

- Discretions – judges may refuse to admit otherwise relevant and admissible evidence. This only applies to prevent receipt of admissible evidence, not to admit inadmissible evidence
- Privilege – these may prevent the court from receiving the evidence

There are also rules relating to particular types of witnesses.

[Evidence Act 1977 \(Qld\)](#); [Evidence Act 1995 \(Cth\)](#).

Comment [A1]: If a Cth matter is being litigated in a state court, the state's own evidence law applies – s 79 Judiciary Act 1903 (Cth)

Judge and Jury

If there is a jury, they are the trier of fact.

In summary criminal trials, judge-only criminal trials and most civil matters, the judge is the trier of fact.

If there is a jury, judges can:

- conduct voir dire
- determine questions of law
- instruct the jury at the end of a case: [OCC s 620](#)
- summarise relevant law and evidence
- help the jury to understand how evidence might operate to in- or exculpate the accused

A trial judge is entitled to express his own view on the facts, as long as they warn the jury that these views are not binding: *Mawson*

Judges have a discretion to exclude evidence under [EAQ ss 98, 130](#).

Voir Dire

A voir dire is a hearing on the admissibility of evidence, before or during trial, generally without the jury.

It is a procedure when a judge has to make a finding of fact before being able to make a determination of law

In relation to facts which must be established in order to determine a question of admissibility, the court only needs to be satisfied on the balance of probabilities: *Wendo v The Queen*

In Qld it is expected that issues about admissibility will be resolved before trial commences. Either party can apply for directions or the court may order parties to tend a hearing for pre-trial issues to be resolved: [OCC s 590AA](#)

Burden and Standard of Proof

Burden refers to which party is required to prove or adduce evidence of the issues in dispute.

There are 2 types:

- Persuasive Burden (burden to prove the case/issue at hand)
- Evidentiary Burden (burden to raise sufficient evidence of an issue for it to be put before a jury)

In a criminal trial, the prosecution bears the persuasive burden of proof - *Woolmington*. The accused holds the evidentiary and persuasive burdens when raising an excuse or justification, and only then is the prosecution required to negative that excuse or justification.

In a civil case, evidential and persuasive burdens sit together. The plaintiff bears the burden of proof to establish their claim. Once a prima facie case has been made out, the onus shifts to the defendant to prove the elements of their defence.

Standard of Proof:

- In criminal cases, the prosecution's standard of proof is beyond reasonable doubt. Where the accused carries the burden of proof, the standard of proof is on the balance of probabilities.
- In civil cases, the cause of action has to be established on the Balance of probabilities.

The Briginshaw principle states that the more serious an allegation is, the more persuasive the proof needs to be. Extraordinary claims require extraordinary proof - *Briginshaw v Briginshaw*

Relevance

Fundamental basis of admissibility. A fact is relevant if it has probative value. A fact will also become relevant and admissible if forms part of the "transaction" about which the trial is concerned - see RES GESTAE

Comment [A2]: The tendency of evidence to prove or disprove facts in issue. If it makes a fact in issue more or less probable

Relevance is different from weight

Comment [A3]: How much a judge relies on that item of evidence

Direct Relevance

- The evidence is an observation or perception of a fact in issue.

Circumstantial/Indirect Relevance

- Evidence where the probative effect depends on an inference being drawn. Evidence of a secondary fact offered as proof of a principle fact.
- See *Plomp v R*, *Shepherd v R*.

Comment [A4]: Eg only one person knows where a ring is hidden, everyone goes out except for her, the next day she deposits the value of the ring in her account.

Types of Evidence

Evidence may be classified as:

- Direct or Circumstantial - see RELEVANCE
- Testimony, Documentary or Real

Testimony/Oral Evidence

Testimony is when witnesses give evidence in court. Witness testimony is evidence capable of proving facts; however the weight to be given to witness testimony is a matter for the individual judge and jury. See EAQ s 102

There is a general preference for oral testimony given by the witness in court from memory.