1.1 The Trial Process

The Law of Evidence

- Generally speaking, the law of evidence is the rules which govern the trial process.
- Rules of evidence provide the legal framework by which the judge determines:
  - how evidence may be adduced by the parties;
  - whether it will be taken into account -- whether it is "admissible"; and
  - how the tribunal of fact, judge or jury, is to decide the factual issues on the evidence – "use" of evidence, and "proof".
- With respect to appeal, it focuses on grounds that evidence incorrectly adduced or that evidence shouldn't have been admitted.
- Directions to jury: about the law (standard of proof, how the jury can use evidence, elements of crime, etc.)
- Prejudice: if there is a reason the jury may be prejudiced, the judge can direct the jury to disregard certain information/news, or the jury could be discharged.
- Notion of relevant: evidence must be relevant to the case so that can be put in the court.

The Power of the Court

- The uniform evidence legislation preserves a number of powers on courts in relation to matters of procedure and evidence.

> **s 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...
> (2) In particular, the powers of a court with respect to abuse of process in a proceeding are not affected.

> **s 26 Court's control over questioning of witnesses**
> The court may make such orders as it considers just in relation to:
> (a) the way in which witnesses are to be questioned; and
> (b) the production and use of documents and things in connection with the questioning of witnesses; and
> (c) the order in which parties may question a witness; and
> (d) the presence and behaviour of any person in connection with the questioning of witnesses.

> **s 27 Parties may question witnesses**
> A party may question any witness, except as provided by this Act.
>
> **s 28 Order of examination in chief, cross-examination and re-examination**
> Unless the court otherwise directs:
> (a) cross-examination of a witness is not to take place before the examination in chief of the witness; and
> (b) re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness.

> **s 29 Manner and form of questioning witnesses and their responses**
> (1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.
> (2) A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.
> (3) Such a direction may include directions about the way in which evidence is to be given in that form.
> (4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

1.2 Background to the Evidence Act 1995 (Cth) and (NSW)

- In response to the then Federal Attorney-General's reference on 18 July 1979, the Australian Law Reform Commission (ALRC) produced an interim and final report on evidence; Evidence Interim Report (No 26) 2 vols (1985) and Evidence Final Report (No 38) (1987), the Final Report contained a draft Evidence Bill.
- Both the Commonwealth and NSW Parliament introduced Evidence Bill that implemented the majority of the recommendations in the ALRC report and were essentially uniform; Evidence Bill 1993 (Cth) and the Evidence Bill 1993 (NSW). – The Bills were passed in both Parliaments.
- The Commonwealth Evidence Act 1995 commended on 18 April 1995 and the NSW Evidence Act commenced on 1 September 1995.
- The ALRC, the Victorian and New South Wales Law Reform Commissions released a joint report in December 2005 that recommended amendments to the uniform evidence legislation – ALRC 102.
- The NSW Parliament implemented the recommendations of ALRC 102, and enacted the Evidence Amendment Act 2007 (NSW), which commenced on 1 January 2009.
- The Commonwealth passed the Evidence Amendment Act 2008 (Cth), which commenced on 1 January 2009.
- Any interpretation of the Acts needs to have reference to the relevant Law Reform Commission Reports – principally ALRC 26, 38 & 102: s 4, EA.

Structure of the Evidence Act 1995 (Cth)

- Preliminary matters (Ch 1)
- Adducing Evidence (Ch 2) – How the evidence is to be presented to the court
- Admissibility (Ch 3) – What evidence can be adduced or taken into account
- Proof (Ch 4) – How the court, whether it be a judge or jury, decides the issues

1.3 Relationship between the Evidence Acts, the common law and other statues

Uniform Evidence Legislation

- The law of evidence was an unstructured and complex combination of the common law and statute.
- However, with the enactment of the Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW), the existing statutes dealing with the rules of evidence were abrogated and most of the common law principles were extinguished.
- These statutes cover the field and the rules of evidence across a number of jurisdictions is now uniform.

Non Exhaustive Code

- The Act is not a code of the law of evidence. s 8 (Operation of other Acts) and 9 (Application of common law and equity) provide that the Act operates with other statues and laws.
- But it was held that basically "the admissibility of opinion evidence is to be determined by application of the requirements of the Evidence Act rather than by ...decided cases": Dasreef Pty Ltd v Hawchar (2011).
- Of course, in particular context the position before enactment of the legislation may provide assistance in interpreting the Act.

1.4 Taking Objections

- Where the other party objects to the adducing/admissibility of evidence or to a direction being given. The Judge has to rule on that objection. If you succeed on the objection, it may be excluded. Even if you don't succeed, the objection is important because you can later appeal from it.
- In practice, it will often be necessary for a party to object to evidence or a question eliciting evidence before a court will ensure strict compliance with the provisions of the uniform evidence legislation.
- In a civil case, the matter cannot be appealed without having made the objection. In criminal cases, an appeal can be made in the Criminal Court of Appeal without having made an earlier objection if you claim incompetent counsel (this loophole is allowed because of the gravity of the consequences in criminal proceedings).
- Noteworthy, Reg 4 of the Criminal Appeal Rules (NSW) provides: "the admission of evidence shall not be allowed as a ground for appeal unless objection was taken at trial". – no objection, no appeal.
- In Picken v The Queen [2007], Mason P said "leave to rely on an error to which no objection had been taken at the trial will be granted only where the appellant can demonstrate that the error led to a miscarriage of justice ... It appears to be

generally accepted that the appellant must at least establish that he or she has lost a real chance (or a chance fairly open) of being acquitted."

1.5 Dispensing with the Rule of Evidence

- *Section 190 allows dispensing from rules of evidence – waiver of some rules of evidence if the defendant consents (and only if there has been advice from the defendant's lawyer that they should consent). This provision is not often used.*
- *In criminal cases, the rules of evidence are strictly applied, whereas they are not so strict in civil cases. Judges in civil proceedings may allow evidence but degrade the amount of weight s/he gives that evidence. In the UK, the rules of evidence only apply to criminal cases. The Australian practice is similar, but some rules of evidence are applied more rigidly than others (e.g. use of expert evidence and legal professional privilege arise more frequently in civil cases).*

s 190 Waiver of rules of evidence

(1) The court may, if the parties consent, by order dispense with the application of any one or more of the provisions of:

(a) Division 3, 4 or 5 of Part 2.1; or

(b) Part 2.2 or 2.3; or

(c) Parts 3.2 to 3.8;

in relation to particular evidence or generally.

(2) In a criminal proceeding, a defendant's consent is not effective for the purposes of subsection (1) unless:

(a) the defendant has been advised to do so by his or her Australian legal practitioner or legal counsel; or

(b) the court is satisfied that the defendant understands the consequences of giving the consent.

(3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if:

(a) the matter to which the evidence relates is not genuinely in dispute; or

(b) the application of those provisions would cause or involve unnecessary expense or delay.

(4) Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection (3), it is to take into account:

(a) the importance of the evidence in the proceeding; and

(b) the nature of the cause of action or defence and the nature of the subject matter of the proceeding; and

(c) the probative value of the evidence; and

(d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

1.6 Voir Dire (Trial within a Trial)

- *Questions of evidence are determined on the voir dire. If there's a question about admissibility or something that has occurred in the trial, the jury will go out and the parties will make submissions to the judge, who will determine that question about evidence. The voir dire is open to the public, it's just the jury that is excluded.*
- *Section 189 deals with the voir dire. S189(1) – preliminary questions on these matters are to be determined in the jury's absence.*

s 189 The voir dire

(1) If the determination of a question whether:

(a) evidence should be admitted (whether in the exercise of a discretion or not), or

(b) evidence can be used against a person, or

(c) a witness is competent or compellable,

depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.

(2) If there is a jury, a preliminary question whether:

(a) particular evidence is evidence of an admission, or evidence to which section 138 (Discretion to exclude improperly or illegally obtained evidence) applies, or

(b) evidence of an admission, or evidence to which section 138 applies, should be admitted,

is to be heard and determined in the jury's absence.

(3) In the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.

(4) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders.

(5) Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account:

(a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the defendant, and

(b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question, and

(c) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).

(6) Section 128 (10) does not apply to a hearing to decide a preliminary question.

(7) In the application of Chapter 3 to a hearing to determine a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.

(8) If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless:

(a) it is inconsistent with other evidence given by the witness in the proceeding, or

(b) the witness has died.

Civil Proceedings

- The correct approach to the standard of proof in a civil proceeding...is that for which s140 of the EA provides: Qantas.
  - But in circumstances where reference was immediately made to s 140(2) of the Evidence Act, the citation of Briginshaw v Briginshaw is not appropriate: Bibby Financial Service v Sharma.
- The test in s 140 is a flexible test based on the standard of balance of probabilities of reasonable satisfaction, which varies according to the nature and circumstances of each case: Qantas.
- There is only two standards of proof, being criminal standard of beyond reasonable doubt and the civl standard of balance of probabilities of reasonable satisfaction: Qantas.
- The matters in s 140(2) of the Evidence Act are a non-exhaustive list of 'matters' that must be taken into account in applying the standard of proof on the balance of probabilities in civil proceedings: Qantas, and its application is not limited to allegations of fraudulent or criminal conduct: Bibby Financial Service v Sharma.
- In civil proceedings, the burdens of proof shifts to the shoulders of the defendant when he has a "case to answer": May v O'Sullivan.

Criminal Proceedings

- The Criminal Trial Courts Bench Book (Judicial Commission of NSW) suggests the direction for a judge to give in explaining the standard of proof:
  - The burden is on the Crown to prove the guilt of the accused.
  - The onus of proof on the Crown is in respect of every element of the charges.The accused bears no onus of proof.
  - The Crown must prove the guilt of the accused beyond reasonable doubt. The expression "proved beyond reasonable doubt" requires no explanation from trial judges.
  - Persons tried are presumed to be innocent, unless and until they are proved guilty beyond reasonable doubt
  - The Crown does not have to prove every single fact in the case beyond reasonable doubt; the Crown bears the onus of proving the elements of the charges BRD (and the trial judge will outline those elements).
  - Accordingly, there is a single ultimate issue in a criminal trial: whether the Crown has proved the guilt of the accused beyond reasonable doubt.
- In a criminal proceeding, no attempt should be made to explain the meaning of "beyond reasonable doubt". The expression must be given its ordinary and natural meaning; it is the subjective view of the jury: Green.
- In a case where the one party misdirect the jury, the judge can properly instruct the jury that such direction ought not to be regarded by them as the source of reasonable doubt: Green.
- In criminal proceedings, subject to contrary intention of legislations, a ruling that there is a "case to answer" has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end: May v O'Sullivan.
- Circumstantial Evidence: Shepherd
  - In a case involving substantial circumstantial evidence, a direction that "guilt should not only be a rational inference, but should be the only rational inference that could be drawn from the circumstances" will be helpful.
    - The direction just means "no inference consistent with innocence is reasonably open on the evidence".
    - But such direction is not helpful, even may be confusing for those cases where the amount of circumstantial evidence involved is slight.
  - A judge is not required to direct jury that each intermediate fact should be proved beyond reasonable doubt in a case where those intermediate facts only consist of strands in a cable rather than links in a chain.
    - In such a case, all evidences can be viewed as a whole to be satisfied of guilt beyond reasonable doubt.
  - However, in a case where the intermediate facts constitute indispensable links in a chain of reasoning towards an inference of guilt, it is appropriate for a judge tell the jury that each fact must be found beyond reasonable doubt before the ultimate inference can be drawn.

Waring of the evidence

- Under circumstances where an appropriate warning of the evidence can be directed to the jury, the weight to be given to that evidence is to be determined by inference based on the jury's collective experience of ordinary affairs as the question whether the evidence is truthful: Doney.
- Direction as to verdict of not guilty
  - A trial judge cannot direct a jury to return a verdict of not guilty notwithstanding the evidence is tenuous, weak or vague, as long as it is capable of sustaining a guilty of verdict: Doney.
  - A verdict of not guilty may be directed only if there is a defect in the evidence and such defect will not sustain a verdict of guilty, other than the reason that the verdict may be set aside in the appellate court: Doney.

2.1 Burden of Proof

Different burdens:
- Burden of proof
- Burden of adducing evidence
  - The burden of adducing of evidence is bore on the prosecution / plaintiff.
  - Sometimes burden of proof and burden of adducing evidence are separate, for example, in case of self-defence, when the burden of adducing evidence is satisfied by the accused, then the prosecution bears the burden of adducing evidence (i.e., disproving) the evidence of self-defence.

The standard of "burden of proof of adducing evidence"
- In a criminal case where the burden bore on the prosecution, could a reasonable jury find the case proved BRD?
- In a criminal case where the burden bore on the accused, for example, self-defence, could a reasonable jury find the accused innocent BRD?

✦ Burdens of proof illustrate who has to establish what.
✦ The Evidence Act does not deal with the allocation of the burden of proof in respect of facts in issue. This is a matter of substantial law. – but the EA deals with the standard of proof.

Legal Burden

✦ Legal burden means the obligation of a party to meet the requirement of a rule of law that a fact in issue must be proved or disproved either on the balance of probabilities (s 140) or beyond reasonable doubt (s 141) (i.e., standard of proof).

	Civil Proceedings	**Criminal Proceedings**
General Rule	Party that alleges a fact must prove it – Usually, the plaintiff bears the onus of proof.	Usually, the prosecution bears the onus of proof to prove all elements of a crime or to rebut available defences: Schedule 13.1, Criminal Code Act 1995 (Cth)
Exceptions	For example, the defendant bears the onus of proving contributory negligence.	For example, defence of insanity – the party raising the issue of insanity, usually the defendant, bears the legal burden of proving insanity on the balance of probability: Porter. (when the prosecution has proved all elements of the crime)

Evidentiary Burden

✦ Evidential burden generally used to refer to whether a party has an obligation to show that there is sufficient evidence to raise an issue as to the existence of a fact in issue (getting past the judge).
✦ Therefore, evidential burden is the obligation to produce evidence to properly raise an issue at trial. Failure to satisfy the evidential burden means that an issue cannot be raised at a court of law.
✦ If this burden is satisfied (e.g. self-defence), the legal burden returns to the opposing party.
✦ One party's duty of producing sufficient evidence for a tribunal to call upon the other party to answer - the obligation to show that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue.

1. Building and Construction administered a statutory scheme for leave provisions for temporary workers in the building and construction industry.
2. There was concern that Apollo was in breach of the scheme.
3. Apollo sought a declaration that its workers who installed prefabricated shower screens, wardrobe doors and shelving were not within the statutory definition of "workers within the industry", which would mean there was no breach.
4. In effect, the plaintiff had an onus to prove a negative proposition (that the class of work was not usually performed by a carpenter).

The court held that the plaintiff must establish sufficient evidence from which the negative proposition can be inferred. The defendant then has an evidential burden to advance in evidence any particular matters with which (if relevant) the plaintiff would have to deal in the discharge of the plaintiff's overall burden of proof.

Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation (1985) 1 NSWLR 561

- In the present case, the court held the burden of proof worked in this way:
- ...where a plaintiff carries the onus of proving a negative proposition and where the defendant has the greater means to produce evidence which contradicts that negative proposition, provided that the plaintiff establishes sufficient evidence from which the negative proposition may be inferred, such evidence being more than a scintilla, the defendant carries an evidential burden to advance in evidence any particular matters with which (if relevant) the plaintiff would have to deal in the discharge of the plaintiff's overall burden of proof.

2.2 Standard of Proof

✦ Standard of proof means to what standard, the evidence must be proved.

> **Dictionary in Evidence Act**
> "**Civil proceeding**" means a proceeding other than a criminal proceeding.
>
> "**Criminal proceeding**" means a prosecution for an offence and includes:
> (a) a proceeding for the committal of a person for trial or sentence for an offence; and
> (b) a proceeding relating to bail;
> but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of Part III of the Taxation Administration Act 1953.

Civil Proceedings

✦ s 140 of the EA provides for the standard of proof in civil proceedings, that is, the balance of probabilities.

> **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.

- s 140, especially s 140(2) reflects the common law positions as to the strength of evidence necessary to establish satisfaction on the balance of probabilities: Qantas Airways Ltd v Gama (2008).
- In Briginshaw v Briginshaw (1938), the court pointed out "the court did not impose on the parties....the same strictness or exactness of proof about all questions arising in a civil trial without regard to their triviality or importance, the unlikelihood or the probability of their occurring".

> - Thus, "'the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved".

- Therefore, the "balance of probabilities" standard is a flexible test, which depends on the serious of the allegation: s 140(2).
- The more serious the allegation, the stronger the evidence required. -- for example, an allegation of fraud is the most serious and thus incurs the highest standard of proof, i.e., the standard of proof for civil fraud is higher than the standard required to prove negligence.
- Direct evidence, admissions, documentary evidence are strongest.
- Further, "without limiting" means s 140(2) is not an exclusive list: Qantas Airways Ltd v Gama (2008).

There are three types of evidence:
(1) Testimonial Evidence – evidence from a witness reporting their perceptions or opinion.
(2) Documentary Evidence – the examination of a document.
(3) Views and Experiments – observations made by the court by attending a scene or conducting some form of experiment.

Qantas Airways Ltd v Gama (2008) 167 FCR 537

1. On 8 December 2006, the Federal Magistrates Court ordered Qantas Airways Limited (Qantas) to pay William Charles Gama, a former employee, $71,692.70 as damages, including interest, for breach of s 9 of the Racial Discrimination Act 1975 (Cth) and s 15(2)(d) of the Disability Discrimination Act 1992 (Cth).
2. The learned magistrate found in Mr Gama's favour that certain racially discriminatory remarks had been directed to him in the course of his employment at Qantas and constituted unlawful conduct under the Racial Discrimination Act. The Court also found that certain of these remarks constituted discrimination under the Disability Discrimination Act. Many other complaints were rejected.

Held,
the appeal allowed in respect of the disability discrimination findings. However, as essentially the same events underpinned the findings of racial discrimination, the damages order was not disturbed.

- In the present case, the court held that "the correct approach to the standard of proof in a civil proceeding...is that for which s140 of the Evidence Act provides. It is an approach which recognises...that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved, and...the circumstances in which it is sought to be proved (Branson J; French & Jacobsen JJ agreeing)."
- This is because the Evidence Act was intended to reflect the common law position as to the strength of evidence necessary to establish satisfaction on the balance of probability.
- The common law position, as reflected in Briginshaw v Bringinshaw is that "reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal".
- Speaking briefly, "in every case, it is necessary to consider not only the nature of the case but also the nature of the particular fact in issue, of which proof is required, including its inherent gravity and unlikelihood".
- Further, the Court through Branson J also stressed that "the common law has not developed a third standard of proof other than the two standards -- the criminal standard of beyond reasonable doubt and the civil standard of balance of probabilities of reasonable satisfaction."
- Finally, Branson J also pointed out "in addition to taking into account the three matters specifically identified in s 140(2) of the EA, it was open to the court to have regard to other relevant matters, which could include the inherent unlikelihood, or otherwise, of the occurrence of the matter of fact alleged and the long standing common law rule that evidence should be weighed according to the proof which it was in the power of one party to produce and the power of the other party to contradict, etc.

1. Appeal concerns the circumstances and consequences of the termination of a contract of employment between the respondent (Mr Sharma) and the appellant (Bibby), the terms of which were recorded in an Executive Service Agreement dated 2 June 2002 (the Contract).
2. The primary judge (Bergin CJ in Eq) found that Bibby had terminated Mr Sharma without cause and was liable to pay Mr Sharma a sum equivalent to six months salary in lieu of notice and a Special Bonus of $1,400,000, plus interest: Sharma v Bibby Financial Services Australia Pty Ltd [2012] NSWSC 1157. Judgment was entered for Mr Sharma against Bibby in an amount of $1,637,266 plus costs. Bibby appeals against that decision.

Held,
the citation of Briginshaw v Briginshaw was not inappropriate, or an indication of error, in circumstances where reference was immediately made to s 140(2) of the Evidence Act.

Bibby Financial Services Australia Pty Limited v Sharma [2014] NSWCA 37

- In the present case, one argument for the appellant was that "in finding that two of the alleged incidents had not been proved - the incident at a lunch with Mr Lea, and the pursuit of a relationship - the primary judge inappropriately had regard to the Briginshaw standard and s 140(2)(c) of the Evidence Act 1995."
- Bibby contended this was not a case where either the principles in Briginshaw v Briginshaw or s 140(2)(c) of the Evidence Act, required any special or heightened approach to the findings of fact by the primary judge. Bibby argued that these principles were limited to findings on the balance of probabilities concerning fraudulent or criminal conduct, and had no application to an allegation of sexual harassment.
- The court held "the citation of Briginshaw v Briginshaw was not inappropriate, or an indication of error, in circumstances where reference was immediately made to s 140(2) of the Evidence Act. This was because:
  - Firstly, the senior counsel who appeared for Bibby at the trial, but not on the appeal, acknowledged in his closing submissions that the Briginshaw standard was appropriate in the present case.
  - Secondly, the primary judge did not err in taking into account "the gravity of the matters alleged" as required by s 140(2)(c) of the Evidence Act. This is one of a non-exhaustive list of "matters" to be taken into account in applying the standard of proof on the balance of probabilities in civil proceedings and its application is not limited to allegations of fraudulent or criminal conduct.
  - Thirdly, s 140(2) of the Evidence Act reflects the principles stated in Briginshaw v Briginshaw, that the requirement that there should be clear and cogent proof of serious allegations, does not change the standard of proof, but merely reflects the perception that members of the community do not ordinarily engage in serious misconduct: Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992]
  - Fourthly, the distinction sought to be made by Bibby between the nature of the behaviour itself (unwelcome sexual advances) and what Bibby contended rendered it serious misconduct (because it occurred in the context of the supervisorial employment relationship) does not detract from the requirement of s 140(2)(c) of the Evidence Act that the Court take into account "the gravity of the matters alleged".

Criminal Proceedings

✦ s 141 provides for the standard of proof in criminal proceedings, namely "beyond reasonable doubt".

> **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.

- The jury is not to be directed about what those words mean: Green v The Queen (1971),
  - The expression is to be given its ordinary meaning.
- Defendant needs only to prove defence on balance of probabilities: s141(2), for example. defence of insanity.
- By comparison, in the UK the expression is explained to the jury as a question of whether they are sure.

1. Green and others were convicted of rape. Green appealed on the basis that the trial judge had improperly instructed the jury as to the onus of proof.

Held,
the jury were not properly instructed as to the onus of proof. For that reason alone there must be a new trial.

Green v The Queen (1971) 126 CLR 28

- This case outlined previous dicta about the danger of attempting to explain what BRD means or substitute other expressions, as it can obscure the true meaning.
- In the present case, the Court held that the trial judge not only confused the jury but misdirected them.
- Instead, the Court pointed out "a reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances. It is that ability which is attributed to them which is one of the virtues of our mode of trial: to their task of deciding facts they bring to bear their experience and judgment...A reasonable doubt which a jury may entertain is not to be confined to a 'rational doubt', or a 'doubt founded on reason'..." – that is to say, the meaning of reasonable doubt should be understood according to its ordinary meaning (by ordinary people)
- But the Court also pointed out in a case, for example, where counsel for the accused has laboured the emphasis on the onus of proof to such a degree as to suggest to the jury that possibilities which are in truth fantastic or completely unreal ought by them to be regarded as affording a reason for doubt it, it would be proper and indeed necessary for the presiding judge to