Evidence Law is a form of **adjectival law** (meaning procedural law; relating closely to civil and criminal procedure)

About the proof of facts before courts and tribunals

Best understood in the context of the processes followed in courts (hence the relationship to criminal procedure)

**1.1 The Problem of Proof**

- Evidence is about the problem of proof – how does a tribunal establish the events that occurred in the past? Stone: only two ways – the truth is either revealed or discovered
- Evidence law fulfils perceived needs in societies including a democratic society which respects individual and collective rights
- It did not spring into being in 1995 with the uniform Evidence Act
- It evolved with political and judicial administration of England and Wales and travelled to settler colonies in the minds of immigrants
- In civil law jurisdictions it is part of procedural law and not a separate area of law
- In 1600s and 1700s jury trial in countries making up the United Kingdom came to have political and constitutional significance
- News South Wales was the only ‘settler’ colony in the British empire where British subjects had to fight for trial by jury

**Justifications for Procedural Rules**

- a framework for citizens to settle disputes
- a mechanism for law enforcement
- material facts need to be determined – what facts are material? Those which must be proved to obtain the remedy or conviction or to successfully make a defence – they are past events or states of mind such as intention
- Positivist mode of law: rule x facts = decision – but choice in respect of rules because rules are ambiguous and finding facts which attract rules involves much greater discretion in judges and juries

**Scientific Proof and Mathematical Approaches to Probability**

- courts are sceptical of the use of probability theory – only indicates that it is possible that something forms part of class – not that event occurred
- yet expert evidence admitted although it is based on probability theory – eg DNA – The Victorian Court of Appeal deals with this issue in *Mansfield v The Queen* [2013] VSCA 161 – Substance in the contention that it would be dangerous to base a conviction on DNA evidence alone...on the other hand...it is possible that the number of the odds favouring the conclusion...may be so large that it can properly found a conclusion BRD – the
Evidence Exam Notes

significance of depends upon the existence and nature of other evidence linking the accused to the commission of the crime

Preliminary Conclusions

- all theories take into account a maximum of available information
- an orderly approach to fact finding is fragile: experience of fact finder alone determines when principle of indifference is appropriate and when evidence is consistent with possible hypotheses
- fact finders need to act impartially
- in a democracy fact finding by courts must maintain the confidence of the people

Jury and Constitution of the Commonwealth of Australia

- Section 80 of the Constitution: ‘The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.’
- Zarb v Kennedy (1968) 121 CLR 283 – HCA reads down protection upholding the validity of a summary offence carrying two years imprisonment
- contrast Baldwin v New York 299 US 66 (1970) - trial of matters carrying more than 6 months imprisonment in a summary manner is unconstitutional
- Cheatle v The Queen (1993) 177 CLR 541 – for federal offences tried on indictment the jury’s decision must be unanimous – state legislation allowing for majority verdicts invalid in respect of federal crimes
- Juries Directions Act 2015 (Vic) - s 5 sets out the guiding principles for its application - Parliament recognises:
  - (a) the role of the jury in a criminal trial is to determine the issues that are in dispute between the prosecution and the accused; ...

1.2 The Uniform Evidence Act

Sources of Evidence Law

- common law – once significant source now diminishing
- legislation – by mid 1800s - reforming some common law and recognising globalisation of trade
- Uniform Evidence Act – restates and reforms common law and the accretion on it of 150 years of legislation

Uniform Evidence Law follows the common law tradition in terms of its basic goals - Primary purpose is to promote accurate fact-finding through rules informed by a set of principles:
  - Fact-finding should be rational
Relevant information should be available to the court
- Irrational fact-finding should be discouraged
- Unreliable information should be treated with caution

- This primary purpose is subject to competing goals, including ensuring the proper functioning of the courts and a variety of public interests
- It is not comprehensive and may be supplanted by local statutes, supplemented by the remaining common law, influenced by overseas law and modified by human rights law

Jury Directions Act 2015 (Vic)

Jury Directions Act 2015 (Vic) repeals and enlarges on the provisions of the Jury Directions Act 2013 (Vic):

- adds to the non-uniformity of the Victorian version of the UEA by amending or repealing particular provisions and also be changing some common law principles not affected by the UEA:
- power of judge to give directions in respect of the meaning of reasonable doubt: this is generally prohibited by the common law - Part 7, s 61-64 repeat provisions in the 2013 Act. Section 62 abolishes the common law rules found in Shepherd v R [1990] HCA 56 and R v Sadler [2008] VSCA 198.
- incriminating conduct including post offence conduct which is a lie or act or omission by the accused after the crime has been committed: Part 4 Div 1 s 18-24 repeat provisions in the 2013 Act. Section 24 abolishes the common law rules found in Edwards v R [1993] HCA 63 and Zoneff v R [2000] HCA 28.
- failure to give evidence or call witness: Division 6 s 41-44 provide for judicial comments on the failure of the accused to give evidence. The provisions abolish the rule in Weissensteiner v R [1993] HCA 65; (1993) 178 CLR 217 and applied in Azzopardi v R [2001] HCA 25; (2001) 205 CLR 50 and the rule attributed to Jones v Dunkel [1959] HCA 8; (1959) 101CLR 298 and applied to the accused and prosecution in criminal cases.
- identification evidence: Division 4 s 35-37. Section 116 of the UEA is repealed which relates to directions on identification evidence, which is replaced by s 39 and 40.
- unreliable evidence and corroboration: Division 3 s 31-34. It amends 164 of the UEA about the need for particular evidence to be corroborated and it amends s 165 about unreliable evidence and s 165A about children’s evidence. It repeals s 165B.
- family violence: Part 6 s 55-60.

Is the UEA a code?
• ALRC intended UEA to be a code but s 8 and 9 indicate that it is not
• But some provisions do codify parts of the law:
  – documentary evidence – s 51 abolishes the rules relating to
documentary evidence - but not real evidence which can include
documents – s 52
  – relevance s 55-58
  – hearsay and its exceptions - s 59 and following
  – tendency and coincidence – s 97, 98, 100 and 111
• not always clear where there is codification - residual judicial discretion to
exclude for unfairness to the accused - Haddara v The Queen [2014] VSCA
100 – majority holds that there is still a residual common law discretion so
this has not been codified
• not always clear when it codifies by incorporating common law principles
which may continue to develop at common law

**Interstate skirmishing around interpretation of UEA**

• High Court – where a statute with a common provision is to be interpreted
the decisions of courts in other jurisdictions should be followed unless they
are wrong: Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22
• Dupas v The Queen a five member bench of the Victorian Court of Appeal
refused to follow NSW Court of Criminal Appeal in R v Shamouil [2006]
NSWCCA 112 in interpreting s 137 – discretion to exclude for unfairness in
criminal trials
• R v XY [2013] NSWCCA 121 (22 May 2013) a five member bench of the NSW
Court of Criminal Appeal, by majority, decided to follow R v Shamouil

**Application of the Evidence Act 1995 (Cth)**

• s 4 applies to federal courts – defined in dictionary to mean bodies or
persons required to apply the rules of evidence
• s 5 a number of provisions apply to all Australian courts based on federal
parliament’s power to legislate
• s 8 saves a number of Acts from its operation
• s 4 applies to Victorian courts – defined in dictionary to mean bodies or
persons required to apply the rules of evidence – not applicable to bodies
which investigate - Newcastle Wallsend Coal Company Pty Ltd v Court of Coal
Mines Regulations (1997) 42 NSWLR 351
• s 9 preserves existing rules of common law and equity unless there is an
express or necessary intendment
• s 10 preserves the law on parliamentary privilege
• s 11 preserves general powers of court to control proceedings unless there is
an express or necessary intendment

**Criminal Procedure Act 2009 (Vic)**
• reform of evidence law had continued in Victoria independently of the uniform Act particularly in the area of committals and trials in criminal cases particularly in the Crimes (Criminal Trials) Act 1999 (Vic)
• the power to make orders and other decisions before trial, s 199.
• to order the service of the substance of statements of expert witnesses, s 189.
• the use of the discretions relating to calling alibi evidence where the required notice has not been given, s 190.
• the hearing applications to exclude evidence prior to trial, s 202.
• to give leave for evidence which was not recorded at committal or which departs from pre-trial admissions to be led s 233
• trial judge has considerable power to control both pre-trial and trial issues relating to evidence including:
  • power to make orders and other decisions before trial, s 199;
  • to order service of the substance of statements of expert witnesses, s 189;
  • use of discretions relating to calling alibi evidence where required notice has not been given, s 190;
  • hearing applications to exclude evidence prior to trial, s 202;
  • to give leave for evidence which was not recorded at committal or which departs from pre-trial admissions to be led s 233;
  • to decide documents which the jury may take to jury room, s 223;
  • chapter 4, s 95 – 157 deals with committal hearings
  • to decide the documents which the jury may take to the jury room, s 223
  • to decide the manner in which a witness gives evidence, including reading a statement, s 232.
  • the use of the discretions relating to the ‘shield’ protecting complainants from cross-examination on particular issues, s 338-352.
  • the use of discretions relating to the exceptions to the hearsay rule where previous representations were made by complainant under age of 18, s 377.
• s 141 contains the standard of proof to be used by the Magistrate’s Court

(4) At the conclusion of all of the evidence and submissions, if any, the Magistrates’ Court must—
• (a) if in its opinion the evidence is not of sufficient weight to support a conviction for any indictable offence, discharge the accused; or
• (b) if in its opinion the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged, commit the accused for trial in accordance with section 144; or
• (c) if in its opinion the evidence is of sufficient weight to support a conviction for an indictable offence other than the offence with which the accused is charged, adjourn the committal proceeding to enable the informant to file a charge-sheet in respect of that other offence and, if a charge-sheet is filed, must commit the accused for trial in accordance with section 144.
2.4 Voir Dire

- the UEA and the *voir dire* – Norman French – *voir* – true – *dire* – to speak – from the oath administered – to speak the truth
- used to determine preliminary points – competence – compellability – whether child understands need to speak truth – expertise of witness for opinion evidence
- used to determine admissibility – is evidence relevant? – was the truth of a confession affected by circumstances in which it was made? – is a witness is adverse? – whether an answer would incriminate? – whether an answer would breach client legal privilege or public interest immunity or other privilege or immunity?
- Questions of fact relating to the admissibility of evidence are labeled ‘preliminary questions’ by s 189(1) and are decided by the judge – these decisions are made ‘voir dire’ effectively a trial within a trial
- answers two questions which had once been uncertain at common law in Australia

  - first – whether *jury should be present* had been answered in negative at common law – UEA: jury not present unless judge orders otherwise
    - s 189(4) In deciding whether to make this order the judge should consider, among other things, whether the evidence to be adduced during the voir dire might be prejudicial to the defendant. The judge cannot order the jury be present for the voir dire if it relates to the admissibility of an admission/confession or illegally or improperly obtained evidence s 189(2)
    - If the evidence would not be prejudicial, then no reason to exclude the jury eg: competence of a child or expert witness - allowed

  - second – whether accused could be asked if confession was true - in Victorian common law and practice answered in affirmative – provision in UEA resolves it in negative – but equivocal because of impact of s 85 with this 189 – prosecution must show confession not made in circumstances which could affect its truth

- issue determined on **balance of probabilities** s 142 (for both civil and criminal)
  - generally it is the party seeking to adduce the evidence that must satisfy the court of its admissibility
  - HOWEVER, sometimes it is up to the party opposing the admission of evidence to persuade the judge to use their discretion to exclude it
- s 189(6) in providing that s 128(8) does not apply, extends the privilege against self-incrimination to the accused giving evidence on the voir dire
2.6 Relevance

- basic inclusionary principle – sets limits to admissibility in context of specific trial by specifying what evidence is relevant to the existence of material facts
- relevance is determined by issues which must be proved in the case, either by plaintiff or prosecutor or defendant or accused by way of defence.

s 55 – defines relevance – similar to Stephen’s common law definition:
Any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in conjunction with other facts proves or renders probable the past, present or future existence or non-existence of the other

Fundamental Rule of Evidence: the requirement of relevance – evidence that is relevant is admissible, unless excluded by the operation of one of the exclusionary rules of evidence.

Evidence that is irrelevant is inadmissible, without a need to consider the exclusionary rules.

S 56 Relevant Evidence to be Admissible

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.
- this marks a departure from the common law which uses the concept of ‘legal relevance’ which permits evidence which is marginally relevant to be excluded – under the UEA s 135 performs this role
- s 55 test is one of ‘logical relevance’ – the test is ‘not a stringent or narrow one’ Kirby J in Smith v The Queen (2001) 206 CLR 650 THEREFORE under the UEA evidence should be classified as relevant if it is capable of rationally affecting the assessment of the probabilities of the existence of facts in issue, NO MATTER HOW MINIMALLY IT DOES SO – however it must be capable of having some affect

S 55 Relevant Evidence (definition)

- Relevance is an ordinary, non-legal concept
- Something is relevant to the determination of an issue (or argument or question) if it helps us to decide that issue in a rational manner

55(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

• (a) the credibility of a witness; or
• (b) the admissibility of other evidence; or
• (c) a failure to adduce evidence.

Smith v The Queen (2001) 206 CLR 650 at 654; [2001] HCA 50
Gleeson CJ, Gaudron, Gummow and Hayne JJ:
[7] In determining relevance, it is fundamentally important to identify what are the issues at the trial. In a criminal trial the ultimate issues will be expressed in terms of the elements of the offence with which the accused stands charged. They will, therefore, be issues about the facts which constitute those elements. Behind those ultimate issues there will often be many issues about facts relevant to facts in issue. In proceedings in which the Evidence Act 1995 (NSW) applies, as it did here, the question of relevance must be answered by applying Pt 3.1 of the Act and s 55 in particular. Thus, the question is whether the evidence, if it were accepted, could rationally affect (directly or indirectly) the assessment by the tribunal of fact, here the jury, of the probability of the existence of a fact in issue in the proceeding.

Thus: Evidence that rationally affects the assessment of the probability of the existence of facts, which are relevant to the facts in issue, thereby affects the assessment of the probability of the existence of the facts in issue themselves; and satisfies the requirement of relevance.

Important: In rationally assessing whether evidence is capable of rationally affecting the probability of the existence of a fact in issue, the court assumes the credibility of the evidence Papakosmas v The Queen [1999] HCA 56

Questions of reliability and credibility are generally to be determined by the tribunal of fact – who may ultimately decide that a witness lacks credibility and rejects the evidence.

Cases illustrating s 55

Applying the test of relevance is a matter of common sense, logic and experience – always room for disagreement.

In Wilson v R (1970) 44 ALJR 221 Q: defendant charged with shooting partner in the head – were the bitter arguments prior relevant? Evidence of a loving relationship would be relevant to the defendant’s case that it was an accident, therefore evidence of a bad relationship was relevant to the prosecution’s case.

In Plomp v R (1963) 110 CR 234 Plomp was having an affair with another woman and had represented himself as a widower when his wife drowned in the surf at Surfers Paradise. Held: this was relevant to prove that he had murdered her. It did go to motive - motive was the connecting link.
Well known series of Victorian previous manner of driving cases and manslaughter or culpable driving

- *R v Lewis* [1913] VLR 229 Manner of driving .6km from collision relevant
- *R v Buchanan* [1966] VR 9 (SC Vic FC) previous driving relevant
- *R v Horvath* [1972] VR 533 (SC Vic FC) previous driving not relevant
- *R v Walker* [2001] VSCA 28 not relevant because no connecting link
- *Semaan v The Queen* [2013] VSCA 134
  - must be connecting link – created by the elements of crime charged
  - circumstantial evidence and relevance

- s 57 provisional relevance
- s 58 inferences as to relevance

**s 135 General discretion to exclude evidence**

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—

(a) be unfairly prejudicial to a party; or
(b) be misleading or confusing;
(c) cause or result in undue waste of time;
(d) unnecessarily demean the deceased in a criminal proceeding for a homicide offence. (added by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic))

**Cases relevant to link between s 56 and 135**

- ALRC wanted to avoid the exercise of a concealed and illogical discretion in ‘legal relevance’ – so s 56 includes all relevant evidence and shifts the discretion to exclude to s 135
- *R v Stephenson* [1976] VR 376 (SC Vic FC) may still have the same outcome but the process would be different – need to use discretion in s 135 to exclude the evidence
- McHugh J recognises this in *Papakosmas v The Queen* (1999) 196 CLR 297 at [81] - refers to this distinction at common as the difference between ‘logical’ and ‘legal’ relevance but the terminology for this varies and this adds to confusion
- *Smith v R* [2001] HCA 50; 206 CLR 650 – High Court does not appear to accept this – jury saw same evidence – video of armed robbery and accused in court – as police who gave evidence it was same person – majority thought it was ‘irrelevant’ – Kirby J dissented partly because point should have been taken at trial
- *Evans v The Queen* [2007] HCA 59 – court divides on relevance in case of identity of armed robber – accused made to wear to disguise – Heydon J of opinion that it was relevant – Kirby J also of this view but thought it was
unfair and should be excluded under s 137 – Gummow and Hayne JJ – not relevant

**S 136 General discretion to limit use of evidence** * More info towards end

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:
(a) be unfairly prejudicial to a party; or
(b) be misleading or confusing.

**S 137 Exclusion of prejudicial evidence in criminal proceedings** * More info towards end

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

**3.1 Nature of the Burden of Proof & on Whom it Lies**

- formulation of claims is responsibility of parties and belongs to civil and criminal procedure law

nature of burden of proof
- burden of adducing evidence – evidential burden - significant at the close of plaintiff’s and prosecutor’s cases
- burden of persuasion – persuasive burden - significant at the end of trial as it relates to findings by tribunal of fact

no consistency in use of terms - legal burden, evidential burden and persuasive burden – differently used by different people

The legal burden
- ‘The term ‘legal burden of proof’ refers to who **bears the risk of losing the case if there is a failure to persuade the trier of fact** that a proposition has been made out.
- In **criminal cases**, the general rule is that the prosecution **bears the legal burden** of proving all the elements of the crime and rebutting any defences. That is, the prosecution bears the risk of losing the case if all the elements of the crime have not been made out or a defence rebutted.
- In **Victoria**, the one exception to this rule is that of the **defence of mental impairment**. If the defence raises evidence of mental impairment, it bears both the evidential and legal burden of proof to the standard of the balance of probabilities.’

**Steps In Trial Imposed by Burden of Proof**
before court will consider whether or not it has been persuaded it will require that there be sufficient evidence to seriously require such a consideration - reason for rules relating to no case to answer which falls to be determined at the end of the plaintiff’s or prosecutor’s case

substantive law may place burden on defendant in particular circumstances eg to plead and prove contributory negligence

Civil Standard – Balance of Probabilities

UEA 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 restates the common law
s 140(2) corresponds with the reasoning in Briginshaw v Briginshaw (1938) 60 CLR 336, weight of evidence must persuade tribunal so that they can make any findings in good conscience

sometimes expressed in terms of mathematical probabilities but most judges avoid betting terms and many recognise that cases are decided on facts which cannot be expressed in that way

generally approached as competing hypotheses to best explain the facts

To succeed, the plaintiff must satisfy the court that it’s case is more probable than not

Often translated as ‘more likely than not’

SGIC v Laube (1984) 37 SASR 31 – approach taken by King CJ – whether decision is based on a reasonable search taking into consideration criteria now found in s 140(2)

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) – the strength of evidence necessary to establish a fact on the BOP may vary according to the nature of what it is sought to prove

Incident of burden of proof in civil cases

generally plaintiff or prosecutor bears evidential and persuasive burden

legal burden of proof lies on the party alleging the facts – plaintiff carries the burden of proving the facts alleged in the statement of claim – the defendant carries the burden of proving any further facts pleaded in the statement of defence that would establish a defence
• substantive law may place burden on defendant in particular circumstances e.g. to plead and prove contributory negligence
• ‘illusory’ in the sense that the issue and hence burden of proof can be categorised in different ways which can change who bears burden of proof – who bears burden of proof appears to depend on issue raised

Criminal Standard – Beyond Reasonable Doubt

*UEA 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*.

• s 141 restates the common law - it does not attempt to do what the High Court has prohibited at common law - defining what reasonable doubt might mean - *Jury Directions Act 2015* (Vic) in s 61-63 however, does - this is discussed further below

• never expressed in a mathematical way
• *R Cavkic* (2005) 12 VR 136 - Vincent JA: [226] … Not being directed otherwise, the jury may well have regarded a 70 per cent probability as satisfying the test, although I would have thought that the existence of an approximately one in three chance that an accused may not be guilty could hardly be regarded as proof beyond reasonable doubt, however the standard may be identified.

**Incident of the burden of proof in criminal cases**

• *Woolmington v DPP* [1935] AC 462: Viscount Sankey:
  1. The accused is presumed innocent
  2. Prosecution case must be proved beyond reasonable doubt

The charge fails if the prosecution does not prove, to the standard required, all the facts that make up the charge

General rule: Prosecution carries the legal burden of proving (disproving) every fact in issue.

PLUS: s 141 UEA

‘Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a
reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can entertained.’

No explanation of beyond reasonable doubt

Common law a strong line of precedent requires judges to say nothing more by explanation than that ‘reasonable doubt’ are two English words of which we all understand

• one exception – circumstantial evidence – if only evidence is circumstantial jury must be satisfied of proof of evidence beyond reasonable doubt and guilt inferred from it beyond reasonable doubt

2013 Act abrogated the common law rules in Victoria on this point – new provisions continued by Jury Directions Act 2015 (Vic)

Jury Directions Act 2015 (Vic) s 63
When trial judge may explain "proof beyond reasonable doubt"

s 63 permits a judge to give the jury an explanation of the term, beyond reasonable doubt

s 63 When trial judge may explain "proof beyond reasonable doubt"
(1) A trial judge may give the jury an explanation of the phrase "proof beyond reasonable doubt" if the jury asks the trial judge—
(a) a direct question about the meaning of the phrase; or
(b) a question that indirectly raises the meaning of the phrase.

(2) Subsection (1) does not limit any other power of a trial judge to give the jury an explanation of the phrase "proof beyond reasonable doubt".

s 64 How explanation may be given in response to jury question

Permits judges to refer to a number of factors:
– refer to the presumption of innocence and the prosecution's obligation to prove that the accused is guilty;
– indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty;
– indicate that it is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so;
– indicate that the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty; or
Evidence Exam Notes

– indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.

s 61 – What must be proved beyond reasonable doubt

• stipulates that unless other legislation requires it judge need only direct that the elements of the offence charged or absence of relevant defence are only matters required to be proved beyond reasonable doubt
• it provides two examples:
  – when directing the jury that an element must be proved beyond reasonable doubt, the trial judge may refer to the evidence relied on by the prosecution to prove that element and direct the jury that it must be satisfied that that evidence proves that element beyond reasonable doubt; or
  – where the only evidence relied on by the prosecution to prove an element is an alleged admission made by the accused, the trial judge may refer to the alleged admission and direct the jury that it must be satisfied that that evidence proves that element beyond reasonable doubt.

Beyond reasonable doubt and circumstantial evidence

In a line of cases the High Court tied itself in knots seeking to explain reasonable doubt and circumstantial evidence (all this abolished by JDA)

• Chamberlain v R (No 2) (1984) 153 CLR 521 – in a case based on circumstantial evidence the court is entitled to find that guilt has been proved BRD, only if it is satisfied that there is no reasonable hypothesis consistent with innocence
• R v Murphy (1985) 4 NSWLR 42 – motive as circumstantial evidence needed to be proved beyond reasonable doubt
• Shepherd v R (1990) 170 CLR 573 – High Court again clarifies what it meant by a ‘Chamberlain direction’ – Dawson J with Mason CJ and Toohey and Gaudron J agreeing: where a particular fact constitutes an indispensible link in a chain of reasoning towards an inference of guilt then that fact must be proved BRD

Jury Directions Act 2015 (Vic) s 62

Abolished these common law rules in s 62 of the Jury Directions Act 2015 (Vic)

Any rule of common law under which a trial judge in a criminal trial is required to direct the jury that a matter, other than a matter referred to in section 61, must be proved beyond reasonable doubt is abolished.

• Notes
• 1 This provision abolishes —