or relied on by the accused; and
  - (ii) whether the direction would involve the jury considering the issues in the trial in a manner that is different from the way in which the accused has presented his or her case

## UNRELIABLE EVIDENCE:

**CIVIL PROCEEDINGS s.165 EA**

(1) The following kinds of evidence in a CIVIL proceeding may be unreliable

- (a) hearsay evidence or admissions
- (b) identification evidence
- (c) evidence the reliability of which may be affected by age, ill health (physical or mental), injury or other

(2) If there is a jury and a party requests, the judge is to:

- (a) warn the jury that the evidence may be unreliable; and
  - (b) inform the jury of matters that may cause it to be unreliable; and
  - (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
- (6) Does not permit a judge to warn or inform a jury that the reliability of a child's evidence may be affected by the age of the child

### CRIMINAL PROCEEDINGS

**s.31 JDA:** Unreliable evidence includes:

- (a) hearsay evidence or admissions
- (b) Evidence the reliability of which may be affected by age, ill health (physical or mental), injury or the like
- (c) Evidence given by a witness who might be criminally concerned in the events giving rise to trial
- (d) Evidence given by a witness who is a prison informer
- (e) Oral evidence of questioning by an investigating official of an accused where the questioning has not been acknowledged by the accused

**s.32 JDA:** Direction on unreliable evidence:

- (1) P or D may request that the trial judge direct the jury on evidence of a kind that may be unreliable
- (2) In making a request referred to in subsection (1), P or D must specify—
  - (a) the significant matters that may make the evidence unreliable; or
  - (b) if the request concerns evidence given by a child, the significant matters (other than solely the age of the child) that may make the evidence of the child unreliable.
- (3) In giving a direction referred to in subsection (1), the trial judge must—
  - (a) warn the jury that the evidence may be unreliable; and
  - (b) inform the jury of—
    - (i) the significant matters that the trial judge considers may cause the evidence to be unreliable; or
    - (ii) if the direction concerns evidence given by a child, the significant matters (other than solely the age of the child) that the trial judge considers may make the evidence of the child unreliable; and
  - (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

### DISCRETIONS TO EXCLUDE

- *Probative value*= extent to which evidence rationally affects the assessment of the probability of existence of fact in issue (**Dictionary**)
- *Prejudicial effect*= undue impact, adverse to the accused, evidence may have on jury over and above impact it might be expected to have if consideration confined to its probative force (**Pfennig**)

### CIVIL PROCEEDINGS:

**s.135 EA:** DISCRETION TO EXCLUDE:

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time; or
- (d) unnecessarily demean the deceased in a criminal proceeding for a homicide offence.

*Application:*

1. Establish extent of probative value (direct or circumstantial);
2. Establish extent of prejudicial effect (impact on rationality)
3. NB: Requirement that the probative value is substantially outweighed

**s.136 EA:** DISCRETION TO LIMIT

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might—

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

### CRIMINAL PROCEEDINGS:

**s.137 EA:** EXCLUSION OF PREJUDICIAL EVIDENCE

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by

the danger of unfair prejudice to the accused.

*Application:*

1. Establish extent of probative value (direct or circumstantial);
2. Establish extent of prejudicial effect (impact on rationality)
3. NB: Mere requirement that probative value is outweighed

## APPEALS IN CRIMINAL CASES

- ONLY the accused can appeal a finding of guilt by jury
  - Person convicted of an offence by an originating court may appeal to the Court of Appeal against the conviction on any ground of appeal if the Court of Appeal grants the person leave to appeal (s.274 CPA)
- Must show statutory basis for appeal against conviction

**s.276 CPA:**

(1) Court of Appeal must allow the appeal if the appellant satisfies the court that:

- (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or
- (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
- (c) for any other reason there has been a substantial miscarriage of justice.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 274.

**s.277 CPA:** If Court of Appeal allows an appeal it must set aside the conviction and must:

- Order a new trial
- Enter a judgement of acquittal
- Enter a judgement of conviction and impose a sentence for another offence to which the appellant could have been found guilty
- Order a new trial for another offence
- Enter a finding of not guilty because of mental impairment

## TOPIC 2: RELEVANCE

*[P] will argue [the evidence], if accepted, rationally affects (directly or indirectly) assessment of probability of existence of fact in issue (s.55), meaning that it is [relevant] unless proved otherwise (s.56)*

### RULE:

**s.56 EA:** Evidence that is relevant in a proceeding is admissible in the proceeding

### 1. ESTABLISH WHAT THE FACTS IN ISSUE ARE

- Facts with the plaintiff or prosecutor and the defence or accused must prove in order to be successful and are established by reference to substantive rules of law
- Facts necessary to be made out in order to prove:
  - A cause of action (civil); or
  - Show that the defendant has committed the crime (criminal)
  - A mode of complicity (eg. conspiracy to commit... aided and abetted.. etc.)
  - A defence

### s.61 JDA:

Judge may direct the jury that these following matters must be proved BRD

- (a) the elements of the offence charged or an alternative offence; and
- (b) the absence of any relevant defence

### 2. ESTABLISH THE EVIDENCE

#### DIRECTLY RELEVANT EVIDENCE:

- Evidence which, if accepted, tends to prove/disprove a fact in issue directly
- If proven, nothing else can be gained other than the cause of action/ crime being made out
- Only inference available is of its truth.
- If believed, resolves fact in issue (highly probative)
- Must be proved BRD

#### Includes:

- Oral evidence of witness's sensory perceptions of facts in issue (e.g. "I saw trigger pulled")
- Documentary evidence depicting facts in issue
- Admissions made by the defendant

#### INDIRECTLY RELEVANT EVIDENCE

- Requires the tribunal of fact to engage in extended reasoning processes to determine whether the existence of the fact in issue is made more or less probable by the evidence
- Evidence of facts which provide a logical basis for inferring that a fact in issue is more/less likely to have occurred
- Inference the jury is invited to make
- Raises consideration of exclusionary rules- **s.135-137**

#### Circumstantial Evidence –

- If proven does not prove existence of a fact unless inference is drawn.
- Observed fact, not a fact in issue, but relevant to a fact in issue (may make further inferences from this piece of evidence)
- Does not prove the crime was committed, another inference must be made (**Plomp v R**)
- "facts relevant to facts in issue" (**Smith**)
- Permitted and acts accumulatively- many pieces of circumstantial evidence may establish a fact in issue
- Not every piece of evidence needs to be established BRD (strands in a cable)
  - Sufficient to find guilty BRD (**s 140 EA**) if:
  - on whole leaves no other reasonable explanation consistent with innocence (**Plomp v R; Shepherd v R**).
- Some intermediate crucial evidence must be established BRD (**Shepherd v R**) – links in a chain.