Week 1 - Burden and Standard of Proof, Trial Procedure, Presumptions (Ch 1-2)

Evidence is *'information, which … will be received by a court for the purpose of deciding issues of fact that arise for its decision'* Gleeson CJ in *HML v The Queen* [2008] HCA 16

'Evidence is the foundation of proof … proof is that which leads to a conclusion as to the truth or falsity of alleged facts … evidence, if accepted and believed, may result in proof …' – Words and Phrases Legal Defined (2nd ed, 1969) at 191.

The law of evidence regulates what information that court can consider in finding the facts. This is called 'admissible evidence'. The rules of evidence '*represent the attempt made, through many generations, to evolve a method enquiry best calculated to prevent error and elicit truth'* Evatt in *R v War Pensions Entitlement Tribunal; ex parte Bott* (1933) 50 CLR 288.

The exclusionary approach seeks to establish reliability of evidence, and fairness in its application by regulation and prohibition of illegally or unfairly obtained material.

In Western Australia: State jurisdiction & Commonwealth matters heard in State Courts apply a combination of the common law and the EA 1906 (WA). In the Federal court, Family court & Federal Circuit Court the EA 1995 (Cth) is applied.

Trial procedure (pp 15, 189-94, Criminal Procedure Act 2004 (WA) ss65(3), 101-16)

Charges are laid. If it is a serious offence, CPA requires prosecution disclose. If there is a plea of guilty, the statements of facts is read, there is a plea in mitigation and then sentencing. If there is a plea of not guilty, a hearing/trial is heard. The prosecution carry the evidential burden, due to the defendant putting each element of the charge in issue. The prosecution open their case and calls evidence, which the defence may cross-examine. At the end of the prosecution case the defence may make a no-case submission, which is where the prosecution have failed to discharge the evidential burden on the test that the fact-finder *could* find the charges proved and that *'on the evidence as it stand, he could be convicted*' *May v O'Sullivan* (1955) 92 CLR 654.

The accused does not have to call evidence, but he may do so to negate facts essential to the prosecution case. He does bear the evidential burden in relation to defences and will have to call evidence to establish them. If they do not meet this burden then the prosecution may make a no-case submission. If the burden is met, the prosecution need to negative one element beyond a reasonable doubt. The parties then sum up their cases in closing address. If there is a jury, the judge sums up the prosecution and defence cases and directs the jury as to the law, who then return with its verdict. If there is not jury the judge or magistrate deliver their finding.

The burden rests on the defence in situations such as demonstrating insanity under s 26 CCWA, exceptions that reverse the onus such as s 11 Misuse of Drugs Act 1981, and implied statutory exceptions as in s 321 (9) CCWA.

Where '*there is evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to have a reasonable doubt that each of the elements of the defence had been negative?*' *Braysich v R* (2011) 243 CLR 434

The preliminary issues involving the admissibility of particular pieces of evidence are heard in absence of the jury in the *voir dire* ('speak truly'). If there is no jury, the judge or magistrate may have to notionally instruct themselves to disregard certain evidence.

Burden and Standard of Proof (pp16-31, EA Cth 140-2)

The evidential burden is the responsibility to provide 'enough' evidence to have the court consider the matter. The legal, or persuasive burden, is the responsibility to satisfy the court to the appropriate level of proof. In *Wendo v R* (1963) 109 CLR 559, the High Court held that even in common law criminal cases, the party bearing the burden of proof of the admissibility of an item of evidence need only discharge that burden to the extent of shoing a *prima facie* justification for its admission. If the perty is the Crown, it must go on to prove the reliability beyond a reasonable doubt, and the council who lost of voir dire may attempt to reduce the weight before the jury. (pg 31)

The standard of proof is '*the degree of rational certainty, of probability that will be accepted as proof of the material facts*' (Ligertwood & Edmond [2.57] 100). In civil cases, the standard is the 'balance of probabilities' *Delta Corp v Davies* [2002] WASCA 125; Evidence Act (Cth) s 140. The court needs to be *actually* persuaded, rather than finding 51-49% *Briginshaw v Briginshaw* (1938) 60 CLR 53;*Clay v Clay* (1999) 20 WAR 427. In criminal trials, the standard is 'beyond a reasonable doubt'. The burden rests on the prosecution to establish this *Woolmington v DPP* [1935] AC 462;*Challis v WA* [2014] WASCA 8. A 'reasonable doubt' is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances *Green v The Queen* (1971) 126 CLR 28. This does not mean that it need be '*proof to the point of absolute certainty*' *Goncalves v R* (1997) 99 A Crim R 193. (pages 22-3)

Circumstantial evidence

'Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is rationally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved' *Shepherd v The Queen* (1990) 170 CLR 573. This implicitly references means, motive and opportunity. Not all the 'strands in the cable' may need to be proved beyond reasonable doubt.