

Table of Contents

Week 1, Lecture 1- Accusatorial Justice (online readings)	1
Introduction:	1
Right to a Fair Trial:	2
The public face of justice (and its non-public dimensions).....	3
Presuming Innocence, the right to silence and accusatorial trials:	3
Right to Silence in Court.....	5
The presumption of innocence and the accusatorial trial: the practice?	7
Week 1, Lecture 2- Prosecutors, Pleadings and Proof:.....	10
Prosecutors' pleadings and their fairness obligations:	10
The Prosecutor:.....	11
The Rule against double jeopardy	11
Prosecutors:	12
Disclosure:.....	13
Prosecutors' in-court fair trial obligations:	14
The Function and the Art of the Proof:.....	14
Advocacy	15
Proof – Beyond Reasonable Doubt:.....	15
Balance of Probabilities and the Briginshaw principles:.....	16
Judges and Sources of Proof – “matters of common knowledge”	16
The jury, decision-making and avoiding speculation:.....	17
The mechanics of proof – directed acquittals:	19

Week 1, Lecture 1- Accusatorial Justice (online readings)

Introduction:

- Juries are a significant agent in the contest between the state and individual but its role is much narrower – no longer are juries the decision-makers for most offences, and the most serious offences can be determined by judge-alone trials in most states of Australia
 - NSW Courts 2019 – 18,500 defendants contested trials with over 13,500 found guilty of at least one charge, and over 3,500 not guilty on all charges
 - Of the 140,104 defendants before the NSW courts in 2019 – nearly 88,000 pleaded guilty and proceeded directly to sentencing hearings
- Notwithstanding the reduced role of the jury, the jury has defined and shaped the law of evidence

- 1960s US criminologist Kamisar – the trial gives defendants a ‘mansion’ of justice compared to the police station, where they are protected by judges and a structured process (legal representation), which ensures fairness and embeds rights
- “The white man’s vision of Justice” – Tom Calma – confronting statistics of equality of justice in Australia and the need to understand and respect the practices of Indigenous culture and heritage in the trial process (e.g Circle Sentencing)

Right to a Fair Trial:

- The common law trial is NOT an inquiry into ‘the truth’ – it is a process which the prosecution seeks to prove guilty beyond reasonable doubt in which the presumption of evidence is kept
 - *Pearse v Pearse* (1846) – ‘the discovery and vindication and establishment of truths are main purposes of the existence of Courts of Justice’, but they are to be pursued with moderation, fairness and by fair means
 - JJ Spigelman AC, former CJ of NSW: ‘prevailing community standards’ – community sets the standards of fairness and what constitutes fair means
- Lord Devlin – the logic behind the adversarial ideal
 - The English say that the best way of getting at the truth is to have each party dig for the facts that help it; between them they will bring all to light
 - The inquisitor works on his own but has in the end to say who wins and who loses
 - It can also be argued that two prejudiced searchers starting from opposite ends of the field will between them be less likely to miss anything than the impartial searcher starting at the middle
- The role of adversarial judges – ensure rules of process and evidence are adhered to, clarify the witness’ testimony through questions but they do not raise new issues or cross-examine witnesses
- Other pre-trial rights (but not absolute rights) include:
 - Right to privacy- no one can just march into a suspect’s house to search for evidence
 - Rights to silence – no one can demand a suspect explains his or her whereabouts, motivations or feelings
 - Rights to liberty – no one can detain or lock up a suspect because that is more convenient than allowing them to remain at large
- Human rights – ICCPR article 14 emphasises the presumption of innocence and that the right to a fair trial is a bundle of rights – some of which apply in Australia:
 - The right to know the charges with sufficient particularity to meet those charges
 - Obligation for court to ensure a fair trial is not impeded by the charging practices of the prosecution (*Grey* (2001))
 - A stay in proceedings if delay prevents a fair trial (*Jago v District Court of NSW* (1989))
 - An impartial judge who acts appropriately and assists unrepresented litigants (who are not otherwise entitled to legal representation) and who directs the jury appropriately in regards to unreliable evidence
 - Prosecution must act fairly in court
 - A stay in proceedings unless there is legal representation (for serious offences) (*Dietrich* (1992))
 - The right to an interpreter if needed (*Hakimi* (2011))
 - Convictions will be quashed if defence counsel is flagrantly incompetent (*Nudd* (2006))

- Article 14 – the right to a fair trial pivots upon the obligation to be fair to the accused – psychological research shows that
 - Those that are mentally vulnerable will admit to crimes they have not committed
 - Vulnerable members and children will be overwhelmed by cross-examination in court such that it impedes the giving of a full and accurate testimony
 - People sub-consciously form a negative view of the criminal defendant who has a criminal past
 - Tendency for a lay-person to wrongly but honestly and confidently identify a person they saw or heard as the thief, murderer and fraudster

The public face of justice (and its non-public dimensions)

- Idealistic version of justice – oral legal argument, legal representation and a judge guiding 12 randomly chosen citizens with the public gallery to view proceedings and media to report proceedings
 - Important aspect of transparency and accountability
- Suppression orders – used particularly for national security and sexual assault offences, are a response to the impact of pervasive and unfettered media on the accused's rights
- The impact of COVID-19 on trials:
 - Postponement of trial by jury and all arraignments, judge-alone trials, sentencing hearings and appeals from the Local Court were suspended
 - The need for high quality technology
 - The risk of efficiency gains at the cost of lost transparency
- The non-public dimension of justice – Lawyer X
 - Nicola Gobbo, a Victorian Police and Melbourne criminal defence lawyer and registered police informer, prioritised her informant role over acting in the best interests of her clients while also acting as a double agent in feeding information back into the Melbourne criminal underworld
 - “As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system” – High Court
- Gaudron J in Dietrich (1992) – the criminal trial as “the stage for a retrospective check on evidence-gathering, investigation and prosecution decision-making” and to “retrospectively, within boundaries make good lost rights... investigative illegality and impropriety... through the judicial discretion to exclude evidence so obtained”
 - Needs to be understood that the major power imbalance is not readily repaired after individual rights are lost and that the scope to review police behaviour is incidental
- The flawed ways in which guilt can be determined include; forensic science evidence, interpreting non-English speaking witness testimony, flawed jury processes, flawed judicial processes and distortions created by lawyers' advocacy
- The role of luck – luck to not be misidentified, to be exonerated by DNA or alibi and is not necessarily socially or economically neutral

Presuming Innocence, the right to silence and accusatorial trials:

- Two accusatorial justice principles which have been under siege despite the High Court demanding that they not be undermined (the CFMEU case (2015))
 - The ‘fundamental principle’ of the common law – “that the accusatorial nature of a criminal trial means that, under the common law, the onus of proof is upon the prosecution to prove its case”

- The “companion rule” – “an accused person cannot be required to testify”
- First line - These principles are sometimes breached by judges or prosecutors suggesting that an accused has an obligation when they do not- this include:
 - No adverse inference could be drawn from the appellant’s refusal to answer police questions as the Crown did not cross-examine Hogg on his explanation (legal advice) for not answering police questions (Hogg v R (2019))
 - The fact that an accused person failed to testify does not mean that a trial judge can tell the jury that “the fact that the accused did not deny or contradict evidence about matters which were within his personal knowledge”(Azzopardi (2001)
 - In appropriate circumstances, it is desirable to give the Azzopardi direction: “[I]f an accused does not give evidence at trial it will almost always be desirable for the judge to warn the jury that the accused’s silence in court is not evidence against the accused, does not constitute an admission by the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt”
 - Suggesting to the jury to scrutinise the accused’s testimony closely (Robinson (1991))
 - Suggesting the accused would do anything you have to avoid conviction (Wise v The Queen (2019))
 - Suggesting the accused failed to offer an explanation for the prosecution allegations (Palmer (1998) – the prosecution’s cross-examination shifted from the prosecution bearing the burden of proof to a focus on the accused
 - Suggesting that the accused failed to call a witness (Dyers v The Queen (2002) – Gaudron and Hayne JJ – “not only is the accused not bound to give evidence, it is for the prosecution to prove its case beyond reasonable doubt”
 - Distinct from civil cases – court is able to draw adverse inferences
- Second line – the inquisitorial style of investigating fact-finding clashes with accusatorial ideology because a criminal defendant is forced to answer questions that traverse criminal charges awaiting trial
 - X7 v Australian Crime Commission (ACC) (2013)
 - X7 had been charged and was awaiting trial on drug-related conspiracy offences, and sought for a declaration and injunction, claiming that the commission’s compulsory examination powers crated an impermissible interference with the right to a fair trial
 - The High Court accepted X7’s claims – “It would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial trial in the court room”
 - The accused would have to answer the charge based on additional material and self-incriminatory answers given to the commission compared and can no longer decide the course that he would adopt at trial based on the material before or during the trial
 - Lee (No 1) (2013) and Lee (No 2) (2014)
 - Jason and Seong Won Lee were facing firearm and drug-related criminal conspiracy charges and resisted orders under the criminal Assets Recovery Act 1990 (NSW) made on behalf of the NSW crime commission

- These orders, which were issued from the NSWSC required the Lees to be compulsorily examined on their financial affairs on oath before a Supreme Court registrar
- The majority rejected the Lees claim, distinguishing X7, holding that the Supreme Court powers to prevent unfairness were sufficient to protect the Lees' accusatorial rights
 - Crennan J – the SC's powers to control the examination could 'prevent the prosecution from obtaining an unfair forensic advantage'
 - Gageler and Keane JJ – the impact of the compulsory examination should be assessed as a matter of 'practical reality'
- The minority – found that the legislature had failed to express by words of clear intendment, the abrogation or restriction of a fundamental right
- In Lee (No 2) – the Lees were successful in appealing their convictions as they produced evidence revealing that the Commission had given to the prosecution, transcripts from the compulsory NSWCC examination which could be used by the prosecution to counter elements of the defense
- Kiefel J – 'It is the duty and function of the court in which the trial is pending to ensure that the trial will be in accordance with law. This requires, at a minimum, that it be conducted in accordance with the fundamental principle and the requirements that flow from it'
- Strickland (a pseudonym) et al v CDPP and ors (2018)
 - The High Court restored the primary judge's order permanently staying proceedings on the basis that they constituted an abuse of process where after refusing to answer police questions the three appellants had been compelled to divulge information during ACC examinations
 - It was held that the special investigations conducted by the ACC had been driven by the AFP for the purposes of its own criminal investigations and that it had acted unlawfully and that the prosecution had gained an unfair forensic advantage

Right to Silence in Court

- Choice between giving sworn evidence (and the likelihood of cross-examination) and silence (unsworn or dock statements have been abolished since the early 1990s)
- The loss of the dock statement has been seen as reverting the imbalance against the accused to the stage of 19th century trials, where the accused was not permitted to give evidence; Kirby J saying, "it has returned the criminal trial... to a position similar to that which pertained when the accused was incompetent and not compellable to give evidence on his own behalf" (Dyers (1993))
- Weissensteiner (1993) – held that where an accused is silent "in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be [only] within the knowledge of the accused"
 - Since the X7 line of cases and Azzopardi and Dyers, there seems to be a narrow scope for applying the inference suggested by the trial judge in Weissensteiner
- Failure to testify and impermissible comment

- s 17 of UEA (Evidence Act 1995 (NSW)) – an accused is not competent to testify as a witness for the prosecution nor can an associate defendant (a defendant charged in connection with facts giving rise to the offences charges, but not yet finalised)
 - Kirk v Industrial Court (NSW) (2010) – any breach of s 18 is a jurisdictional error and a departure from the rules of evidence
- S 20 of UEA – limits comments which can be made during the trial to an accused who exercises their right to silence
 - Reflects pre-existing common law principles but expressly only applies to indictable offences
 - Distinguishes three different perspectives
 - The co-accused is not limited on their comments about another accused’s silence
 - The judge can comment on the accused’s failure to give evidence, but cannot suggest that such failure implied guilt or belief of guilt on the accused’s part (s 20 (2))
 - The prosecutor cannot comment at all on an accused’s silence
 - S 18 (2)– similar provisions apply for the partner, parent or child of an accused
 - A person who, when required to give evidence, is the spouse, de facto partner, parent or child of a defendant may object to being required—
 - (a) to give evidence, or
 - (b) to give evidence of a communication between the person and the defendant,
 - as a witness for the prosecution.
 - S 20 (5) – a judge will comment on matters raised by the co-accused if they offend the terms and spirit of s 20
- In Victoria, the Azzopardi and Weissensteiner directions and the UEA s 20 have been repealed in favour for the Jury Directions Act 2015 (Vic)
 - S 41 – summarises the essence of the Azzopardi direction
 - S 42 = prevents the trial judge, the prosecution and defence counsel from saying or suggesting in any way that because an accused did not give evidence, that the jury may conclude guilt or use that failure to draw adverse influences that would prove the guilt of the accused
- The accused’s post-offence conduct- flight, threats, concealment and lies
 - Case law encourages a cautious approach to using an accused’s lie as evidence of their consciousness of guilt
 - Consciousness of Guilt: A lie may amount to an admission if (Edwards (1993):
 - It is deliberate
 - A clear lie (not necessarily straightforward nor simple)
 - The jury is satisfied that it was told because the accused knew the truth would implicate them in the commission of the offence
 - Zoneff (2000) Direction : “do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt.”
 - Evidence of flight from the crime scene, threats to someone who may reveal such evidence engages the same legal principles in finding a consciousness of guilt

- The judicial direction – the flight/lies “may only be used as evidence of a consciousness of guilt of the offence charged where the jury is satisfied that it points unequivocally to consciousness of guilt of that offence and not some other offence or discreditable conduct (R v Cook (2004))
- R v Baden-Clay (2016)
 - Baden-Clay was charged with murdering his wife in a domestic violence scenario
 - The High Court upheld the original jury’s verdict of murder with the evidence of Baden-Clay’s post-offence concealment and lies playing a significant role in the verdict
 - Baden-clay had falsely denied his ongoing affair and had warned his girlfriend to ‘lie low’ – these acts lead to a conclusion that ‘it was open to the jury... to regard the lengths to which the respondent went to conceal his wife’s body and to conceal his part in her demise as beyond what was likely, as a matter of human experience, to have been engendered by a consciousness of having unintentionally killed his wife’
- R v Lane (2011)
 - Keli Lane was on trial for the murder of baby Tegan, that she had secretly given birth to in 1996; here whereabouts unknown
 - It had become clear that she had also given birth to two babies in 1995 and 1999
 - She denied Tegan’s birth on a number of occasions to adoption agency personnel and then explained that Tegan was adopted by a Perth Family going by the name of Andrew Norris/Morris
 - The trial Judge, Whealy J, ruled that the jury could only determine that the Morris/Norris story to be a lie if it accepted the entirety of the Crown’s circumstantial case, refusing to give a Zoneff direction to the jury
 - The Court of criminal Appeal overruled Whealy J – the court accepted that there may be an innocent explanation for Lane’s statements but that there was evidence to enable the jury to conclude beyond reasonable doubt that these lies were potentially evidence of consciousness of guilt and not just a matter relevant to Lane’s credibility and that the Zoneff direction could be given by the trial judge

The presumption of innocence and the accusatorial trial: the practice?

- FEW (No 2) (2013) –
 - This judge-only trial (Fullerton J) shows the importance of the presumption of innocence – judge only trials permitted in NSW if both the prosecutor and accused agree, and are allowed if the accused wishes only if it is in the interests of justice to do so
 - Judgment is in form and tone that is strikingly distant from emotion generated by social media
 - FEW was tried for the murder of his child, JP, after the toddler had passed away after suffering significant injuries
 - Procedural law supports assessment strategies such as
 - Examining the consistency of a witness’ account (both internally and in the context of other evidence)

- Indicating to the jury, initially through witness questioning, the need to consider whether a witness has a bias or a motive to lie and whether a witness has a background that permits an inference that their evidence in court is loose with the truth or honestly mistaken
- At the post-mortem, it was identified that suffered associated secondary injuries to the fatal head injuries, including bruising to the forehead, scalp, both ears, buttocks and left thigh
- The role of credibility and the presumption of innocence was a large reason for Fullerton J's decision – especially regarding the establishment of circumstantial evidence that the crown needed to prove beyond reasonable doubt
- The prosecution case:
 - The accused's account was inherently implausible and that, between 10:10am and 10:21am, FEW assaulted JP with sufficient force to fracture her skull and then stage the pram accident before calling BJP (JP's mother)
 - The particular inconsistencies pursued by the prosecution were that the television programs that FEW repeatedly told police JP was watching were screened earlier (before the trip to the chemist) and that FEW described the morning routine as unexceptional (omitting to mention his call to the doctor and the trip to the chemist)
- The defence case:
 - FEW did not give evidence and relied on two electronically recorded interviews (ERISPs) with police, in which he said that he was in the toilet when the pram had tipped over and had called BJP straight away
 - FEW also said that BJP had taken JP out the day before JP's death and noted that BJP found JP to be a "handful" which was different to FEW's experiences with JP
 - FEW did not confirm nor deny the possibility that BJP may have assaulted the child and denied ever assaulting JP, but also told police that he had heard BJP smack the child after suffering a "skitzing out"
 - The defence also tendered tendency evidence relying on evidence revealing that BJP and inflicted injury on RW (her wheelchair bound mother), had tightened the straps to restrain the child without caring whether she would bruise the child and physically pushing the child back into the pram by holding her face or placing her hand over the child's face
 - These documents included risk assessment reports under subpoena from FACS as proof of BJP's tendency to lose control and act in a violent manner
- The role of credibility in Fullerton J's judgment:
 - BJP explained that the delay in calling the ambulance was because she was in shock and was not thinking clearly – this did not corroborate with the recording of her 000 conversation with the operator
 - BJP was also cross-examined on whether she spoke to her mother whilst at the accused's premises, as she had given evidence to police that she did not speak to her, but BJP could not explain the several calls when at the accused's premises between 10:21am and when the ambulance was called at 11:31am

- The accused's accounts to police were a possible version of the events on the day, and his account of his and the child's mother's relationship with the child were "entitled some weight"
- The crown's witnesses credibility was a concern for Fullerton J:
 - Those three witnesses "must have appreciated that the child was seriously injured and in need of urgent medical assistance. These concerns left me in doubt as to whether those three witnesses were making a genuine attempt to give completely frank and honest evidence"
 - Both witnesses gave the same demonstration of the possible discipline that would be given to the child, despite both suffering disabilities which undermined their reliability in recalling past events
 - Concludes that there is a possibility that they were worried that the evidence of inflicted injuries to child's head, buttocks and thigh would be revealed if the child were transferred into institutional medical care
- Furthermore, medical evidence showed that while deaths from short distance falls are 'very rare' or 'unlikely', "absolute proof of causality applicable to individuals is difficult if not impossible, in many instances" – two approaches:
 - Epidemiological – how frequently do these sorts of injuries occur under the circumstances? – it was very rare but it doesn't necessarily mean it wouldn't happen
 - Biomechanical one – it is possible if you look at the worst case scenario, that it is possible that these injuries occurred under the circumstances outlined
- Conclusion:
 - The crown's circumstance evidence case meant that it relies on no facts or not just facts themselves to establish guilt, rather that it is the analysis of the evidence that there was no other conclusion but that the accused is guilty of the child's murder/manslaughter
 - On the tendency evidence – there is no evidence that suggests that the accused was ever violent to the child, where as the accused's evidence establishes that, under stressful circumstances, the mother may lose self-control to the extent of inflicting serious and sustained violence
 - Evidence from under medical experts and from the accused suggest that the child was a relatively quiet child, which was contrary to BJP's evidence, and that she was not always willing to employ more benign methods of controlling the child
 - There is a reasonable possibility that the child's conditions worsened on the night before the child's death and that with the bruising becoming apparent, the accused became concerned that either he would be regarded as a negligent carer or knew or believed that the child's mother was responsible for harming the child and reported this anxiety to Dr McClure that "something terrible has happened"
 - There was a very little window between the child's mother being called and to her arriving at the accused's premises, that the accused deliberately inflicted the head injury
 - The combined weight of medical and biomechanical evidence cannot exclude the possibility that the child sustained the fatal head injury from the

postulated fall from the pram, and in absence of other evidence available to the Crown to discount that as a reasonable possibility, I am compelled to the conclusion that the Crown has not disproved beyond reasonable doubt that the child's fatal injury was the result of an accident

Week 1, Lecture 2- Prosecutors, Pleadings and Proof:

- Pressure for the accused to plead guilty
 - Typically requires negotiation between defendant and police for an early guilty plea, as trials are expensive and to reduce congestion and delay in the court system
 - It is not uncommon for a sentencing discount of twenty-five per cent
 - Studies show that people accused of crimes may confess or plead guilty despite being innocent
 - They may want to prevent charges from being broadly known
 - Defending charges will be costly or that the system is pitched against them
 - A prosecutor may accept an accused's guilty plea to a lesser offence that relies on agreed facts that reduce the accused's culpability of actions which are inconsistent with the victim's account given to police
- 2014 study examined that there are often complex unidentified factors in determining when and what plea is entered – e.g if an accused is facing domestic violence and child sexual assault offences, they tend to plead not guilty and change to a guilty plea later than those facing other types of charges
- Issues with late or inadequate disclosure of the prosecution case to the defence when deciding a plea – contradicts the fundamental principle that no plea of guilty can be expected until the prosecution has fulfilled its obligations to disclose its case and an accused has received independent legal advice
- Yale Kamisar – anything in the 'mansion' of the courthouse may need even more fixing than some of the proceedings in the 'gatehouse' because 'criminal trials seem to be on the verge of extinction'
- The NSW Early Appropriate Guilty Plea (EAGP) system replaces the old committal proceedings for indictable offences with a strategy aimed at promoting an early-guilty-plea environment – includes a procedure overseen by a magistrate that requires the prosecutor to disclose a brief of evidence to the accused and to provide for a formal conferencing procedure
 - Improved as more than half of the matters were resolved before the trial date which was better than less than a quarter from the 'control' list
 - Allowed because of the ability for counsel and clients to negotiate and make decisions before the trial with the certainty that nothing would change closer to the trial date

Prosecutors' pleadings and their fairness obligations:

- Indictable offences commence with an indictment that is filed in a higher court charging the accused with an offence triable before a jury
- Committal proceedings – used to determine the adequacy of prosecution's case had sufficient evidence to justify putting the accused to answer the charges and for setting discounts for guilty pleas and ultimately for the prosecution to determine whether to proceed or not proceed with a case "if there is no reasonable prospect of a conviction being secured"

The Prosecutor:

- The prosecution must call all credible and material witnesses whether they assist or not the prosecution case
- The prosecutor's choices are subject to the obligations of fairness, and that overloading an indictment is inappropriate (especially the pressure on an accused to negotiate charges in return for pleas of guilty)
- Indictments and other prosecutors' pleadings:
 - The charges (indictment, the information or Court Attendance Notice) are an important reference point for court proceedings because they:
 - Define a court's jurisdiction
 - Establish the legal and factual elements the prosecution must prove and they put the defence on notice of what to meet and
 - They are a touchstone for determining questions of admissibility of evidence
 - Key requirements
 - Sufficiency – describes the essential legal and factual elements of the offence (the time, the place, and the manner in which the alleged offence took place)
 - Kirk v Industrial Court (NSW) (2010) – charging the accused with failing in its occupational health and safety obligations to an employee who died driving an all-terrain vehicle on Kirk's farm lacked sufficient detail of how the offence allegedly occurred
 - Clarity – each charge be for a single offence, irrespective of the initiating document
 - Important for accused to know what legal offence and what facts the court are ruled on for double jeopardy (e.g Attorney general (NSW) v Built NSW Pty Ltd (Built NSW) – the person authorised to commence proceedings mistakenly delegated this role to their legal representative which meant that the summons had to be dismissed and there was no valid charge and hence no jurisdiction for the court
 - Also important to frame the charge in pleadings by following the terms of the statutory provision creating the offence e.g Built NSW – used the language for one subsection of the legislation but charged an offence in another subsection
 - Can re-charge after a realisation of defect, but is not always possible (e.g may be time-barred for summary offences)

The Rule against double jeopardy

- Double jeopardy prevents the state having more than one attempt to prosecute a person – three maxims from Gummow and Hayne JJ in *Island Maritime Limited v Phillipowski* (2006)
 - It is in society's interest that there be an end to litigation
 - What is adjudicated is taken as the truth
 - No one should twice be vexed for one and the same cause
- Exceptions to the Double jeopardy rule (Crimes (Appeal and Review) Act) 2001 (NSW) ss 100 – requires an order based on the presence of "fresh and compelling evidence" and a finding that it is in their interests of justice for a retrial after an acquittal to proceed
 - Legislation was pushed based on the murders of indigenous children Clinton Speedy and Evelyn Greenup by XX, who was acquitted – the reopening of the case would

not be possible under the previous similar fact rule but was reopened in 2018 based on the exceptions to double jeopardy

- The evidence concerning the disappearance and presumed death of a third indigenous child Colleen walker was not deemed fresh and XX could not be retried

Prosecutors:

- The office of the director of public prosecutions institute prosecutions for indictable offences on behalf of the crown
- The prosecution has the sole discretion to shape its charges
 - They should not be instituted unless there is admissible, substantial and reliable evidence that a criminal offence known to law has been committed by the alleged offender
 - The decision requires consideration of interests of the victim, the suspected offender and the community with fairness and consistency of particular importance
 - Governed by the Prosecution policy of the Commonwealth, Guidelines for the Making of decision in the Prosecution Process
- Important that the judge and prosecutor are separated so that the courts independence and impartiality such that judicial review is generally unavailable
 - Too little – risk of misconduct from the prosecutor and risk of giving approval of that conduct
 - Too much – suggestions of bias
- Likiardopoulos (2012) – the prosecutor is to determine the following decisions:
 - To prosecute
 - The charge includes aggravated elements, or is just the offence simpliciter
 - To withdraw charges
 - To proceed irrespective or without a committal hearing
 - To accept a plea of guilty to a lesser offence or to withdraw acceptance of a plea
- Courts can act where there is a tangible risk that the trial would be unfair and they can do so before a trial has commenced – a court may order a temporary or permanent stay of proceedings that are an abuse of process but typically in exceptional circumstances only – precedents include:
 - Where the initiation of process by police is severely compromised (e.g unlawful extradition; entrapment) (R v Horseferry Road Magistrates' Court (1994))
 - When the committal process is marred in some way (Basha (1989))
 - When it seems a nolle prosequi (dismissal of proceedings) is being utilised to stop a trial where the prosecution is going badly and the prosecution then commences on the same charges again (Jemielita (1995))
 - Where delay or pre-trial publicity has made a fair trial not possible (Jago v District Court (NSW) (1989))
 - Where there is a breach of the spirit of double jeopardy principles that limit over-charging (Conolly v DPP (1964))
 - Where a prosecution is brought for an improper purpose, that is, for some sort of collateral advantage (Williams v Spautz (1992))
 - Where an accused is unrepresented and is facing charges for serious indictable offences (Dietrich (1992))
 - If to proceed without disclosure would create a tangible risk that the trial would be unfair (Marwan v Director of public Prosecutions (2019))

Disclosure:

- *Mallard v R* (2005) – situation where a failure of disclosure resulted in a miscarriage of justice
 - 2nd appeal of his 1994 conviction was successful, which revealed instances of non-disclosure
- Australia was slow in instituting legislation regarding the obligations of disclosure
 - England – 1993 Royal Commission on criminal Justice (the Runciman inquiry), which exposed the lack of disclosure in the wrongful convictions of those considered to be IRA terrorists
 - *Stinchcombe* (1991) – Canadian case which said that prosecutorial disclosure is founded on “the principle that the search for truth is advanced rather than retarded by disclosure of all relevant material”
- Prosecution is obliged to disclose all evidence that is relevant to the case (relevance to the totality of the case) – includes material:
 - Gathered during investigation but not intended to be used by the prosecution
 - That assists the defence case or
 - That relates to the credibility of prosecution witnesses
- Legislation with disclosure guidelines include the legal Profession Uniform Conduct (Barristers) Rules 2015, regs 87 and 88 and the Criminal Procedure Act (NSW)
- Criminal Procedure Act (NSW) s 141 – prosecutor must give notice of the prosecution case to the accused, accused give notice of the defence response to the prosecution’s notice, prosecution is to give notice of the prosecution response to the defence response
- Criminal Procedure Act (NSW) s 142 – requires that the prosecution provide the defence with:
 - The notice of the case for the prosecution including a copy of the indictment, a statement of facts, each document and each witness statement to be adduced at trial, a copy of exhibits, charts, summaries, copies of all items provided by the police, or in the prosecutor’s possession ‘that would reasonably be regarded as relevant to the prosecution case or the defence case’, and that has not otherwise been disclosed to the accused person and
 - A list of items also reasonably regarded as relevant, but not in the prosecutor’s possession, together with a copy of items informing on prosecution witnesses’ and the accused person’s reliability or credibility
- S 143 also requires the defendant to respond to the prosecution’s disclosure notice by providing:
 - The name of the relevant legal representative appearing on behalf of the accused
 - The nature of the defence, including particular defences,
 - Any factual matters or circumstances in the prosecution case that the defence intends to take issue
 - Any points of law to be raised by the defence, notices of alibi or claims of substantial mental impairment
 - Notice of waiver of rules of evidence under UEA, s 190
- A second wave of prosecution disclosure may follow, which puts the defence on notice of any prosecution to raise issues or dispute accuracy or admissibility of the disclosed defence case
- Sanctions for non-compliance by a party include a court order that:
 - Evidence not disclosed be excluded from the trial

- Order expert evidence be excluded from the trial where a copy was not provided in accordance with pre-trial disclosure requirements
- Grant an adjournment and
- Where the defence fails to comply with pre-trial disclosure obligations, s 146A(2) provides that a court may make such comment at trial as appears proper and that the court/jury can draw such unfavourable inferences as appear proper
- S 146 A(3) – direct inference of the accused’s guilt arising from its failure to comply with disclosure obligations cannot be the sole basis for finding the accused guilty

Prosecutors’ in-court fair trial obligations:

- The adversarial dynamic of partisan allegiance and self-interest creates competition which motivates zealous behaviour – suppressing information, creating fabricated evidence and engaged in inappropriately aggressive or manipulative behaviour
- The question for the court is whether any breach of a prosecutors’ obligations creates a miscarriage of justice
- The Australian Bar Rules set base-line standards, including the requirements of:
 - Impartiality – prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court (cl 83) and must not press the prosecution’s case for a conviction (cl 84)
 - Fairness – not engaging in inflammatory language or conduct that biases the court against the accused (cl 85)
 - Professionalism – not putting propositions the prosecution does not believe on reasonable ground to be probative (cl 86), obligation to call all witnesses to give admissible and are necessary for the presentation of all relevant circumstances, subject to necessity criteria or if the prosecutor believes on reasonable grounds that the witness evidence is plainly untruthful or is plainly unreliable or having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, or if interests of justice would be harmed if the witness was called as part of the prosecution case (cl 89)
- Libke (2007) – ‘the duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice... a central...element in that role is ensuring that Crown case is presented with fairness to the accused’
 - The questioning from the prosecutor which intruded the prosecutor’s personal view was held to not make the trial unfair, as the appellant was able to give the account of events that he wished to give to the question asked, even though the prosecutor’s actions were inappropriate
- Wood (2012) – Gordon Wood trial reveals the ways beyond cross-examination in which the minds of the jurors can step beyond ethics
 - Wood was acquitted, after the court found that the prosecutor advanced a motive for Wood’s murder was ‘entirely speculative and internally inconsistent’ and that the prosecutor’s advocacy in submitting conclusions were not sustainable based on the evidence before the court

The Function and the Art of the Proof:

- Proof is the rationale and end game of the trial – it arises not only in the evidential burden of proof (the obligation for a party to raise an issue), but also arises
 - With respect to the ultimate proof of the charge which is proven by the prosecution beyond reasonable doubt (UEA, s 141(1))

- Where the defence bears a legal burden of proof, the balance of probabilities standard also applies (UEA s 141(2))
- Where a court is required to establish a 'preliminary question' (a finding whether a particular fact exists for a court's determination of whether evidence should be admitted, or evidence can be used against a person or a witness is competent or compellable), those facts must be established on a balance of probabilities (s 142 UEA);
 - Where a judge takes judicial notice of facts or law (UEA, s 144)
 - The drawing of inferences, as distinct from speculating, in the context of jury and judicial fact-finders' decision-making and
 - In the context of directed acquittals

Advocacy

- Counsel does not just dump information before the jury, they 'shape' their case so that the jury better understands how the information fits into the context of the trial
- Trial is in a rigid order:
 - Initial remarks from judge -> summary of prosecution's case -> defence opening remarks -> prosecution witnesses (which can be cross-examined) -> defence witnesses -> closing remarks
- Trial is in an austere courtroom with large amounts of activities taking place at once, creating a process with complex rules of evidence and procedure
- The accused, witnesses and jurors are lay people who are 'tourists' who, unlike the lawyers and judges who do not understand the process
- Unless a breach trips a prescribed fundamental principle or rule, stretching the boundaries of advocacy is seen as incidental to adversarialism
- David Bennett AO QC, former Commonwealth Solicitor General
 - "You're persuading a human being to come to a particular viewpoint, and that's terribly important. That's basic to everything about matter"
 - E.g there are two strategies when advocating for a lawyer to be disciplined for speeding – any violation justifies disciplinary action or speeding is a different parking offence
- Effect on human emotion – four ways emotion influences legal judgements (Bandes and Blumenthal (2012))
 - People strategies for processing information
 - Biasing the perception, recall or evaluation of facts in a particular direction
 - By providing informational cues to proper attribution of blame
 - By anticipating future emotions that might follow from a judgment

Proof – Beyond Reasonable Doubt:

- Woolmington v DPP (1935) – 'the golden thread' is the obligation on the prosecution to satisfy each legal element of the charge to the criminal standard of proof beyond reasonable doubt: see UEA s 141(1)
- The High Court has remained firm that there is to be no judicial explanation of beyond reasonable doubt to the jury (Green (1971) – the standards set, 'bringing to bear their experience and judgment')
- Judges using analogies of reasonable doubt to cricket in Condo (1992) and CBK (2014) have been described as unacceptable

- Judges have also over-complicated the direction with an inappropriately demanding test on the jury e.g Green (1971) – it was suggested that the jurors ‘are both unaccustomed and not required to submit their process of mind to objective analysis’ of the kind suggested to them by the trial judge
- NSWLRC – absurdity of asking for defining reasonable doubt involving a jury asking for a dictionary to determine the words “beyond reasonable doubt”
- BOCSAR study (2008) – revealed that from four options, only 55% jurors equated ‘beyond reasonable doubt’ to mean ‘sure’ that the defendant is guilty, with 23% ‘almost sure’, 12% ‘very likely’ and 10% ‘pretty likely’
- Victoria through the Jury Directions Act 2015 allows a trial judge to respond to a direct or indirect jury request for guidance (s 63) and allows for judicial explanations of the meaning of beyond reasonable doubt (s 64)
- The NSWLRC report, Jury Directions, notes that that ‘the standard of proof is pivotal to the criminal justice system’ and prefers a single Australian approach where a chosen formulation is more easily understood, consistently applied and does not result in a change in the standard required

Balance of Probabilities and the Briginshaw principles:

- Balance of probabilities – where the judge must establish facts relevant to determining the admissibility of evidence and where the defence bears the burden of proof (UEA ss 141, 142 and 189)
- Briginshaw v Briginshaw (1938) – satisfying balance of probabilities depends on the context
 - Ss 140 (2) and 142 (2) – requires the court to consider;
 - “the importance of the evidence in the proceeding, and... the gravity of the matters alleged in relation to the question’
 - “does not involve a mechanical weighing of probabilities – satisfaction as to whether the civil onus had been discharged [depends]... upon the gravity of the allegation and its consequences (R v Petroulias (no 8) (2007))
 - Situations where the gravity of the matters alleged is a major impact relates to the admissibility of allegations that someone has made a fraudulent statement – e.g relation to admission/confessions that the defence may raise the issue of duress

Judges and Sources of Proof – “matters of common knowledge”

- If there is a void of evidence, courts have some limited scope to take “judicial notice” of matters of common knowledge
- The logic behind this proof is it would be practical to accept that parties should not be obliged to formally prove the obvious e.g it is common knowledge that a bullet piercing the brain of a human being will in all likelihood prove fatal
- S 144 of UEA – facts need no proof if they are ones that are ‘not reasonably open to question’ and are
 - s 144 (1)(a) Common knowledge in the locality in which the proceeding is being held or generally or
 - Common knowledge includes:
 - Understanding of the ordinary use of English and basic arithmetic
 - Common knowledge and experience of physical phenomena (e.g the behaviour of fires or the position of the moon)

- The capacities of people to engage in physical activities (e.g Plomp (1963) – a “good swimmer” as not likely to have been lost unless her efforts of recovery were in some way obstructed)
- The “basic psychology” of door-to-door selling taught by “life experience and common sense” (ACCCC v Lux Distributors Pty Ltd (2013))
- Eating habits of shoppers in country shopping centres (Strong v Woolworths Ltd (2012))
- “Document retention requirements” which would make it “unlikely that any financial or similar institutions” would have such records from 30 years ago (Rogic v Samaan (2018))
- Published research from UNSW to establish the median ‘street’ purity of drugs regarding a sentencing appeal (Farkas (2014))
- s 144(1)(b) Capable of verification by reference to a document the authority of which cannot reasonably be questioned
 - Mchugh J in Woods v Multi-Sport Holdings (2002) – could include politics as common knowledge
 - What is not reasonably open to question is hazy but s144 (4) protects parties by requiring the judge ‘give a party such opportunity to make submissions and to refer to relevant information relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced’ (s 144(2) and (3))
- S 144 (2) allows judges to ‘acquire knowledge... in any way the judge thinks fit’ – has limitations:
 - Cannot override s 144(1)(b) – e.g relying on facts established from mass media
 - Cannot rely on facts established in another case (e.g Aregar v Cox (2018) – location of the Australian Fishing Zone is not ‘common knowledge’)
- Aytugrul (2012)
 - Argument that psychological research should be considered by the court as evidence of ‘legislative facts’ to aid in applying the phrase ‘unfair prejudice to the defendant’ when applying s 137
 - This was evidence to support an argument in changing the way DNA analysis was referenced, so that it would be expressed as a reference to a frequency ratio (1 in 1600 people in the general population would share the recovered DNA profile) rather than by an exclusion ratio (that 99.9% of the population did not share the DNA profile)
 - Found that the research findings could not be treated within s 144 – it would be when talking about psychiatry, “dangerous for the Court ‘to embark – without a pilot, rudder, compass or radar – on an amateur’s voyage on this fog-enshrouded sea”
- DPP v Gramelis (2010) – example of facts outside scope of s 144 would be the speed of a loaded truck in second gear in defence of a speeding ticket

The jury, decision-making and avoiding speculation:

- Juries are prescribed under s80 of the commonwealth constitution and are the default for trials on indictment in the states and territories
- The anonymity, randomness and transient status of jurors creates a check against state power in the criminal justice system

- Basten JA in *Brown v Director of Public Prosecutions (NSW)* – “mechanism for preserving confidence in the criminal justice system”, preventing the trial from being the ‘closed shop of the legal expert’
- Strengths and Weaknesses of juries in the trial process (Heydon J):
 - Procedure is cumbersome – jury trials are slow and expensive and will increase delays for all types of litigation
 - Jury trials can generate brevity – orally given evidence is usually less voluminous than evidence given through statements prepared by lawyers
 - Jury Trials can be shortened by juries being unable to reserve a judgment – a trial judge sitting alone can for long periods of months or years
 - Judge only trials will tend to have fewer interruptions – jurors will sometimes have illnesses or risk day-to-day accidents which cause late starts
- Devine’s theory on decision-making – human nature tends to cast information into stories/schemas that resonate with cultural norms and with stereotypes
 - Jurors will sift through evidence and any gaps will be filled with scripts and stereo types (e.g race, gender, socio-economic status, and trust in the legal system)
 - Scripts – event-centred cognitive structures that involve a series of actions occurring in a causal sequence
 - Stereotypes – person-centred cognitive structures consisting of a category label and a set of associated characteristics
- Three considerations that come into play when making choices about which conflicting story to accept:
 - Coverage – the extent to which the facts in the story are accounted for by the evidence
 - Coherence – how logical and believable the story is
 - Uniqueness – where the story alone satisfies the evidence
- Pennington and Hastie suggest that there is “limited evidence” that once a juror has committed a decision that it becomes more difficult for the juror to change and that it suggests that “deliberation strategies which combine maximal sharing of information and minimal early commitment to decisions will ensure the broadest coverage of evidence and relevant background knowledge”
- Influences on Witness credibility
 - Confidence and consistency promote believability
 - Devine suggests that jurors will characterise expert witnesses by three characterisations; a benevolent educator, a hired gun or a superfluous pontificator
 - Specific evidence is more persuasive than general evidence
 - Clinical support is more compelling than actuarial support
 - If technical points are not understood, then other qualities (qualifications, ages and gender) may sway impressions
- Circumstantial Evidence Case – where “evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts” (Shepherd (1990))
 - Lord Pollocks statement (Exall, Edwards and Skelton (1866)) about a circumstantial evidence case being a chain in which if one link breaks, the chain would fall or as a rope composed of several cords, in which three strands together create a rope of considerably greater strength than of one cord
 - Wannouch & Lee (2019) – distinction between inferences and impermissible speculation

- Speculation occurs when there are no positively proved points from which an inference is made, and a one opts for an interpretation over other equally available options
- *Gui v Weston* (2013) – three hypothetical situations which can assist the jury with distinguishing between inference and speculation
 - The rain example – an inference can be drawn that it had rained during the night because the ground and trees were wet in the morning without needing to see the rain
 - The plane example – if the jurors who took the 5pm flight to Sydney saw the two barristers who were in trial in Melbourne at 4pm, at a Sydney restaurant at 8pm, the inference would be that counsel flew to Sydney but it would be ‘merely guesswork or speculation’ to infer that they had flown with Qantas or that they had travelled together
- Judges and juries will often tell juries to not speculate but Australian juries do not deliver a reasoned verdict – their deliberation remains a secret
 - NSWLRC report (2012) – “growing awareness that jury directions are not always working well in guiding jurors in their task” – noting the complexity and uncertainty of jury directions, outmoded communication methods and lengthy and complex directions which prolong lengthy trials
- Majority verdicts are allowed in NSW – where s 55F(2) of Jury Act (1977) (NSW) gives the ability for the court to take a verdict of 11 jurors out of 12 agreeing or 10 out of 11 after no less than 8 hours of deliberation and where the court is satisfied that the jury is unlikely to reach a unanimous verdict
 - They will be given a *Black* direction (1993) – which asks the jury to reconsider and discuss the evidence to reach a verdict, based on jurors swearing or affirming that a true verdict will be given according to evidence
- A judge-alone trial is exceptional as it is only available where it is in the interest of justice to be the mode of trial – requires the ‘application of reasonableness, negligence, indecency, obscenity or dangerousness’
 - Questions of the impact of unfettered globalised media has raised new issues

The mechanics of proof – directed acquittals:

- Prasad (1979) direction – where the jury was invited to consider its verdict at the conclusion of the prosecution case
 - Required the defence to make a request of the judge, and for the jury to then accept the invitation from the judge to hear no further evidence
- The Prasad direction is no longer allowed as the High Court ruled that it was inconsistent with the division of functions between the judge and jury as it had the potential for jurors to perceive the judge’s direction as a statement that the prosecution evidence is so unsatisfactory as to warrant an acquittal (Director of Public Prosecutions Reference No 1 of 2017)
- It also would invite jurors to stop a trial with having heard all the evidence, without having heard counsel’s final addresses and without the understanding of the law and its application to the facts
- If at the close of the prosecution case there is not sufficient evidence capable of supporting a guilty verdict, the defence may seek a directed acquittal – test of sufficiency (*Doney v R* (1990))

- Requires the trial judge to determine if there is evidence (even if tenuous, inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision or
- A 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