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## §1. Intro to Evidence

Evidence Law is about:

1. What material the finder of fact may consider when determining factual issues
2. How material may be presented
3. How evidence may be used concerning the burden of proof, evidential weight, standards of proof.

List of admissibility rules:

1. Relevance
2. Roughly 6 exclusionary rules focussed on in the course
3. Discretionary rules: e.g. ss135, 137
4. Warnings

Whilst an inquisitorial trial's main purpose might be discovering the truth, the adversarial trial's purpose is to resolve disputes between the parties in a procedurally fair trial that earns respect for the rule of law.

- Due to imbalance of power in criminal law there is extra procedural protection and discretionary leniency for defendants, and more strict procedural requirements for prosecution.
- In theory civil is much more of an even contest and *usually* there is less at stake. Generally, rules of evidence ('RoE') applied much less stringently in civil trials
  - Judge is a specialised decision-maker, whereas Jury, whilst legitimising, is less reliable.

1. **The Evidence Act 1995 (NSW) ('EA') is the main but not the sole source of evidence law**
  - a. Moreover, per **s8 EA** other Acts will prevail over the EA: 'This Act **does not affect the operation of any other Act.**
  - b. **s9** the Act **does not affect the operation of a rule of common law or equity unless it does so explicitly or by clear intendment**
    - i. However, in some areas the Act does operate as a *code* (totally supplanting CL & Eq)
  - c. Regarding Statutory interpretation 'the language of the Act is paramount' - e.g. one should not try to *squeeze* common law into the Act.
2. **s11 General Powers of Court: courts have general discretionary control over proceedings** except where expressly or necessarily pre/proscribed by the Act.
  - a. **Smits v Roach: In civil trial, if objection not raised at the relevant time (ie before the evidence is presented?), it is lost forever**
- Adversarial Trial **CRIMINAL APPEAL RULES - REG 4**—**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.
  - b. Case authorities on the raising of objections cannot be extended between civil & criminal jurisdiction
    - i. **Criminal** (due to need to protect accused, where error causes miscarriage of justice by the loss of a real chance (one fairly open to the finder of fact) of being acquitted, the outcome of the trial can be appealed on the basis of a failure to object.
      1. **Supreme Court Crim app rules 2021**— **leave to appeal needed for failure to object**
3. **s190 Rules of evidence may be dispensed with** by the consent of the parties
  - a. **ss2 Crim.**—defendant **requires legal advice** for dispensation to be upheld



- b. **ss3 Civil court** may make own motion without consent of parties where matter is not ‘genuinely in dispute’ or application of EA would cause unnecessary expense or delay
- 4. **New evidence** ‘genuinely new and fresh’ = distinct from **an erroneous finding of fact** from old evidence. Ie. **Appealing a determination of fact on evidence previously adduced is distinct from raising fresh evidence.**
- 5. **s189 VOIR DIRE** ...interlocutory proceeding (trial within a trial) **to decide whether evidence will be admitted**
  - a. (*usually* absent the jury (ss4 discretion)); ss2 Jury must be absent for disputing
    - i. **Improperly obtained evidence**
    - ii. **Confession**
      - 1. ss3, the **issue of admission’s truth** is to be disregarded unless raised by defendant
  - b. ss5 discretionary matters
- 6. **s192 Factors that may be taken into account when court exercises its discretion** to grant leave, permission, or direction due to the Act.
  - a. Length of hearing, unfairness, the importance of the evidence, nature of proceeding, alternative courses of action.
- 7. **s192A advance Rulings and findings**—resolving evidential issues in dispute **before adducing** them in proceedings.

NB between the voir dire 189 and s192A advance rulings: Adducing (step 1) (presenting evidence in a legal proceeding) is the stage prior to the adduced evidence being admitted (step 2) for formal consideration.

## Admissibility of Evidence

Relevance, Hearsay, credibility

## §2. Relevance-a necessary basis for admissibility

What facts are in issue?

-Civil: - pleadings and particulars **or elements of the cause of action**

-Crim: **-elements of the offence.**

1. **s55(1) Relevance test:** Broad test, low threshold (as intended by Parliament)
  - a. 'If it were accepted' (ie by the jury) means: **'could the evidence taken at its highest'**(Gageler J) (*IMM* 2016) HCA
    - i. 'Could' -- logical possibility test
  - b. 'Could rationally affect directly or indirectly the assessment of the probability of a fact in issue'
    - i. 'Indirect' **Circumstantial evidence** is **that which requires an inference to be drawn** in order to affect the probability of a fact in issue.  
(most evidence is circumstantial)
  - c. **s55(2)** Double negative 'evidence is **not irrelevant** only because it only relates to':
    - a)The credibility of a witness,
    - b)the admissibility of other evidence,
    - c)a failure to adduce evidence
  - i. In other words: Although not directly relevant to an issue of fact, but **only relevant to the admissibility of other evidence, this MAY be enough to argue relevance** of the evidence.
2. **Smith 2001 CLR- Bank Robber CCTV**
  - a. **Discerning who was in CCTV footage- testimony of police irrelevant because jury could see the footage for themselves.**
    - i. Wrongly adduced, therefore trial miscarried
3. **Evans v Q 2007 CLR– accused forced to reenact for jury**
  - a. **CCTV armed man in balaklava and overalls reenactment**
  - b. **Most of evidence relevant, some was not:**

- i. All judges: asking him to speak was relevant
  - ii. Hayne ‘balaklava and overalls relevant’
  - iii. Heydon & Crennan: ‘overalls relevant’
  - iv. Kirby (Broad stance on relevance generally) ‘it is all relevant but it is prejudicial, unfair, humiliating, dangerous’
- 4. **Phillips 2006 CLR**– Multiple rape charges with questionable consent evidence adduced
  - a. (key issue here was whether to try cases together or separately due to the multiple complainants–tendency evidence can be a tricky area of law regarding prejudicial/probative value)
  - b. Joint trial occurred
    - i. Jury told by trial judge on issue of consent ‘it is extremely unlikely all 6 are lying’
    - ii. [47]- logically, because consent is non-transitive (one’s consent does not rationally affect the probability of another’s) **it is irrelevant**
      - 1. Obiter: Although it may be relevant to the mental state of the accused if there were some common feature to the consents given.
- 5. **S56–Relevant evidence to be admissible**
  - a. where the evidence is not otherwise excluded by the act, **Relevance is sufficient for admissibility**
  - b. **Relevance is necessary for admissibility**: if it is irrelevant then it is not admissible.
- 6. **s57 Provisional Relevance**– Relevance of some evidence might not become clear until finding the relevance of other evidence
  - a. **Nodnara (civil)** Where the relevance of particular evidence is initially unclear, it remains appropriate under the Act for evidence to be admitted in a non-jury case subject to relevance, and for a ruling to be made as to its effect at the conclusion of the case
- 7. s58 inferring the relevance of documents or real evidence ‘things’

- a. **Judges can now draw any reasonable inference from a document, including inferring the authenticity/identity of the document.** (contrary evidence of inauthenticity can of course be led).
- b. **s58 ousted common law** (*gregg v Q 2020*)

## §3. Proof (part I)

### a)Burden of Proof and Standard of proof

Legal vs evidential burden of proof

1. Legal Burden: (Roy Williams amalgamated definition from cases): **‘The duty of a party (civ or crim), once all evidence has been received, to satisfy the tribunal of fact, that it has established its case to the required standard of proof.’**
  - a. The ‘no-case’ submission: When all evidence taken at its highest couldnt reasonably lead a jury open to convict.
2. Evidential Burden: **Is the evidence sufficient to raise an issue?**
  - a. **Braysich** [35]: “there must be evidence upon which the trial judge can properly direct the jury that the defence is open as a matter of law”

Standard of proof

1. **s 141 EA Criminal: ‘Beyond a reasonable doubt’ (Woolmington)**
  - a. Any case made by the defendant (e.g. defence of mental impairment) needs only to be proved on the balance of probabilities.--**only applies for defences for which the burden of proof has been explicitly placed on the defendant.**
  - b. ‘beyond a reasonable doubt’ **means what jury think it means** (*green; Dookheea*)
    - i. Generally undesirable for trial judges to clarify- often leads to mistrial.
      1. Permissible to say that jury must be ‘sure’ (*Dookheea*)
      2. Permissible to compare against the balance of probabilities (*Dookheea*)

ii. Big mistake—*Liberato direction* (de Silva 2019 CLR)—Belief ≠ proof

1. 'If believe accused's account or might believe it, acquit. If don't believe, still have to ask if prosecution's account is believable beyond a reasonable doubt' -mistrial

c. *Shepherd 2009*—Solely circumstantial evidence—Wigmore's chain of evidence vs cable with dispensable strands.

- i. **Depending on the facts**, not each item of circumstantial evidence has to found guilt BRD, rather, **generally, the task for the jury is whether the circumstantial evidence taken together founds guilt BRD.**



1. However, *if it is appropriate to identify an indispensable (link in the chain) intermediate step of reasoning founded upon circumstantial evidence*, that must on its own be accepted BRD.
  - i. Defence *may* ask for a Shepherd direction: May be necessary to direct jury that guilt must not be a, but *the only* rational conclusion to be inferred from the circumstance,
2. The facts here were a cable not a chain:
  - a. Separately implicated as involved with trafficking drugs, implicated in financial transactions, and implicated in conversations about leading an organisation.-taken together, guilty.

2. *Braysich 2011 CLR*—Evidential burden (**criminal**)—Stockbroker false or misleading trades

- a. (corp law created offence and defence)-Defendant had to prove an innocent mind on the balance of probability, Trial judge said 'no evidence'-- evidential burden not met.
- b. However, on appeal, *because the offence specifically targeted dishonesty*, good character evidence from 6 witnesses, taken at its highest, could have convinced a reasonable jury.
- c. The relevant test[36]:

- i. In a case where the legal burden is on the prosecution and the evidential burden on the accused – is there evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to have a reasonable doubt that each of the elements of the defence had been negated?
- ii. In a case in which both the legal burden and the evidential burden rest upon the accused – is there evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to conclude on the balance of probabilities that the defence had been established?

3. Civil courts dealing with ‘criminal’ allegations

- a. Briginshaw 1938 CLR – Adultery –
  - i. Standard of proof does not change (i.e. balance of probabilities) BUT the standard of evidence in total must be higher than in the ordinary civil case.
  - ii. What does this mean? Better *quality* evidence required?
- b. s 140(2).. ‘the gravity of the matters alleged’ may be taken into account when determining whether standard of proof has been met.
- c. While s 140(2)(a) does refer to ‘the nature of the ... defence’, this arguably is intended to apply to situations where the defence bears the persuasive burden, eg, contributory negligence. That is not the case here.
- d. Further, courts have recently been reluctant to view s 140(2) as introducing flexibility into the standard of proof: Qantas v Gama.