

# Evidence 70109

## Week 1/23 July Lecture:

*Introduction to evidence*

*Proof and presumptions*

*Structure of Evidence Act admissibility*

Subject is designed to give you a good working insight into the **Adjectival Law** that is associated with the Law of Evidence.

These aspects of the Law are very practical and will require us to look at how the various rules and protocols are applied.

### Truth – What does it mean ??

- What is not incorrect
- Proof of what is happening
- Accurate information
- Different versions of the truth
  - this causes issues in court--> difficult concept.
  
- Some of the central questions that concerns us when studying Evidence are:
  - What really happened ?
  - Who can we believe ?
  - How do we know if something is true ?
- How can the law help us decide:
  - What is true ?
  - What is reliable ?
    - Reliability needs certain parameters.
    - Can be used in circumstances to reach an outcome.
    - Expert witness may be more reliable then a lay person.
    - Reliability and truth go hand in hand→ yet different concepts
  - What really happened?
  
- Questions of ‘truth’ are asked in every discipline.
  - A scientist has specific tools and techniques for drawing conclusions, based upon hypothesis and experimentation.
  - A philosopher examines ‘truth’ by evaluating(human) experience through logic and deduction Reasoning.
  - A religious person’s ‘truth’ might be a matter of faith.
- Need to be careful when talking about ‘truth’ in law, because it is a very **specific type of truth**.
- Truth must be used in a specific wayà must understand what words mean and how they work in the law.

### Proof

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

- “A court of law is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it”. (Viscount Simon LC in *Hickman v Peacey* [1945] AC 304, cited in Spigelman).
- **In the law, we refer to this type of truth as “proof”.**
- Types of truth revolves around ‘Proof’

<u>ELEMENTS (Facts in Issue)</u>	<u>PRIMARY FACTS</u>	<u>EVIDENCE</u>
<u>Actus reus</u> • <u>The Accused (A)</u> • <u>Did an act</u> • <u>Causing death of V</u> <u>Mens rea</u> • <u>Intent to kill</u> • <u>Intent to inflict GBH</u>	- <u>A stabbed V 20 times in the chest</u>	• <u>CCTV recorded crime (document)</u> • <u>W witnessed the crime (oral testimony)</u> • <u>Murder weapon (real evidence)</u>

- Quotes mean that the – ultimate quest is not the truth one must prove it/must show that the procedure adopted is a methodical process
- Legal truth+ proof.

### Proof Making Models

- Primary facts- accused stabbed victim 20 times
- Is there enough proof to show the truth
- **Primary facts 1st, elements 2<sup>nd</sup>, evidence 3<sup>rd</sup>**
- Primary facts is not enough for court, in order to prove guilt, must prove every element of the facts.
- Elements → each must be proven → in order to prove need some type of evidence to support the accusation (act, cctv, confession etc).
- Is there any other evidence to show the act took place? Weapons, fingerprints.
- 4<sup>th</sup> column on spreadsheet would be → the evidentiary admissibility issues e.g. CCTV impediments. To overcome

### Proof

- Raises the question of who has to prove what and to what standard.
- The law refers to these requirements as:
  - **Burden of Proof**
  - **Standard of Proof**
- The concepts that underpin these requirements are important within the law of evidence because they help ‘the system’ to ensure the rights of the various parties are protected and also help provide fairness and consistency to the litigation process.
- Utilizing the laws and rules of evidence → (parties have burden of proof and certain standard) protects rights of parties. Providing fairness and consistency to the litigation process.

### Burden of Proof

- Mere accusations do not prove a crime / action.
- In order for a person to be found liable the facts of the case must be established to the satisfaction of the Court.
- Burden of Proof may also be referred to as the **Onus of Proof**.
- Different Burdens of Proof may be applied in certain circumstances:
  - **Legal Burden** of Proof
  - **Evidential Burden** of Proof

## Standard of Proof

- In a criminal case it is the **Prosecution** that bears the onus of proving the guilt of the Accused.
  - It is not up to the Accused to prove his / her innocence.
- Refers to the obligation of proving all elements of the offence / action.
- The case that must be made by the Prosecution so as to persuade the Court that the Accused is guilty.
- In a civil matter it is the party who makes the assertion (in their pleadings) who must prove that assertion.
- Obligation on Plaintiff in civil matter → party to prove what they asserted
- Obligation On plaintiff in criminal matter → idea that prosecution must persuade court that the accused is guilty in each and every element of the offense.

## Legal Burden of Proof—Criminal Case

- *Woolmington v DPP (1935) AC 462*

Lord Sankey: “Throughout the web of the English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt”

## Evidential Burden of Proof

- The burden a party must meet to demonstrate to the Court that an allegation / assertion / defence has sufficient foundation for evidence to be taken on that particular issue.
  - Defendant raises it holds burden to show that it has the same validity to do it.
- It is the obligation to produce sufficient evidence on a particular proposition to render that issue worthy of consideration by the Court.
- Normally operates when the Accused raises a defence to the crime.
- If the Judge determines that insufficient evidence has been presented, the Judge will not allow the Jury to consider the issue as part of the evidence.
- Defendant raises it holds burden to show that it has the same validity to do it.
- If judge finds the evidence is not sufficient → won’t go forward or be considered by the court.

## Evidential Burden of Proof—Criminal Case

- *The Queen v Khazaal [2012] HCA 26*
- *Khazaal* accused of knowingly making a document connected with terrorist act, contrary to s **101.5(1) of the Criminal Code (Cth)** .
- *Khazaal* relied on evidence adduced by the prosecution concerning his status as an accredited journalist and researcher with an academic interest in Islam – he claimed that this is why he made the e-book. *Khazaal* argued that this evidence suggested a reasonable possibility that the making of the e-book was not intended to facilitate assistance in a terrorist act.
- HCA held that evidence relied on was not inconsistent with the alleged purpose of facilitating violence and that there was insufficient evidence to support his contentions (defence).
- Basically he failed to meet the Evidentiary Burden of Proof that was placed on him

## Standards of Proof

- Standard of Proof refers to the **level of proof required to meet the Burden of Proof** (strength of proof).
- In criminal cases the Prosecution must prove the Accused person’s guilt **‘beyond reasonable doubt’**. (*s141 Evidence Act refers*)
- Beyond reasonable doubt is a difficult standard to meet – no mathematical formula → Ordinary everyday meaning.

- In civil matters the party seeking to prove an allegation contained in their pleadings must convince the Court ‘**on the balance of probabilities**’ – i.e. more likely than not. (s140 EA refers) e.g. 51% ← mathematical formula. Lower threshold.
- For Evidential Burdens, the Standard of Proof is the lower standard of ‘**on the balance of probabilities**’ – ie more likely than not.
- How strong does the proof/evidence need to be

### Standard of Proof—Criminal

- There is longstanding authority for the proposition that, except in certain limited circumstances, no attempt should be made to explain or embellish the meaning of the phrase “beyond reasonable doubt”: see *Green v The Queen* (1971) 126 CLR 28
- Generally, for Circumstantial Evidence cases there is no requirement for each piece of circumstantial evidence to be proven beyond reason doubt - the evidence must be considered as a whole and not by a piecemeal approach to each particular circumstance (unless the circumstantial fact is so fundamental to the reasoning process. : see *Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56, per Dawson J at 578

### Standard of Proof—Civil

- In civil matters, the strength of the evidence that is required to make a case “on the balance of probabilities” will really depend on the type of case it is.
- The “balance” of probabilities must have actually shifted so that the trier of fact must feel an “actual persuasion” of the occurrence or existence of particular facts before they can be found.
- The standard of proof must be met “clearly” or “strictly” or “with certainty”.
- The following cases make it clear that the strength of evidence necessary to satisfy the civil standard will vary depending on the gravity of the allegations and the consequences for a party of its outcome.
- *Briginshaw v Briginshaw* (1938) 60 CLR 336 – this case involved a petition for divorce based on adultery. Adultery was not a crime (although it was characterised as quasi-criminal behaviour) but a presumption of innocence applied. Briginshaw testà the more grave the allegations the higher the standard gets → particularly in allegations of fraud.
- *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 – this case involved deceit over the worth of a business and the subsequent rescission of a contract.

### Judicial Notice

- **Not all facts before the Court need to be proven.** There are certain things that the law has decided do not need to be proven.
- These facts are referred to as **common knowledge** in EA (s144 refers). Also sometimes referred to as “**notorious facts**”.
- Where the court thinks something is common knowledge, **they will not require any evidence to be adduced about it**, and can take judicial notice of that fact.
- Do not need to be re-proven every time they arise in court. As in decisions gone before.
- Judicial notice can also apply to matters of **common sense**. E.g. A court once took judicial notice of the fact that drugs are heavier when they are wet than when they are dry.
- In *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, the HCA took judicial notice of the tenets of Marxist-Leninism. Court **held that no evidence needed to be called to prove what political and economic principles Marx and Lenin stood for**. The court also took judicial notice of certain events in the history of communism.

- Don't need to prove everything.

## Evidence

What is evidence?

- Evidence is the information (facts) received by the Court in its efforts to determine the existence of some other matter of fact. Sometimes referred to as a **proof model (table)**.
- "it encompasses, in my view, at least all of those matters which one party must prove in order to succeed in the proceeding and that the other must prove to establish its defence" per **Branson J**
- Why do we need rules / laws that govern the use of evidence? Can be excluded based on one of the following
- Three **main reasons**:
  - Fairness – a way of ensuring that the parties are treated fairly.
  - Efficiency – a way of limiting extraneous material to ensure the effective and efficient conduct of Court matters.
  - Standardisation – allows for a degree of standardisation across all Court matters (consistency and certainty).
    - Consistency and certainty
    - Relying on precedents to provide client with the best advice. (based on my knowledge of the law etc.. You will have difficulty providing your case, my advice is do not bring forward the matter.

## Uniform Evidence Legislation

- Originally we had the Common Law Rules of Evidence – very complicated, convoluted and difficult to apply.
- In year 1980's ALRC conducted inquiry into problems associated with evidence.
  - Resulted in **Uniform Evidence Acts (1995)** in NSW and Cth jurisdictions
  - Since that time other States and Territories have adopted the approach. (ACT, TAS, VIC)
  - Although the various Acts are described as 'Uniform', there are some differences between them.
- This legislation → standardization for evidence

## Evidence Act Structure

- In NSW, the use of evidence in both Criminal and Civil matters is governed by the *Uniform Evidence Act 1995* (EA)
- Structure of EA is designed to allow for a more **systematic approach to the assessment of admissibility**.
- then once they are in → how can we use/utilize them,
- Under the EA, every piece of evidence needs to be **rigorously assessed to assess whether, or not, it is admissible**.
- Broken into major Chapters including:
  - Chapter 1 - Preliminary matters (application of the Act)
  - Chapter 2 - Adducing evidence
  - Chapter 3 - Admissibility
  - Chapter 4 - Proof
- Under the EA, evidence may be classified as either:
  - Testimonial (oral / written evidence given by a Witness)
  - Documents (papers, electronic recording etc)
  - Other (views, re-enactments, real evidence - eg the weapon)
- EA allows the Court to ensure that facts are proven in a methodical and consistent manner.

- Under the *Uniform Evidence Act 1995* (EA) evidence is based on admissibility through:
  - The concept of Relevance.
  - The use of Exclusionary Rules.
  - The Use of Discretionary Rules
- Aim is to be more 'Inclusionary' than 'Exclusionary'.
- Three stage process; is it relevant, are there any exclusionary rules (exception to rule), discretionary rule as to exclude that evidence.

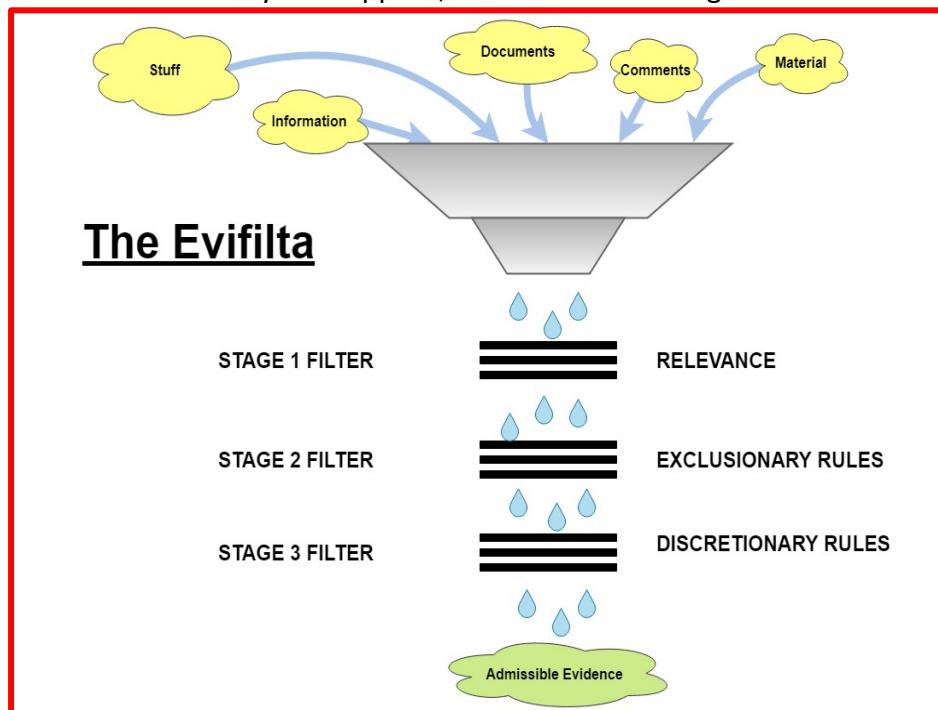
### Admissibility- A 3 Stage Process

- In assessing the admissibility of evidence the Court undertakes a three stage process where each threshold must be met before moving to the next step:

1. Relevant / Not Relevant ?

2. If Relevant, are there any Exclusionary Rule that apply ?

3. If no Exclusionary Rule applies, should the Trial Judge use Discretion to exclude the evidence ?



### Week 2/Tutorial 1: Reading:

Students should reflect on and apply the critical reading exercise below while reading the two articles prescribed for the tutorial accessible on UTS Online:

Katherine Biber, 'Law, evidence and representation' in Michelle Brown and Eamonn Carrabine (eds), *Routledge International Handbook of Visual Criminology* (Routledge, 2017) 13-22.

Available at: <https://drr.lib.uts.edu.au/search.html?q=70109>

Reg Graycar, 'The Gender of Judgments: An Introduction', in M. Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 262-282

Available at: [https://online.uts.edu.au/bbcswebdav/pid-1275336-dt-content-rid-7274128\\_1/courses/70717/GraycarSSRN-id1465171.pdf](https://online.uts.edu.au/bbcswebdav/pid-1275336-dt-content-rid-7274128_1/courses/70717/GraycarSSRN-id1465171.pdf)

### Week 2/Lec 2

**Documentary Evidence (likely in exam)**

## Real Evidence

### Documents Generally

- Understanding how **documents can be used in Court / Litigation** is an important skill for a lawyer to possess. Can be a very **potent tool** when handle correctly.
- Many forms of litigation rely **heavily on documents** being adduced as evidence.
- **EA** made **significant changes to the Common Law about how documents** can be **adduced**. → Common Law was very strict on the notion of only using original documents. CL saw it as unless you were dealing with an original document → don't bother
- **Part 2.2** of the EA deals with how the contents of documents can be adduced. Deals with how originals, copies, extracts, summaries etc. can be tendered in order to bring the contents of the document before the Court.
- **Provides different avenues to adduce the context of those documents.**
- **How to get the court to look at the document**
- Should be noted that proving the content of a document is a different issue to how the content of the document is used / assessed in evidence. **Getting the content of the document into evidence should be considered the first step.**

### Definition of “document”

In the Dictionary of the **Evidence Act**

"document" means any **record of information**, and includes:

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

**Note:** See also clause 8 of Part 2 of this Dictionary on the meaning of “document”.

→ **when thinking about documents** → **think big/broad** → **not just paper**

### Clause 8 Part 2 of the Dictionary:

- References to documents
- A **reference** in this Act to a document includes a reference to:
  - (a) any **part of the document**, or
  - (b) any **copy, reproduction or duplicate of the document** or of any part of the document, or
  - (c) any **part of such a copy, reproduction or duplicate**

### Proof of Contents of Documents

- Main guidance as to the various ways that the contents of a document can be brought into evidence are dealt with under **s48 EA**.
- Under the EA, it is possible to:
  - –Tender the document itself – s48(1)
  - –Tender a copy of it – s48(1)(b)
  - –Adduce evidence as to its contents – s48(1)(a)
  - –Tender a transcript of it – s48(1)(c)

- –For **voluminous** documents, it is also possible to tender a summary (with leave) – s50.
  - If large volumes of documents (fraud case or banking inquiries) → would waste time of court to read every single document. With court leave you can deviate from the court rules. To ask for summary of documents given rather than all (e.g. 52 boxes) be given
- s48 also provides a way of utilising the contents of a document even though the document in question is **not** available to the party. (ss 48(2) and 48(4) refer)
  - ways around not having the physical document in possession.

### Section 48(4) Proof of Contents of Documents

- s48(4) A party may **adduce evidence of the contents of a document in question** that is **not available to the party**, or the existence and contents of which are not in issue in the proceeding, by:
  - (a) tendering a document that is a copy of, or an extract from or summary of, the document in question, or
  - (b) adducing from a witness evidence of the contents of the document in question.
- If no argument as to the document then can do either (a) or (b)
- Can also work adduce the contexts of the documents through a witness → as in bring them to the stand who can verify the document and its contexts
- Adduce → bringing to the courts attention

[See *R v Cassar and Sleiman (No 28)* [1999] NSWSC 651]

### Definition of “unavailable”

- **Part 2 of the Dictionary: 5 Unavailability of documents and things**
- For the purposes of this Act, a document or thing is taken not to be available to a party if and only if:
  - A) **it cannot be found after reasonable inquiry and search by the party**, or
  - B) **it was destroyed by the party**, or by a **person on behalf of the party**, otherwise than in bad faith, or **was destroyed by another person**, or
  - C) **it would be impractical to produce the document or thing during the course of the proceeding**, or
  - D) **production of the document or thing during the course of the proceeding could render a person liable to conviction for an offence**, or
  - E) it is **not in the possession or under the control of the party** and:
    - i. **it cannot be obtained by any judicial procedure** of the court, or
    - ii. it is in the **possession or under the control of another party** to the **proceeding concerned who knows or might reasonably be expected to know that evidence of the contents of the document**, or evidence of the thing, is likely to be relevant in the proceeding, or
    - iii. it was in the **possession or under the control of such a party at a time when that party knew or might reasonably be expected to have known that such evidence was likely to be relevant in the proceeding**.

*R v Cassar v Sleiman* [1999] NSWSC 651