

70109 EVIDENCE

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LECTURE 1: INTRODUCTION TO EVIDENCE

INTRODUCTION TO EVIDENCE

Elements (Facts in issue)	Primary Facts	Evidence
<i>Actus reus</i> <ul style="list-style-type: none">- The accused (A)- Did an act- Causing death of victim (V) <i>Mens rea</i> <ul style="list-style-type: none">- Intent to kill- Intent to inflict GBH	A (accused) stabbed V (victim) 20 times in the chest	<ul style="list-style-type: none">- CCTV recorded the crime (documentary evidence)- W (person) witnessed the crime (witness evidence)- Murder weapon (real evidence)

PROOF AND PRESUMPTIONS

The “common law adversarial system of legal procedure is not directed to the establishment of truth”. The adversarial system is concerned with “procedural truth” or “legal truth” (Former CJ Spigelman, *Bar News*, Winter 2011, 101)

“A court of law is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it” (Viscount Simon LC in *Hickman v Peacy [1945] AC 304*, cited in Spigelman)

WHAT IS THE BURDEN OF PROOF?

- ‘Proof’ refers to the fact finding process in litigation
- One party to the proceeding has the **burden (or onus) of proof**
- The **burden of proof** refers to the obligation on a party to prove the facts
- As a general rule the party that brings (civil) or prosecutes (criminal) the matter bears the **burden of proof** and must meet the required **standard of proof**
- The party who brings (civil) or prosecutes (criminal) a matter must adduce sufficient evidence to meet the required standard

WHO BEARS THE BURDEN OF PROOF?

Civil Matters: plaintiff

Criminal matters: Crown (prosecution)

“Throughout the web of the English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt” → *Woolmington v DPP (1935) AC 462*

EVIDENTIAL BURDEN OR LEGAL BURDEN?

- Legal burden: the party who will lose the case if a proposition is not proven to the required standard
 - o In criminal matters, the legal burden is held by the prosecution
- Evidential burden: the obligation to produce *sufficient* evidence on a particular proposition to render that issue worthy of consideration
 - o *The Queen v Khazaal [2012] HCA 26*
 - o *Strong v Woolworths Ltd [2012] HCA 5*, per Heydon J at [50]-[54]
 - o *Braysich v The Queen (2011) 243 CLR 434; [2011] HCA* at [33]-[36]

STANDARD OF PROOF – CIVIL MATTERS

What is meant by “on the balance of probabilities”?

- **Briginshaw v Briginshaw (1938) 60 CLR 336** – this case involved a petition for divorce based on adultery. Adultery was not a crime at the time (although it was characterised as quasi-criminal behaviour) but a presumption of innocence applied.
- **Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449** – this case involved deceit over the worth of a business and the subsequent rescission of a contract.

These cases stand for the proposition that the standard of proof must be met “clearly”, “strictly” or “with certainty”. That is, the “balance” of probabilities must have actually shifted so that the trier of fact must feel an “actual persuasion” of the occurrence or existence of particular facts before they can be found.

STANDARD OF PROOF – CRIMINAL MATTERS

What is meant by “beyond reasonable doubt”?

- Trial judges have been strongly advised by the HCA to refrain from explaining to a jury what is meant by the term “beyond reasonable doubt”: see **Green v The Queen (1971)**
- “Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt... If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence ‘of course it is possible but not in the least probable’, the case is proved beyond reasonable doubt, but nothing short of that will suffice’ → **Miller v Minister of Pensions [1947]**
- Circumstantial evidence:
 - o **Chamberlain v The Queen (No 2) [1984] HCA 7; 153 CLR 521**
 - o **Shepherd v The Queen [1990] HCA 56; (1990) 170 CLR 573**; per Dawson J at 578

WHAT IS JUDICIAL NOTICE?

The doctrine of judicial notice operates with respect to facts that are so obvious, well known or indisputable that the party which relies upon them is relieved of the obligation to lead evidence to prove the fact.

S 144(1) Proof is not required about knowledge that is not reasonably open to question and it—

- (a) Common knowledge in the locality in which the proceeding is being held or generally, or
- (b) Capable of verification by reference to a document the authority of which cannot reasonably be questioned

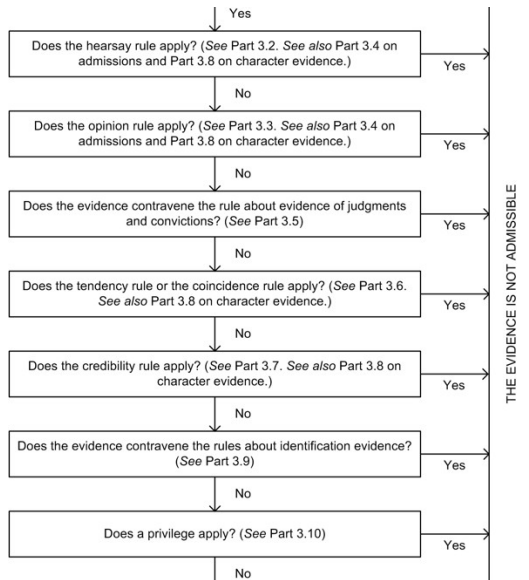
UNIFORM EVIDENCE LAW

- **Evidence Act 1195 (Cth), Evidence Act 1995 (NSW)**
- **Evidence Act 2001 (Tas), Evidence Act 2004 (Norfolk Island), Evidence Act 2011 (ACT), Evidence Act 2008 (Vic), Evidence (National Uniform Legislation) Act 2011 (NT)**
- Does not include QLD, SA and WA which have their own rules of evidence or where the common law continues to apply

‘[89]... As an Act which had as one of its purposes the clarification and simplification of evidentiary questions, it has had at best mixed success. Far too often this Court has had to decide questions arising under it, for which in the past, common law, or earlier well understood statutory provisions provided the answer. The number and complexity of these cases exceed what might ordinarily be expected in respect or even a new and significantly changed legislative regime’ → **Dhanhoa v R [2003] HCA** per Callinan J

Thresholds to admissibility:

- Relevance
- Hearsay
- Opinion
- Tendency and coincidence



Every piece of evidence needs to be rigorously assessed to decide whether or not it is admissible. Some things are clearly admissible, some things are clearly inadmissible. The parties in dispute need to know the rules of evidence very thoroughly – often what distinguishes them is the depth of their knowledge about the rules. One party will try to find a rule that will get a piece of evidence admitted; the other party will try to find a rule to have it excluded. Arguments can sometimes be very powerful both ways, and the judge makes the ultimate decisions on admissibility.

LECTURE 2: TYPES OF EVIDENCE: DOCUMENTARY EVIDENCE & REAL EVIDENCE

GENERAL POWERS OF THE COURT

Evidence Act 1995 (NSW)

Section 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 proceeding are not affected

Unless the Evidence Act explicitly prevents a Judge from doing so, a trial judge can depart from the Evidence Act at any time → to ensure fairness and to prevent the court from having its process abused

TYPES OF EVIDENCE

Evidence is adduced in three forms:

1. Oral testimony (witnesses) (Evidence Act Pt 2.1)
2. Documents (Evidence Act Pt 2.2)
3. Other evidence (or Real Evidence) (Evidence Act Pt 2.3)

Adduce Evidence → “what we put before the court and how we get it before the court”

DOCUMENTS

Evidence Act 1995 (NSW)

Part 2.2 Documents

47 Definitions

48 Proof of contents of documents

49 Documents in foreign countries

50 Proof of voluminous or complex documents

51 Original document rule abolished

- Evidence Act made significant changes to the common law regarding how evidence could be adduced

PROOF OF CONTENTS OF DOCUMENTS

S 48 Proof of contents of documents

- Tender the document itself → 48(1)
- Tender a copy of the document → s 48(1)(b)
- Adduce evidence as to the contents of a document → s 48(1)(a)
- Tender a transcript of a document → s 48(1)(c)
- For voluminous documents, it is also possible, with leave of the court, to tender a summary of a document → s 50

Proof of contents of documents

- (1) A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods:
- (a) adducing evidence of an admission made by another party to the proceeding as to the contents of the document in question;
 - (b) tendering a document that:
 - (i) is or purports to be a copy of the document in question; and
 - (ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;
 - (c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing)—tendering a document that is or purports to be a transcript of the words;
 - (d) if the document in question is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it—tendering a document that was or purports to have been produced by use of the device;
 - (e) tendering a document that:
 - (i) forms part of the records of or kept by a business (whether or not the business is still in existence); and
 - (ii) is or purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such an extract or summary;
 - (f) if the document in question is a public document—tendering a document that is or purports to be a copy of the document in question and that is or purports to have been printed:
 - (i) by the Government Printer or by the government or official printer of a State or Territory; or
 - (ii) by authority of the government or administration of the Commonwealth, a State, a Territory or a foreign country; or
 - (iii) by authority of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament.

- (2) **Subsection** (1) applies to a document in question whether the document in question is available to the **party** or not.
- (3) If the **party** adduces evidence of the contents of a document under **paragraph** (1)(a), the evidence may only be used:
- (a) in respect of the **party**'s case against the other **party** who made the admission concerned; or
 - (b) in respect of the other **party**'s case against the **party** who adduced the evidence in that way.
- (4) A **party** may adduce evidence of the contents of a document in question that is not available to the **party**, or the existence and contents of which are not in issue in the proceeding, by:
- (a) tendering a document that is a copy of, or an extract from or summary of, the document in question; or
 - (b) adducing from a witness evidence of the contents of the document in question.

Note 1: Clause 5 of Part 2 of the Dictionary is about the availability of documents.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records and certain Commonwealth documents.

S 51 → Under the Evidence Act, the focus is on the relevance for admissibility → The tribunal of fact (court) is able to make its own conclusion surrounding the authenticity of a document (**s 51** – abolishes original document rule)

S 57(1) → Provides for a finding of provisional relevance if it is reasonably open for a court to find authenticity

S 58(1) → Allows the court to make a reasonable inference as to authenticity

WHAT IS A DOCUMENT?

The Dictionary of the Evidence Act (Part 1) defines '**document**' to mean any record of information, and includes:

- (a) Anything on which there is writing, or
- (b) Anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or
- (c) Anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or
- (d) A map, plan, drawing or photograph

Note: See also clause 8 of Part 2 of this Dictionary on the meaning of "document"

REFERENCES TO DOCUMENTS

Dictionary, Part 2, Clause 8

References to documents

A reference in this Act to a document includes a reference to:

- (a) Any part of the document, or
- (b) Any copy, reproduction or duplicate of the document or of any part of the document, or
- (c) Any part of such a copy, reproduction or duplicate

UNAVAILABILITY OF DOCUMENTS

Dictionary, Part 2, Clause 5: Unavailability of Documents and Things

For the purposes of this Act, a document or thing is taken not to be available to a party if and only if:

- (a) It cannot be found after reasonable inquiry and search by the party, or
- (b) It was destroyed by the party, or by a person on behalf of the party, otherwise than in bad faith, or was destroyed by another person, or
- (c) It would be impractical to produce the document or thing during the court of the proceeding, or
- (d) Production of the document or thing during the course of the proceeding could render a person liable to conviction for an offence, or
- (e) It is not in the possession or under the control of the party and:
 - i. It cannot be obtained by any judicial procedure of the court, or

- ii. It is in the possession or under the control of another party to the proceeding concerned who knows or might reasonably be expected to know that evidence of the contents of the document, or evidence of the thing, is likely to be relevant in the proceeding, or
- iii. It was in the possession or under the control of such a party at a time when that party knew or might reasonably be expected to have known that such evidence was likely to be relevant in the proceeding