

COURT PROCESS, EVIDENCE
AND PROOF

Semester 2, 2015

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Administration:

- Peden & Kumar *Quick Reference Card* – Good 6 page summation of the Evidence Act

Assessments:

- Mid-session assignment – 30% Court report
- Final exam – 70%
- Class participation is maximisable 10% - Taken seriously to improve marks

Introduction:

- The Australian criminal justice system is essentially an accusatorial system where it is important to protect the accused from abuses of power or tyrannical treatment
- The presumption of innocence dictates that persons need not assist the state in its prosecution of criminal charges. This is confirmed by 3 main pre-trial rights:
 - Rights to privacy
 - Rights to silence
 - Rights to liberty
- The pre-trial processes must not impair a fair trial → Judicial discretion to exclude evidence should address this issue by eliminating any investigative illegality or improprieties
- Criminal trials are adversarial – Parties dominate the trial process and the presiding judge must defer to the parties on the substance of the contest

Lee v NSW Crime Commission (Lee (No 1) [2013] HCA 39 – Keifel J:

- ‘The golden thread of the system of English criminal law is that it is the duty of the prosecution to prove the prisoner’s guilt’
 - The onus of proof rests upon the Crown and its companion rule expressed to be that the accused person cannot be required to testify to the commission of the offence charged
 - The prosecution must discharge the onus of proof and cannot compel the accused to give evidence for it
 - Possible to say that the prosecutions duty to discharge their onus of proof is not adequately performed by admissions

Class 2 – Core principles, Screening, Criminal pleadings, Double Jeopardy, Prosecuting and Prosecution and Defence Disclosure

Lee (No 2) [2014] HCA 20:

- **Facts** – Unauthorised disclosure amounted to the removal of Lee’s privilege against self-incrimination. DPP solicitor asked the NSW Crime Commission for a transcript of Lee’s compulsory examination to check for likely defences to charges
 - HCA indicated their vigilant protective disposition of accused person’s rights → One is protected from having to give self-incriminating evidence
 - The privilege against self-incrimination reflects the long-standing antipathy of the common law to compulsory interrogations about criminal conduct (French CJ in *Lee No 1*)
- **Held** – The privilege against self-incrimination was removed
- The HCA’s strict stance on a person rights against self-incrimination is supported by Article 14.3(g) of the *International Covenant on Civil and Political Rights*

Accusatorial Justice:

- The fundamental principle is the prosecution must discharge its burden of proof → The fact that the accused cannot be compelled to testify is an aspect of this principle (*Lee No 1*)
- Accusatorial Justice is a manifestation of the state’s relationship to the citizen and found in the UEA
- Fair Trial of the European Convention of Human Rights sets out a list of requirements for a fair trial however the common law is less exact → Works on the basis of appeals due to unfairness

Screening Weak Cases and Disclosure:

- Unless there is a reverse burden of proof, the prosecution must prove each physical and legal element of a case to a beyond reasonable doubt standard → This leads to cases being screened before trial to ascertain the prospects of success

The vanishing institution of committal proceedings:

- The 1st stage in a contested charge for an indictable offence is a committal hearing
 - Proceedings are initiated by a Court Attendance Notice (CAN) for the magistrate to establish whether the prosecution case is sufficient to justify putting the accused to answer the charge (no plea from prosecutor)
 - Standard at committal proceedings = Whether there is a reasonable prospect that a reasonable jury would convict the accused person of an indictable offence’
 - Witness involvement is minimal – A magistrate may only direct a witness to attend if ‘satisfied that there are substantial reasons why, in the interests of justice, the witnesses should attend to give oral evidence

Guiding Principles in Criminal Pleadings:

- Every person with a criminal charge against him shall be entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him (*ICCPR Article 14(3)(a)*)
 - Pleadings set boundaries of process and admissible evidence by defining what prosecution must prove (and thus limiting evidence to that situation)
 - There are fundamental requirements in pleadings and process... Such as the defendant not testifying (*Kirk*)

Prosecutors' Pleadings:

- Prosecutor's pleadings define the court's jurisdictions and determine the factual and legal elements of the case → The indictment/CAN to the specific jurisdiction + the legal/factual elements of the offence
 - A defect in pleadings may lead to a lack of jurisdiction for the court which will ultimately result in the pleading failing
 - If pleadings fail the entire case is lost!
- Sufficient detail about the manner of an offence should be provided with clarity in the pleadings
 - Clarity and singularity of charges are important to allow the accused to know the charge against him/her + also to prevent double jeopardy
- Each charge is to be for a single offence, with the correct person, namely the prosecutor, signature being necessary (*Built NSW*)

Accused's pleadings: The one to two word response:

- Most pleadings are either guilty or not guilty
 - 2014 – 83% of matters in the NSWDC were resolved by a guilty plea (Ringland and Snowball)
 - More likely to plead guilty = Those with a prior conviction, those charged with DV, younger defendants
 - More likely to plead not guilty = Those with more than one charge, those facing child sex offences
- Studies show that people accused of crimes may plead guilty despite being innocent
 - Reasons = Embarrassment, cost, inconvenience, belief that the system is pitched against them
- Court has held that negotiated justice (in reducing the charge of those who provide assistance) is valid → Is possible to charge accessory to manslaughter for one whilst also running a case for murder for another (*Likiadopoulos*)

The Rule against Double Jeopardy:

- No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country (*ICCPR Article 14*)

- Rational behind double jeopardy prohibition (as per Gummow and Hayne JJ in *Island Maritime Limited v Filipowski*):
 - (1) It is in society's interest that there be an end to litigation
 - Avoids the injustice occasioned by the re-litigation of what has already been determined
 - (2) What is adjudicated is taken as the truth
 - (3) No one should twice be vexed for one and the same cause

Guiding Principles in Prosecuting:

- The decision whether or not to proceed with charges is made by the DPP and requires consideration of 'the interests of the victim, the suspected offender and the community at large... fairness and consistency... are of particular interest'
 - **LAW** - A prosecution should not be instituted or continue unless there is admissible, substantial and reliable evidence that a criminal offence has been committed
 - Public interest considerations include a range of matters (set out p. 22 text)
- The judiciary is not to intervene with prosecutorial discretion decisions → Maintains impartiality and the separation of powers
 - Judge may however intervene and overrule a prosecutor's decision where that is necessary to ensure that a fair trial is afforded
- The judge, in giving a sentence is adjudicating and not a mere bystander to an agreement between an accused and a prosecutor → Judge can ignore the prosecutor (*Barbaro*)

Prosecutors' disclosure and fairness obligations:

- 'The best way of ensuring a fair trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied upon in support of those allegations' (*Secretary of State for the Home Department v AF*)
 - Disclosure promotes court efficiency + ensures 'equality of arms' and eliminates the trial by ambush previously seen
- Prosecutors must disclose all information that contributes to a fair and rational process → Not just material that benefits their case!
 - Prosecutors are representatives of the state... Their role is to ensure that justice is done, not necessarily get a win
 - Must disclose information that (a) is relevant or possibly relevant to an issue in the case, (b) to raise a new, non-apparent issue, (c) to hold out a real prospect of providing a lead on evidence (Hodgson J in *Keane*)
- In NSW (under s 15A *DPP Act*), police are under a statutory obligation to disclose/produce all relevant information, documents and things to the DPP
 - DPP has an obligation to ensure that police have appropriately disclosed information, documents or other things subject to a bona fide claim

- NSW Bar Association Rule 86 also requires all information be disclosed to the opponent as soon as practicable
- **Criminal Procedure Act 1986 and Disclosure** - CPA s 142 sets out the notice which the prosecution must provide the defence (see p. 30 text) + s 144 sets out more rigorous disclosure requirements in certain situations (see p. 31 text)
 - Prosecution must disclose documents which are material → Those that are relevant or possibly relevant to an issue in the case + those which raise or possibly raise a new issue
 - More than just admissible evidence!
 - 'An issue in the case' has been given a broad interpretation
- The prosecutor's obligation to make available all material ameliorates the inequality of resources between the parties (Hodgson in *McIlkenny*)
- Opinion – There is a lurking culture of suspicion occupying corners of prosecutorial offices and police stations about disclosure

Defence Disclosure:

- s 143 CPA requires an accused (or their defence counsel) to respond to the s 142 prosecution disclosure notices (see text p. 34 for what response must/may include)
 - Rationale = Assists enhancing efficiency both during the trial and also in having the accused plead well before the trial
 - Defence response must contain their lawyer, their defence, their version of the facts, the legal basis for their defence, what's agreed, an alibi and whether they seek to rely on mental impairment
- s 146 CPA sets out what a court may do if timetables are not met and disclosure obligations are breached → May order evidence not disclosed be excluded, grant an adjournment, make such commences as appears proper and consequently allow the jury to draw unfavourable inferences
 - If the defendant shows no intention to dispute then ambushes the prosecution, the Court will permit persons to dispense with formal proof
 - Difficult to get an adverse inference decision

s 143 Criminal Procedure Act – Defence Disclosure

A court *may order* disclosure of:

- (a) a copy of any report,
- (b) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means **of surveillance**, notice as to whether the accused person proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,
- (c) notice as to whether the accused person proposes to raise any issue with respect to the **continuity of custody** of any proposed exhibit disclosed by the prosecutor,
- (d) if the prosecutor disclosed an intention to tender at the trial any transcript, **notice as to whether the accused person accepts the transcript as accurate** /what respect the transcript is disputed,

(e) notice as to whether the accused person proposes to **dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by** the prosecutor,

(f) notice re **indictment, severing charges, separate trials**

(g) notice of any consent the accused person proposes to give under section 184 of the *Evidence Act 1995*

Class 3 – Prosecutors and Adversarialism & The Judge, Jury and Proof

Criminal Trials:

- (1) Prosecution opens
 - Prosecution calls witnesses → Examination in chief by prosecution, cross examination by defence, re-examination by prosecution
 - ‘No case to answer’ submission may be made by the defence’
- (2) Defence opens
 - Defence may call evidence → Examination in chief by defence, cross examination by prosecution, re-examination by defence (evidence may be given by the accused and witnesses)
- (3) Prosecution closing evidence
- (4) Defence closing address
- (5) Judge’s summing up if jury trial (unless judge is of the opinion that it isn’t necessary) + warnings/directions
- (6) Jury retires to consider verdict

Adversarialism, Advocacy, Proof and the Jury:

The best way of getting at the truth? Advocacy and case construction and destruction:

- **The defence challenge strategy** - Any prosecution weakness or gap is drawn to the jurors’ attention. An accumulation of small gaps, or the location of a key gap in the prosecution case may be sufficient to establish a reasonable doubt
 - Gaps in evidence highlight doubt... Reasonable doubt is all that is needed!
- **The defence redefinition strategy** - Counsel can accept that the prosecution case as coherent, but expose the ambiguities within it consistent with possible innocence that create a reasonable doubt of guilt
- **The defence reconstruction strategy** - The defence offer an affirmative defence and present its own version of the facts

Adversarialism: Its Rules of Engagement:

- In the adversarial system, prosecutorial ‘ministers of justice’ must call all credible and material witnesses, whether they assist or not the prosecution case

Prosecutors’ in-court Fair Trial Obligations:

- A prosecutor must be fair, dispassionate and not gun for convictions
 - They are essentially ministers of justice
 - Zealous behaviour can stimulate the creation of fabricated evidence and inappropriately aggressive or manipulative behaviour
- In assessing prosecutorial behaviour, ultimately the question for the court is whether any breach of these obligations has created a miscarriage of justice

New South Wales Barristers Rules:

Prosecutor's Duties:

83. A 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, and must seek to **assist the court** with adequate submissions of law to **enable the law properly to be applied** to the facts.

84. A prosecutor must **not press** the prosecution's case for a conviction **beyond a full and firm presentation** of that case.

85. A prosecutor **must not**, by language or other conduct, **seek to inflame or bias the court** against the accused.

86. A prosecutor **must not argue** any proposition of fact or law which the prosecutor **does not believe on reasonable grounds to be capable of contributing to a finding of guilt** and also to carry weight.

87. A prosecutor must **disclose to the opponent as soon as practicable all material** (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware **which could constitute evidence** relevant to the guilt or innocence of the accused other than material subject to statutory immunity, **unless** the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously **threaten the integrity of the administration of justice** in those proceedings or the safety of any person.

88. A prosecutor who has decided not to disclose material to the opponent under rule 87 must consider whether:

- (a) the charge against the accused to which the material is relevant should be **withdrawn**; and
- (b) the accused should be **faced only with a lesser charge** to which such material would not be so relevant.

89. A prosecutor **must call as part of the prosecution's case all witnesses:**

- (a) whose **testimony is admissible and necessary** for the presentation of all of the relevant circumstances; or
- (b) whose **testimony provides reasonable grounds for the prosecutor to believe** that it **could provide admissible evidence** relevant to any matter in issue; **unless:**
 - (i) the **opponent consents** to the prosecutor not calling a particular witness;
 - (ii) the only matter with respect to which the particular witness can give admissible evidence **has been dealt with by an** admission on behalf of the accused;
 - (iii) the only matter with respect to which the particular witness can give admissible **evidence goes to establishing a particular point already adequately established** by another witness or other witnesses;

(iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is **plainly untruthful or is plainly unreliable**; or
(v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the **interests of justice would be harmed** if the witness was called as part of the prosecution case.

90. The prosecutor **must inform the opponent as soon as practicable of the identity of any witness** whom the prosecutor intends **not to call on any ground within rule 89(ii), (iii), (iv) or (v), together with the grounds on which the prosecutor has reached that decision**, unless the interests of justice would be harmed if those grounds were revealed to the opponent

91. A prosecutor who **has reasonable grounds to believe** that certain material available to the prosecution may have been **unlawfully obtained** must promptly:

- (a) **inform the opponent** if the prosecutor intends to use the material; and
- (b) **make available to the opponent** a copy of the material if it is in documentary form.

92. A prosecutor **must not confer with or interview any accused except in the presence of the accused's legal representative.**

93. A prosecutor **must not inform the court or opponent that the prosecution has evidence** supporting an aspect of its case unless the prosecutor believes on **reasonable grounds that such evidence will be available** from material already available to the prosecutor.

94. A prosecutor who has informed the court of matters within Rule 91, and who has later learnt that such evidence will **not be available, must immediately inform the opponent of that fact** and must inform the court of it when next the case is before the court.

Libke v R [2007] HCA 30:

- **Facts** – Prosecutor made comments during cross-examination which lead the jury to infer that the accused was lying and guilty
 - The prosecutor was accused of breaching his obligation to be an officer of the court (as a minister of justice who does not unfairly favour one side)
- **Issue** – Did the prosecutor cross the ethical line during his cross examination and commentary of the accused?
- **Held** – The accused's opportunity to respond to allegations was not impaired, the prosecutor was found to have not breached his obligations
- **Held** – The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice
 - They have a public duty that is not based on winning... Case is to be presented with fairness to the accused
- **Decision** – Departure from ordinary conduct did not create a miscarriage of justice... Prosecutor should not have aligned himself with the prosecution case *but* this did not have the effect of making the trial unfair or influence the decision of the jury

Wood [2012] NSWCCA 21:

- **Facts** – Mark Tedeschi (as Crown prosecutor) was accused of improperly speculating in his evidence in relation to the motive to kill, cause of argument and Wood's relationship with Rene Rivkin
- **Held (McClellan CJ)** – The prosecution's speculation with respect to the Wood's motive was not justified on the evidence
 - Speculative questions were unreasonably prejudicial to the applicant
 - Questions created the impression that the onus of proof was reversed and consequently created a miscarriage of justice
- **Held** – The purpose of a prosecutor is not to obtain a conviction; it is to lay before a jury what the Crown considers to be relevant, credible evidence
 - Role of the prosecutor excludes any notion of winning or losing → Function is a matter of public duty

The Art of Proof:

Advocacy:

- Counsel cannot make submissions based on speculation (*Wood*)
- Advocacy should be directed towards getting the jury to make a choice to accept their case. Psychologists have identified 3 key considerations that come into play when people make choices:
 - Coverage, coherence and uniqueness

The Jury:

- Juror's presence in the justice system promotes the verdict as a community decision
 - Jurors central decision making role in the trial prevents the trial becoming the closed shop of the legal expert
- Trial by jury is likely to take longer than trial by judge alone → It can increase delays in all types of litigation

The Mechanics of Proof – The judge's decision and Standard of Proof:

Uniform Evidence Act s 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.

Judges and Sources of Proof:

- Judges must rely on evidence properly admitted to establish a fact, *unless*, it can be the subject of 'judicial notice' (so notorious that it goes without saying)
 - Judge has discretion to rule something as a matter of judicial notice but that decision must not unfairly prejudice one party
 - Judicial notice examples – The date of Christmas day, Sydney is surrounded by a harbour
- Judicial notice requires incontestable information → Must be something that is sufficiently common knowledge (*Farkas*)

Uniform Evidence Act s 144 – Matters of common knowledge:

- (1) **Proof is not required about knowledge** that is not reasonably open to question and is:
- (a) **common knowledge** in the locality in which the proceeding is being held or generally,
 - (b) **capable of verification by reference** to a document the authority of **which cannot reasonably be questioned**.
- (2) The judge may **acquire knowledge** of that kind **in any way the judge thinks fit**.
- (3) The court (including any jury) is to take knowledge of that kind into account.
- (4) **The judge is to 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**.

The limits of common knowledge:

- Knowledge capable of verification by reference to a document is not judicial notice (*Gattellaro v Westpac*)

Aytugrul [2012] HCA 15:

- **Facts** – A hair found on the deceased's thumbnail had been subjected to mitochondrial DNA testing.
 - Results showed that the appellant could have been the donor of the hair and how common the DNA profile found in the hair was in the community
 - The popularity was expressed as a frequency ratio and also as an exclusion %
 - Expert who conducted the test gave evidence that it was 1/1600 people and the 99.9% of people would not have expected to have a DNA profile matching that of the hair
 - Argued that it should have been presented as 1/1600 rather than 99.9% as it is unlikely to be rounded up to a certainty
 - Suggested that the unfair rounding up would have created an unfair prejudice against the accused
- **Issue** – Alleged that the evidence the witness gave in the form of an exclusion percentage was not admissible as it could not be classified as judicial notice

- Was the probative value of the evidence outweighed by the danger of unfair prejudice (s 135 UEA) or perhaps misleading or confusing (s 137 UEA)
- **Held** – Knowledge of the proposition in question could not be said to be "not reasonably open to question" and "common knowledge" or "capable of verification by reference to a document the authority of which cannot reasonably be questioned"
 - No proof was attempted, whether at trial or on appeal, of the facts and opinions which were put forward (by reference to the published articles) as underpinning the adoption of some general rule
 - Material must be uncontroversial for judicial notice to be taken of it
- **Decision** - The evidence that was given did not, and was not said to, establish that the DNA profile found in the hair definitely came from the appellant. There was no risk of rounding the figure of 99.9% to the certainty of 100%
 - Claim that 99.9% is rounded to a certainty was unjustified

Juries and Judicial fact-finders' decision-making: Drawing Inferences:

- Minds must not be able to differ about the information for an inference to be drawn

Gui v Weston [2013] VSCA 364:

- **Facts** - Direct evidence was not available therefore inferences needed to be relied upon by the prosecution to prove the evidence beyond reasonable doubt
- **Held** - The judge's use of a witty example to explain the difference between direct evidence, well-sustained inferences and speculation was not appreciated by the appeal court → Raised the possibility of jurors becoming insensitive to misunderstandings
 - Judge made the mistake of adding humour to her anecdote → This raised the possibility of the jurors decision being wrongly founded

The Prasad direction and directed acquittals:

- Open to the jury at any time after the close of the case for the prosecution to inform the judge that the evidence which they have heard is **insufficient to justify conviction** and to bring in a verdict of not guilty without hearing more (*Prasad*)
 - Inappropriate where the direction requires detail to explain aspects of the prosecution case
 - If a complainant was to admit to lying, or is contradicted in material ways with other prosecution witnesses, a *Prasad* direction might be suitable.

Beyond Reasonable Doubt:

- Golden thread in a criminal prosecution = Obligation on the prosecution to satisfy each legal element of the charge beyond reasonable doubt (*Woolmington*)
- Further explanation of *beyond reasonable doubt* has been regarded as unnecessary and dangerous because it is a phrase that is 'in ordinary and common use' and is a 'well understood expression'

- Judges are not to explain the meaning as they can over-complicate their directions (plain, English meaning to be given to BRD)
- Cricket references in *Condo* and *CBK* have been struck out on appeal as they were considered to trivialise the solemn role which the community demands of jurors
- Words are to be interpreted to mean exactly what they say! (see text p. 69 for a detailed list of what is/is not regarded as an appropriate suggestion + p. 70 for suggested uniform interpretations of beyond reasonable doubt)

Uniform Evidence Act s 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.**

Balance of probabilities and the *Briginshaw* principles:

- Balance of probabilities is based on a sliding scale which adjusts to the seriousness of the offence (higher standard required for higher consequences)
 - Balance of probabilities is to taken into account the gravity of the matters alleged, the nature of the cause of action and the subject matter of the proceeding!

Uniform Evidence Act s 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.**

