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# THE TRIAL PROCESS

- **Arbiter of fact**
  - o Civil = Judge
  - o Criminal = Jury (serious indictable offences)
- **Appeals**
  - o Appellate court will not overturn decisions of jury
  - o Will only overturn judge's finding on **credibility** if it is "*inconsistent with facts incontrovertibly established by the evidence*" **House v The King 1936**
  - o Will rarely overturn when judge has exercised **discretion**
  - o Have to show **wrong principle** etc **plainly unjust**
- **When EA applies?**
  - o Not to bail hearings
  - o Act generally does **not apply to pre court** matters, it applies to **hearings in court**
  - o i.e. depending on whether the Act applies depends on whether the document will be privileged, under the act

## 27 PARTIES MAY QUESTION WITNESSES

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

## 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.

## 29 MANNER AND FORM OF QUESTIONING WITNESSES AND THEIR RESPONSES

- (1) **A party may question a witness in any way the party thinks fit**, except as provided by this Chapter 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.

## 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, and
- (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, and
- (d) the presence and behaviour of any person in connection with the questioning of witnesses.

## Relationship between Act, CL and other statutes

Does not affect the operation of other statutes (s8) - so differences between states can still arise

## 8 OPERATION OF OTHER ACTS

This Act does not affect the operation of the provisions of any other Act.

CL can still apply if EA does not expressly or impliedly override CL (s9). Still some areas where CL expressly preserved, e.g. CL power to dispense with rules of evidence for interlocutory proceedings

## 9 APPLICATION OF COMMON LAW AND EQUITY

(1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.

(2) Without limiting subsection (1), this Act does not affect the operation of such a principle or rule so far as it relates to any of the following:

- (a) admission or use of evidence of reasons for a decision of a member of a jury, or of the deliberations of a member of a jury in relation to such a decision, in a proceeding by way of appeal from a judgment, decree, order or sentence of a court,
- (b) the operation of a legal or evidential presumption that is not inconsistent with this Act,
- (c) a court's power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding.

## Taking Objections

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

### CRIMINAL APPEAL RULES R 4 EXCLUSION OF CERTAIN MATTERS AS GROUNDS FOR APPEAL ETC

No direction, omission to direct, or decision as to the admission or rejection of evidence, given by the Judge presiding at the trial, shall, without the leave of the Court, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at the trial to the direction, omission, or decision by the party appealing or applying for leave to appeal.

- Some Rules can be dispensed with by consent s190(1)

Court can dispense with some of the rules of evidence if the parties consent (**s190.1**)

- but special protections for the accused in **criminal cases**. The court must be 'satisfied', at the least, that the accused understands the significance of the waiver or D advised by Australian legal counsel

Can dispense with provisions in civil proceedings if matter not genuinely in dispute, or application would involve unnecessary expense or delay

## The Voir Dire

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

## 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 the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.

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

(a) particular evidence is evidence of an admission, or evidence to which section 138 (Discretion to exclude improperly or illegally obtained evidence) 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. ***Jury must be sent out re: admission***

(3) In the hearing of a preliminary question about whether a defendant'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 defendant.

(4) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders. SS4: any other preliminary question, jury should go out unless judge determines jury should stay in ***Jury must be sent out re: preliminary questions***

(5) Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account: ***list of factors to determine whether jury should stay***

(a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the defendant, and

(b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question, and

(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 question or, in a criminal proceeding, a hearing in relation to sentencing).

## Leave given by the Court

### 192 LEAVE, PERMISSION OR DIRECTION MAY BE GIVEN ON TERMS

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take 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

(c) the importance of the evidence in relation to which the leave, permission or direction is sought, and

(d) the nature of the proceeding, and

(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.

# PROOF PT 1

## Burden of Proof

The one who asserts must prove **Apollo**

### **Apollo Shower Screens 1985**

*General principle (civil cases): court likely to allocate an evidential burden on the party who has the power to produce the evidence*

**Facts:** Apollo sought declaration that workers were not within statutory definition of “workers in the industry”

- Court said:
  - P first has an evidential burden, enough that could be conferred
  - D had enough evidence to show were carpenters
  - P ultimately had legal burden to show requisite standard they were not carpenters
- About how burdens go back and forth and who has what

## Standard of Proof

### Civil

P bears evidentiary and legal burden, balance of probabilities

#### 140 CIVIL PROCEEDINGS: STANDARD OF PROOF

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved **on the balance of probabilities.**

(2) Without 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, and
- (b) the nature of the subject-matter of the proceeding, and
- (c) the gravity of the matters alleged. **Briginshaw Principle**

### **Briginshaw Principle**

*The seriousness of the allegation made and consequences flowing must affect Q of whether issue has been proved to reasonable satisfaction of tribunal*

- The more serious it is or great the consequences, the more convincing or better evidence will have to be to satisfy balance of probabilities
- Reflects principles that if you are alleging that someone has engaged in serious misconduct, need better proof

### **Qantas Airways Ltd v Gama (2008)**

*'The degree of satisfaction that is required in determining that that standard has been discharged may vary according to the seriousness of the allegations of misconduct that are made' (French and Jacobsen JJ)*

## Criminal

Prosecution bears legal burden (BRD), D bears evidentiary burden (Balance of probabilities)

### 141 CRIMINAL PROCEEDINGS: STANDARD OF PROOF

(1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved **beyond reasonable doubt.**

(2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the **balance of probabilities.**

#### **Green 1971**

*Incorrect direction to the jury explaining BRD. Judge should use the term and avoid explanation*

**Facts:** Green appealed on basis trial judge improperly instructed jury on onus of proof

**Held:** erroneous explanation: jury not required to evaluate own mental process

#### **Dookheea 2017**

*Green still a good law in VIC but is looser, not an error to contrast reasonable doubt with "proof beyond any doubt"*

#### **Shepherd 1990**

*Not all circumstantial evidence must be proved BRD, but indispensable does*

**Facts:** Largely circumstantial case, Appealed trial judge's direction on circumstantial evidence

**Issue:** what is the standard of proof in relation to **circumstantial evidence**

**Held:** Not all circumstantial evidence must be proved BRD, but indispensable does

### JURY DIRECTIONS ACT 2015 (VIC) PT 7

- Judge can only direct jury if they ask a direct question about the meaning of the phrase
- **Shepherd** does not apply in Victoria

## Admissibility of evidence

### 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 or 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.



## Prima Facie Case

- “based on the first impression: accepted as correct until proven otherwise”
  - o Has the party proved their case such as the opponent has a case to answer?
- Act does not deal with this, **common law**
- If haven't made prima facie case out, make a "no case submission" no case for D to answer
- P must achieve prima facie first

**Civil test:** is the evidence **capable** of proving on the balance of probabilities P's claim?

- P's case taken at it's highest. Determined at end of P's case

**Criminal test:** is there evidence on which jury could lawfully convict? If not, verdict by direction

### **May v O'Sullivan (1955)**

*If P makes out prima facie case, burden of proof does not shift to D. Q of law; not fact*

- P must still prove its case BRD after making PFC, even if D does not give evidence

At end of P's case, if D makes submission of “no case to answer” Q is not whether ought to be convicted but could lawfully be convicted

- If not case to answer, jury given a directed verdict

### **Doney (1990)**

*If no evidence of a crime - there is no prima facie case. But if there is evidence, however tenuous or vague, it should be left to the jury and only removed if there is such a “defect” a verdict of guilty could not be sustained.*

- Very low threshold
- Only if such a defect that evidence taken at highest would not sustain a verdict

### **R v PL (2012)**

*Even if inconsistent, if the evidence can establish guilt then judge should not direct a verdict.*

**Facts:** Trial judge erred in reaching conclusion after evaluating alternative hypotheses, which is the jury's job

# ADDUCING EVIDENCE – WITNESS DOCUMENTS AND REAL EVIDENCE

Mainly focused on the trial

Problem: most civil and many criminal cases, no trial

## Calling a Witness

Role of the court: adversarial trial, parties call witnesses, but subject to control and regulation of the court.

### Act doesn't say much...

#### 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.

S11 gives court general power to control proceedings (Odgers)

#### 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, and
- (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, and
- (d) the presence and behaviour of any person in connection with the questioning of witnesses.

## Civil

### Sharp 2008

S26 gives broad enough power for judge to call a witness

- Only most exceptional cases, highly unusual

### Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd (1988)

Civil cases: judge cannot call witnesses without consent of the parties, or lack of objection

- This is because it disrupts the presentation of a case, and gives rise to an apprehension of bias

## Criminal

### ***R v Apostilides 1984; R v Kneebone 1999***

*Decision for P not to call a witness will only set aside a conviction if gives rise to a miscarriage of justice (in relation to whole trial)*

- Judge may comment to jury about failure of Crown to call a witness & it's effect, but save for exceptional circumstances, cannot call a witness.

### ***R v Kneebone (1999)***

*If witness is essential to narrative or credibility, must be called.*

**Facts:** P did not call 2 witnesses to sexual assault. TJ also did not call witnesses

**Held:** Prosecutor should have called because evidence was **essential** to unfolding of narrative and crucial on **credibility**. New trial ordered

1. P bears responsibility for deciding whether to call a witness for the Crown
2. Judge may, but is not obliged to question P regarding reasons to not call a witness.
3. Judge may ask P to reconsider decision not to call witness, but cannot compel to call

## Criminal (Expert Opinion)

### ***Velveski v R 2002***

*Principal as per Kneebone applies primarily to evidence of facts, not of expert opinion. No miscarriage of justice in not calling supportive expert opinion*

**Facts:** A convicted of murdering wife and children. D argued murder/suicide, P murder/murder

- Appeal focused on conflicting pathological evidence
- Expert called by P, was supportive of murder/suicide
  - o P aware there were colleagues of expert who agreed, but did not call them

**Issue:** was prosecution's failure to bring 4 extra witnesses who supported D's case, in addition to 5 that supported P's case, a miscarriage of justice?

**Held:** Dismissed, no miscarriage of justice

### **COURT WAS SPLIT:**

Gummow and Callinan JJ: though witnesses should have been called, the 'defect' was cured by

- a. **Appropriate judicial comment** allowing jury to infer evidence

Gaudron: **Dissent**, experts should have been called. The facts were not in dispute, it was about which expert was to be believed and more experts = more weight

### DPP PROSECUTION GUIDELINES

If it's clearly established the witness is unreliable, Crown does not have to call on.