## Evidence Law – LAWS5013

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(iii) s 111

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How this interacts with ss 135, 137 and the dispositions to exclude evidence

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(i) What about the D’s failure to testify in a criminal trial? Yes (Weissensteiner)

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(ii) Warnings in relation to delayed complaint cases

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(1) Introduction

This course is about
- How to adduce evidence
- Admissibility of evidence
- Proof

Materials
- *Evidence Act 1995 (NSW)*
- Victorian Judicial College
  - E.g. has a lot of flow charts on their website

Assessment
- Optional mid-term exam – 3 September
- Must register for this

(A) Introduction

**Substantive law** lays down rules of behaviour for legal persons to follow (E.g. law of torts, contract, property etc). **Procedural** or **adjectival law** are rules that enable substantive law to be enforced. **Evidence law** is of the latter kind.

(i) The adversarial setting of evidence law

In an adversarial system, the parties to the proceeding, not the court, determine the issues which they will fight. The parties, not the court, obtain and produce evidence in support of their case. This is the **principle of party presentation**.

In the criminal context, this model is modified in ways to afford the accused certain procedural safeguards. In a civil context, there is an emphasis of efficient case management.

The ‘**tribunal of law**’ (judge) controls admissibility and use of evidence under evidence law and can direct the jury (if any) on their fact-finding. The ‘**tribunal of fact**’ (judge or jury, as the case may be) weighs up the evidence and reaches a verdict.

(B) The trial process

<table>
<thead>
<tr>
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<tr>
<td>(1) The powers of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment</td>
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<td>(2) In particular, the powers of a court with respect to abuse of process in a proceeding are not affected</td>
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<th>§ 26 Court’s control over questioning</th>
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<td>The court may make such orders as it considers just in relation to:</td>
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<td>(a) The way in which witnesses are to be questioned; and</td>
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<tr>
<td>(b) The production and use of documents and things in connection with the questioning of witnesses; and</td>
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<tr>
<td>(c) The order in which parties may question a witness; and</td>
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(d) The presence and behaviour of any person in connection with the question of witnesses

**s 27 Parties may question witnesses**
A party may question any witness, except as provided by this Act

**s 28 Order of examination in chief, cross-examination and re-examination**
Under the court otherwise directs:
(a) Cross-examination of a witness is not to take place before the examination in chief of the witness; and
(b) Re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness

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

(C) Relationship between the Evidence Acts, the CL and other statutes

Until 1995, the law of evidence was largely part of the CL (product of long historical development by the courts themselves) with only limited statutory modification. With the enactment of the Evidence Act 1995 (Cth) and (NSW) must existing statute law dealing with rules of evidence in those jurisdictions was abrogated.

The Act have been held to cover the field in a number of areas (most notably in relation to the admissibility of evidence rules (Telstra Corp v Australia Media Holdings (No 2) (1997); McNeil v The Queen (2008)) and in these fields the common law rules no longer apply. However, the Acts, in large measure, are not a code (i.e. are not exhaustive) and so ss 8, 8A and 9 provide that the Acts operate with other statute and laws.

However, the courts have though tit incorrect to use pre-existing laws of evidence (CL and equity) to interpret the Act

**s 8 Operation of other Acts**
This Act does not affect the provisions or operation of any other Act

**E.g.**
- *Crimes (Forensic Procedures Act) 2000 (NSW)* – statute rules re admissibility of evidence where samples taken by police unlawfully
- *Criminal Procedure Act 1986 (NSW)* – s 281 provides admissibility requirements for certain evidence in response to verballing issues.

**s 9 Application of common law and equity**
(1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment
(2) Without limited subsection (1), this Act does not affect the operation of such a principle or rule as far as it relates to any of the following:
   (a) Admission or use of evidence of reasons for a decision of a member of a jury, or of the deliberations of a member of the jury in relation to such a decision, in a proceeding by way
of appeal from a judgement, decree, order or sentence of a court,

(b) The operation of a legal or evidential presumption that is not inconsistent with this Act,

(c) A court’s power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding

E.g.

- *Evidence Act* s 165B(2) (Delay in prosecution) replaces what was previously found at common law in *e.g. Longman v The Queen* (1989) – court must inform jury of nature of forensic disadvantage because of delay and need to take it into account – often arises in sexual assault cases brought years after the event – harder for D to give alibi or medical evidence

s 11 also recognises, courts have an inherent power to control the conduct of a proceeding and this power is not affected by the Acts unless provided for expressly or by necessary intendment

(D) Taking objections

In practice, there is a duty placed on parties to object where rules of evidence law are not followed strictly. Leave to appeal on an unobjected error will only be granted where aggrieved parties can show that the error led to a miscarriage of justice (E.g. lost a real chance of being acquitted (*Picken* [2007]))

- E.g. *Criminal Appeal Rules (NSW)* (made under *Supreme Court Act* 1970) REG 4

4 Exclusion of certain matters as grounds for appeal etc

No direction, omission to direct, or decision as to the admission or rejection of evidence, given by the Judge presiding at the trial, shall, without the leave of the Court, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at the trial to the direction, omission, or decision by the party appealing or applying for leave to appeal

(E) Dispensing with the rules of evidence

*Evidence Act* 1995 (Cth) s 190

s 190 Waiver of rules of evidence

1. The court may, if the parties consent, by order dispense with the application of any one or more of the provisions of:
   a. Division 3, 4 or 5 of Part 2.1; or
   b. Part 2.2 or 2.3; or
   c. Part 3.2 to 3.8

In relation to particular evidence or generally

Note – matters related to evidence in child-related proceedings (within the meaning of s 69ZM of the *Family Law Act* 1975) are dealt with by that Act

2. In a criminal proceeding, a defendant’s consent is not effective for the purposes of subsection (1) unless:
   a. The defendant has been advised to do so by his or her Australia legal practitioner or legal counsel; or
   b. The court is satisfied that the defendant understands the consequences of giving the consent

3. In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if:
   a. The matter to which the evidence relates is not genuinely in dispute; or
   b. The application of those provisions would cause or involve unnecessary expenses or delay

4. Without limiting the matters that the court may take into account in deciding whether to exercise the
power conferred by subsection (3), it is to take into account:
   a) The importance of the evidence in the proceeding; and
   b) The nature of the cause of action or defence and the nature of the subject matter of the proceeding; and
   c) The probative value of the evidence; and
   d) The powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence

(F) The voir dire (s 189)

“Trial within a trial”
- This is where the court sits in absence of the jury to determine preliminary questions. It has also been considered an appropriate forum in which to reprimand counsel or where counsel may make submission as to the running of the court to the TJ. Determinations of these kinds are made in absence of the jury so as not to prejudice a party (E.g. if admission was allegedly obtained under duress this may prejudice the D’s case – see s 138 – discretion to exclude improperly or illegally obtained evidence)

s 189 The voir dire

(1) If the determination of a question whether:
   a) Evidence should be admitted (whether in the exercise of a discretion or not); or
   b) Evidence can be used against a person; or
   c) A witness is competent or compellable;
   depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question

(2) If there is a jury, a preliminary question whether:
   a) Particular evidence is evidence of an admission, or evidence to which section 138 applies; or
   b) Evidence of an admission, or evidence to which section 138 applies, should be admitted;
   is to be heard and determined in the jury’s absence.

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

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

(5) Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account
   a) Whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the defendant; and
   b) Whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question; and
   c) Whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing)

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

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

(8) If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless:
   a) It is inconsistent with other evidence given by the witness in the proceeding; or
   b) the witness has died
(2) Proof – Part 1

(A) What is proof?

Critical to the practice of law in winning cases – can only make out claims WITH evidence.

The proof question – does the evidence as a whole prove (criminal / civil) liability to the requisite standard?

This question is separate to, E.g. the relevance question asked of each individual piece of evidence – if it were accepted, could it rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding? See s 55

Both of these questions look at probative value – the former looks to the probative force of the evidence as a whole, the latter to the probative value of the individual item

Civil – where do questions of proof arise?

• Leal advice on prospects of success
• Case preparation – gathering evidence
• Pleadings
• Interlocutory application for summary judgement or dismissal
• In the hearing – application that no prima facie case
• In hearing – parties need to prove case
• Judgement – judge’s findings of facts from the evidence and application of law
• Appeals – errors of law or fact-finding?

Criminal – where do question of proof arise?

• Police investigation – brief of evidence
• DPP – decision to prosecute
• Accused may make No Bill submission to DPP
• Committal in Local Court
• Instructions from accused and case preparation
• Application for stay of proceedings
• In the trial – application that Pradsad direction or No Case to Answer (verdict by direction)
• In trial – Crown must prove elements of charge (D has evidential burden to raise specific defence
• In trial – Rulings on evidence
• In trial – Judge directs the jury
• Jury consideration – verdict
• Appeal – there are a number of grounds for appeal including a challenge to a conviction involving a question of law – the Court of Criminal Appeal may also grant leave to appeal in matters involving question of fact or mixed questions of fact and law
• HCA – special leave to appeal required

(i) Different types of evidence

Direct evidence

• Evidence, which if accepted, establishes the fact in issue

Circumstantial evidence
• Evidence, which is accepted, requires further inference to establish the fact in issue

(B) Burden of proof

The Act does not deal with the allocation of the burden of proof in respect of facts in issue, which the ALRC regarded as a matter of substantive law

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

• Facts
  o B&C administered a statutory scheme for leave provisions for temporary workers in the building and construction industry
  o Concern that Apollo breached the scheme, so it sought a declaration that its workers who installed appliances were not within the statutory definition of “workers within the industry”
  o The plaintiff had the onus to prove a negative proposition (that the class of work was not usually performed by a carpenter)

• Held
  o The plaintiff must establish **sufficient evidence from which the negative proposition can be inferred**
  o The defendant then has an evidential burden to advance in evidence any particular matters with which (if relevant) the plaintiff would have to deal in the discharge of the plaintiff’s overall burden of proof

(C) Standard of proof

(i) Types of evidence – direct vs circumstantial 9 varying degrees of probative value)

**Direct evidence** is eyewitness evidence. It is direct in nature because if it were accepted, it would establish the existence of a fact in issue, E.g. “I saw Bob stab Jane”

• There are ways to challenge this evidence:
  o **Honesty** – does this witness mean what she says? Perhaps she is being dishonest because of bias, previous history of perjury, or previous history of dishonesty offences (including theft, fraud etc)
  o **Memory** – does this witness remember the event correctly? Perhaps she is confusing it with another event. Perhaps she was intoxicated, infirm etc
  o **Observational powers** – how reliable is the witness’s perception? Perhaps the lighting was bad, she saw it from a distance, she has bad eyesight etc

**Circumstantial evidence** is evidence that, if accepted, still requires some inference to establish the existence of a fact in issue. E.g.:
  o “I saw Bob argue with Jane hours before the stabbing” – **motive/opportunity**
  o “I saw a person outside of Jane’s house minutes before the stabbing. I identify Bob as that person” – **identification**
  o “I met Bob on the evening of the stabbing. He said to me ‘Jane has it coming’” – **admission**
  o The knife found at the scene had Jane’s blood and Bob’s fingerprints – **forensic identification**
  o “I saw Bob with a similar knife a week before the stabbing” – **means**

This evidence (eye witness accounts) can be challenged in the same way as challenging direct evidence above. However, the strength of the inferences needed to establish the facts may also be challenged
(D) Proof rules

Evidence law lays down two sets of rules in regard to proof

- Who proves what – the **BURDEN OF PROOF**
- To what standard must the evidence prove liability – the **STANDARD OF PROOF**

(i) Criminal proof rules – s 141

(ii) Standards of proof (for prosecution (PR) and defence (D))

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<th>The PR must prove its case <strong>beyond reasonable doubt</strong> – s 141(1)</th>
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What does “beyond reasonable doubt” mean in Australia?

- In Australia, trial judges should NOT attempt to explain the content of this expression

*Green v The Queen* (1971)

- Facts
  - TJ attempted to explain to the jurors by direction the meaning of “beyond reasonable doubt”
  - He said it means ‘if you have a nagging doubt, you need to identify it and work out whether it stems from reason or instead some prejudice or self-doubt,’ i.e. if the doubt does not stem from reason, it is not a reasonable doubt
  - ‘A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances. It is that ability which is attributed to them which is one of the virtues of the trial: to their task of deciding facts they bring to bear their experience and judgment. They are both unaccustomed and not required to submit their processes of mind to objective analysis of the kind proposed in the language of the judge in this case. “It is not their task to analyse their own mental processes”’

- Issue – was this a misdirection by the TJ?

- Held (by the HCA)
  - Yes
  - It is up to the jury themselves to work out what the expression means
  - Jurors are both unaccustomed and not required to submit their processes of mind to objective analysis of the kind proposed in the judge’s direction
  - It is NOT their task to analyse their own mental processes

- Note
  - In the UK, the law has moved towards the expression “sure” rather than beyond reasonable doubt

*Shepherd v The Queen* (1990)

- Facts
  - Appeal of heroin importation conviction by Shepherd that the PR case rested on circumstantial evidence
  - It was possible to classify the evidence into three broad categories
    - Statements from undercover police
    - Evidence from members of the organised crime
    - Financial transaction records attributable to the criminal dealings

- Held
If it is necessary for the jury to reach a conclusion of fact as an indispensable intermediate step in the reasoning process towards an inheritance of guilt, that conclusion must be established beyond reasonable doubt.

The D must prove his / her case on the **balance of probabilities** - s 141(2)

In the criminal context, the D may be required to prove aspects of his / her case (E.g. certain defences etc)

**(ii) Burdens of proof (for PR and D)**

Allocations of burdens are generally **a matter of substantive law** and thus not provided for in the EAs.

However, the position is expressed clearly at CL → the PR **bears the burden of proving each and every element of the offence** beyond reasonable doubt

- “No matter what the charge or where the trial, the principal 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 be entertained”: *Woolmington v DPP [1935]* per Lord Sankey LC

The defence of **insanity** is a special case – if it is relied upon by the D, the D bears the burden of proving its case on the **balance of probabilities**. Similarly, thousands of statutory defences require the D to prove its case on the balance of probabilities if it chooses to rely upon them – this often reverses the onus of proof from the outset

- E.g. *Summary Offences Act 1988 (NSW)* s 4A offensive language (offence) – s 4A(2) provides that it is a sufficient defence to the offence if the D can satisfy the court that it had a reasonable excuse for using the language (on the balance of probabilities)

**Distinction b/w direct and circumstantial evidence in criminal cases**

- Direct evidence – evidence which if accepted, alone, establishes guilt
- Circumstantial evidence – evidence of a basic fact or facts from which the jury is asked to infer a further fact(s) to find the accused guilty
- E.g. *Chamberlain v The Queen (1893)*
- Guilt should not only be rational conclusion but also the only rational conclusion that can be drawn from the circumstances
- In other words, the jury must find the accused not guilty if there is an inference consistent with innocence, reasonably open on the evidence (*R v Knight (1992)*)

*Chamberlain v The Queen (1983)*

- Facts
  - Crown’s case was that a baby was murdered in a car
  - Scientific evidence that foetal blood in the car – this was disputed by defence experts
- Held
  - 3:2 dismissed
- Gibbs CJ & Mason J
  - Foetal blood needed to be proved beyond reasonable doubt before the ultimate inference of guilt could be drawn beyond reasonable doubt

**(ii) Civil proof rules – s 140**

**(i) Standards of proof (for P and D)**
Each party must prove its case on the balance of probabilities – s 140(1)

In more serious civil cases, it is sometimes suggested that the standard of proof is higher than mere satisfaction of the balance of probabilities

• “The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved...” (Briginshaw v Briginshaw (1938) per Dixon J)

To some extent, this idea has been incorporated into EA s 140(2):

s 140 Civil proceedings – standard of proof

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied [i.e. note: whether balance of probabilities standard is enough], 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

Note
• Flexible test – 'Court may take into account' (s 140(2))’

TWO theories have flowed from this suggestion

1. Theory 1 – the civil standard is flexible and increases when the defendant has more at stake (harder to prove), i.e. professional misconduct, proving someone has committed fraud or MDC
• This is consistent with the asymmetric criminal standard of proof – searing injustice of convicting an innocent person far outweighs letting a guilty person go free (Van Der Meer (1988) per Deane J)

2. Theory 2 – the civil standards are fixed (at balance of probabilities), but the prior probability is lower for more serious claims. Fraud is less common than negligent misrepresentation
  o The court is Neat Holdings v Karajan Holdings (1992) preferred theory 2

Qantas Airways Ltd v Gama (2008)

• Facts
  • The FMC order Qantas to pay damages for breach of the RDA 1975 (Cth) s 9
  • The magistrate found that racial remarks had been directed at Mr Gama in the course of work
  • The court also found that certain of these remarks constituted discrimination under the Disability Discrimination Act

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

• Tenor of the judgement
  • Towards uniformity of the standard, rather than variability

Briginshaw v Briginshaw (1938)

• ‘The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ...’
(ii) Burdens of proof (for P and D)

The allocation of burdens of proof between parties is a matter of substantive law. However, generally, the party alleging must prove its case on the balance of probabilities.

(E) Standard of proof relating to admissibility of evidence

s 142 deals generally with the applicable standard of proof in relation to factual findings which are a pre-condition to admissibility or “any other question arising under the Act.”

(F) Preliminary questions – proof rules head on the voir die) – s 142

Issues concerning preliminary matters must be proved on the balance of probabilities (s 142)

- E.g. admissibility of an admission – the D alleges admission obtained through police brutality – judge is to decide question on the voir dire – D must prove the facts on the balance of probabilities
- Note – s 142(2)
  - (2) In determining whether it is so satisfied, the matters that the court must take into account include:
    - (a) The importance of the evidence in the proceeding; and
    - (b) The gravity of the matters alleged in relation to the question

(i) What must be proved to the requisite standard?

EACH and ALL elements of the claim (civil) or the offence (criminal)

Any fact that is essential to establish an element must be proved to the requisite standard (beyond reasonable doubt or balance of probabilities)

(E) Evidentiary burden vs persuasive burden

The persuasive (or legal) burden is what has been discussed above – e.g. proving the elements of an offence to the requisite standard.

The evidentiary burden, in contrast, is a question of law (for the judge, E.g. to be considered after the plaintiff / prosecution has made its case) – the following question must be asked:

COULD the evidence TAKEN AT IT’S HIGHEST persuade a reasonable fact-finder to the requisite standard?

Note

- This gives the judge some control over the factual issues that reason the fact-finder
- It is sometimes (incorrectly) called the burden of production
- Evidence here is taken at its highest (i.e. its weight – in terms of credibility – does not come into play

Generally, where one party bears the persuasive burden, it ALSO bears the evidentiary burden. E.g. D bears both persuasive and evidentiary burden for relying on defence of insanity

However, in some instances, there may be a SPLIT BURDEN, e.g. in relying on self-defence, D bears the evidentiary burden, but after it is discharged P still has the persuasive burden (tricky concept)
(F) Is there a “prima facie” case or “no case to answer”?

The plaintiff (or prosecution) must discharge the evidentiary burden in relation to the elements of its claim or elements of the offence.

At the conclusion of the plaintiff (or prosecution’s) case, the defendant may make a “no case to answer” submission, that is, even taking the evidence at its highest, the plaintiff / prosecution could not persuade a reasonable fact-finder to the requisite standard (i.e. that the plaintiff / prosecution HAS NOT discharged the evidentiary burden) and that the defendant needn't put on any evidence.

If the judge then upholds this submission:
- In a criminal trial, the jury will be directed to acquit; see Doney v The Queen (1990)
- In a civil trial, the judge will find for the defendant.

*Doney v The Queen (1990)*

- Facts
  - Conviction for importing cannabis, but the PR case depended on the evidence of an accomplice, Freeman, whose evidence was flawed, not only because it was evidence given by an accomplice, thus requiring warning, but also because he admitted to telling lies at various stages from the time he was first interviewed.
  - Doney appealed on the basis that the trial judge erred in holding that he had no power to direct the jury to enter a verdict of not guilty on the ground that such a verdict would be quashed by an appellate court on the basis that it would be unsafe and unsatisfactory.

But if the judge dismisses the “no case to answer” (or is satisfied that the plaintiff/prosecution has discharged the evidentiary burden) – i.e. that there IS a case to answer, the plaintiff/prosecution still has to discharge the persuasive burden at trial (*May v O’Sullivan (1955)*). This has the consequence that the defendant may still choose to put no evidence on and still come out with a successful verdict in the end (but note: in a civil trial, after a ‘no case to answer’ submission is dismissed then the defendant needs to seek leave to put on further evidence, but need not. In a criminal setting, the case just continues).

*May v O’Sullivan (1995)*

- Facts
  - May convicted of two charges related to betting
  - If May’s evidence had been believed it would have established that he was not present when all but one of the alleged bets had been made.
  - The magistrate did not believe the evidence, and instead accepted without qualification the evidence of the chief prosecution witness.
  - The decision was appealed.
(3) Adducing evidence – witnesses and real evidence

Adducing rules govern HOW evidence is brought before the court – admissibility is a separate question – it is asked immediately AFTER evidence is adduced

(A) Calling a witness

- In the adversarial setting, the calling of witnesses is very much left in the control of the parties (whether it be a criminal or civil trial)
- For a court to call witnesses, it would:
  - (i) Disrupt a party’s preparation of the case; and
  - (ii) Give rise to an apprehension of bias (Clark Equipment Credit of Australia v Como Factors Pty Ltd (1988))
- However, this may be appropriate where there is a weak or unrepresented party (Sharp v Rangott (2008))
- The court has the power at CL (now codified in statute) to deal with witnesses (s 11) and to control questioning of witnesses (s 26)
  - “Save in the most exceptional circumstances, the trial judge should not call a witnesses” (Apostilides)

**s 11 General powers of a court**

1. The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment
2. In particular, the powers of a court with respect to abuse of process in a proceeding are no affected

**s 26 Court’s control over questioning of witnesses**

The court may make such orders as it considers just in relation to:

- (a) The way in which witnesses are to be questioned; and
- (b) The production and use of documents and things in connection with the questioning of witnesses; and
- (c) The order in which parties may question and witness; and
- (d) The presence and behaviour of any person in connection with the questioning of witnesses

(i) Prosecutor’s duty to call all witnesses to ‘unfold the narrative’

- All available witnesses necessary to unfold narrative (particularly eyewitnesses to disputed events – see exceptions [below])
- Unlike the civil case, the criminal trial is accusatorial
- Thus, the prosecutor should be detached, and has strong duties of fairness, i.e. to present the case fairly, to assist the court in finding the whole truth (Whitehorn (1983))

**The prosecutor has a duty to call all available witnesses necessary to unfold the narrative**

Exceptions

- Where evidence would be repetitious
- Where the / a witness would be unreliable, untrustworthy – but notice must be given to D that such a witness will not be called
  - Note – the PR must give proper consideration to the question of choosing not to call an ‘unreliable’ witness, perhaps incl. a conference with the witness in question (Apostilides)
- Note that it is an insufficient reason NOT to call a witness ONLY if: