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(1) Introduction

a) The Trial Process

◆ S 27 Parties may question witnesses

A party may question any witness, except as provided by this Act.

◆ S 29 Manner and form of questioning witnesses and their responses

(1) A party may Q a witness in any way the party thinks fit, except as provided by this Ch or as directed by the court.

(2) A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.

(3) Such a direction may include directions about the way in which evidence is to be given in that form.

(4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

◆ S 11 - General powers of a court

(1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.

(2) In particular, the powers of a court with respect to abuse of process in a proceeding are not affected.

◆ S 26 Court's control over questioning of witnesses

The court may make such orders as it considers just in relation to:

- (a) The way in which witnesses are to be questioned; &
- (b) The production and use of documents and things in connection with the questioning of witnesses; &
- (c) The order in which parties may question a witness; &
- (d) The presence and behaviour of any person in connection with the questioning of witnesses.

◆ S 28 Order of examination in chief, cross-examination and re-examination

Unless the court otherwise directs:

- (a) Cross-examination of a witness is not to take place before the examination in chief of the witness; &
- (b) Re-examination of a W not to take place before all other parties who wish to do so have cross-examined the W.

b) Relationship between the *Evidence Acts*, the Common Law and other Statutes

◆ S 8 Operation of other Acts etc.

(1) This Act does not affect the operation of the provs of any other Act, other than ss 68, 79, 80 & 80A of the Judiciary Act 1903.

◆ Section 9 Effect of Act on other laws

(1) For the avoidance of doubt, this Act does not affect an Australian law so far as the law relates to a court's power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding.

o Does not affect operation of common law or equity unless done expressly or by necessary intendment – S 9;

=> But it has been held to cover the field and therefore be a code in relation to:

- o Ch 3 – Admissibility: *Telstra Corp v Australis Media Holdings* (No 2) (1997) 41 NSWLR 346 (disputed);
- o Competence & Compellability: *R v Grasby* (2000) 115 A Crim R 465 – See the language of S 12.

c) Taking Objections

o Trial is adversarial – Fight; => Court is there only to ensure a 'Fair Fight' – Not an equalization of talent.

=> Up to party to object to evidence at the trial.

◆ Regulation 4, Criminal Appeal Rules:

D cannot make a ground of appeal on a matter not objected to at trial by counsel without the leave of the court. Leave of the court will not be given unless D can demonstrate the original error led to a miscarriage of justice.

◆ *Picken* [2007] NSWCCA 319

=> Rule applied strictly. D must establish in fact that she or he lost a chance (real opportunity) of being acquitted.

d) Dispensing with the Rules of Evidence

o Some rules can be dispensed with by consent – S 190(1):

=> Part 2.1, Divs 3, 4, 5; => Part 2.2, 2.3; => Part 3.2 – 3.8 (important admissibility sections);

- o Consent in criminal proceedings is limited (court must be 'satisfied', at the least, that the accused understands the significance of the waiver or D advised by her Australian legal counsel.

o Court can dispense with these provisions in civil proceedings – S 190(2):

=> If matter not genuinely in dispute; => Application would involve unnecessary expense or delay.

o Can't dispense with: competence and compellability; oaths and affirmations; rules on relevance, identification evidence, privileges and discretions to exclude; rules relating to proof and the 'miscellaneous' rules.

e) Voir Dire

=> Preliminary questions as to admissibility of evidence to be dealt with, in certain cases (eg confessions and illegally obtained evidence), by a trial within a trial.

◆ S 189 The voir dire

(1) If the determination of a question whether:

- (a) evidence should be admitted (whether in the exercise of a discretion or not); or
- (b) evidence can be used against a person; or
- (c) a witness is competent or compellable;

depends on court finding that a particular fact exists; Q whether that fact exists is, for the purposes of this S, a preliminary Q.

(2) If there is a jury, a preliminary question whether:

- (a) particular evidence is evidence of an admission, or evidence to which section 138 applies; or
- (b) evidence of an admission, or evidence to which section 138 applies, should be admitted;

is to be heard and determined in the jury's absence.

(3) In the hearing of a preliminary Q about whether a dft's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the dft.

(4) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary Q unless the court so orders.

(5) W/o limiting matters the court may take into account in deciding whether to make such an order, it is to take into account:

- (a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the dft; &
- (b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary Q; &
- (c) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary q or, in a criminal proceeding, a hearing in relation to sentencing).

(6) **Subsection 128(10)** does not apply to a hearing to decide a preliminary question.

(7) In the application of Ch 3 to a hearing to determine a preliminary Q, the facts in issue are taken to include the fact to which the hearing relates.

(8) If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless:

- (a) it is inconsistent with other evidence given by the witness in the proceeding; or
- (b) the witness has died.

(2) Proof – Part 1

a) Burden of Proof

- o Allocation of proof – Question of substantive law – Not evidence. **UEA** doesn't deal with it.

Criminal Law

♦ *Woolmington v DPP*

- => 'Golden thread' of criminal justice that burden of proof remains on prosecution throughout;
- => No burden on Dft to prove innocence; Subject to defence of insanity / Existence of statutory exception.
- => Sufficient for D to raise a doubt as to his guilt.

- o Obligation on prosecution relates to all the ingredients of a charge;
- o Defence = Necessary ingredient of charge => No legal/Evidential burden rests on Dft (Defence of accident in murder charge).

Civil Cases

- o The one who asserts must prove;
- o Relates to all the issues essential to a party if they are to succeed in the action;
 - => Action for Negligence: Existence of duty of care, breach and loss – Burden of proof all rest upon the Ptf.
 - => Action for breach of contract: Existence of a contract, breach & consequential loss – Burden of proof rest upon Ptf.
- o Issues that go beyond simple denial of Ptf's claim: Contributory negligence, volenti non fit injuria; discharge by agreement or frustration – Burden of proof rests on Dft.
- o Allocation of burden of proof usually evident upon the pleadings – But can't re-allocate burdens by clever drafting!

♦ *Apollo Shower Screens v Building & Construction Industry Long Service Payments Corp* (1985) 1 NSWLR 561

- 1) Ptf must establish sufficient evidence from which the negative proposition can be inferred.
- 2) Dft has evidential burden to advance matters Ptf has to deal with discharging its overall burden of proof.

[Ptf had an onus to prove a negative proposition (class of work was not usually performed by a carpenter).]

b) Standard of Proof

♦ S 140 Civil proceedings: standard of proof

- (1) Civil proceeding: Court must find case of party proved if it is satisfied the case has been proved on balance of probabilities.
- (2) W/o limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
 - (a) the nature of the cause of action or defence; &
 - (b) the nature of the subject-matter of the proceeding; &
 - (c) the gravity of the matters alleged.

♦ *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 (Racial Discrimination)

=> The strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved and the circumstances in which it is sought to be proved.

♦ *Bibby Financial Services Australia Pty Ltd v Sharma* [2014] NSWCA 37

- o Citation of *Briginshaw* not inappropriate/indication of error, in circs where ref is immediately made to **S 140(2)**.
 - o **S 140(2)** = Non-exhaustive list of 'matters' that must be taken into account in applying SoP on BoP in CivPs;
 - => Application is not limited to allegations of fraudulent or criminal conduct.
 - o **S 140(2)** = No new pple; Reflects pples stated in *Briginshaw*; Requirement = Clear & cogent proof of serious allegations; Not change SoP; Reflects perception: Community Membs not ordinarily engage in serious misconduct.
- [Wrongful termination of an employment contract; Allegations involved sexual harassment by a supervisor of an employee.]

♦ S 141 Criminal proceedings: standard of proof

- (1) Criminal proceeding: Court is not to find case of the prosecution proved unless it is satisfied that it has been proved BRD.
- (2) Criminal proceeding: Court is to find case of Dft proved if it is satisfied that the case has been proved on the BoP.

♦ *Green v The Queen* (1971) 126 CLR 28

- o A trial judge should not explain the meaning of the phrase 'beyond reasonable doubt';
 - => The expression must be given its ordinary and natural meaning; it is the subjective view of the tribunal;
 - => A reasonable doubt is a doubt which the tribunal of fact entertains in the circumstances.

♦ *R v Reeves* (1992) 29 NSWLR 109

=> The Crown must satisfy the jury beyond reasonable doubt of the guilt of the Dft by establishing the essential ingredients of the charge to that standard, that the Dft is entitled to the benefit of any reasonable doubt in their minds and that the accused does not have to prove his or her innocence, except by way of contrasting it with the standard of proof in civil proceedings.

♦ *R v Dookheea* [2017] HCA 26 (Kiefel CJ, Bell, Gageler, Keane, Nettle & Edelman JJ)

- o While it is generally 'undesirable' for a trial judge to contrast reasonable doubt with 'proof beyond any doubt', it was not an error to do so in the circumstances of this case'. More flexibility given to compare.
 - => Whether the words spoken in terms of the record of the summing up are such that the jury would have derived a false perception of the basis for deciding whether the Crown has proved its case.

=> Decided by taking the summing up as a whole and as a jury listening to it might understand it, not upon some subtle examination of its transcript record or by undue prominence being given to any of its parts.

- o Common Law: Where there is an exception or qualification, as implied by the words in the statute (Eg, Unless...), D will need to prove he comes within that (legal burden): *R v Hunt* [1987] 1 All ER 1.

i) Circumstantial Evidence

Types of Evidence

- o Direct Evidence – “accept that this event happened because a credible witness says that they saw it happen”;
=> If accepted, alone establishes guilt.
- o Circumstantial Evidence – “accept this event happened because the circs suggest that it must have happened”;
=> Evidence of a basic fact(s) from which the jury is asked to infer a further fact/s to find the accused guilty.

♦ *Shepherd v The Queen* (1990) 170 CLR 573

=> Where case relies solely upon circumstantial evidence, guilt should not only be a rational conclusion that can be drawn but also the only rational conclusion from the circumstances.

♦ *R v Knight* (1992) 175 CLR 495

=> Jury must find accused not guilty if there is an inference consistent with innocence, reasonably open on the evidence.

- o Issue: Prosecution case not wholly dependent upon circumstantial evidence – But inferences of guilt will require ‘intermediate’ conclusions of fact.

=> Evidence = Indispensable link in chain of reasoning, jury should be directed that all of the evidence adduced in the trial should meet the required standard of proof; *Shepherd; Hannes v DPP* (2006) NSWCCA.

♦ *Chamberlain v The Queen* (1983) 153 CLR 521

=> Defendant was charged with the murder of her baby. Blood found at the crime scene had to be proven beyond reasonable doubt to be foetal blood before the jury could find the defendant guilty for that murder.

♦ **S 142 Admissibility of evidence: standard of proof**

- (1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding:
 - (a) a question whether evidence should be admitted / not admitted, whether in the exercise of a discretion or not; or
 - (b) any other question arising under this Act;have been proved if it is satisfied that they have been proved on the balance of probabilities.
- (2) In determining whether it is so satisfied, the matters that the court must take into account include:
 - (a) the importance of the evidence in the proceeding; and
 - (b) the gravity of the matters alleged in relation to the question.

ii) Standard of Proof for Evidential Burden

- o Evidence must be enough to ‘suggest a reasonable possibility’ (Lord Devlin) (*Jayasena v R* [1970] AC 618 at 624).

c) Prima Facie Case

Criminal (Submission made at end of Crown case)

=> Test – Is there evidence upon which the jury could lawfully convict? (*May*)

Civil (Made at close of Ptf’s case)

=> Is the evidence capable of proving on BoP the Ptf’s claim? Ptf’s case taken at its highest.

♦ *May v O’Sullivan* (1955) 92 CLR 654

- o Not if ‘Dft ought to be convicted’; => But whether, ‘on the evidence as it stands, she could lawfully be convicted’.
=> Ruling that there is a case to answer has no effect on burden of proof (trier of fact – PBRD).

[TJ did not believe M’s (exculpatory) evidence; Accepted w/o qualification, evidence of chief prosecution witness.]

♦ *Doney v The Queen* (1990) 171 CLR 207

- o No evidence of a crime => No prima facie case. If is evidence (however tenuous or vague) => Should be left to the jury & only removed if there is a such a defect in the evidence that a verdict of guilty could not be sustained.

=> Verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty.

- o TJ cannot uphold a no case to answer submission if he thinks CCA will set aside verdict because it is unsafe and unsatisfactory. [Prosecution case depended on flawed evidence of accomplice, Freeman.]

♦ *R v PL* [2012] NSWCCA 31

=> Sufficiency of evidence to warrant a conviction is to be resolved without regard to evidence which favours the accused as, for example, by qualifying, contradicting or explaining the evidence in support of a conviction.

=> In a case which depends in the main on circumstantial evidence, a judge cannot direct a verdict of acquittal if there is evidence in support of the Crown case on which the accused could be convicted even though a reasonable hypothesis consistent with innocence can be formulated.