1. BASIC CONCEPTS

INTRODUCTION

- **The law of evidence**:
  - Regulates the process for ***proving*** **material facts**;
  - (Together with adversary system) Sets up a procedure by which evidence is presented;
  - Determines what evidence a court is entitled to consider in determining whether material facts have been proved
    - Provides rules that in some situations relevant evidence cannot be received, or not received for a particular purpose (eg – evidential rules of admissibility).

BASIC CONCEPTS

MATERIAL FACTS

- **Material facts** = the facts which, if proved, will justify legal claim/defence being put forward by a party →
  - ***The elements of the CoA/offence/defence***
    - Material facts are defined by the substantive law → determine the material facts by examining the legal basis of the claim/defence.

- **In Issue** → Material facts are "**in issue**" when disputed by the parties.
  - *In civil cases*: pleadings, interrogatories & notices to admit operate to narrow & define the material facts in issue.
  - *In criminal cases*: a plea of not guilty theoretically puts all material facts in issue, but →
    - D may tactically limit what is in issue through his defence story (in order to appear credible, eg – if D says he was not at the scene, cannot then also say he did it accidentally)
    - D may formally admit facts (s.34 *SAEA* // s.184 *UEA*)
    - P may serve a notice to admit facts on D (s.285BA CLCA)

    - If D calls no evidence, no inference of guilt can be drawn from his silence (he has a right to remain silent)
      - But if the prosecution case is strong & D does not testify to something clearly within D's knowledge, the jury can take this into consideration in drawing inferences (*Azzopardi*)

How to prove material facts in issue (Evidence → Material facts in issue)

- Material facts in issue are **proved** by the court receiving & considering **evidence** tendered by a party →
  - **All relevant evidence can be tendered** (CL // s.56 *UEA*)

Evidence that can be received by the court

- Only **RELEVANT** *AND* **ADMISSIBLE** evidence can be received by the court for determining whether the material facts in issue are proved or not.
  - Relevance & admissibility are determined at trial when counsel seek to tender the evidence or ask that a jury be directed in respect of the use of evidence in the process of proof

- **Basic rule**: Where evidence is relevant, it must at common law be received by the court & considered by the trier of fact, *unless* the law steps in to exclude the evidence or limit its use [ie. a rule of admissibility]. (cf s 56 *Cth*)

Nature of evidence

- Distinction based on the way evidence is tendered – tendered evidence can take the form of →

- **Testimonial evidence** → testimony of witnesses made to the court about their observations of relevant events.
- **Documents** → containing relevant information (but usually need a *witness* to tell why it's relevant)
  - Testimony in documents (eg – statements and reports of witnesses) is generally excluded as hearsay evidence → witnesses have to give evidence orally
- **Real evidence** → Things that the trier of fact can *directly observe* himself and draw conclusions about from their own direct observations
  - Eg – witness demeanor
  - But real evidence must be authenticated by a witness (that it is what it's purported to be & hasn't been tampered with) in order to make it relevant

- Distinction based on the way evidence proves a fact:
  - **Direct evidence** = No need for any inference to be made from one fact to the other
    - The testimony evidence of an eye-witnesses who saw the event sought to be proved.
  - **Circumstantial evidence** = evidence of a basic fact from which the trier of fact is asked to infer a further fact
    - The evidence does not prove the material fact until the court draws an inference from the evidence to the fact in issue – there are other possible explanations
    - Difficult to satisfy the burden of proof if the only evidence is circumstantial

(A) RELEVANCE (A NATURAL CONCEPT)

- (Relevance describes a ***relationship*** between the *evidence* & *material facts* in issue)

- EVIDENCE IS **RELEVANT** WHERE IT ***TENDS* TO PROVE/DISPROVE A MATERIAL FACT IN ISSUE** → *Goldsmith v Sandilands* [2002] HCA 31 per McHugh J

  - It may do this →
    - Directly or indirectly (eg – credibility of an eye-witness);
    - Alone or in combination with other evidence

  - Determining relevance is **not** deciding whether material fact is proven by the relevant evidence →
    - Only decide whether the evidence can be considered as ***capable*** of throwing light on the question whether the material fact exists
    - Whether the evidence *actually proves* the material facts is to be decided later by the trier of fact

- s.55 *Cth*: Evidence is **relevant** if it could rationally affect (directly/indirectly) the probability of the existence of a material fact in issue.
- s.56 *Cth*: Except as otherwise provided by this Act, relevant evidence is admissible.

- **Irrelevance of identification evidence of D**
- ***Smith v R*** [2001]
  - Testimony from police officers identifying D as the culprit photographed on bank surveillance camera → relevant?
  - Fact in issue = whether D *then* standing trial *is* depicted in the security photos.
  - POs gave evidence at trial that they had previous dealings with D & recognised the man in the photos as D.
  - There was no suggestion that D's appearance changed after the photos were taken.
  - Held → irrelevant under s.55
    - The officers had **no knowledge beyond that of the jury's** to support their identifications – the officers had nothing to add
    - **Material fact in issue** was whether D was the person depicted in the security photos →
    - The police witnesses' evidence of identity was founded on material no different from the material available to the jury from its own observation →

- The police witnesses were in no better position to make a comparison between D and the person in the photos, than the jurors were →
- Their evidence could not rationally affect the assessment by the jury of the fact in issue
    - By the time the evidence had concluded, the jurors had probably spent more time in D's presence than had the officers

- Their evidence was irrelevant & should not be received

- Cf: evidence from a picture of how D looked at the time of the offence would be relevant if it how D now looks at trial is in issue

- Cf: ***R v Goodall***
- Fact in issue was whether D owned a jacket of the kind the offender was shown to be wearing in security photos – such a jacket had been found
- Two officers gave evidence they had seen D wearing this jacket before the robbery
- Held → this evidence was **relevant** to link D to the jacket →
    - Unlike *Smith*, it ***went beyond the bare assertion of the recognition of the person on trial as the person in the photograph***

- **Evidence of identity is relevant if**
    - The witness gave evidence that the man in the photos was wearing a jacket they saw D wear previously;
    - It is suggested that D's appearance at trial differs significantly from D's appearance in the photo; or
    - It is suggested that there is some distinctive feature revealed by the photos which would not be apparent to the jury (eg. manner of walking)

(B) RULES OF ADMISSIBILITY (A LEGAL CONCEPT)

- CL // s.56 *Cth* → Where evidence is **relevant** it must be received and considered by the trier of fact *unless* the law steps in to exclude the evidence / limit its use →
    - Rules of **admissibility** which exclude/limit the use of evidence → the evidence becomes inadmissible for that purpose
    - **Discretionary exclusion**

- Admissibility is a **legal concept**. The law provides rules for determining admissibility →

    - Some rules of admissibility are **defined** (exclusionary rules) →
        - Hearsay rule (out-of-court statements cannot be tendered in order to prove facts asserted in the court, unless the statement is relevant independently of any assertion of fact in it).
        - Legal professional privilege

    - Some rules of admissibility are **not defined** (discretions to exclude evidence)

- There is some difficulty in distinguishing between q of relevance & q of admissibility (eg *Smith*). It can make a difference to the burden of proof:
    - If it's a q of relevance, then the party tendering the evidence bears the burden of convincing the court that the evidence should be considered.
    - If it's a q of admissibility (discretionary exclusion), then generally the burden is on the other side to convince the court that the evidence should be excluded.

- *Cth* → Relevance is a separate concept to admissibility (*Papakosmos*) but →
    - Hearsay evidence is not necessarily relevant under s.55 (*Papakosmos*, Gleeson CJ)

- *Smith v The Queen* → identification evidence irrelevant as police officers had no knowledge beyond the jury to support their identifications

(C) DISCRETIONS TO EXCLUDE RELEVANT EVIDENCE

(1) Sufficient relevance discretion

- Where relevant evidence **throws little light on the existence of the material facts**, a court may as a practical matter refuse to receive the evidence (*R v Stephenson* / ss.135-136 *Cth*)
  - Applies in all cases
  - Barely separable from the concept of relevance → to many judges, relevance means 'sufficient relevance' →
    - Although relevance is a natural concept, sufficiency is a legal rule of admissibility

- See *Smith*, above → insufficient relevance on the facts of that case

  - *Cth* → distinction between 'relevance' and 'sufficient relevance'
    - Relevance defined in s.55(1) *Cth*
    - Sufficient relevance in s.136 *Cth*

(2) Fairness discretion (concerned with risk of error in the trier's decision)

- Evidence can be excluded if its reception would cause D**'s trial to be unfair** →
  - This only happens if there is a sufficient risk that the evidence would mislead the trier of fact into making a wrong decision →

- Examples of unfairness of a trial →

  - **(i)** Where evidence **MORE PREJUDICIAL THAN PROBATIVE** (*Christie* discretion)
    - [such that the evidence is likely to mislead the trier of fact to convict not on the basis of the evidence itself]

    - Eg – if D's presence at the crime scene can be proved through revealing his guilt of another offence, but there is other evidence of his presence, a court may exclude the evidence revealing the other offence as too prejudicial – the jury might convict D on the basis that he is a criminal.
    - Eg →***R v Ames***
      - Gruesome photos of the crime scene admitted into evidence
      - Trial judge found the photos had considerable probative value → they should be tendered
      - Held → judge had a discretion as to whether the photographs were more prejudicial than probative – no reason to doubt the discretion was not exercised properly
        - The photos were gruesome, but that was to be expected and they did have some probative value (as distinct from an oral description)

        - However, it might be argued that if the photos would be of little assistance in the case, they might be excluded as capable of misleading the jury by arousing their sympathies (*Christie*)

    - **Where evidence is merely unreliable** (ie – of doubtful probative value) and this is apparent to the trier, then it **cannot** be regarded as potentially misleading →
      - No reason to exclude the evidence as more prejudicial than probative (*Rozenes v Beljajev*; *R v Tugaga*)

- Unreliable evidence can be dealt with by → (*Rozenes*)
    - Careful directions
    - XXN of crown witnesses by defence
    - Addresses of defence counsel

- **Judge cannot withdraw evidence from jury simply because it is unreliable**
- Mandatory warning for accomplice evidence
- ***Rozenes v Beljajev***
    - W testified against his accomplices, having agreed to an undertaking with Prosecution that W's statements would not later be used against him at trial
    - Trial judge made a ruling to exclude W's evidence as it might have been unfair – general bad character, existence of motives to implicate others, lack of credibility as W was an accomplice of the Ds.
    - P sought declaratory relief
    - Held → appeal upheld →
        - In the circumstances, it was not easy to think of grounds for the exercise of the residual discretion (more prejudicial than probative)
        - The evidence was **unreliable → there is no discretion to exclude evidence that is merely unreliable**
        - The trial was **not unfair** by reason of the unreliability of evidence which was probative → as ***the circumstances which made the evidence unreliable had been properly explained to the jury***
            - **It is for the jury to determine reliability**

- Fairness discretion to exclude **unreliable** evidence?
- ***R v Tugaga***
    - Poor quality of witness' ID evidence → D was a pacific islander → W's had agreed D looked like that and identified D in presence of police
    - Judge did not withdraw evidence
    - Held → appeal dismissed, should withdraw only on rare occasions
    - It is always open to trial judge to ***withdraw evidence of identification from the jury's consideration*** when its quality has been demonstrated to be such that its probative value is outweighed by its prejudicial effect
    - Test → judge may withdraw evidence only if it is so frail that its probative value is outweighed by its prejudicial effect, which falls short to the point where it **cannot be cured by appropriate jury direction**

- s.137 *Cth* → in **criminal cases**, a trial judge ***MUST*** exclude evidence if its probative value is outweighted by the danger of unfair prejudice to the defendant.
    - s.137 *demands* exclusion → effects the nature of the residuary discretion

- **(ii) DENIED PROCEDURAL PROTECTION FOR TESTING RELIABILITY OF EVIDENCE**
    - Eg – the opportunity to test evidence through XXN or other examination

    - *R v Lobban* (police unlawfully destroyed samples of cannabis seized by them from D)
    - *R v Kreig* (D was denied the opportunity to test a blood sample for its alcohol content, due to a hospital delay)
        - Contrast: *Police v Hall* (in the absence of any evidence that such a blood test was inaccurate, the possibility that D might have been able to challenge the evidence if given an early opportunity to test the blood did *not* make it unfair to admit the evidence)
            - Cf: had there been *impropriety* in denying D the opportunity

- **(iii) IMPROPRIETY**
  - An unfair trial may be caused where it can be shown that if investigators had followed correct procedures, the evidence would never have been obtained (*Duke v R*, Brennan J)
    - NB: this notion of fairness is less concerned with rectitude (look to public policy discretion)

(3) Public policy discretion (Bunning v Cross discretion)

- The public policy discretion permits exclusion of evidence →
  - Produced/obtained by illegal/improper conduct (*R v Ireland*; *Bunning v Cross*); or
  - Evidence in relation to an offence procured by the illegal/improper conduct (*Ridgeway v R*)

- *Bunning v Cross*: In exercising the discretion, the court must consider →
  - *The nature & seriousness of the crime;*
  - *The nature & seriousness of the illegality/impropriety alleged;*
  - *The probative value of the evidence;*
    - in determining whether admitting the evidence would [condone illegal/improper police behaviour &] undermine the integrity of the judicial process

- The evidence or the crime must be **caused** or **procured** by the illegality or impropriety (*Question of Law Reserved (1 of 1998)' R v Lobban*; *Robinett v Police*)

- The public policy discretion requires establishing a causal link between →
  - The illegality/impropriety; &
  - The obtaining of the evidence (*Question of Law Reserved; R v Lobban*)

- *Lobban*
  - Impropriety in denying the subsequent testing of evidence that had been legally obtained
  - Held → did not give rise to the public policy discretion

- Cf: *R v Moore* (wider approach)
- The discretion extends to cover subsequent illegality "so closely related" to the evidence that to admit it would undermine the integrity of the judicial process
  - Endorsed *dicta* in *Police v Hall*

- s.138 *Cth* → evidence illegally or improperly obtained *must* be excluded unless the party seeking admission can convince the court otherwise →
  - Effectively reverses the onus when the public policy discretion is invoked

Moreover, the trial judge has a broad 'public policy' discretion to exclude evidence obtained improperly,[1] notwithstanding that the document may otherwise be admissible. As established in Southern Equities,[2] this discretion is available in civil proceedings. Unlike in Lobban,[3] this document was clearly acquired in consequence of the impropriety – it was effectively stolen. Given the confidential nature of the memo and the considerable impropriety represented by obtaining it unlawfully, it would seem the discretion ought to have been exercised in this instance. To subsequently admit the evidence undermines the court's integrity by giving 'curial approval' to the impropriety.[4]

Overlap between fairness & public policy discretions

- Where evidence is obtained as a consequence of improprieties, the fairness and public policy considerations are in a sense combined →
- *R v Swaffield*; *Pavic v R* →

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1 *Bunning v Cross* (1978) 141 CLR 54.
2 *Southern Equities Corporation Ltd (in liq) v Bond* [2001] SASC 70, 63-129 (Lander J).
3 *R v Lobban* (2000) 77 SASR 24.
4 See *R v Moore* (2003) 6 VR 430; *R v Lobban* (2000) 77 SASR 24.

- In the case of illegally/improperly obtained evidence, of whatever kind, then as a matter of public policy, determine whether a conviction based on such evidence **would be bought at too high a price having regard to contemporary community standards**
- This confines the fairness discretion to issues of rectitude.

- The better view is that only 2 discretions apply, regardless of whether the evidence is confessional or not
  - Cf: *R v Lobban* →
    - **Confessional evidence** → the fairness and public policy discretions are combined
  - **Compared with;**
    - **Other evidence obtained through impropriety** → exclusion must be considered separately →
      - (i) First, as a matter of fairness (not limited to issues of rectitude); then
      - (ii) Second, as a matter of public policy
  - Cf: *Police v Hall*
    - Court did not disapprove of *Lobban* → held
    - In the absence of any real question about rectitude *or any evidence of impropriety* the unfairness discretion was not enlivened

- **CTH** →
- s.135-8, s.90
- s.90 *Cth* → confessional evidence may be excluded where it would be 'unfair' to D to use it in evidence →
  - Proper approach is to →
    - Define 'fairness' in terms of rectitude of decision (for s.90) →
    - Leave the effect of impropriety in obtaining evidence to s.138

- The discretions are principally of importance in criminal cases, but no reason why they may not also be appropriate in civil cases

Discretions to give leave (Other Discretions)

- Examples of evidentiary contexts in which the court's leave is required:
  - *Witness referring to notes in-court;*
  - *Witness being asked leading questions or cross-examined by the party calling him;*
  - *Accused being cross-examined on prior convictions;*
  - *Witness being re-examined;*
  - *Witness being recalled;*
  - *Party re-opening his case.*

- The granting of leave really just depends on the application of the evidentiary rules in question – but many of these rules are open-ended, and so leave is regarded as discretionary (in the sense that an appellate court won't interfere unless the trial judge acted upon some erroneous basis or failed to take account of a relevant consideration).

- s.192 *Cth* provides that in granting leave, the court must take into account (makes FORMAL provisions for granting of leave):
  - *The extent to which the decision might unduly lengthen the trial;*
  - *The extent to which the decision might be unfair to a party/witness;*
  - *The importance of the evidence;*
  - *The nature of the proceeding.*

- *Stanoevski v R*: Failure to consider these matters is a ground for appeal

SOURCES OF EVIDENCE LAW

- Application of evidence legislation depends on the *court* you are appearing before (NOT the *jurisdiction* that the court would be exercising).
- **SA COURTS** follow the common law of evidence as modified by the *Evidence Act 1929* (SA).
- **FEDERAL & ACT COURTS** follow the *Evidence Act 1995* (Cth) [*Cth*] (s.4).
    - The *CEA* doesn't apply in SA courts merely because they are exercising federal jurisdiction – only to Federal courts in s.4
    - *CEA* codifies the common law exclusionary rules in s.56(1): "Except as otherwise provided by this Act, all relevant evidence is admissible".
- NSW & Tasmanian courts same as *CEA*

CIVIL & CRIMINAL CASES

- Rules of evidence apply in **both civil and criminal cases** (insofar as they define a process of adversarial proof) →
- Insofar as evidential rules exclude/control the tender of evidence because of the risks of unreliability, they are of much greater practical concern in **criminal cases**.
- Special rules in **criminal cases** →
    - Exclude evidence of D character;
    - Control the reception of confessional evidence [& evidence obtained by police illegality/impropriety];
    - Require warnings to be given to juries in the case of unreliable witnesses

JUDGE & JURY ROLES

- A **jury's** role is to → decide the facts which are legally determinative of the case.
- A **judge's** role is to →
    - Decide *which* facts are legally determinative of the case;
    - Decide what evidence counsel can put before the jury to prove those facts; and
    - Direct the jury about how that evidence can/cannot be used by them in finding the facts proved
- Judge decides disputes about legal questions following argument of counsel
- Voir dire hearings →
    - Held to determine the facts upon which the admissibility of the evidence depends

PROCESS OF PROOF

Burden of proof

- Generally P bears the burden of proving that the material facts exist to the required standard of proof → both **legal and evidential** burden
    - NB: if D pleads insanity, bears both the legal and evidential, but to the civil standard

- At common law:
    - The party tendering evidence has the obligation to persuade the court that it is relevant.
    - The opponent generally has the obligation to persuade the court to exclude relevant evidence in exercise of the residuary discretion.

- Under *Uniform Acts*:
    - ss.135-6 only apply where the opponent can show the relevance is "substantially outweighed" by the stipulated considerations.
    - s.137 *demands* exclusion in criminal cases where the evidence is unfairly prejudicial.

- s.138 excludes evidence shown to be illegal/improperly obtained, unless the party seeking admission can convince the court otherwise (effectively reversing the onus where the public policy discretion is invoked)

Standard of Proof

- Criminal → The material facts must be proved **beyond reasonable doubt** (s.141(1) *Cth*)

- Civil → The material facts must be proved on **the balance of probabilities** (s.140(1) *Cth*)

  - ***Civil Standard of Proof*** – Balance of Probabilities
    - *Briginshaw Test* – factors to take into account when determining if satisfied:
      - The seriousness of the allegation made
      - The inherent unliklihood of an occurrence of a given description
      - The gravity of the cosequences flowing from a particular finding

- Proof is always for the court (jury) to determine

How evidence proves the material facts in issue

- Proof is a process of inference from evidence to material facts. Whether inferences are drawn depends on the knowledge & experience of the person drawing the inference (eg – common sense).
  - Where the evidence is direct, generally the question of proof turns on whether the witnesses are credible.
  - Where the evidence is circumstantial, the question of proof turns on what competing hypotheses might explain all the tendered evidence

Jury reasoning

- *Links in a chain of evidence // strands in a cable of evidence*
  - If a link in the chain is absent, the ultimate material fact will not be found

- *Mathematical theories of proof* (eg – Bayes Theorem)
  - *Adams* – these are too complicated for a jury to understand and may interfere with the decision making process

Directions to juries

- *Shepherd v R*:
- In directing juries on the **standard of proof**, it is enough to say that →
- The case as a whole must be "proved beyond reasonable doubt".
  - There is no need to analyse its meaning for it can only confuse (*Green v R; R v Puhuja*)
  - There is no need to analyse particular inferences & direct the jury to apply the criminal standard to them

  - BUT sometimes the jury might need assistance if counsel refer to **'indispensable intermediate facts'** which logically require proof BRD if the case as a whole is to be proved (see below) (*Shepherd*, *Kotzmann*)

- *Shepherd v R*: In **criminal cases** turning on **circumstantial evidence**, the jury should be directed to eliminate all reasonable hypotheses consistent with innocence before finding D guilty of the Crown hypothesis (in order to avoid miscarriage of justice).
  - [So – if D puts up possible alternative hypotheses, judge must tell jury that they must eliminate those possible hypotheses before finding that the prosecution case is made out BRD.]

- *Shepherd v R*: The jury may draw an inference of guilt having regard to the *whole* of the evidence, whether or not each individual evidence relied upon is proved BRD →

- So not every basic fact relied upon to prove an element of the crime by inference must itself be proved BRD.

- *Shepherd v R*; *R v Kotzmann*: If it is appropriate (in the circumstances of the case) to identify an **indispensable intermediate fact**, it may be appropriate to tell the jury that that fact must be proved beyond reasonable doubt before the ultimate inference of guilt can be drawn
  - If the jury might not appreciate this
  - What is an **"indispensable intermediate fact"** →
    - (a) A necessary link in a chain (as opposed to a strand in a cable) of reasoning towards an inference of guilt
      - Eg – a particular inferential analysis, which logically requires an intermediate fact to be inferred BRD if the case as a whole is to be so proved (eg – D's vicinity to the crime) →
        - If the jury might not appreciate this, they might have to be directed accordingly if a miscarriage of justice is to be avoided
    - (b) A fact that is not a necessary link in a chain towards an inference of guilt, but:
      - (i) has a strong importance in the case (eg – in *Chamberlain*, the fact that the blood in the car was foetal blood); or
      - (ii) is emphasised by counsel to the jury to be very important (eg – *Kotzmann*).

- *Adams*: Numerical analysis (eg. Bayes' Theorem) is an inappropriate method for use in jury trials

APPEAL

- An evidential error is an error of law
  - Eg – inadmissible evidence received
  - Eg – jury inadequately directed about the use of evidence before it

- s.353 *CLCA* →
  - Permits appeal where there has been an error of law; BUT
  - Appeal can be rejected if there has been "no substantial miscarriage of justice"
    - Eg – appellate court thinks that conviction would have been inevitable even if no error had occurred

- *R v Kotzmann*: Even if there is no particular error, an appeal can be allowed if the court feels that overall there has been "a miscarriage of justice".

- *Denis Adams*:
  - Trial judge concentrated his directions on the Theorem that had been presented by the defence, without indicating the more commonsense and basic ways in which it would have been open to them to weigh up the relative weight of DNA evidenc
  - Held → failure to direct the jury adequately
  - Evidence of the Bayes Theorem or any similar statistical method of analysis of evidence is inappropriate for use in jury trials

2. BURDENS OF PROOF, SUBMISSIONS, JUDICIAL NOTICE

PARTY PRESENTATION

- Evidential principles, rules and legal consequences flow from this:
  - *(a) The incidence of the burdens of proof in a particular case*
  - *(b) If one party has the burden of carrying forward the evidence in a case, then the opponent is entitled to have the case terminated if that evidence is not adduced ('no case to answer')*
  - *(c) The court cannot act on its own knowledge in deciding whether material facts are made out*
    - *Courts cannot call witnesses*
    - *Courts may ask questions to clear up ambiguities*
    - *Courts can take 'judicial notice' of facts*
    - *Courts must use their general knowledge and experience in deciding what inferences to draw from the evidence tendered*

(A) THE NATURE AND INCIDENCE OF THE BURDENS OF PROOF

- There are 2 adversarial burdens → (as stated in ***Braysich v R*** [2011] HCA 14 at [33])
  - **EVIDENTIAL BURDEN OF PROOF →**
    - The burden of adducing relevant evidence of a material fact in issue
    - Must adduce to the court evidence from which the court can find facts you want to prove
  - **PERSUASIVE (LEGAL) BURDEN OF PROOF →**
    - The burden of persuading the court that the evidence proves the material fact in issue [to the required standard]

- The legal consequences if the burdens are not satisfied:
  - **Evidential burden of proof**
    - If a party bears an evidential burden, and fails to adduce relevant evidence of the material fact in issue → the other side can submit a *"no case to answer"* in relation to that fact.
  - **Persuasive burden of proof →**
    - If a party bears a persuasive burden, and fails to persuade the court of the existence of the material fact in issue to the required standard, then the fact is not proved

- The burdens are allocated by the law issue by issue, and won't necessarily be on the same party on a particular issue.
  - Eg of split burdens → In a causation issue, D bears an evidentiary burden to adduce evidence to show that it was P's own negligence which caused P's loss. Having adduced evidence on this point, P bears the persuasive burden to show that on the balance of probabilities, the loss was caused by the breach of contract, and NOT caused by his negligence

- **Tactical burden** may lie on a party to adduce countering evidence where the case against him is strong & the trier of fact will probably find against him in the absence of further evidence.
  - There are no *legal* consequences if the tactical burden is not satisfied

D's Right to Silence

- D's failure to present evidence *within his knowledge* which would explain the P evidence against him, **can** be taken into account in deciding whether to accept inferences that may independently be drawn from P's evidence.
- ***Weissensteiner v R***
  - P presented circumstantial evidence to infer D's guilt.

  - D chose not to testify.
  - Trial judge directed the jury that although D's guilt cannot be inferred from his failure to testify, "an inference of guilt may be more safely drawn from the proven facts when a D elects not to give evidence of relevant facts which could be perceived to be within his knowledge."
  - Held → this direction was permissible.
    - Cannot draw an inference of guilt merely from silence
    - Cannot use D's silence at trial as evidence to fill in any gaps in P's case.
    - **Can** draw an inference of guilt more safely from P's circumstantial evidence if D has not supported any hypothesis which is consistent with innocence from facts which the jury perceives to be within D's knowledge

- *Azzorpardi*
  - Can only draw an inference against D from D's silence regarding a material fact, if that fact was peculiarly within the knowledge of D (ie. evidence on the material fact couldn't have come from anyone else)

INCIDENCE OF THE BURDENS OF PROOF

CIVIL CASES

- Generally:
  - **P** bears both burdens in relation to the **material facts essential to establishing the CoA**; while
  - **D** bears both burdens in relation to the **material facts essential to establishing any defences / counterclaim**.

- **D** bears an evidentiary burden in relation to **material facts that negate the existence/occurrence of the CoA** (otherwise P must negative all unlikely circumstances in advance, which is impossible) (*Purkess v Crittenden*)

- In a particular case **burdens may be allocated differently**
  - ***Purkess v Crittenden*:**
    - P sued D for personal injury.
    - Persuasive burden was on the P to establish causation of injuries from the accident
    - D wanted to defeat P on the ground that the injuries were pre-existing
    - Held →
      - In relation to the issue of **pre-existing injury** →
        - The evidential burden was on D →
          - *It was up to D to raise evidence of the possibility that injuries were pre-existing, before the court would consider it*
          - And once this burden is satisfied →
        - The persuasive burden was on P →
          - *To satisfy the court that no such pre-existing injury existed*

CRIMINAL CASES

- ***Woolmington v DPP***: Generally, the **P** bears both the evidential and persuasive burdens in relation to all the **material facts of the crime charged**

- **Exceptions** →

Defences

- **D** wishing to raise a **defence** (eg – self-defence, provocation) bears the evidentiary burden to adduce credible evidence of their reasonable possibility
  - Once there is this evidence → P bears the persuasive burden of showing beyond reasonable doubt that the defence does not arise on the facts

- **(Exception) D** wishing plead **insanity** bears both evidential and persuasive burdens in relation to issue →
    - D must adduce evidence *and* persuade the court of such insanity
    - But standard of proof is the balance of probabilities

Statutory offences – legislative reallocation of burdens

- There is a *presumption* that **P** bears both burdens in relation to **all the material facts** (*Woolmington v DPP*) →
    - Courts should be reluctant to interpret legislation as placing burdens on D
    - Needs clear words to displace the *Woolmington* presumption

- If legislation expresses that a D bears the burden of "**proving**" a defence →
    - This has been interpreted as placing a persuasive burden on **D**
        - (to show that the defence applies, although only on the balance of probabilities)

Exceptions / provisos / excuses to offences

- Where legislation expresses an **"exception / proviso"** to an offence →
    - Courts are prepared to place a persuasive burden upon **D** (the rule in *R v Jarvis*)
    - Particularly where those matters within the exception / proviso are within D's knowledge (the rule in *R v Turner*)
    - s.56(2) *Summary Procedure Act* → both burdens in relation to that exception/proviso are on **D**
    - But can argue → In light of the *Woolmington* principle, Parliament should be taken to cast an evidential burden only upon D unless it expressly states that a persuasive burden should be borne.

- **What is an exception / proviso – is something an exception/proviso?**
- ***Dowling v Bowie*** (1952) HC
    - D was charged with selling liquor to Abo under *Liquor Act*.
    - *Liquor Act* allowed the Protector to declare that any Abo is not an Abo for the purposes of the Act (an exemption)
    - P did not adduce evidence that the Abo was not exempt under the declaration.
    - D was convicted, & appealed on the basis that → P failed to meet its burden on the issue of exemption
    - Held →
        - Pro had access to Gazettes & an official list of exempt Abos → P would have no difficulty in proving that the Abo was not exempt, but D would →
            - It would be unfair to put the burden on D
            - The fact of exemption is not an exception/proviso → burden is on P to offer evidence of non-exemption → conviction quashed
    - [Can argue the other way: As a matter of policy to reduce drunk Abos, the burden should be on D rather than P.]
    - **How is an exception/proviso determined →**
        - By looking at the form of the legislation
        - By considering all relevant circumstances [including policy]
        - It is ultimately a matter of statutory interpretation

- **If an element of the offence is peculiarly within D's knowledge, and D fails to offer an explanation of that issue → very little P evidence will satisfy the burden**
- ***Donoghue v Terry***
    - *Motor Car Act* prohibited using "any motor car without the consent of the owner or person in possession".

- D gave no evidence, and was convicted.
- D argued that P had the burden of proving consent
- Held →
- The issue of "without consent" is **not** an exception / proviso / excuse → it is an essential element of the offence →
    - The burden of proof thus rests on P →
        - P must give evidence that there was no consent

    - But very little evidence will satisfy that burden, because knowledge of the consent is a matter peculiarly within D's knowledge →

    - There was some evidence of absence of consent, and was no evidence to the contrary →
        - That was sufficient to determine the case (that consent had not been given)

PRESUMPTIONS

- A CL technique for allocating burdens of proof
- Characterised by reference to the effect they have on the burdens of proof (persuasive / evidential)

- **Presumption of innocence** →
    - A general rule
    - Effect → casts the burdens of proving material facts of crimes upon P

- **Presumption of death** (a persuasive presumption)
    - Arises only upon *proof* of a person's absence for 7 years from those whom one would expect to have heard of his whereabouts → death is presumed at the time of the action →
    - There is an evidential & persuasive burden on the opponent to show that the person is still alive on the balance of probabilities

- **Presumption that commonly used scientific instruments are accurate** (evidential presumption)
    - But → once there is *evidence* of an instrument's inaccuracy →
    - The party relying on the instrument's accuracy must persuade the court that it is accurate.

- Presumptions of fact: **Cf *inferences* of fact** →
    - When inferences of fact arise, **no** burden is placed on an opponent
    - Eg – doctrine of *res ipsa loquiter* gives rise to only an inference of fact, and places no formal burden on D (although if the inference is strong, a tactical burden may lie on D to adduce countering evidence).

- Presumptions arising within the one fact situation must be carefully applied to determine which party bears the burdens of proof and upon exactly which issues

(B) SUBMISSION OF NO CASE TO ANSWER

- Where P (plaintiff/prosecutor) **FAILS TO SATISFY THE EVIDENTIAL BURDEN** →
    - D has an adversarial entitlement to submit "**no case to answer**" and **have the case dismissed**
        - (NB: effect is a res judicata of the case)

- Evidential burden satisfied by adducing evidence capable of supporting the material facts →
    - The *weight* and *sufficiency* of the evidence is **not** considered at this stage (*Tepper v DiFrancesco*) though it is difficult to altogether put aside sufficiency

CRIMINAL CASES

- **(i) Submission of "no case to answer"** (no case to answer on the law)

    - ***That on the evidence as it stands D could not lawfully be convicted because there is no evidence with respect to every element of the offence charged which, if accepted, would prove that element***

    - At the close of P's case, D has an *absolute right* to submit that there is no case to answer → on the basis that the evidential burden has not been satisfied

        - If P fails to satisfy its evidentiary burden of proof in relation to any material fact essential to establishing the charge → there is no case to answer and →
            - The judge must acquit D (or direct the jury to acquit D)

        - King CJ in *R v Billick and Starke*: *The evidential burden is satisfied by adducing some evidence which, taken at its strongest, and drawing all favourable inferences, is capable of persuading a reasonable trier of fact beyond reasonable doubt that the material fact exists.*
            - Consider practical consideration – could Pro have adduced other better evidence?
            - *Tepper v Di Francesco*: The weight, credibility & sufficiency of the evidence is not considered at this stage.

    - **Direction to jury →**
        - If no case to answer → the judge should direct the jury as a matter of law that there must be a verdict of not guilty, and the jury is bound to accept and act on that *direction*

    - **Where a judge sits alone** (also the trier of fact) →
        - Submission of 'no case to answer' must be determined when made

    - If a judge erroneously rejects the submission of no case to answer, it is an error of law & ground for appeal.

    - **Defence put to their election →**
        - **No.** The judge must consider the no case submission, even if D does not elect to call no further evidence (*Tepper v Di Francesco*)

    - NB: If there is *some* evidence which might prove the relevant part of the offence, make a sufficiency submission →

- **(ii) Sufficiency submission / *Prasad* submission** (no case to answer on the facts)

    - ***There is insufficient evidence to justify a conviction, notwithstanding that there is evidence on which D could lawfully be convicted, if the court considers that the evidence is so lacking in weight and reliability that no reasonable court could convict on it***

    - D *may request* the judge at any stage (usually at end of P's case) to exercise his discretion to acquit D early (or ask the jury to consider it) on the ground that →

        - (i) The evidence is **too weak** to persuade a reasonable trier of fact beyond reasonable doubt → there is no possibility of the evidence persuading the trier; or

        - (ii) The evidence is so unsatisfactory (lacking in weight & reliability) that it would be **unsafe to convict** upon it – cannot safely be acted upon (*R v Prasad*).

    - If P satisfies the evidential burden, there is a case to answer →
        - D has *no right to ask* that the jury be directed to acquit on the basis that the case is weak