

Introduction
General Principles Behind the Exclusion of Evidence
<ol style="list-style-type: none"> 1. The Reliability Principle eg: hearsay 2. The Libertarian/Protective Principle eg: privilege against self-incrimination 3. The Disciplinary Principle eg: exclusion of illegally-obtained evidence 4. All three are used eg: confessions and admissions <p>Haddara v R [2014] VSCA 100 S56: except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding S56 refers only to express provisions which render evidence inadmissible They do not affect provisions that allow for the exclusion of admissible evidence</p>
Preliminary matters:
<ul style="list-style-type: none"> • Standard of Proof – the degree to which an issue must be proved <ul style="list-style-type: none"> ○ Criminal cases – beyond reasonable doubt <ul style="list-style-type: none"> ■ At CL, the jury was told to give BRD its ordinary meaning, without further elaboration - Green v R (1971) 126 CLR 28 ■ ss.63, 64 Jury Directions Act 2015 (Vic) ○ Civil cases – the balance of probabilities • Burden (Onus) of Proof – who has the onus of proving a particular issue • Evidential Burden – obligation to adduce evidence that prima facie establishes a material allegation/element • Legal Burden – obligation to prove a material allegation
Part 4.1 Evidence Act 2008 (Vic)
Criminal proceedings
<p>The prosecution bears both the evidential and legal burden in relation to the elements of the offence.</p> <p>The defence bears the evidential burden in relation to the general defences, but the prosecution bears the legal burden.</p> <p>The criminal standard is 'beyond reasonable doubt' (s.141(1)).</p> <p>In the case of some affirmative defences, such as mental impairment, the defence bears both the evidential and legal burden.</p> <p>In such cases, the standard of proof is 'on the balance of probabilities' (s.141(2)).</p> <p>In all cases, questions of admissibility are determined 'on the balance of probabilities' (s.142).</p>
Civil proceedings
<p>Plaintiff bears both the legal and evidential burden for establishing a cause of action</p> <p>Defendant – may have the evidential burden in relation to defence</p>

<ul style="list-style-type: none"> - standard of proof is “balance of probabilities”: s 140(1); - but compelling evidence is often required to satisfy this standard if the pleaded allegations are serious (e.g. civil fraud): s 140(2)
<i>Jury Directions Act 2015 Vic</i>
S 63 When trial judge may explain “proof beyond reasonable doubt”
<p>(1) A trial judge may give the jury an explanation of the phrase “proof beyond reasonable doubt” if the jury asks the trial judge—</p> <ul style="list-style-type: none"> (a) a direct question about the meaning of the phrase; or (b) a question that indirectly raises the meaning of the phrase. <p>(2) Subsection (1) does not limit any other power of a trial judge to give the jury an explanation of the phrase “proof beyond reasonable doubt”.</p>
S 64 How explanation may be given in response to jury question
<p>(1) If the jury has asked a direct question about the meaning of the phrase, or a question that indirectly raises the meaning of the phrase, “proof beyond reasonable doubt”, the trial judge may—</p> <ul style="list-style-type: none"> (a) refer to— <ul style="list-style-type: none"> (i) the presumption of innocence; and (ii) the prosecution's obligation to prove that the accused is guilty; or (b) indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty; or (c) indicate that— <ul style="list-style-type: none"> (i) it is almost impossible to prove anything with absolute certainty when reconstructing past events; and (ii) the prosecution does not have to do so; or (d) indicate that the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty; or (e) indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.
Functions of judge and jury
<p>Civil and criminal jury trials:</p> <ul style="list-style-type: none"> - judge is the tribunal of law - jury is the tribunal of fact (or the “fact-finder”) <p>Civil and criminal trials/summary hearings (without jury):</p> <ul style="list-style-type: none"> - judge/magistrate is tribunal of law and tribunal of fact
Voir Dire: s.189

Questions of admissibility, the use to which evidence may be put and competence and compellability are determined on a 'voir dire'.

The voir dire usually takes place in the absence of the jury.

Judicial Notice: s. 143-144

The purpose of dispensing with proof at the trial:

- if a party's counsel does not object to certain evidence being adduced, some judges take the view that the evidence can be admitted and considered though an evidential rule is prima facie violated;
- "judicial notice" permits courts to accept that certain laws, well-known facts, and international states of affairs exist without formal proof of such matters: ss 143-145;

Formal Admissions: ss146-159

court may presume copies of certain documents, and certain public/official records and their contents to be authentic and correct in the absence of proof to the contrary: ss 146-159.

court may presume that certain communications sent (e.g. letter by post, fax, etc) were received at a certain time: ss 160-162.

parties may agree to waive evidential rules: 190(1)-(2);

court may dispense with rules without parties' consent in civil proceedings: s 190(3).

Leave, Permission and Directions:

In some cases, a judge may direct a jury as to how they should approach certain forms of evidence, and/or may warn them about the dangers of certain types of evidence.

Such directions/warnings may have a significant impact on the outcome of a trial, and are a common ground of appeal.

In general terms, a direction on law is binding whereas a warning/comment is advisory.

Leave, permission: s 192 Evidence Act 2008 (Vic);

Identification evidence: s 36 Jury Directions Act 2015 (Vic)

Unreliable evidence: s 31, 33 Jury Directions Act 2015 (Vic)

Discretions to exclude:

s.135 General discretion to exclude evidence

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

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

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s.136 General discretion to limit use of evidence

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

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