



UNIFORM EVIDENCE LAW GUIDEBOOK

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CHAPTER 2: PROOF AND PRESUMPTIONS

ASSESSMENT PREPARATION (PP 35-37)

REVIEW PROBLEMS – ADDITIONAL NOTES

Case 1

(a) Facts in issue:

Existence of contract between the plaintiff, 'Computers-are-us' (C) and the defendant, 'Roadways Australia' (R) is not seemingly in issue. Issue relates to breach of the contract and facts establishing the breach (loss of consignment of laptop computers in a fire).

(b) Incidence of the evidential burden:

As plaintiff, C must bring evidence of the terms of the contract relating to the alleged breach – particularly that R was liable in the instance of fire, as in this case, provided that R's employees were not negligent. Not disputed by R.

As to deliberate destruction by fire, C has an evidential burden to bring sufficient evidence of what it asserts in relation to breach of contract – R facing insolvency and the making of an insurance claim on the truck. Circumstantial evidence in this case (in the absence of an admission) to infer deliberate destruction of the truck based on documents or other evidence of the financial motivation of R.

Alternatively, C asserts that the fire was caused by the carelessness of the truck driver (which would result in R avoiding liability for the loss caused by the fire under the contract). In making this alternative claim, C would likely have to bring a separate action in negligence against the truck driver (if not a party to the contract) and adduce sufficient evidence of carelessness on the part of the truck driver. If

there is no direct evidence apart from that of the truck driver himself, C may rely on *res ipsa loquitur*, namely, that according to the ordinary course of things the fire would not have happened without negligence on the part of the truck driver having regard to the location of the incident being a motorway rest area.

R has no evidential burden by simply claiming no liability for the loss unless the *res ipsa loquitur* maxim operates to place an evidential burden on R or the truck driver in a separate action in negligence. If the truck driver is aware of the cause of accident and can bring evidence to show that he was not careless when he parked the truck and its load in the motorway rest area then he will have an evidential burden. In the circumstances, there may be facts peculiarly within the knowledge of the truck driver.

(c) Incidence of the legal burden:

The legal burden does not shift in this case from C who must establish the breach of contract on the balance of probabilities either by proving R is liable for the loss resulting from the fire or in the alternative by carelessness of the truck driver in a separate action in negligence. Even if *res ipsa loquitur* operates in relation to the alternative of action in negligence by the truck driver the legal burden does not move to him as defendant (*Mummery v Irvings Pty Ltd* (1956) 96 CLR 99; *Schellenberg v Tunnel Holdings* (2000) 74 ALJR 743).

(d) Standard of proof is on the balance of probabilities [s 140(2) EA] but it is clear in establishing the cause of action to the reasonable satisfaction of the tribunal that the gravity of the allegation, namely a claim of arson, must be taken into account.

Case 2

(a) Facts in issue:

The prosecution must prove that Dwaine (D) assaulted Vincent (V) in that he intentionally or recklessly applied force to V without his consent. There may also be an element relating to the serious head injuries occasioned to V from being struck by the metal post (actual bodily harm, grievous bodily harm).

D raises self-defence, so the question is did he believe that his conduct was necessary in order to defend himself and if he did hold that belief was the conduct a reasonable response in the circumstances that D perceived to exist?

(b) Incidence of evidential burden:

The prosecution has the evidential burden to bring sufficient evidence of each of the elements of the offence, that is, whether a jury could reasonably find that it is persuaded of the existence of the facts essential to establishing all the elements of the particular assault charge based on the prosecution evidence taken at its highest. Arguably, the prosecution could make out a prima facie case through the eyewitness evidence of V as the alleged victim and the medical evidence of the nature and extent of V's injuries.

As to the issue of self-defence, which is in the nature of a plea of justification or excuse, the evidential burden is on D so that he must bring sufficient evidence of self-defence to raise the issue for consideration by the jury as fact-finder. Taking the evidence adduced by D at its highest with evidence from three eyewitnesses to the altercation all of whom corroborate D's account of the incident it should be sufficient to get past the judge and leave the issue to the jury.

(c) Incidence of legal burden and (d) the standard of proof:

The prosecution has the legal burden of establishing the elements of the particular assault offence beyond reasonable doubt (s 141(1) EA). Also, once there is sufficient evidence of self-defence to raise the issue for consideration by the jury, the prosecution has the legal burden to negative the defence beyond reasonable doubt. For example, in NSW s 419 *Crimes Act 1900* provides that the prosecution has the onus of proving beyond reasonable doubt that the person did not carry out the conduct in self-defence either by establishing (1) there was no reasonable possibility that D believed that his conduct was necessary in order to defend himself, or (2) that if D did hold that belief, then there was no reasonable possibility that what D did was a reasonable response to the circumstances as he perceived them to be. This second limb involves an objective assessment of the proportionality of D's response to the situation that he subjectively believed that he faced. On these facts the prosecution would have to prove that what D did was not a reasonable response to the danger he perceived to exist from V, including D's belief that V was reaching into his pocket for an automatic switchblade knife, which he was known to carry on his person.

Alternatively, if Dwaine raised the defence of mental illness or mental impairment:

(b) Incidence of evidential burden:

For the common law defence of mental illness in NSW (*M’Naghten rules*) and statutory defence of mental impairment in Victoria (*s 20 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*) there is an evidential burden on D as the accused raising the defence to adduce evidence that taken at its highest it would prove the elements of the defence to the reasonable satisfaction of the jury.

(c) Incidence of legal burden and (d) the standard of proof:

If the evidential burden is met then as D raised the defence he also has the legal burden of proving the mental illness or mental impairment defence on the balance of probabilities (*s 141(2) EA* – civil standard of proof applies where the burden of proof rests on the defence in a criminal proceeding). It is in the nature of a confession and avoidance type defence with D asserting that he is not responsible for the crime otherwise proved beyond reasonable doubt by the prosecution. Therefore, only the legal burden is altered in relation to the specific defences raised. The incidence of the evidential burden is on D in relation to both self-defence and mental illness

2. DC denies responsibility for the attack on the 11-year-old girl, V, so identity is the primary fact in issue as well as all the elements of the offence of ‘attempted child abduction’. The burden of proof is on the prosecution to establish all the elements of the offence beyond reasonable doubt (*s 141(1) EA*) and they have the evidential burden of adducing sufficient evidence to leave the issue of DC’s guilt for the attempted abduction of V to the jury to consider. See *R v Drummond* [2012] SASFC 87 for a very similar case.

In this case there is direct evidence from V as to the attack upon her but the evidence as to the identity of the assailant is circumstantial because the assailant was not known to V and must be inferred from other basic facts. Accordingly, DC’s counsel should seek a judicial direction be given to the jury that they are only entitled to find that guilt has been proven beyond reasonable doubt if they are satisfied that there is no rational hypothesis consistent with innocence (*R v Hodge* (1838), *Chamberlain v R (No 2)* (1984) and *Shepherd v R* (1990) 170 CLR 573). For the direction to be given an hypothesis must be both reasonable and available on the evidence (*R v Park* [2003] NSWCCA 203) so that in DC’s case there is arguably an hypothesis consistent with his innocence that if the attempted abduction was in fact

perpetrated as V has alleged, DC was not the person responsible but rather it was another man, not yet identified.

In relation to a specific analysis of the available evidence for the prosecution to prove DC's guilt beyond reasonable doubt, this largely relies on the video-recorded evidence of V and the observations she made to link DC with this crime. The evidence of the model (station wagon), colour (white) and registration number of the car observed by V and then entered into her mobile phone, her observation of the driver's seat 'leaning right back' and her general description of the man who attacked her, including his hair, eyes, height, build and age go to proof of DC being the person responsible. It is apparent she saw the face of her assailant in the car looking directly at her and then she had turned to face him when she kicked him in the groin before running off. There seems to have been sufficient time for her to at least get a clear look at his facial features and build.

The car is an important piece of circumstantial evidence linking DC with the means of committing the offence coupled with the later observations by the police that both the driver's and front passenger's seat of the white station wagon were significantly reclined when the vehicle was located in the yard of DC's home. The other important factors in circumstantial evidence are opportunity and motive. There is no evidence of motive but there is evidence of opportunity that DC would likely have been driving his car in the area near the school at about 3.50pm when V was walking home. There would have to be other evidence as to the route taken for DC to drive home but assuming it includes driving past the school, which is about four blocks from his home, then it is strongly arguable that there is evidence of opportunity. The evidence from NG shows DC rang her at 3.35pm and it is about a 20-minute drive to his home from his workplace at the paint factory, and he arrived home at 3.55pm.

There are some weaknesses in V's evidence relating to the clothing worn by DC, his teeth, and not noticing a substantial and colourful dragon tattoo on his left arm. The fact that there were no traces of DC's DNA on V's clothing seems to be inconsequential as there is no evidence that the assailant's hand came into contact with any of her clothing (no details as to type of clothing worn). Also, it is clear that she saw the distinctively yellow stained teeth of her assailant and this corresponds with DC's two front bottom teeth. The fact that she saw no other teeth and says that her assailant did not have teeth like the dentures tendered in evidence by DC is a possible inconsistency that weakens the circumstantial evidence to some extent but not entirely as DC could have removed the dentures at the time of the attack or they may not have been visible when he gave what V described as a very 'creepy smile'. The clothing worn by DC is different to that described by V and the large lettering

'Perfect Paints' is potentially significant in relation to the accuracy of the evidence of V. That DC was wearing these clothes at 3.55pm on 6 November 2013 is confirmed by NG so V's evidence of blue tracksuit pants and a dirty, stained white T-shirt is at odds with his actual denim jeans and brown coloured t-shirt. However, it is not clear that V had a good look at his clothing in the short time she saw him out of the car and in circumstances where she feared for her life. The failure by V to smell the strong paint and chemical odour that was apparent to NG and then the police officers when they arrested DC later that afternoon is a further potential weakness in the circumstantial evidence of V. Finally, the failure to see the distinctive tattoo on DC's left arm is another weakness in V's evidence identifying DC as the perpetrator of the attack. It is described as large and colourful and was not covered by any clothing at the time so this may be a significant matter impinging on the accuracy of V's observations and overall adversely affecting her credibility as a witness of truth. On the other hand it is likely that the assailant grabbed V with his right arm (dominant side for most people) and she may not have had time or the perspective to see his left arm.

As to judicial directions in relation to the burden and standard of proof, it depends on how the circumstantial evidence is characterised in the particular case. It may be characterised as a strand in a cable forming the inference that it was DC who intentionally attempted to abduct V or as a link in a chain of reasoning towards that same inference of identity. In *Shepherd v R* (1990) 170 CLR 573, it was established that where a prosecution case relies upon circumstantial evidence and an intermediate conclusion of fact in the inferential process constitutes an "indispensable link in a chain of reasoning towards an inference of guilt", such fact must itself be proved beyond reasonable doubt. In later cases, such as *The Queen v Hillier* (2007) 228 CLR 618, *The Queen v Keenan* (2009) 236 CLR 397, *R v Davidson* (2009) 75 NSWLR 150 and *Rees v The Queen* (2010) 200 A Crim R 83, it has been emphasised that circumstantial evidence should not be artificially divided for this purpose and a 'circumstantial case is not to be considered piecemeal' (Keifel J in *Keenan*). In *Davidson*, Simpson J stated (at [75]) the test for determining whether there is an indispensable intermediate inference that must be proved beyond reasonable doubt is, 'in the absence of evidence of that fact, would there, nonetheless, be case to go to the jury?' If the answer is in the affirmative, even if the Crown case is weakened (even considerably), the fact is not indispensable. Where the answer is in the negative, the fact is 'indispensable and the jury should be directed accordingly'.

Applied to the specific evidence in this case, it is arguable that counsel for DC would seek a judicial direction that the jury must be satisfied beyond reasonable doubt that the car seen by V and that owned and driven by DC on that day are one

and the same, which is an intermediate fact in proof of DC's presence at the scene. DC's counsel would argue that this basic fact is an indispensable link in a chain to the inference that DC had the means and was present at the relevant time to attempt to abduct V with the requisite intention. This goes strongly to establishing identity of the perpetrator of the attempted abduction. There is really no other evidence of means and if that can't be established then arguably on the *Davidson* test there would not be a case to go the jury against DC. There is a counter argument in relation to opportunity that the evidence is a strand in the cable forming the inference of opportunity as there is also other evidence of opportunity, including from NG, so that there are still other strands available to support the inference of opportunity (albeit a weaker cable carrying less weight in proof of the ultimate fact in issue). If characterised in this way then the jury do not have to be satisfied of the matters V refers to in her evidence beyond reasonable doubt going to opportunity but only that an inference of opportunity can be drawn from the "concatenation of probabilities" from various pieces of evidence (*Edwards v The Queen* (1993) 178 CLR 193). There are no other intermediate facts/inferences that might reasonably be characterised as indispensable to proof of guilt.

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