TOPIC 1: INTRODUCTION

Nature of Evidence Law, Uniform Evidence Acts, Overarching Concepts, Role of Judge/Jury, Burden/Standard of Proof

Nature of evidence law

- Defines type of info that can be received by decision maker (judge/jury) that may properly be used by decision maker in the resolution of factual issues in dispute in a case
- Admissible evidence = info that can be received
- Inadmissible evidence = info that is excluded
- 1st - rules regulating matters of process concerning HOW evidence can be given and WHO can give it
    - Compellability, competence, reception of material (documents, physical objects, verbal)
- 2nd - there are rules prescribing WHAT sort of info can be received by courts
    - Only relevant evidence may be adduced
    - Many exclusionary rules designed to exclude types of evidence

Intro to the Uniform Evidence Acts

- The 2008 Victorian Evidence Act is based on legislation that has been operational in NSW and Federal courts since 1995.
- Only been operational in Victorian courts since January 2010.
- The legislation extinguishes most of the common law rules with the goal of uniform evidential rules in all state, territorial and federal courts.
- Needless to say there are many similarities between the common law evidential rules and the legislative evidential rules that we look at.
    - Common law cases help to clarify meaning or application of a provision in the Act
    - Difference b/w common law and UEA *PAGE 15 OF BOOK*

Objective of Evidence Law

- Pursued objectives of truth (hearsay), discipline (illegally/improperly obtained), protection (tendency/coincidence)
- *PAGES 3-7 OF BOOK*

Reform of Act and Historical Foundations of Evidence Law - *PAGES 7-12 OF BOOK*

Structure and interpretation of UEA - *PAGES 16-18 OF BOOK*

Nature of court proceedings and duties of courtroom

- Criminal proceedings = state (prosecution/Crown) brings proceedings against individual (accused/defendant) who is suspected of committing crime with aim of vindication/punishment, and must adduce evidence to prove each element of charge and rebut defences
    - Rules of evidence stricter in criminal cases - *PAGE 20 OF BOOK*
- Civil proceedings = plaintiff brings proceedings against defendant who it claims committed legal wrong with aim of redress for plaintiff, and must adduce evidence to prove each element of cause of action and rebut defences

Adversarial system, duty of prosecutor and order of proceedings - *PAGE 20-23 OF BOOK*

Rule in *Jones v Dunkel*: if party, without giving satisfactory explanation, does not call witness who would reasonably be expected to give evidence, adverse inference can be drawn that witness's evidence would not have assisted party's case

Voir dire = separate hearing from main trial (usually conducted without jury) for court to decide 'preliminary question', i.e. question of fact that judge must determine to decide whether evidence should be admitted, evidence can be used against a person, or witness is competent or compellable

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

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

- Grant of voir dire is a matter of discretion and NOT a right
  - Party seeking voir dire must convince court to exercise discretion to grant it by establishing reasonable grounds, and court must identify party's objection to admission of evidence (which gives rise to voir dire) and the basis for it, and rule on whether the evidence has been admitted into the proceeding [DPP v Zhang]

Fact Finder - Judge/Jury

- Jury determines facts
- Judge determines questions of law (e.g. admissibility of evidence)
  - Unless sits alone - decides all
- Judge directs jury on how to conduct its fact-finding function
  - Gives jury 'charge' at end of trial to summarise arguments

Overarching concepts: evidence in the courtroom

The legislation deals with three types of evidence:

1. Witness testimony

2. Physical objects or exhibits

3. Documents

Witness Testimony

- Oral evidence
- It is problematic since it based on the perceptions and memory of a human being

However, the evidence that the witness gives will fall into one of these three types:

1. It will be honest evidence
2. It will be dishonest evidence
3. It will be honest but mistaken evidence

- Cross-examination is about testing a witness – not only for honesty but for accuracy (both fall within the concept of 'reliability').
- If a witness is lying or mistaken, then it will be desirable to expose this by way of cross-examination.
- Reliability will be heavily influenced by their performance under cross-examination.
- John Henry Wigmore: Cross-examination is the greatest legal engine ever invented for the discovery of truth."

Exhibits

- Exhibits or physical objects are often referred to as real evidence.
- Potentially relevant items recovered from a crime scene or accident scene that might be used (adduced) as evidence in a trial.
    - It might be a murder weapon, serum sample such as blood or saliva recovered, glass cup from which a fingerprint is collected.
- Usually exhibits will be treated as circumstantial evidence
- Exhibits from a crime scene will usually do no more than create suspicious circumstances.

Documents

- Despite the fact that documents are a very common source of evidence
- A document might include such things as a airline ticket that is introduced to support an alibi, sales receipt for a large quantity of potassium or nitric acid

Direct Relevance, Indirect Relevance and Circumstantial Evidence

- Direct evidence = evidence that jury can accept without needing to draw inference from it
- Circumstantial evidence = fact-finder must draw inference from one fact to another, and usually there are multiple possible explanations for evidence
    - Accused must be acquitted if evidence in criminal proceeding is entirely circumstantial and there is reasonable explanation of evidence consistent with their innocence [Rv Shepherd]

Burden of Proof - civil and criminal

- As a general rule the party who makes the allegation must provide relevant evidence that supports it
- Since it is the prosecution that makes the allegations in a criminal trial it is generally the prosecution that bears the burden of proof.

Legal and evidential Burdens

- The burden of proving each allegation or fact in issue in a criminal or civil dispute to the required legal standard or proof is divided into two stages or requirements.
- Evidential burden that relates to the sufficiency of evidence introduced to make out the claim - It is simply a question of looking at the volume and weight of evidence (witnesses, documents and exhibits) and deciding whether there is enough.
    - Requires that the prosecution or defendant has to produce sufficient evidence before a jury or judge in the capacity of a fact finder is required to consider it. If it is decided that the evidence is insufficient then there is no need for a jury or judge to reach a verdict.
    - In a criminal trial after the prosecution has finished presenting its evidence the defence may make a 'no case' submission. The judge must decide the submission. If the judge finds that the prosecution has adduced insufficient evidence then the case is over (doesn't usually happen)
- Legal burden that relates to the persuasiveness of the evidence

- The legal burden is to be decided by the jury or judge if there is no jury
- It only arises if the evidential burden is satisfied first
- The legal burden is very closely connected to the closing address that each party delivers at the end of the trial after all the evidence has been presented.
- During a closing address - prosecution will arrive at a conclusion that is based on the evidence that it has presented. In their closing argument the prosecution will review the evidence and tell the jury that it leads to one conclusion: the accused is guilty. The jury will listen to the argument and decide whether it is persuasive. If it is persuasive they will accept it, if not they will reject it.

The burden of proof gives rise to two questions.

1. Is there sufficient evidence to make out a case (evidential burden)?

2. Does the evidence yield a persuasive argument to prove the case (legal burden)?

Both questions have to be addressed before the burden of proof can be discharged. If the prosecutions evidence is sufficient and persuasive then the jury will arrive at a guilty verdict.

Which party must discharge the evidential burden and which party must discharge the legal burden?

- Criminal proceedings = prosecution must discharge evidential and legal burden; defence only needs to discharge evidential burden if pleads insanity or raises defence
- Civil proceedings = evidential and legal burden on party making a claim

Standard of Proof

- Criminal proceedings = prosecution must prove every element of charge that accused is guilty beyond reasonable doubt, and accused must only prove defence on balance of probabilities
- Civil proceedings = party must prove case on balance of probabilities

Both standards are defined in the *Evidence Act*

- Criminal Standard: section 141 AND Civil Standard: section 140

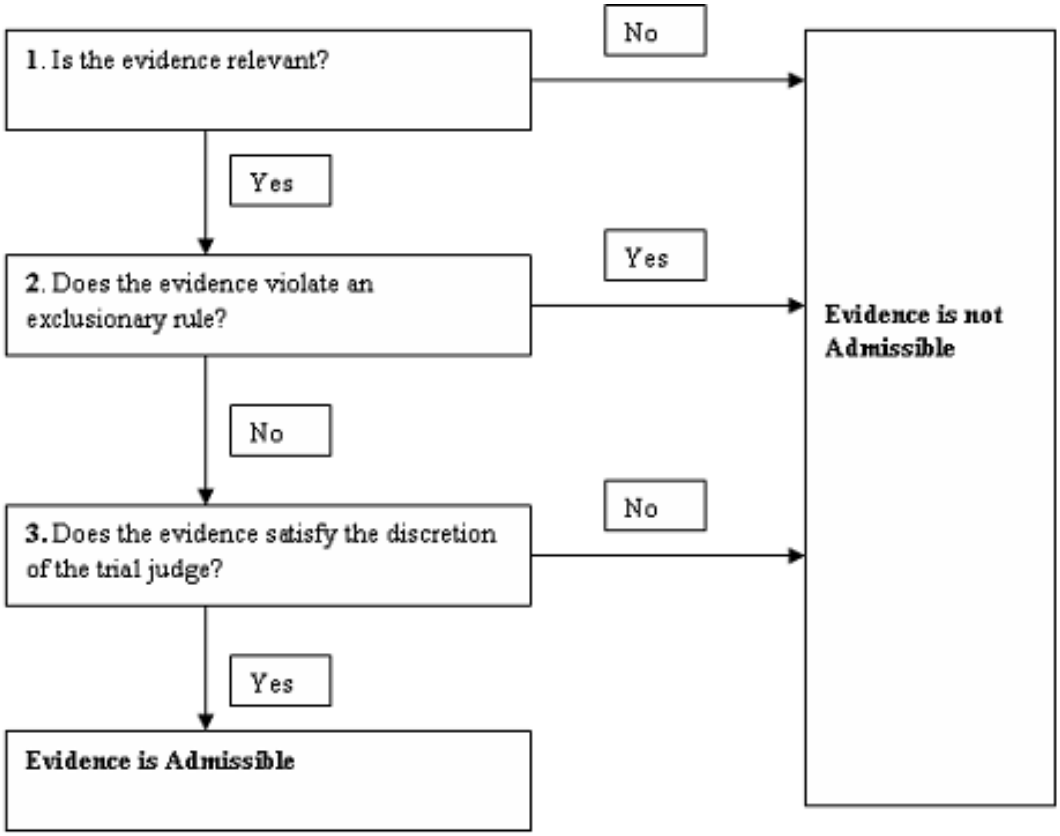
To understand when the different standards apply we need to return to the legal burden of proof which overlaps with the standard of proof

- If the legal burden of proof is on the D as it is when you plead insanity then the persuasiveness of the insanity claim must be beyond the balance of probabilities.
- The legal burden on the prosecution is stricter
    - The claims or allegations they make must not give rise to a reasonable doubt

"Beyond a reasonable doubt"

- No attempt should be made to explain or embellish the meaning of the phrase "beyond reasonable doubt": *Green v The Queen* (1971)
- However, pursuant to section 64 of the *Jury Directions Act 2015* (Vic),
- Judges now have power to elaborate somewhat on this difficult question. If so asked by a jury.
- The question of whether there is a reasonable doubt is a subjective one to be determined by each individual juror: *R v Southammavong* [2003] = "the words 'beyond reasonable doubt' are ordinary everyday words and that is how you should understand them"

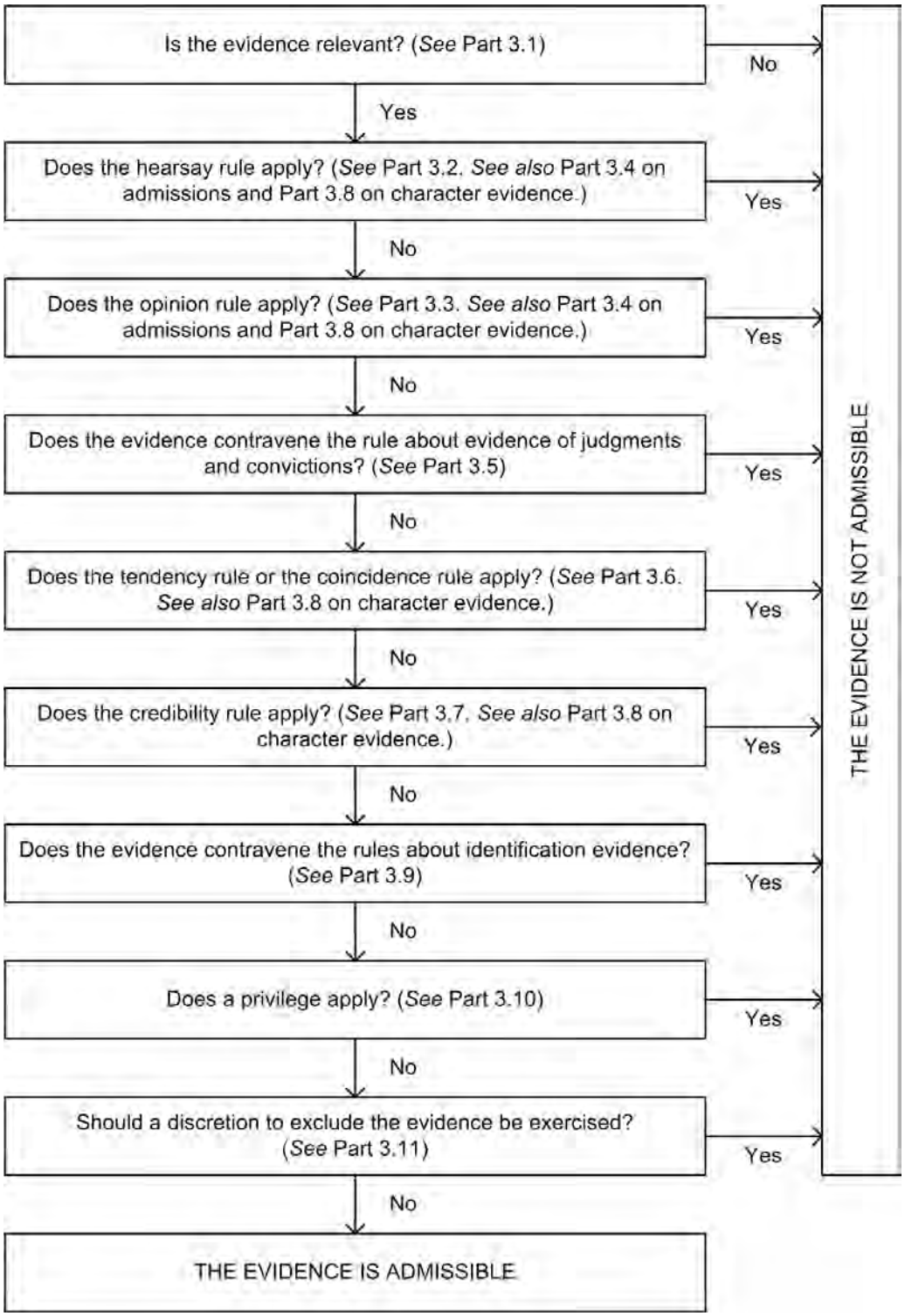
If the evidence survives all the stages, it will be admitted. A simple diagram that represents the 3 stages can be drafted as follows:



A complete answer would recognise that all three stages must be satisfied as opposed to focusing exclusively on a single exclusionary rule and overlooking the requirement of relevance and discretion.

If relevance and trial discretion are not the focus of the question you need only mention the requirements in passing. In most problems that we look at the question will focus on the exclusionary rule.

A more detailed diagram appears in the Act itself:



TOPIC 2: VERBAL EVIDENCE

Competence, compellability, examination-in-chief, cross-examination and re- examination

Admissibility of verbal evidence

- To be admissible:
  - Witness must be competent (allowed to testify)
  - Witness must be compellable (lawfully obliged to testify)
    - E.G. Diplomatic immunity preventing some
  - Witness must not be able to claim a privilege not to answer questions (e.g. against self-incrimination, religious confessions, etc.)

1. Competence

- Competence focuses on who is qualified to give evidence in court
- S 12 – unless otherwise provided for in the Act, all witnesses are competent and compellable
- S 13 *(exceptions)* – a person who is not competent to give sworn evidence may give unsworn evidence
  - Section 13 places a filter to exclude two categories of people: young people and the mentally impaired.
- S 13(1) *(general provision) – a person is not competent to give evidence (sworn or unsworn) if they do not have the capacity to:*
  i) Understand a question, or
  ii) Give an answer that can be understood
  and this cannot be overcome (example: age, mental/physical impairment …)
- S 13(2) – *a person who is not competent to give evidence about some facts can give evidence about other facts* (example: a child witness to arson…)
- S 13(3) *(sworn evidence) – a person is not competent to give sworn evidence if they do not understand that they are under an obligation to tell the truth*
- S 13(4) *(unsworn evidence) – a person who is not competent to give sworn evidence can give unsworn evidence*
- s. 13(5) *(unsworn evidence) – a person can give unsworn evidence if the court has told them:*
  i) it is important to tell the truth,
  ii) they will be asked questions that they know, do not know, or cannot remember, and they should answer accordingly,