

Evidence and Proof in Theory and Practice Notes

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Topic 1: Fundamental Concepts

Lecture:

Part 1: Fundamentals

- Distinguish questions you ask:
 - Test what you're being told by someone.
 - Not gathering info about the surrounding circumstances.
 - Don't just accept the answer and move on.
 - Test it.
- Need to be able question with a view to testing the fundamental proposition in the answer given.
 - Don't ask questions that accept the answer given.
 - Leg hurts
 - Satisfy what is wrong with the leg first – which part of the leg? Test the info you're given.
- Evidence in a nutshell: Process
 - Story
 - Complete, succinct, believable.
 - Issues (legal problem/dispute)
 - Cause of Action / Charge
 - Based on what is told in the story.
 - Start thinking about what proof is needed.
 - Jurisdiction
 - Preliminary legal points/where action can be brought: which J is most favourable for action, which depends on elements, procedure and evidence
 - Eg, easy = contract dispute for building work; hard = Detroit museum sale of bequeathed pieces
 - Jurisdiction depends on the COURT you are in; NOT what kind of jurisdiction the court is exercising.
 - State Courts may be able to hear Federal matters. However, State evidence rules will apply to as it is a State Court, irrespective of the nature of the matter (federal).
 - Elements
 - Divide it up:
 - Elements in the law
 - Contextual these elements with the material facts.
 - Material Facts (not facts but what is material to proving elements, really, contextualized elements)
 - Dissecting your story into the facts that will prove each element.
 - Issues (MFs in dispute)
 - If not in dispute, waste of money.
 - Come back to what the case is about.
 - Go from believable story to centering upon the heart of the matter.
 - Evidence (what do you have to establish each MF>element>Action)
 - Admissible?
 - Jurisdiction again, which J has most favourable admission rules: J will affect every legal consideration as different rights)
 - Evidences is admissible if it is (i) relevant and (ii) probative**
 - All exclusionary rules are based on probity.
 - Probity: internal integrity.

- Perhaps (iii) public interest, which is the subject of discretion to maintain integrity of judicial process: although most discretions have basis in probity, ie, beaten confessions are unreliable; illegally obtained drugs are not excluded because still probative. Better public interest grounds are privileges to permit openness and frankness, although only LPP is non-derogable
- Relevant (inclusionary) [relevance is determined naturally]
 - Relevance means a process of logical inference – the inferences (the reasoning) by which E tends to prove MF
- Rules (exclusionary) [admissibility is determined by relevance: how you want to USE the evidence determines whether an evidential exclusion applies by virtue of your use not being probative, more prejudicial than probative]
 - How you want to use the evidence determines whether or not it is admissible.
 - Hearsay in one case may not be so in another. All depends on use. Must be relevant towards something.
 - Hearsay: repeating in court something said outside of court.
 - Problem is you have to rely on the person telling the truth.
 - Two parts:
 - Repeating something in court that was said outside of court by Bob.
 - Relevance/use of the statement is to prove what Bob asserted as true.
 - Relying on an assertion that happened, or that something was said.
 - Bob: light was green. John: Bob said light was green.
 - Cannot test what was said.
 - Statement are the words; the assertion is what happened. Have to rely on the assertion. Statement is only relevant/useful if we rely on that part that asserts that which is trying to be proved.
 - It is a problem because it cannot be tested – Bob isn't there to attest to the colour of the light.
 - None of the questions directed to the other person goes to the evidence on which they are relying – only testing the veracity and credibility of the witness.
 - Can only test them on their perception of the assertion. All that is relevant to the case is whether the light was green or not
- Discretions (exclusionary of relevant evidence; re-inclusionary of rule excluded evidence, eg, character)
 - More prejudicial than probative:
 - Probative: affects your rational senses (mind)
 - Prejudice: calls on your emotions
 - Evidence can be shown in another way.
 - Exceptions (re-inclusionary)
 - All done to establish Facts (which are the MFs etc).
- Fundamental questions:
 - Is the evidence relevant? And is it probative?
 - Relevance is a natural concept, without legal meaning. Ordinary, natural meaning.
 - Rationally affects your reasoning/consideration.
 - Logically infer something from something else – one leads to the other
 - Keep your gaps short.
 - Short hand: Admissible=probable

- If not probable of something trying to be proved, it's not probable.
 - Probity of piece of evidence has to be looked at regarding its integrity.
 - Exceptions if it can be tested.
- Probity:
 - Goes towards suggesting a link.
- If these two questions are answered in the affirmative, then it is admissible.
- Why do you want this evidence? Use this rule
 - This conceptual foundation then feeds into the law.
 - Admissibility problems arise based on how you want to use evidence.

Part 2: Submissions Rejecting Proof

- No case to answer submission:
 - Submission on the law
 - Law not being satisfied – P has missed proving one or more elements of their case. If evidence missed on one or more material facts.
 - Taking P's case at its highest – there is no evidence re one or more MFs:
 - Therefore, there is no case to answer (there's nothing to establish that MF)
 - What are you looking for: Has P failed to meet evidential burden?
 - No election because;
 - You're not considering the strength of the evidence; only its existence (taken at its highest)
 - The Crown must meet its evidential burdens (there must be something to answer) – hence, D has an absolute right to the NCtoA Submission.
- Prasad 'Sufficiency':
 - Submission on the facts
 - The evidence is too weak and or unreliable to convince fact-finding tribunal of material facts to requisite standard
 - Not enough weight to convict on it.
 - What does the above mean?
 - The evidential burden is met – but what D says is that the evidence cannot meet the persuasive burden (to the requisite standard, BRD)
 - This is a question of the sufficiency of the evidence, notwithstanding that there is evidence on which the defendant could lawfully be convicted, the evidence is so weak that the conviction would be unsafe
 - The Court has a discretion to entertain such a submission; and
 - Because the court is considering the sufficiency of evidence, if the court is constituted by judge or magistrate alone, it will want to consider that submission in light of all the evidence – hence, D must elect.
- What is key in determining whether it is a No case to Answer or a Prasad?
 - Relevance:
 - Why?
 - Taking the evidence you have:
 - If there is no inferential chain of relevance to a material fact = no case to answer
 - If the evidence is relevant to a material fact (via inferential chain) = Prasad (if doubts over reliability /credibility).

Part 3: Examination-in-Chief

- Prompts along the way so that they don't have to remember everything. Tell the story in the measure and structure the barrister wants.
 - Certain points resound more than others
 - Can't put words in their mouth; can't ask them 'and then what happened'.

- XN = Examination in chief. XXN = cross examination.
 - Comes down to relevance and probity to material facts in issue.
 - Relevance informs probity. Probity deals with admissibility.
 - When you have evidence, think – how do you want to use it?
 - What inference can you draw from the evidence?
 - How do I want to use the evidence?
 - What makes it relevant?
 - Issue v credit: - use of evidence
 - Issue: something that goes to prove a material fact in the case. Something disputed.
 - Credit: whether the evidence on the issue is believable/reliable.
- Evidence:
 - Testimonial evidence: witness speaks in court
 - Judicial notice: court knows the speed limit – common knowledge available to everyone.
 - **Concentrate on what you want to get them to say**
 - Rephrase if leading.
 - If answer to question is yes/no, then it's a leading question because witness doesn't need to supply an answer, but merely agree to it.
- Why XN?
 - Issues
 - Not Credit.
 - Can't ask questions about the credit of the witness.
 - Your duty as an officer of the court to call reliable witnesses – taken to be credible. Ethical responsibility.
 - The Court implicitly tests credibility and reliability by recall. Hence, why, even if you could, you would prefer not to give W their Witness Statement.
- Exceptions to Issue only XN:
 - Refreshing memory:
 - Pre-requisites are?
 - Memory of witness needs to be exhausted. Credibility comes from the way in which they give it.
 - Statement needs to be contemporaneous with the memory.
 - Couldn't have been penned a long time ago: notes for court. Not refreshing memory – a reconstruction.
 - A diary entry of the day is okay.
 - Only desirable to do it for?
 - Cops – so many crimes, often in and out of court. Need the notes.
 - Need to do it for Hostile Witness
 - Who is a HW?
 - Someone doesn't want to be there, not answering questions.
 - How do you show that?
 - Confirming identification:
 - Previous ID = Exception to Prior Consistent Statement (something witness said previously) – 3 scenarios:
 - Can be admitted into evidence to support argument/back up their ID.
 - W identifies D in Court: Relevant and Admissible re Credit (unless well-known)
 - W unable to ID D in Court, but did ID D out of Court and testifies to that: Testimony of prior ID (from another witness) is R&A re prior ID.

- Can use PCS for first two as it backs up prior statement.
- W unable to ID D in Court, and cannot testify to out of Court ID (Can't remember): Testimony of out of court ID would be Hearsay.
 - Can't use PCS as nothing to back up. Only relevant use of out of court statement is the assertion within it.
- Rebutting recent (initial, SAEA s 34M) Complaint; rebutting allegations of recent invention – done in ReXN
 - Event --- alleged imagined event --- trial
 - PCS needed before the alleged imagined event. Rebutts the reason for invention given by the cross-examiner.
 - Shows story has been consistent without – hasn't changed. Needs to rebut what the cross-examiner is suggesting.
- All of these exceptions generally involve putting before the W a PCS
 - At common law, in SA:
 - The PCS is admissible only to **credit**
 - A separate basis of admissibility is needed to admit the PCS (as opposed to the testimony which may derive from it) for **issue** (for example, statute may provide that it is admissible in exception to hearsay)
 - Under the UEA, this distinction is abolished:
 - The effect of s 60 of the UEA is that evidence which is relevant and admissible for one use, is admissible for all other relevant uses (ie as admissible hearsay which goes to issue).
 - Competence of W
 - Comes up with young children, or cognitive disabilities.
 - Compellability of W
 - Making them give evidence. You can put them in the stand, but you can't force them to speak.
 - Court has discretion.
 - D not compellable by the Prosecution.

Part 4: Cross Examination

- Key issues:
 - Attacking the issues, not just credit.
 - *Browne v Dunn* a key case:
 - Can't save questions.
 - You have to put your case to them so that they may comment on what you're saying.
 - PIS: Prior Inconsistent Statement
- Purpose is to impugn the credibility of a witness. Look for prior inconsistent statements.
 - Transcript is main source of evidence in trial.
 - Want PIS to be put on transcript through XXN questioning.
 - If witness acknowledges PIS, no need to introduce the evidence – goes to credibility.
 - Can read from PIS if w denies remembering.
 - Never goes to their hand unless they deny it existing.
 - Only admitted to go to credibility.
- Two ways to make evidence relevant to credit and then issue: (See XN)
 - If witness agrees with PIS and reneges on testimony, it then goes to issue
 - Finality/collaterally rule: cannot go to credit beyond XN. Exceptions when examiner can prove credibility beyond XN. Proving a PIS goes beyond: exception.
 - If w doesn't authenticate, go to other relevant party, such as a police officer.
 - Authenticate = providence.

- Authentication:
 - Px: authenticated and in the case
 - MFIP: not authenticated and therefore not relevant
 - Authentication first step to relevance.
 - PIS is not used or relevant to the issue.
 - If statement denied by W, goes to credit: whether you believe W.
 - Sections 61-66 UEA: exceptions for firsthand hearsay
 - One person hears something directly, provided it is relevant.
 - Section 60: one relevant use of evidence means can be used for all relevant purposes.
 - Abolishes the issue/credit distinction although remains in SA.
 - Statements against self interest are an exemption to hearsay: confessions or admissions.
 - Probative value. *Spence v Dimasi*: full statement must be included (the parts that aid your case or otherwise to be included).
 - Referring to previous statements: bolstering your witness – not allowed.
 - Rather, use it as a guide to illicit desired response.
 - Are exceptions to this.

Part 1 Syllabus Notes: Fundamental Concepts

- Courts will only consider 'relevant' evidence.
 - Relevant evidence is evidence which tends to prove or disprove the material facts in issue.
 - Evidence said to be relevant is not necessarily admissible.
 - Facts need to be proved in accordance with an adversarial process of proof.
- The *Evidence Act* 1995 (Cth) applies in Federal courts around Australia by virtue of s 4 (to those specified).
 - Does not entirely codify the evidential process, but the exclusionary rules are effectively codified by s 56(1), which provides that 'except as otherwise provided by the Act' all relevant evidence is admissible.
- Judge and Jury in Criminal Cases, Objections and Voir Dire Hearings:
 - Voir Dire hearings are when a judge holds a separate trial (trial within a trial) to determine the facts upon which the admissibility of the evidence depends.
 - Done in the absence of the jury so that if it is found that the evidence is not admissible, it has not been heard by the jury.
 - Judge summaries the case to the jury before they give their verdict based on the evidence and addresses given.
 - This summing up must:
 - Direct the jury about which material facts it must find proved and to what standard;
 - Direct the jury about which evidence can (and cannot) be used in finding the facts proved;
 - Give such other directions and warnings about the evidence as the law requires.
 - Judge should also comment more generally upon the evidence and how it might be considered by the jury to ensure that no miscarriage of justice occurs.
- Basic terminology:
 - The material facts are those that, if proved, will justify a claim or defence being put forward by a party
 - Material facts are in issue when they are disputed by the parties.
 - An accused can formally admit facts (eg under s 34 Evidence Act 1929 (SA); uniform Acts s 184) and in South Australia a court may permit the prosecution to serve a notice to admit facts upon an accused under threat of the unreasonable failure to admit being taken into account upon sentencing (s 285BA Criminal Law Consolidation Act).
 - Evidence is relevant where it tends to prove or disprove one or more of the material facts in issue.
 - It may do this directly, indirectly (including via the credibility of an eye-witness), alone or in combination with other evidence.
 - Relevance describes a relationship between tendered evidence and material facts in issue: s 55.
 - In determining if evidence is relevant, one is not deciding whether the existence or occurrence of the material fact is proved by the relevant evidence. One is only deciding whether the evidence can be considered by the trier of fact as capable of throwing light on the question of whether the material facts existed or occurred.
 - As long as the evidence is capable of being accepted and regarded as throwing some light, no matter how dim, the evidence may be regarded as relevant. Whether it is accepted and whether the material facts are proved by it are matters to be decided later by the trier of fact.
 - Where evidence is relevant, it must be received and considered by the trier of fact unless the law steps in to exclude the evidence altogether or to otherwise limit its use: s 56.
 - Where the law does step in to exclude or limit the use of relevant evidence, it may be described as to that extent inadmissible.
 - Neither irrelevant nor inadmissible evidence can be received by the court.
- Starting point is always the question of relevance and exactly how the evidence is relevant.
 - Only then do you consider how this relevance is affected by the rules of admissibility.

- Some of the admissibility rules are definitive. For example, evidence may be excluded on grounds of legal professional privilege whatever its intended use. However, there is a set of exclusionary rules which are not in this sense definitive, but are more discretionary in nature and comprise what are known as the discretions to exclude relevant evidence.
- The Discretions to Exclude Relevant Evidence:
 - Sufficient relevance:
 - Where relevant evidence throws little light on the existence of the material facts a court may, as a practical matter, refuse to receive the evidence (see *R v Stephenson* [1976] VR 376; and ss 135-136 uniform Acts) where it would be simply a waste of the court's time to consider it.
 - This discretion applies in all cases.
 - It is barely separable from the very concept of relevance - relevance means to many common law judges 'sufficient relevance' (cf *R v Stephenson* [1976] VR 376) - but conceptually once one starts talking about sufficiency one is referring to a legal rule of admissibility which imposes some standard of sufficiency.
 - Common law position: varied by the Uniform Acts
 - It is the obligation of the party tendering evidence to persuade the court that it is relevant, whilst it is generally the obligation of the opponent to persuade the court to exclude relevant evidence in exercise of the residuary discretion.
 - Sections 135-6 only apply where the opponent can show the relevance is 'substantially outweighed' by the stipulated considerations, s 137 demands exclusion in criminal cases where the evidence is unfairly prejudicial and s 138 stipulates that evidence shown to be illegally or improperly obtained must be excluded unless the party seeking admission can convince the court otherwise (effectively reversing the onus where this public policy discretion is invoked).
 - Besides the 'sufficient relevance' discretion, there are two other grounds for exercise of the 'discretion' - fairness and public policy (see ss 135 - 138 and s 90 of the uniform Acts).
 - These discretions are principally of importance in criminal cases to protect the accused but in principle there is no reason why they may not in appropriate cases apply in civil cases as well.
 - Insofar as ss 135, 136 and 138 of the uniform Acts embody these discretions they apply to both civil and criminal cases but ss 137 and 90 apply only in criminal cases.
 - The general fairness discretion and *Christie* discretion:
 - Fairness refers to the fairness of the trial - that is, evidence can always be excluded if its reception would cause a criminal trial to be unfair.
 - This may occur if the evidence in some way misleads the trier of fact into making a wrong decision.
 - The prime example of unfairness is where the evidence is regarded as more prejudicial (that is, may mislead the jury) than probative (that is, rationally proving): the so-called *Christie* discretion.
 - Note that evidence is not prejudicial simply because it implicates the accused in the offence charged.
 - Thus, if an accused's presence at the scene of the crime charged can be proved through revealing his guilt of another offence (eg proving presence in the vicinity by adducing evidence of escape from a nearby prison), but there is other evidence of his presence, a court may exclude the evidence revealing prior offending as too prejudicial - one does not want the jury convicting the accused simply on the basis that he is a criminal.
 - Another example might involve a situation where certain photographs are particularly grisly and of little assistance such that they might be excluded because they are capable of misleading the jury by arousing their sympathies (*Ames* [1964-5] NSWLR 1489; *R v Bunting* (2004) 92 SASR 146 at [665]).

- Where evidence is merely unreliable, that is of doubtful probative value, if this is apparent to the trier of fact (and a judge may assist in making it apparent through direction or comment to a jury) then it cannot be regarded as potentially misleading and there is no reason to exclude the evidence as more prejudicial than probative (cf *Rozenes v Beljajev* [1995] 1 VR 533; *R v Tugaga* (1994) 74 A Crim R 190).
- The uniform Acts in s 137 stipulate that in criminal cases a trial judge must exclude evidence if its probative value is outweighed by the danger of unfair prejudice to the defendant.
 - In *Aytugrul v R* [2012] HCA 15 the High Court unanimously held that there had been no error by the trial judge in admitting statistical evidence regarding DNA which was expressed in what is known as exclusion percentage terms (in that case 99.9%).
 - The High Court held that the appellant had not demonstrated that the probative value was outweighed by the danger of unfair prejudice.
 - At common law, judges must not exclude evidence simply because they think it is unreliable if the jury is perfectly able to decide that issue.
 - The determination of reliability is a matter for the jury.
 - That determination should only be taken from it if there is a real risk that, even with appropriate directions, the jury might give the evidence more weight than it deserves.
- Another example of unfairness may be where the accused is denied a procedural protection for testing the reliability of evidence - for example the opportunity to test evidence through cross-examination or pre-trial forensic examination.
 - The discretion in this sense was considered in *R v Lobban v R* (2000) 77 SASR 24; [2000] SASC 48, where police unlawfully destroyed samples of cannabis seized by them from the accused, and also in *R v Krieg* (Judgment of Ms Bolton SM, 11th January 2001) where due to hospital delay an accused was denied the opportunity to test a blood sample for its alcohol content.
 - The decision in *Lobban* was not followed in *Police v Hall* (2006) 95 SASR 482, [2006] SASC 281. In that case a majority of the Full Court decided that, in the absence of any evidence that a blood alcohol test taken by police and tendered by the prosecution was inaccurate, the speculative possibility that an accused may have been able to challenge that evidence if given an early opportunity also to test the blood did not make it unfair to admit the prosecution evidence.
 - The majority held that had there been impropriety in denying the accused the opportunity to test the blood that that would have been another matter (enlivening the public policy discretion discussed below). Further, the relevant legislation did no more than demand a procedure constituting an opportunity to test and that procedure had been complied with.
 - The law in this area was most recently stated by the High Court in *Police v Dunstall* [2015] HCA 26, on appeal from the Court of Criminal Appeal of South Australia [2014] SASCFC 85 (see Case Note on MyUni).
 - These examples suggest that unfairness is essentially concerned with ensuring the rectitude of the court's verdict.
 - If there is a sufficient risk of error, it would be unfair to tender the evidence against the accused.
 - There are also judges (eg Brennan J in *Duke v R* (1989) 180 CLR 508 at 513) who suggest that an unfair trial may be caused where it can be shown that if

investigators had followed correct procedures the evidence would never have been obtained.

- This notion of fairness seems less concerned with rectitude than with the propriety of the collection of the incriminating evidence which leads to public policy considerations and the exclusion of evidence on public policy grounds.
- The public policy discretion: *Bunning v Cross*
 - Permits the exclusion of illegally or improperly obtained evidence or of evidence in relation to crimes which has been illegally or improperly procured by the law enforcers – *Ridgeway v R*.
 - The evidence or the crime must be caused or procured by the illegality or impropriety (Question of Law Reserved (No 1 of 1988) (1988) 70 SASR 281 at 287-8 (Doyle CJ); *R v Lobban* at [39]-[41] (Martin J); *Robinett v Police* (2000) 78 SASR 85 at 101 (Bleby J)).
 - Under the *Bunning v Cross* principle, the court must consider the nature and seriousness of the crime and the impropriety alleged, together with the probative value of the evidence in determining whether it would undermine the integrity of the judicial process for a court to admit evidence in the circumstances.
 - South Australian courts have emphasised that this discretion requires the establishing of a causal connection between the impropriety and the obtaining of the evidence.
 - Thus in *Lobban* (particularly at [39]-[41]), described above, the improprieties in denying subsequent testing of evidence legally obtained in the first place were held not to give rise to the exercise of exclusion of the evidence based on the public policy discretion (see also Question of Law Reserved (No 1 of 1988) (1988) 70 SASR 281 at 287-8 (Doyle CJ); *Robinett v Police* (2000) 78 SASR 85 at 101 (Bleby J)) but dicta in *Police v Hall* (2006) 95 SASR 482, [2006] SASC 281 endorse the wider approach of Chernov and Eames JJ in *R v Moore* (2003) 6 VR 430 that the discretion extends to cover subsequent illegality so closely related to the evidence that to admit it would undermine the integrity of the judicial process.
- The overlap between the fairness and public policy discretions: *Swaffield*
 - In cases where it is alleged that evidence is obtained as a consequence of illegality or impropriety, the High Court in *R v Swaffield*; *R v Pavic* (1998) 192 CLR 159; [1998] HCA 1, a case involving the admissibility of confessional evidence, emphasised that whether such evidence is excluded depends upon whether a conviction based upon it would be bought at too high a price having regard to contemporary community standards (in terms of the public's interest in the integrity of the judicial process).
 - One might argue that the unfairness discretion should take precedence as it is unfair to admit illegally obtained evidence where if the police had acted legally the evidence would never have been obtained.
 - However, in *Swaffield* the Court held that this sort of unfairness is not decisive of exclusion. The judge must go on to consider the public policy discretion. The effect of the impropriety upon the accused is merely one matter for consideration in determining whether to admit the evidence would be at too high a price having regard to contemporary community standards. In this sense, where there are improprieties it might be said that the fairness and public policy considerations are combined.
 - In *R v Lobban* the Court was of the opinion that *Swaffield* was authority for the view that in the case of confessional evidence the fairness and public policy discretions could be regarded as combined and that, in the case of other evidence obtained through impropriety, exclusion must be considered separately first as a matter of fairness (not limited to issues of rectitude), and then as a matter of public policy.

- It is suggested that this approach muddies the distinction between the fairness and public policy discretions and creates unnecessary complication.
 - If the fairness discretion is confined to issues of rectitude, as is suggested in *Swaffield*, then in the case of improperly obtained evidence, of whatever kind, the effect of the impropriety upon the accused, can simply be regarded as a matter to be considered in determining whether, as a matter of public policy, to convict on such evidence would be to convict at too high a price having regard to contemporary community standards.
 - However, in *Police v Hall* the Full Court refused to disapprove of the court's view in *R v Lobban* and held that in the absence of any real question about rectitude or any evidence of impropriety the unfairness discretion was not enlivened.
 - In this context, s 90 of the uniform Acts provides that confessional evidence ('admissions') may be excluded where it would be unfair to the accused to use it in evidence.
 - It would again be more consistent to define fairness in terms of rectitude of decision and to leave the effect of any impropriety in obtaining evidence to the discretion enacted in s 138.
 - In *Em v R* (2007) 232 CLR 67; [2007] HCA 46 Gummow and Hayne JJ tend to this approach but the other members of the court (Gleeson CJ and Kirby and Heydon JJ) refused to place any limits upon the notion of fairness enacted in s 90.
 - Section 192 of the uniform Acts makes formal provision for the granting of leave and the giving of other directions and provides that a court must take into account a number of general considerations (the extent to which the decision might unduly lengthen the trial, the extent to which the decision might be unfair to a party or witness, the importance of the evidence and the nature of the proceeding). Failure to consider any of these matters will itself provide a ground for appeal (*Stanoevski v R* (2001) 202 CLR 115). Advance rulings are also now permitted by s 192A.
- Proof:
 - The ultimate question for the court is whether the material facts have been proved, beyond reasonable doubt in a criminal case and on the balance of probabilities in a civil case (uniform Acts ss 140 and 141 enact these common law standards).
 - It is important to be precise about one's hypothesis, to maximise available evidence, and be clear about which other hypotheses might explain the available evidence.
 - Where the evidence is the testimony of eye-witnesses to the very events in question, generally the question of proof turns upon whether the witnesses are accepted as credible or not (that is, whether the trier of fact believes them).
 - Where the evidence is not in this sense direct but is (what is called) circumstantial, then the question is what competing hypotheses might explain all the tendered evidence.
 - In a criminal case the jury must be directed to eliminate all reasonable hypotheses consistent with innocence before finding the accused guilty of the hypothesis advocated by the Crown.
 - *Shepherd* suggests that in cases turning on circumstantial evidence this direction will generally be required if a miscarriage of justice is to be avoided.
- When do evidential points arise in Court?
 - Appeal courts make frequent determinations on evidentiary matters on appeal because if there has been an evidential error this constitutes an error of law (see ss 352, 353 Criminal Law Consolidation Act which permits an accused convicted following trial on information to appeal where there has been an error of law).
 - Thus, if inadmissible evidence has been received or a jury has been inadequately directed about the use of the evidence before it, an appeal will prima facie succeed.
 - However, under s 353 an appeal can always be rejected under the proviso; that is, on the basis that there has been 'no substantial miscarriage of justice'.

- This occurs where the appellate court is of the view that, having regard to the trial record, despite the error, the conviction has been established beyond reasonable doubt: *Weiss v R* (2005) 224 CLR 300.
- Where there is no particular (discrete) error, an appeal against conviction can still be allowed if the court feels that overall there has been 'a miscarriage of justice' (see, for example, the decision in *Kotzmann*).
 - Such a miscarriage will arise if there remains an unacceptable risk that an innocent person may have been convicted.
- The Director of Public Prosecutions (DPP) may, similarly, appeal following an acquittal of an accused after a trial on information before a judge sitting alone and without a jury.
 - Where there has been acquittal after a jury trial that acquittal cannot be called into question on appeal

Part 2 Syllabus Notes: Party Presentation

Introduction

- The principal features of the adversarial trial are, first, that it is left to the parties to present evidence and to persuade the court to accept their claims, and, secondly, that the presented evidence is essentially the testimony of human beings, who are called to court and examined by the parties calling them (examination-in-chief) and then cross-examined by opposing parties (further re-examination may be permitted to remove ambiguities or to explain matters newly raised in cross-examination).
 - The parties alone have the responsibility of tendering evidence to the court.
 - The court's role is to consider whether that evidence persuades it to accept the material facts in issue.
 - The court is neither entitled to use its own knowledge in determining the facts in dispute, nor is it entitled to make any further enquiry of its own to obtain relevant evidence.
 - This passivity of the common law judge, contrasts starkly with the more inquisitorial role of the judge in civilian legal systems.
- The principle of party presentation leads to three important legal consequences.
 - First, if parties bear the burden of adducing evidence and of persuading the court then the law must determine the incidence of those burdens in a particular case.
 - Secondly, if one party has the burden of carrying forward the evidence in a case then the opponent is entitled to have the case terminated if that evidence is not adduced.
 - If no evidence is adduced to prove an essential material fact, there is 'no case to answer' and the opponent may so submit.
 - Finally, but more briefly, we will look further at the idea that the court cannot act on its own knowledge in deciding whether material facts (adjudicative facts) are made out.
 - Although courts cannot call witnesses, they may ask questions to clear up ambiguities and take 'judicial notice' of material facts or facts relevant to proving such facts that are notorious and indisputable, and they MUST use their general knowledge and experience in deciding what inferences to draw from the evidence that is tendered by the parties.

The Nature and Incidence of the Burdens of Proof

- Two burdens – evidential and persuasive burdens:
 - Evidential burden of proof: adducing relevant evidence of the material facts
 - The persuasive (legal) burden of proof: persuading the court to accept the material facts in issue.
- If a party fails to adduce relevant evidence of a material fact in issue, then there is 'no case to answer' in relation to that fact.
 - The question of whether it is proved will not have to be considered by the court.
 - But even where the evidential burden is satisfied, and there is relevant evidence from which a material fact may be inferred, the court will only find that fact proved if persuaded of its existence to the required standard - beyond reasonable doubt in a criminal case and on the balance of probabilities in a civil case.
- Incidence in civil cases:
 - Generally, plaintiff bears the evidential and persuasive burdens of establishing the material facts essential to make out the plaintiff's claim, whilst the defendant bears the evidential and persuasive burdens of making out the essential facts of any defences or counterclaim.
 - *Purkess v Crittenden*: whilst the persuasive burden was on the plaintiff to establish injuries resulting from an accident, if the defendant wanted to allege the injuries were pre-existing the court said it was up to him to raise evidence of such a possibility before the court would consider it.

- In relation to the issue of pre-existing injury, one might say the evidential burden was on the defendant and the persuasive burden (to show no such pre-existing injury) on the plaintiff once that evidential burden had been satisfied.
- Incidence in criminal cases:
 - In criminal cases the evidential and persuasive burdens in relation to the material facts of the crime charged are, at common law, firmly upon the prosecution.
 - This is a consequence of the presumption of innocence and the need for the prosecution to prove its case beyond reasonable doubt (*Woolmington v DPP*)
 - However, there are common law exceptions:
 - An accused wishing to plead a mental impairment defence bears the evidential and persuasive burdens in relation to that issue because section 269D of the Criminal Law Consolidation Act 1935 (SA) establishes a presumption of mental competence.
 - Evidence must be adduced and the accused must persuade the court of such mental impairment on the balance of probabilities.
 - In other cases, where the accused wishes to raise a defence, for example, self-defence, provocation, automatism, etc, the common law position is that there is no need for the prosecution to rebut these matters in advance.
 - Rather there is an evidential burden on the accused to raise these defences, to adduce credible evidence of their reasonable possibility.
 - Once such evidence is put forward, 'the golden thread of the criminal law', the requirement that the prosecution prove its case beyond reasonable doubt, takes over and the prosecution bears the persuasive burden of showing beyond reasonable doubt that none of these defences arise on the facts: *Braysich v R*.
 - It is an "elementary principle of the criminal law that unless express statutory provision to the contrary be made, the onus lies upon the Crown throughout to negative defences sufficiently raised." (*King v R*)
 - The authority and responsibility of the judge to instruct the jury on questions of law requires the judge "to put to the jury every lawfully available defence open to the accused on the evidence even if the accused's counsel has not put that defence and even if counsel has expressly abandoned it." (*Fingleton v R*)
 - It may also require a direction to the jury that there is no evidence capable of supporting a particular defence to the charge and that they are not to consider that defence in their deliberations (*Da Costa v R*)
 - In such a case the accused is said to have failed to meet the "evidential burden" necessary to raise the defence. Such a direction may be made in respect of a defence which, if open, the prosecution, bearing the "legal burden" of proof, would have to negative beyond reasonable doubt.
 - As legislation is passed against the background that presumptively the prosecution bears both burdens (*Woolmington*), courts are reluctant to interpret legislation to place burdens upon the accused, particularly persuasive burdens.
 - *Braysich v R*: Where, as in the present case, a statute creating an offence provides for a defence and imposes the legal burden of establishing that defence on the accused, then the accused also bears the evidential burden. For that evidential burden to be met there must be evidence upon which the trial judge can properly direct the jury that the defence is open as a matter of law.
- Presumptions:
 - Presumptions are best categorised by reference to the effect they have on the burdens of proof.

- Thus the presumption of death is a persuasive presumption.
- On the other hand, the presumption that commonly used scientific instruments are accurate is an evidential presumption only so that once there is evidence of an instrument's inaccuracy, that issue is properly raised and the party relying upon the instrument's accuracy must persuade the court of it.
- Occasionally, presumptions may be irrebuttable, for example the presumption that a child under a legislatively stipulated age (usually ten) is incapable of committing a crime.
- Presumptions of fact must be distinguished from mere inferences of fact:
 - Where inferences of fact arise, no burden is placed upon an opponent.
 - For example, the so-called doctrine of *res ipsa loquitur* ("the thing speaks for itself") has been held to give rise only to an inference of fact and places no formal burdens on the defence (although if the inference is strong a tactical burden may lie upon an opponent to adduce countering evidence).

The submission of No Case to Answer

- As prosecutors and plaintiffs generally bear the evidential burden in relation to all the material facts which justify the charge or claim, if they fail to adduce evidence on one of those essential facts then the defendant has an adversarial entitlement to have the case dismissed without having to provide any answer to the charge or claim.
 - The evidential burden is satisfied by adducing evidence which, if it is believed and drawing all possible inferences in its favour, is capable of supporting the material facts alleged. The weight and sufficiency of the evidence is not considered at this stage (King CJ in *Tepper v DiFrancesco*).
- Criminal cases:
 - In every criminal case, an accused is entitled absolutely to submit at the end of the prosecution case that there is no case to answer on the basis that the evidential burden has not been satisfied.
 - A defendant may also request a judge, at any stage, but usually also at the close of the prosecution case, to end the case on the ground that, even though there is evidence adduced, there is no possibility of it persuading a reasonable trier of fact - that is, it is so weak that it would be unsafe to convict upon it.
 - But a defendant has no entitlement to this 'sufficiency' submission which requires the judge to canvass the weight of the evidence before all the evidence has been presented.
 - Where the prosecution fails to satisfy its evidentiary burdens and a submission of no case to answer succeeds, the judge must direct the jury to acquit (strictly, it is not obliged to accept the direction but that is extremely unlikely to occur).
 - But if the evidential burden is satisfied, there is then a case to answer, and the defence has no further adversarial right to ask that the jury be directed to acquit on the basis that the case is weak.
 - The judge may so direct the jury, but it is in the judge's discretion (*R v Prasad*).
 - Only in the exceptionally weak case will a judge remind the jury of its power to acquit before the whole case has been heard.
 - Where a judge sits alone and is therefore also the trier of fact, again the submission of no case to answer must be determined when made, but where the submission is that the evidence is weak and cannot be safely acted upon (a 'sufficiency submission') again the judge is not obliged to consider it.
 - The practice has therefore arisen for a judge sitting alone to refuse to consider a 'sufficiency submission' until the close of all the evidence. If a defendant makes such a submission at the end of the prosecution case, the judge will refuse to consider it unless the defendant elects to call no evidence, thereby completing the evidence in the case.
 - Civil cases:
 - In a civil case it is in the court's discretion as to how it deals with submissions by a party seeking a directed verdict.

- Where the submission is that the evidential burdens are not satisfied, generally a court will hear the submission and enter judgment if it is upheld.
- Where the submission is made on grounds of sufficiency, which requires a weighing of the evidence, generally a court will not entertain the submission unless all the evidence is in, and, if the defendant wants the submission heard at the end of the plaintiff's case it will be asked to elect as to whether it wishes to close its case and call no further evidence (*Copper Industries v Hill*).
- If the defendant creates this situation the judge will then effectively just decide the case on all the evidence.
 - However, in every case it is said to be in the discretion of the court whether it hears the submission and which procedure it adopts: *Protean Holdings v American Home Insurance*.

The Court's Power to Call Witnesses, Take Judicial Notice of Facts and Otherwise Act upon its Own Knowledge

- Calling witnesses:
 - Courts can neither call witnesses nor direct the parties to call witnesses at common law.
 - In a criminal case only in exceptional circumstances may a judge call a witness (*Apostilides v R*)
 - However, whilst the prosecutor is said to have an absolute discretion in relation to which witnesses it will call, it also has an over-riding duty towards the fair administration of justice which generally obliges it to call all material witnesses.
 - Failure to call a relevant witness may produce a miscarriage of justice, particularly where that witness's existence has not been otherwise disclosed to the defence.
 - It also may put an accused in a difficult position to require the accused to call a witness who is not sympathetic to the accused's cause.
 - Thus, in pursuance of its duty to fairly prosecute and to avoid any argument that there has been a miscarriage of justice, the Crown will generally call all material witnesses or disclose to the defence any witnesses or other material evidence that it has decided not to call.
 - When witnesses are called, they are questioned by the parties not by the judge.
 - A judge is not prohibited from asking any questions of the witness (and see s 26 of the uniform Acts) but should take care not to interfere with the strategy of counsel and only ask questions to clear up ambiguities or gaps in the case.
 - An interfering judge can cause a miscarriage of justice.
 - Judicial notice of facts:
 - Judicial notice of facts are matters of common knowledge that cannot be disputed adversarially. Other matters are similarly indisputable and can be easily ascertained through simple inquiry, the distance of Pt Augusta from Adelaide (should this be relevant to proving the material facts in a case).
 - The indisputability of facts may be a matter of common knowledge or may be simply established by consulting authoritative sources.
 - But parties should only rely upon judicial notice where they have to, and should generally make sure they have evidence to prove all aspects of their case.
 - If they want to rely upon judicial notice they should so explain during their case - particularly when some inquiry needs to be undertaken to ascertain the indisputability of the fact in question so that the opponent may comment upon the appropriate mode of enquiry.
 - If the usual adversarial proof will add nothing, because the fact is beyond controversy and simply ascertainable, then the court may take 'judicial notice' of it (see also s 144 uniform Acts).
 - Section 64 Evidence Act 1929 (SA) appears to allow courts to refer to published works of authority in establishing matters of history, geography, science etc.

- But, first, this section is not limited to establishing indisputable facts, it can be used to establish facts that may be controversial, and, secondly, because the section extends beyond indisputable facts authority suggests that a judge acting alone cannot invoke its provisions, unless exceptionally the parties so consent.
- *Cavanett v Chambers*: The better view is that s 64 simply allows certain matters to be proved by parties tendering hearsay evidence contained in published works of authority.
- The other provision is s 59J Evidence Act 1929 (SA) which permits a court to dispense with the strict proof of documents, handwriting and identity etc and to inform itself as it thinks fit (discussed by Gray J in *Trueman v DPP*.
 - Only applies where these matters are, for all practical purposes, indisputable in the case. Obviously, care must be taken in acting on facts in these circumstances.
- A judge is taken to know the law in his or her jurisdiction.
 - This has caused some practical problems in the case of obscure regulations and by-laws and at common law there is authority requiring their proof.
 - The Evidence Act 1929 (SA) s 35 thus provides that judicial notice may be taken of subordinate legislation (see also uniform Acts s 143).
- Section 144 of the Uniform Evidence Acts draws no distinction between adjudicative and legislative facts in permitting only 'knowledge not reasonably open to question' to be acted upon without formal proof.

Professional Ethics

- Hierarchy of duties that legal practitioners have, are a:
 - Duty to the law/society
 - Duty to the court
 - Duty to the client
 - Duty to others.
- Practitioners' duty to the court can be divided into four broad categories:
 - Duty of candour (to disclose the applicable law and not to mislead about the facts)
 - Duty not to abuse the court process
 - Duty not to corrupt the administration of justice
 - Duty to conduct cases efficiently and expeditiously.

Part 3 Syllabus Notes: Evidence in Chief

Introduction

- Examination-in-chief (XN); cross-examination (XXN) and re-examination (RXN).
- Witnesses when called are first examined in-chief by the party calling them.
 - A party's witness must testify her own words and cannot be asked leading questions (suggestive of the answer sought).
 - Once examined in-chief, witnesses are available to be XXN by the other parties to the case, where leading questions may be put to them.
 - The party calling the witness may then, with the court's permission, RXN (in a non-leading way) but only to resolve matters that have been raised in XN.
- In addition, for the most part, parties call all their evidence together. The plaintiff or prosecutor opens and calls all its evidence (subject to cross-examination).
 - The defence or accused then opens and calls all its evidence in reply (again subject to cross-examination).
 - The plaintiff or prosecutor is not as a general rule allowed to split its case, that is, wait until after the defence has presented evidence before calling material evidence already available and admissible.

Competence and Compellability of Witnesses

- At common law any witness prepared to undertake the formalities for testifying was competent to testify, and generally could be compelled to testify.
 - No further cognitive or psychological tests of competence.
 - Basically the position in SA, but the formalities for testifying are liberalized: ss 6 and 9 *Evidence Act 1929* (SA).
 - These permit a witness to choose whether to take an oath or whether simply to affirm (solemnly promise) to tell the truth.
 - Exceptionally, a court may dispense with any formal oath or promise, and allow a witness to testify if satisfied that, although incapable of understanding the obligation inherent in the promise to testify truthfully on oath, the witness does understand the difference between a truth and a lie, is told it is important to tell the truth and indicates that he or she will tell the truth.
 - By this procedure young children, for example, may be competent to testify although too young to understand the solemn obligation of a promise in court to be truthful (see eg *R v Climas*; *R v Pascoe*).
- Section 21 of the uniform Acts provides that generally, witnesses testify by giving sworn evidence (oath or affirmation) but may give unsworn evidence under s 13.
 - By s 12 all persons are presumed to be competent and compellable to give evidence about a particular fact.
 - However, under s 13(1) a person is not competent to give evidence about a fact if that person does not have the capacity to understand a question about that fact or have the capacity to give an answer about that fact that can be understood.
 - The competence relates to particular facts, not to whether the witness can be called to testify generally.
 - Once a witness has that basic competence then the witness may (1) give sworn evidence (oath or affirmation) if she has the capacity to understand that in giving evidence she is under an obligation to give truthful evidence (s 13(3)), or otherwise, assuming the capacity to understand, (2) can give unsworn evidence provided she is first told about the importance of testifying truthfully (s 13(5)).
 - These subsections thus apply a test of understanding (physical and/or psychological) to testimony about particular facts before a witness is competent to testify.

- It should also be noted that a court has a residual discretion to exclude evidence where it would be unfair to admit it, and an accused may seek to have a judge rule that a witness not be permitted to testify where there are grave doubts about the reliability of any testimony which may be given.
 - *Rozenes v Beljajev*: this discretion should seldom be exercised where the trier of fact is itself quite able to determine reliability, but exceptionally a judge may be persuaded to exclude unreliable testimony altogether on the basis that to admit it would be prejudicial.
 - *R v Horsfall*: the testimony of a 9 year-old victim of a sexual assault had been so tainted by hypnotherapy that he refused to allow her to testify.
- Both at common law and under the uniform Acts s 12, presumptively all witnesses who are competent are compellable witnesses.
 - Common law exception: the accused (including any co-accused jointly tried), who at common law was not entitled to testify at all.
 - Legislation has been passed which alters this situation, and only permits the accused to testify for the defence, and then only if he or she so chooses (s 18(1) Evidence Act 1929 (SA); ss 12, 17 uniform Acts).
 - An accused (including a co-accused at a joint trial) is an incompetent witness for the prosecution.
- Where facts exculpatory of a circumstantial case are peculiarly within the accused's knowledge the judge may comment that the accused's silence about these facts may be taken into account by the jury in deciding whether the prosecution case has been proved beyond reasonable doubt: *Azzopardi v R*
 - Generally, juries must simply be directed that the accused has the right not to testify, that there is no obligation to explain and, further, that no inference may be drawn from the accused's failure to testify (*Weissensteiner v R*); s 20 uniform Acts.
 - Or to call evidence: *Dyers v R*.
 - The prosecution is not permitted to comment at all on the accused's failure to testify (s 18(1)(b) Evidence Act 1929 (SA); s 20(2) uniform Acts).
- Court has power in criminal cases to exempt spouses, parents and children from testifying against an accused: s 21 Evidence Act 1929 (SA); s 18 uniform Acts.
 - The court must balance the interest of preserving the relationship between witness and accused against the interests of justice (see eg *R v Andrews & Ors (No 3)*)
 - Expected that these sections would only operate in the most exceptional circumstances.
- Provisions which provide protections to witnesses while they are testifying:
 - Section 12 Evidence Act 1929 (SA) entitles a child witness (under 14 years, see s 4 definition as amended by the Statutes Amendment (Vulnerable Witnesses) Act 2015) to be accompanied by an adult who can provide emotional support when the child is called to testify.
 - Furthermore, s 13 Evidence Act 1929 (SA) permits a court, on its own initiative, to order special arrangements for taking testimony from any witness.
 - This may involve an order to erect screens or permit testimony via video-link to protect a witness from embarrassment, distress or intimidation which confrontation with the accused may cause, for example, where the accused is her alleged attacker in a sexual assault.
 - The SA Supreme Court has liberally interpreted this section as requiring protections whenever a plausible and reasonable application is made (see for example *R v WS* (2000) 78 SASR 33; [2000] SASC 294).
 - However, the legislation has been further strengthened and in the case of vulnerable witnesses (defined in s 4 to include a witness under 16, a witness who is cognitively impaired and a witness who is the victim of a serious assault or other crime in the court's opinion producing a vulnerability) the court must on application (in writing by the party calling the witness) make special arrangements under s 13A unless dispensation can be given under s 13A(11).

- In addition, s 13C requires (in the case of witnesses under 16 and witnesses with cognitive impairments) or enables (following application in the case of other vulnerable witnesses) the testimony of a vulnerable witness in criminal proceedings to be video-recorded so that if the matter requires retrial the testimony can then be tendered in this form under s 13D.
- Section 13B prohibits a defendant from cross-examining in person the alleged victim of his assault (in both criminal and civil proceedings).
- Finally, s 14 entitles a witness not reasonably fluent in English to be assisted by an interpreter.

Witnesses Testify from Memory

- Once competent and compelled to testify, the witness is expected to testify from memory, as it is that memory as articulated through oral testimony which is the focus of the common law trial
 - In examination-in-chief counsel cannot ask leading questions and witnesses must be proofed before they come into court from statements taken from them closer to the events, or be allowed to use these earlier statements in court to refresh their memories of what they experienced
 - There is no procedure in SA whereby a court can take testimony from a witness closer to the relevant events, although in most jurisdictions testimony from children, generally or from child victims of sexual assaults, can (and, in some cases, must) now be taken and video-taped closer to the events in question and the video-tape presented at trial as the child's evidence.
 - Prior out of court statements by the alleged victim of a sexual offence who is a vulnerable witness due to young age or mental capacity, may be admissible under old s 34CA [now, s 34LA].
- The relevant rules in Australian Solicitors' Conduct Rules determine, for example, that a practitioner must not suggest to a witness that they give false evidence or coach them by advising what answers to give.
 - However, proofing of witnesses is allowed, which entails questioning and testing the version of evidence given by the witness before the trial.
 - This can include drawing the witness's attention to inconsistencies or other difficulties with her evidence.
 - But practitioners must not coach or encourage their witnesses to give evidence which is different from what the witness believes to be true.
- The common law does little to control the out-of-court process for reviving the memory of a witness.
 - It does permit counsel cross-examining to call for any document used before trial to revive memory. However, the failure to produce such a document goes only to the witness's credit, not to the admissibility of the testimony (see *Collaton v Correl*)
- Under the uniform Acts s 34, a court may refuse to admit testimony at all where a witness fails to produce material, usually a document, used to revive memory.
 - Courts are not very interested in controlling the sort of materials consulted by witnesses out of court to refresh memory (*R v Richardson*)
 - They may be documents made by the witness or even someone else, and need not have been made contemporaneously with the events.
 - As long as the witness claims that their memory is revived, then the oral testimony can be given.
 - A witness could use a report in a newspaper made long after the events to revive memory out of court.
 - This use would, if discovered, go only to the witness's credit.
 - Where documents are used and called for by cross-examining counsel they are not then automatically admissible.

- The rules for their tender are the same as for documents used to refresh memory in court (see below).
- Common law rules about witnesses using documents when testifying to refresh memory at trial (see *Hetherington v Brooks* and s 32 uniform Acts:
 - A witness can only use documents when he or she is no longer able to testify from memory and then, with the permission of the court (determined at a voir dire), may be allowed to refer to documents made or adopted by them at a time when the events were fresh in their memory (cf *R v Van Beelen*)
 - This may include reference to jointly prepared notes despite the risks of collaboration: *Heanes v Herangi*.
 - Then, if permission is granted to refer to the document, it should be used only as an aide memoire, rather than being read to the court (cf exception created for police witnesses by s 33 Evidence Act 1995 (Cth)).
 - Only if there is no revival of memory at all will a witness be allowed to read to a court a contemporaneous document made or adopted by her.
- Where a witness is permitted to testify using a document (even where the memory is not revived) the oral testimony remains the principal evidence in the case. The document is not admitted into evidence unless certain circumstances occur.
 - Whenever a document is used it must be given to the opponent to enable her or him to cross-examine on it
 - The opponent is then entitled to use the document for this purpose without first putting it into evidence (*R v Pachonik*)
 - However, if the opponent finds an inconsistency between statements in the document and the witness's oral testimony, and the statement in the document when put to the witness is denied, then the opponent may tender that inconsistent statement in the document to prove the inconsistency (this is permitted through the process enacted in s 29 Evidence Act 1929 (SA)).
 - Opposing counsel may then use the resulting inconsistency to discredit the witness, but only to discredit the witness (*Dairy Farmers Co-Operative Milk Co Ltd v Acquilina*).
 - Section 60 uniform Acts provides that if a representation is admitted for a non-assertive purpose then it may also be used as hearsay (whatever the degree: s 60(2) overruling *Lee v R*).
- If the cross-examiner refers to parts of the document which were not used for the purposes of refreshing the witness's memory, then the party calling the witness can (in effect as a penalty against the cross-examiner for using parts of the document she was not entitled to use) insist that the whole document be tendered, and tendered as hearsay evidence (see, for example, *R v McGregor*)
 - By contrast, section 35 of the uniform Acts provides that a party is not to be required to tender a document only because the party called for, or inspected it.
- Where a witness can vouch for the contemporaneity and accuracy of her document but her memory is not revived, so that all she can do is read the document (or report the memorised document) to the court, then, at the option of opposing counsel, the party calling the witness may be obliged to tender the document.
- In the uniform Acts, the rules relating to documents which are used to refresh memory is greatly affected by the hearsay exceptions.
 - Section 60 applies to allow any representations in documents admitted for non-assertive purposes also to be used as hearsay, but under ss 64 and 66, following a witness's testimony in chief, either party may tender as first-hand hearsay a document of the witness containing a previous representation.
 - However, under s 66 the representation in the document must have been made when any asserted facts were still fresh in the witness's memory (the view in *Graham v R* (1998) 195 CLR 606 of Gaudron, Gummow and Hayne JJ, suggesting freshness is simply a matter of time, is reversed by s 66(2A)).

- This means that, whether the witness's memory is revived or not, his or her prior statement about the events may simply be tendered as evidence of the facts in issue in civil cases and, in criminal cases, may be so tendered provided the representations were made when the facts were fresh in the witness's memory.
- Although the rules for in-court refreshment are much stricter than for out-of-court refreshment, a court may always provide a witness with an opportunity to revive memory out of court by granting an adjournment. This approach was endorsed by the Court of Criminal Appeal in *R v DaSilva*.

Prior Consistent Statements of Witnesses

- Common law is opposed to a party tendering a witness's prior consistent statements, as it would allow witnesses to 'bolster' their testimony by making consistent corroborative statements prior to coming to court.
 - Regarded as hearsay. Testimony must be direct in court.
 - Admissibility affected by ss 64 and 66 of the uniform Acts.
 - These provisions simply admit as first-hand hearsay a witness's prior statements, with the added requirement in criminal cases (s 66(2), (2A)) that the statement be made when the asserted facts observed by the witness were fresh in the witness's memory.
 - Because these prior statements are relevant and admissible to proving the facts in issue they may also be used to support the witness's credit (if also so relevant).
 - The uniform Acts do enact the common law principle (the bolster rule) that evidence which is relevant to a witness's credibility should not generally be tendered by a party in chief (s 102), but if the evidence is also otherwise relevant and admissible this prohibition does not apply (s 101A - enacted to over-rule the interpretation of s 102 found in *Adam v R*).
 - However, there are also a number of situations where the admissibility of a prior consistent statement is justified by the common law on the ground of its important relevance to the witness's credit so as to be admissible as an exception to 'the bolster rule'.
 - The three principal exceptions are: prior statements tendered to rebut an allegation of recent invention, prior statements of identification, and complaints in sexual cases.
- Prior statements tendered to rebut an allegation of recent invention:
 - Where in cross-examination an opponent alleges that a witness has as a consequence of a particular event or for a particular reason invented her testimony, the party calling the witness may be permitted to call evidence of a statement consistent with her testimony which was made prior to that event occurring or that reason arising.
 - Such a consistent statement rebuts the allegation of recent invention.
 - It is not enough that it be a prior consistent statement, rather it must have been made at a time before the alleged reason for invention has arisen.
 - An allegation can be made independently of any supporting evidence: *Nominal Defendant v Clements*; *Mapp v Stephens*.
 - The rule is enacted in s 108(3)(b) of the uniform Acts for those (increasingly few) situations where s 102 applies to exclude prior statements which are relevant and admissible only to credit.
- Prior statements of identification:
 - Where a witness needs to identify an accused, the identification must at common law as a matter of principle be done in court in front of the trier of fact.
 - Testimony of the witness's prior identification is a prior consistent statement which is prima facie prohibited by the bolster rule and, in addition, is inadmissible hearsay at common law.

- However, the reliability of an in-court identification is impossible to assess without knowing the circumstances in which the witness first recognised the accused as the person whom the witness saw committing the crime.
 - The most reliable recognition is that made at a properly conducted identification parade (although research suggests that sequential digi-board identification may be just as accurate: see *Winmar v WA*)
 - The first identification following observation of the crime is regarded as normally crucial, as once a witness has identified a person he is likely to stick to it.
 - Thus, it is always important to adduce evidence of identifications made prior to trial and their circumstances even though they are strictly evidence of the identification witness's prior consistent statements.
 - Of course, where a person is well-known to a witness and there has been no need to confirm that recognition before trial this logic does not apply and statements prior to trial asserting that recognition (identification) remain strictly inadmissible (*R v Jansen*)
 - Problems arise where the witness is unable to identify a suspect in court and evidence is called that the witness identified that suspect prior to trial.
 - On the face of it, that testimony is hearsay evidence of an identification, although half the court in *Alexander v R* (1981) 145 CLR 395 was nevertheless prepared to admit it in exception to the hearsay rule.
 - The other half of the court analysed the situation before them (where the witness had testified to previously picking out a photo but to being unable to recall which one, and the attending police-officer was called to say which one he had picked out) as not involving hearsay.
 - This second analysis depends upon the witness testifying in court that a prior identification did take place (to the fact of a prior identification), so that the only function of the evidence of the out-of-court identification is to fill in the details of this in-court testimony.
 - If the witness does not remember or is not prepared to testify in court to the fact of a previous out-of-court identification then this analysis breaks down or, if the identifying witness is not called to testify at all, *Alexander* is again distinguishable.
 - In *R v Turner* (2000) 76 SASR 163 a witness testified to selecting someone at an identification parade but did not make it clear in testimony whether this selection was a positive act of identification.
 - In these circumstances, testimony could be called to establish whether the witness had identified the accused or had merely said that the suspect looked similar to the culprit.
 - None of these cases stand for any more general rule than: out-of-court statements of identity are admissible either as prior consistent statements or in exception to the hearsay rule.
 - Thus, in *Jansen* (referred to above) where an accused was well-known to a witness, the witness's prior statements identifying the accused as in the vicinity at the time of the alleged crime were held inadmissible.
 - Under the uniform Acts, where a witness testifies, her prior statements of identity will be admissible as first-hand hearsay if they satisfy ss 64 or 66.
 - If the witness is not called, the prior statement may still be admitted as hearsay if ss 63 or 65 are satisfied.
- Complaints in sexual cases:

- As allegations of sexual offending may be easy to make and difficult to rebut (for there are seldom other witnesses present), in anticipation of the inference of invention, judges became prepared to admit evidence of recent complaint in sexual offence cases (whether or not consent was in issue) to support generally the credibility of the complainant.
 - The complaint should have been made spontaneously at the first reasonable opportunity.
 - A complaint made in response to leading questions will not be spontaneous.
 - But it is difficult to reconcile decisions of what constitutes a complaint for these purposes and each case can only be explained on its facts and keeping firmly in mind the strict reason for the reception of such evidence at common law (for recent egs see, *Mustafa; R v Humble*).
- The common law of 'recent complaint' has been abolished in SA and replaced with a statutory law of 'initial complaint', permitting an initial complaint to be tendered to support the credibility of the complainant's testimony (s 34M).
 - Once admitted, juries must be instructed about the use that can be made of the complaint.
 - It is not admitted as hearsay, that is to prove any facts asserted in the complaint, and only the fact of the complaint is admitted in support of the complainant's credit as a witness (in exception to the bolster rule).
- Section 34LA admits generally the prior statements of protected witnesses (young children and witnesses with cognitive impairment affecting their capacity to testify) as prior consistent statements in exception to the bolster rule and as hearsay if the court is satisfied that the statement has sufficient probative value to justify its admission.
 - If the statements are admitted, the judge must warn the jury to treat the out of court statements with care because it has not been tested through cross examination.
- It should also be noted that where there has been no prior complaint or statement, while at common law this was a matter that could be taken into account in assessing the witness's credibility (*Kilby v R* (1973) 129 CLR 460), s 34M(2) Evidence Act 1929 (SA) now prohibits the drawing of any inference at all 'in relation to the alleged victim's credibility or consistency of conduct' from such failure.
- Under the uniform Acts the complaint, if prohibited because relevant and admissible only to a witness's credit under s 102, may be admitted under s 108(3)(b) to rebut recent invention and once so admitted becomes admissible as hearsay under s 60.
 - If ss 64 or 66 are satisfied, the complaint can simply be admitted as first-hand hearsay without recourse to s 108(3)(b).
 - As a result, under the uniform Acts, the prior complaints of witnesses appear to become generally admissible to credit and as hearsay unless the court is prepared to exercise its exclusionary discretion.
 - It was initially argued that this discretion should be exercised to preserve the common law position.
 - This argument was firmly rejected in *Papakosmas v R* (1999) 196 CLR 297 with the court making it clear that the uniform Acts intend to alter the common law and to admit generally first-hand hearsay.

Adverse Witnesses

- Counsel can put no suggestions to a witness as to what he or she should say in XN except in two situations: first, where the witness is hostile (adverse) and, secondly, where the witness is genuinely forgetful or confused.
- The common law distinguishes between (a) a witness whose testimony fails to come up to proof and (b) a witness who is hostile to telling the whole truth.

- Only where (b) is demonstrated will a party be permitted to cross-examine its own witness as a hostile witness.
- The procedure for establishing hostility and cross-examination on prior inconsistent statements is set out in *Price v Bevan*.
 - The decision to declare a witness hostile is made by the judge on the *voir dire*.
 - Hostility is determined from a witness's demeanour and any prior inconsistent statements the witness may have made. These statements must be strictly proved at the *voir dire* pursuant to the procedure laid down in s 27 Evidence Act 1929 (SA).
- If it appears that the witness is not hostile to telling the truth but is merely confused or forgetful, a form of limited cross-examination may be permitted to get the witness back on track, although *R v Thynne* [1977] VR 98 is reluctant to use this procedure unless the witness is deliberately evasive or seriously confused.
 - It is not a procedure which should be used to evade the general prohibition against leading questions.
- Section 38 of the uniform Acts permits counsel to cross-examine a witness on a matter relevant to the witness's credibility with leave of the court where evidence given by the witness is unfavourable to the party, where a witness is not making a genuine attempt to testify, or where a witness has made a prior inconsistent statement.
 - There is no need for a party to prove hostility to be able to cross-examine its own witness who has given adverse testimony.
 - However, cross-examination under s 38 is not at large and is limited to discrediting the witness and her adverse testimony.

Part 4 Syllabus Notes: Response and Cross-Examination

Introduction

- Every party has a right to cross-examine witnesses called during a trial whether or not they have testified against them (see uniform Acts s 27).
 - However, a judge now must refuse cross-examination that is inappropriate to the witness (compare with s 41 of the uniform Acts); “inappropriate” replaced “improper” in s 25 of the SAEA.
 - The court also has a discretionary power to disallow questions which might produce unfairness in the trial (at common law or under ss 135-7 of the uniform legislation).
 - *Palmer v R*: it was unfair for the Crown to ask an accused charged with rape why the complainant would lie, for not only is this a matter which is outside the accused's knowledge but it also throws a burden of explanation on the accused, a burden which is inconsistent with the presumption of innocence.
- Cross-examination serves two purposes:
 - First, to obtain evidence relevant to the material facts in issue and, secondly, to obtain evidence relevant to determining the credibility of the witness.
 - The credibility of a witness is effectively of indirect relevance to a determination of the facts in issue (see s 55(2) of the uniform Acts).
 - The uniform Acts ss 101A and 102 make evidence which is relevant and admissible only to a witness's credibility presumptively inadmissible.

Issue Cross-Examination

- Affected by two matters:
 - To ensure an accused has proper notice of the prosecution evidence in criminal cases, the prosecution should lead all its available evidence in chief as part of its case.
 - It is improper for the prosecution to introduce evidence in cross-examination of defence witnesses or by way of rebuttal of defence evidence (*R v Chin*).
 - It is inappropriate, after the prosecution case has closed, to introduce evidence which could reasonably have been introduced in-chief.
 - The *Browne v Dunn* rule: (assumed basis of s 46 of UEA)
 - Demands that, where a party intends to contradict a witness or to suggest an explanation of her testimony, the witness should be given an opportunity during cross-examination to comment upon this other version.
 - This is fair to the witness but, more importantly, it gives the trier of fact the response of the challenged witness to enable it to decide whether to accept the alternative version.
 - It also gives fair notice of which issues relating to that witness's testimony are really in dispute so a party knows to call any available witnesses on that issue (*Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation*).
 - Mere breach seldom gives rise to successful appeal.
 - A miscarriage of justice would have to be demonstrated - for example, that a party was improperly estopped from calling relevant information, that the denial of crucial comment makes the resultant decision unreliable, that the judge failed to explain to the jury that their prerogative to reject evidence remains whatever the degree of cross-examination, or that the judge failed to warn against drawing adverse inferences from counsel's failure to cross-examine
- The more specific the matter in issue and the more it is within the knowledge or expertise of a witness, the stronger the reasons for having the contradictory version put in cross-examination: *Dayman v Simpson*.

- It seems that failure to cross-examine does not estop the failing party from calling contradictory evidence and generally non-compliance can be remedied by recalling the witness (*Reid v Kerr*); s 46 UEA.
- The failure to call any contradictory evidence or otherwise seek to explain away the evidence may give rise to an inference that the evidence is being conceded.

Credit Cross-Examination

- A 'generous' attitude:
 - The bolster rule prohibits the calling of evidence in examination-in-chief which is relevant only to credit (for example, the previous consistent statements of the witness are generally inadmissible), nor can an opponent call further evidence to contradict answers given by a witness in cross-examination about matters going only to credit.
 - To allow matters of credit to be endlessly pursued would generally distract a court from the material issues in the case.
 - Section 102 of the UEA provides that 'Credibility evidence [as defined in s 101A] about a witness is not admissible.'
 - Section 103(1) then creates the most important exception, providing that 'The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.
 - Applies where the evidence sought to be adduced is relevant and admissible only to discredit the witness.
 - Where it is relevant and admissible for another purpose the credibility rule does not apply and cross-examination may proceed, subject to any exercise of discretion, for both purposes.
 - If the assertion does fall within a hearsay exception, generally as first-hand hearsay under ss 64 and 66, then the credibility rule does not apply.
 - The result is that the credibility rule under the uniform legislation applies to evidence that is relevant and admissible only to the witness's credit.
- The credibility of a witness turns upon:
 - (1) an interpretation of the language he or she has used to report observations;
 - (2) the honesty and sincerity of the witness;
 - (3) the accuracy of his or her observations; and
 - (4) the accuracy of the witness's memory of the observations.
- These are the four possible weaknesses of all human testimony:
 - Narration, sincerity, observation and memory.
- Common law judges may impose limits on cross-examination on the ground of sufficient relevance.
 - There have also long been statutory powers to disallow unreasonable, insulting, vexatious and scandalous questions (uniform Acts s 41; Evidence Act 1929 (SA) ss 22-5) but judges have been reluctant to interfere with the questioning of witnesses, often a matter of careful strategy by counsel, and tend to draw the line only in circumstances of obvious irrelevance or impropriety (*Wakeley v R*).
 - The 'generous' common law attitude to cross-examination is seen in the failure of judges to limit the cross-examination of victims in sexual assault cases, which so discouraged victims from testifying that the legislature had to interfere (s 34i Evidence Act 1929 (SA); now s 34L).
 - Although summary offences of a strict liability nature are arguably not normally of any credit relevance (cf *Bugg v Day* (1949) 79 CLR 442), judges are prepared to assume the mere fact of criminality as of sufficient relevance to a determination of credit in allowing cross-examination to reveal quite minor offences (*R v Aldridge* (1990) 20 NSWLR 737 at 741 (AECM [7.157C]).
 - This conclusion appears to be endorsed by that legislation which permits any previous convictions to be proved where denied (Evidence Act 1929 (SA) s 26)

- Restraining the generosity:
 - A judge must disallow inappropriate questions in cross-examination: see s 41 of the uniform legislation and s 25 Evidence Act 1929 (SA).
 - But the court must still take into account all relevant factors in determining whether a question is improper and these sections contain the provision that 'The failure to exercise the discretion in relation to a question does not affect the admissibility of any answer given in response to the question.'
 - Furthermore, it remains up to the accused to establish that any improper questioning has produced a miscarriage of justice, which is no simple task: see *Libke v The Queen*.
 - Section 13B Evidence Act 1929 (SA) also prohibits a defendant appearing in either criminal or civil proceedings from personally cross-examining a witness who is the alleged victim of a serious offence against the person or of a breach of a domestic violence restraining order allegedly committed by the defendant.

The Prohibition against Pursuing Credit Beyond Cross-Examination

- The general rule is that the answer given by a witness to a collateral question, a question relating to credibility alone, is final and cannot be pursued through re-examination or rebuttal: *Nicholls v R*; *Coates v R*.
 - Enacted in ss 102 and 103 of UEA.
- A collateral question is one relating to the witness's credibility alone.
 - Putting it another way, a collateral question is one that relates to a matter that could not have been introduced in chief by a party as sufficiently relevant to the facts in issue.
- Section 106(1) of the uniform legislation erodes the distinction between credibility and issue by giving the court a wide discretion to permit evidence by way of rebuttal where evidence has been put to a witness in cross-examination and denied or not admitted or agreed to.
 - This permits the court, without drawing any conceptual distinction between matters relating to credibility and issue, to allow the pursuit of matters beyond cross-examination where this is practically required to resolve questions decisive of the case.
 - It also makes clear that under the uniform legislation, as at common law, s 106 only comes into play following the putting of evidence to a witness in cross-examination.

The Definitive Common Law 'Exceptions' to the Collaterality Prohibition

- Endorsed by the High Court in *Nicholls v R*; *Coates v R* (2005) 219 CLR 196 and most are enacted in s 106(2) of the uniform Acts, which allows pursuit of these particular exceptional matters beyond cross-examination without requiring the leave of the court.
 - However, the enactment of the wider discretion in s 106(1) means that under the uniform legislation there will now be further situations where leave will be given to pursue matters beyond cross-examination.
- General repute and previous convictions:
 - Proof of a witness's general reputation for veracity (*R v Richardson and Longman*, applied in *R v BDX*)
 - Proof of a witness's previous convictions (Evidence Act 1929 (SA) s 26; uniform Acts s 106(b))
 - May be affected by the s 103 requirement that the evidence be capable of substantially affecting the assessment of the credibility of the witness.
- Bias:
 - Where a suggestion of bias is put to a witness and denied by the witness then the issue may be further pursued (s 106(a) of the uniform legislation extends the exception beyond bias to 'a motive for being untruthful'), but at common law only by calling evidence which clearly establishes the witness's bias: *Nicholls v R*; *Coates v R*.
- Physical or mental capacity:

- Suggestions in XXN to a witness that they are suffering from a specific physical or mental condition that throws serious doubts upon the reliability of their testimony may be a matter of sufficient importance to be pursued in rebuttal through expert medical testimony (*Toohey v Metropolitan Police Commissioner*).
 - To satisfy the rule in *Browne v Dunn*, it will generally require that these matters be first put to the witness in cross-examination before independent evidence of them is called.
 - Enacted in s 106(d) of the uniform Acts to the extent that the evidence affects the ability of the witness 'to be aware of' the matters to which she has testified.
 - But the section does not apply to allow evidence relevant to the ability of a witness 'to recall' the matters to which she has testified.
 - Thus expert evidence showing that the witness's recall has been affected by time or hypnosis has been held to fall outside s 106(d): *R v PLV*
 - The court feeling obliged in this case to draw this distinction because s 104(3)(b) expressly refers to the ability of an accused witness 'to be aware of or recall'
 - However, leave to cross-examine on a matter of 'recall' may now be pursued under ss 106(1) or s 108C (see below) with the leave of the court.
- Section 108C of the uniform legislation has now been inserted to make evidence from persons with specialised knowledge more generally admissible where it is relevant to determining the credibility of a witness
 - An expert might testify about a witness's capacity to see or hear, or to a witness's psychological and intellectual capacities if information about these matters can sufficiently assist the trier in resolving an issue of credit.
- Prior inconsistent statements:
 - Although relevant primarily to the witness's credit, prior inconsistent statements are of such importance in this context that they can be regarded as sufficiently relevant to an accurate assessment of the issues in the case.
 - Such statements are only caught by s 102 (as a consequence of s 101A(b)) if they contain assertions inadmissible as hearsay.
 - Therefore, under the uniform legislation in most cases it will only be prior inconsistent statements not relating to the facts in issue which will be caught by s 102 and require exceptional admission.
 - The procedure for proving prior inconsistent statements is contained in ss 28 and 29 Evidence Act 1929 (SA) and ss 106(c) and 43 uniform Acts
 - PIS exception wider under the uniform Acts than under the SA legislation.
 - The legislation allows a witness's prior statements, oral or written, to be put one by one to the witness and proved (by calling a witness or tendering an authenticated document) if denied (*Alchin v Commissioner for Railways*)
 - In South Australia, once the statement has been admitted into evidence it can only be used to discredit the witness (unless the witness admits the truth of the assertion in the statement in the witness box so that it becomes part of her testimony).
 - However, under s 60 of the uniform Acts, once the statement is admitted for a credit purpose it can be relied upon also as first-hand hearsay
 - Where documents are outside these statutory provisions (eg not made by the witness or where the statements do not relate to matters in issue between the parties) the common law rules for cross-examining on documents as laid down in *Queen Caroline's Case* must be followed.
 - The document must first be authenticated and tendered before it can be cross-examined upon (independently admissible).

- Alternatively, it may simply be put into the witness's hands and, without any reference being made to the contents of the document, the witness may be asked whether she adheres to her testimony (*R v Bedington*); UEA s 44
- The rule in *Walker v Walker* allows a party to compel an opponent to tender a document called for by the opponent but which the opponent was not entitled to see.
 - It does not apply where an opponent calls to see a document that was used by a witness to refresh memory in giving testimony in chief, for an opponent is entitled to see such a document and use it for the purposes of cross-examination
 - As an 'adversary game' rule, the rule in *Walker v Walker* appears to be abolished by Evidence Act 1995 (Cth) s 35.

Re-examination

- RXN an important process for restoring the credit of a witness whose testimony may have been unfairly distorted by cross-examination.
- A court may permit re-examination to explain ambiguities and uncertainties and to adduce information which explains or qualifies matters arising out of cross-examination (*R v Lavery (No 2)*); ss 39, 37 UEA.
 - If prior inconsistent statements are put to a witness in cross-examination, other statements which explain or qualify the apparent inconsistencies may be put and, if in writing, proved, through re-examination (*Alchin v Commissioner of Railways*).
 - Alternatively, if it is suggested in cross-examination that the conduct of the witness is inconsistent with his account then a consistent explanation may be pursued in reexamination.
- Leading questions may not be put in RXN.
 - The uniform Acts enact this common law position, s 39 providing that 'On re-examination [unless the court gives leave] a witness may be questioned about matters arising out of evidence given by the witness in cross-examination.' and s 37 generally prohibiting leading questions in re-examination.
- At common law, prior consistent statements are admissible only to rebut allegations of recent invention, not PIS.
 - However, s 108(3)(a) appears to give a more general right to tender prior consistent statements to counter prior inconsistent statements which have been admitted during cross-examination

Readings:

Chapter 1: The Fundamental Principles

A Procedural Perspective

- The object of procedural rules:
 - This chapter explains and classifies common law rules of evidence to give prominence to procedural rules.
 - Procedural rules have two overall purposes:
 - To provide a framework within which citizens can settle disputes; and
 - To provide machinery for the broader public function of law enforcement.
 - Positivists assert that courts merely apply promulgated legal rules to the facts before them.
 - Having isolated the relevant rule and the facts constituting the dispute, courts reach correct decisions by applying the relevant rule to the facts as found.
 - Jerome Frank describes as $R \times F = D$.
 - *Nicholas v R*: court must find the facts and apply the law which, at the relevant time, prescribes those antecedent rights and liabilities.
 - Difficulties with the positivist approach:
 - Rules may be unclear in their application because their formulation is ambiguous or because their application would produce a decision with which the judge cannot agree.
 - Rules will not cater for every situation.
 - This leaves decisions to the courts' discretion.
 - Ultimately, facts are decisive.
- The nature of material facts: past events
 - Material facts are those facts required to be established to be entitled a remedy under the applicable legal rule.
 - The procedural system provides the parties with an environment in which the alleged material facts can, if disputed, be discovered.
 - The rules of evidence are concerned with the discovery of those disputed material facts alleged by the parties and upon which their legal remedies depend.

Discovering Past Events

- The correspondence theory of knowledge:
 - There is an overarching assumption that there is a physical world out there to be known; that we are capable of knowledge that corresponds to the physical world.
 - Experience provides us with a direct knowledge of the world and its events. Where the world is not directly or fully experienced, it can be constructed through a process of inference.
- The inferential process: Wigmorean analysis
 - The process of reasoning is one of inference – given the direct experience of certain information or evidence, the existence or occurrence of the material facts can be inferred.
 - Not with certainty, but to varying degrees of likelihood or probability.
 - Starting point:
 - Reaching conclusions of fact from particular evidence is a process that can be rationalized – that there is a logical relationship that can be articulated between evidence and conclusions of fact.
 - Thus, the analysis begins with an isolation of, on the one hand, the evidence being relied upon and, on the other, the factual conclusions which the parties seek to justify.
 - The factual conclusions to be inferred from the matters experienced are, for the purposes of litigation, those material facts alleged and which will justify the granting of a particular remedy.
 - Those facts upon which the operation of a legal rule is conditional (positivist terms).

- In practical terms, they constitute that factual hypothesis for which a party is contending and which, if ultimately accepted by the trier of fact, will result in judgment being given in that party's favour.
- Having isolated precisely the information experienced and the facts ultimately to be established, the intermediary steps can be exposed by way of articulating each logical step to be taken if those facts are to follow from that evidence.
 - Each logical step is a process of inference whereby an intermediary fact is inferred.
 - From each intermediary facts further inferences are drawn until by means of a whole series of inferences, the ultimate facts can be regarded as discovered.
- Probability theory:
 - The assumption of equi-possibility, the principle of indifference' is crucial.
 - The assumption finds its justification in the idea that, given a state of ignorance about the individual members of a class, any other distribution of possibility would be arbitrary.
 - This justification relies upon the notion that, in practical decision making, we are ultimately seeking good reasons for deciding one way or another.
 - We must, in the absence of any information, assume equi-possibility.
 - The principle of indifference can only apply in the absence of information distinguishing between the chances of each member of the class.
 - As soon as such information exists, any assessment of probability based upon the principle becomes meaningless.
 - Prosecutor's Fallacy: to attempt to use the probability of a random match as the probability that the accused were the culprits.
 - Bayes's Theorem has no application in a criminal case as the presumption of innocence means prior odds must be set at 0. This means that the resultant multiplication produces the same answer of 0.

The Procedural Environment

- General considerations:
 - The uncovering of and emphasis upon maximal evidence relating to the particular event in issue is the very touchstone of an appropriate trial procedure.
 - Any procedural environment must employ fact finders of sufficient cognitive capacity to be informed by the knowledge of others and to apply their own knowledge and experience in considering available evidence to decide discovery of the material facts in issue.
 - Any process must allow for debate by those affected by decisions about how evidence and knowledge can be used to determine material facts.
 - Fact finders must act fairly and impartially in view of the delicacy of their task.
 - In criminal cases, the state must not interfere with the liberty of its citizens without bringing an accusation that it can establish through lawfully obtained evidence which so far as is humanly possible eliminates the risk of reasonable error.

Chapter 2: The Trial Process

The Process in Outline

- Sources of process:
 - The rules of evidence as a whole are not codified by the uniform legislation. Although the Commonwealth Act does not expressly preserve the rules of common law and equity, this must be the case under ordinary rules of statutory interpretation if the Act as a whole is not a code.
- The ambit of process:
 - Process in this context refers to the formal steps taken in a civil action or a criminal prosecution. Comprises two stages:
 - Pre-trial proceedings, followed by trial.
 - Pre-trial process has a crucial effect upon the factual issues alleged and disputed at trial and upon the evidence available to a party at trial to prove those issues.
 - Where evidence is obtained unlawfully or improperly, judges may forbid its tender at trial where this would compromise the integrity of the court's administration of justice.
- Pre-trial process:
 - Proceedings commence by a party laying a criminal charge or stating a civil claim.
 - Disputed serious criminal charges are screened through an administrative committal process which is held principally to determine whether the prosecution has sufficient evidence to put an accused on trial.
 - Prosecutor must disclose the evidence against the accused to ensure fair disclosure, which enables the accused to meet the case to be alleged at trial.
- Trial process:
 - Criminal trial begins with the taking of a plea from the accused.
 - The party bringing the charge or claim bears the burden of establishing, to the satisfaction of the court, the material facts in issue upon which that charge or claim depends.
 - This party 'opens' by outlining to the court the material facts in issue and the evidence which will be adduced to prove them: *R v Hansen*.
 - The purpose of an opening is to bring to the attention of the trier of fact the matters which the party will prove, the evidence which will be led to prove these matters, the witnesses to be called, the issues in the trial and perhaps some matters of law.
 - It is not appropriate for counsel to use the occasion to make what is in effect a closing address and an argument.
 - Having given this opening explanation, the proponent adduces the supporting evidence, principally in the form of witnesses testifying to material or relevant facts experienced by them.
 - Witnesses are questioned by the proponent (examination-in-chief), cross-examined by any other parties to the proceedings, and permission may be given to the proponent to remove any distortions or ambiguities consequential upon cross-examination through re-examination.
 - Reference to relevant documents and other objects may be made through oral testimony and in appropriate cases these may be tendered to the court as evidence (they become exhibits).
 - Opponent is called to answer at the close of the proponent's case but the need to answer is dependent upon the proponent having produced sufficient allegations and evidence.
 - Opponent may submit 'no case to answer'. If successful, the charge or claim will be brought to a premature and unsuccessful conclusion.
 - Proponent must bring entire case at once – cannot be 'split'. This is a consideration of fairness that demands that an accused know in advance the evidence to be met: *R v Chin*.

- Exceptional circumstances are required to justify a proponent 'reopening' a case after it is closed, more particularly, after other parties have gone into evidence (*Urban Transport Authority v Nweiser*) or after reasons for judgment have been given (*Manwell v Dames and Moore Pty Ltd*).
 - Such circumstances: where the opponent has raised issues not reasonably foreseeable by the proponent (*Shaw v R*), or which could not be fairly dealt with in advance of the opponent's case (*R v Pateman*). Alibis do not fall into this category unless they could not reasonably be foreseen: *Killick v R*), or where fresh evidence has come to light following closure of the proponent's case (*R v Doran*), or where formal, technical or non-contentious matters have been inadvertently overlooked (*R v Chin*).
 - Decision to reopen lies within the discretion of the trial judge. Guiding principles are the interests of justice: *R v Chin*.
- The opponent having answered, the parties address the court and explain how their respective points of view can be maintained in the light of the evidence before the court.
- Jury's role is to determine whether the material facts in issue have been proved to the requisite degree.
 - The judge has the duty of orally directing the jury which material facts must be established to make out the proponent's case and to what standard that case must be proved.
 - The judge must sum up fairly on the evidence presented, put to the jury the respective cases of the parties, and 'direct' the jury about any legal limits on the use of tendered evidence.
 - Judge may even express views about what conclusions appear appropriate, so long as the jury is directed that the final decisions of fact are for it alone and the overall summing-up is fair: *R v Tikos (No 2)*.
 - Judge must direct jury to find the crime proved beyond reasonable doubt.
- Following addresses from the parties and any summing-up, judgment or verdict is given.
- Appeal:
 - The appellate court must allow the appeal if it thinks there has been any wrong decision of any question of law (substantive or procedural) or if it thinks that on any ground there was a miscarriage of justice (general guide: where the accused has been deprived of a real chance of acquittal: *TKWJ v R*), or if it thinks the jury's verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence: *M v R*.
 - Appeal may be dismissed if the appellate court considers that no substantial miscarriage of justice has actually occurred ('the proviso'). This requires the court to determine for itself that the record proves the case beyond reasonable doubt and that there has been no fundamental procedural error that in itself can be said to contribute a substantial miscarriage of justice: *Weiss v R*.

The Essential Tasks of the Trial Court

- Essential tasks of the trial court:
 - 1. Determine which information presented by the parties it can properly consider;
 - 2. Decide whether the proponent has adduced sufficient information to require the opponent to answer; and
 - 3. Determine whether the information received establishes or proves the material facts in issue.
 - First two are decisions of law, exclusively for the judge; third is a decision of fact, the province of the jury if there is one.
- The reception of evidence:
 - Two fundamental principles:
 - The first forbids a court considering information which is not, by virtue of the natural rules of fact discovery, probative of the material facts in issue; that is, it 'forbids receiving anything irrelevant'.
 - The second directs that 'unless excluded by some rule or principle of law, all that is logically probative of the material facts in issue is admissible.

- Found in s 56 of the uniform legislation in reverse order to above (ss (2) and (1)).
- The court must first apply natural rules to conclude the information relevant, and, secondly, apply any legal rules that make the information inadmissible.
 - Only relevant and admissible information can be received.
 - By virtue of s 56(1) of the Uniform Acts, the only exceptions to the presumption that relevant evidence is admissible are those which arise under the Act and not by common law.
- The nature of relevance:
 - Relevance describes the relationship between the information or evidence presented and the facts upon which the charge or claim depends (material facts in issue).
 - Evidence is relevant where it can be regarded as capable of affecting, directly or indirectly, the probability of the occurrence (or non-occurrence) or existence (or non-existence) of one or more material facts in issue.
 - As long as the evidence is capable of rationally affecting the probability of a fact in issue to some degree, it is relevant.
 - Reflected in s 55.
- Relevance and admissibility:
 - All relevant evidence is presumptively admissible: *Papakosmas v R*.
 - The majority in *Smith* seems to have included a notion of sufficiency into s 55(1) by interpreting the words 'could rationally affect' to mean that the evidence be reasonably capable of adding to a jury's probability assessment.
 - As the jury was able to undertake a similar process of comparison to that undertaken by the witness the witness' testimony was irrelevant.
 - Only those facts constituting the basis for legal recovery (the material facts in issue) can be proved in a court of law and where evidence is relevant to an alleged fact, but that fact is neither a material fact in issue nor itself relevant to a material fact in issue, sometimes that evidence is described as irrelevant.
 - Discretion:
 - Every discretion must be exercised to ensure that decisions of fact are reached in accordance with those principles upon which our procedural system depends.
 - Discretion ensures judges do not attempt to mechanically apply rules which of their very nature defy mechanical approach.
 - Whether leave is given depends upon a proper application of the evidential rules in question rather than discretion in any literal sense.
 - Section 192 provides that before a trial judge gives any leave, permission or direction because of the Act, a number of matters must be taken into consideration.
 - The failure of a judge to have regard to these matters may provide grounds for appeal: *Stanoevski v R*.
 - The matters include the effect of the decision on the length of the hearing; the extent to which the decision would be unfair to a party or to a witness; the importance of the evidence; the nature of the proceeding; and the power to make other orders or directions.
 - It considers fairness in relation to all parties, including the Crown (*R v Le*) and to witnesses (s 18).
 - The onus is upon the party seeking exercise of a discretion to justify its exercise: *MacPherson v R*.
 - Once evidence is shown to have been unlawfully or improperly obtained, it must be excluded unless the court is persuaded to exercise its discretion to admit the evidence: *R v Haughbro*.
 - Efficiency, time and cost:

- General discretion to exclude relevant evidence on the ground that, having regard to matters of efficiency, time and cost, it is just not worth considering.
 - Applies in both civil and criminal cases.
- Section 135 allows a court to refuse to admit evidence if its probative value is substantially out-weighed by the danger that the evidence might ... (c) cause or result in undue waste of time.
 - There is thus under the Uniform Acts a strong presumption in favour of admitting relevant evidence (whichever party is tendering it and whether civil or criminal) and a clear and heavy onus upon an opponent to justify the exclusion of evidence altogether on these grounds.
 - A judge should seldom restrict the tender of relevant evidence from an accused in a criminal case on these grounds: *R v Beattie*
- Fairness:
 - Common law discretion to exclude evidence where this is required to ensure an accused a fair trial.
 - Applies to all evidence tendered in criminal cases: *R v Edelsten*.
 - Originated as the *Christie* Discretion:
 - Common law discretion permits exclusion of evidence in a criminal trial considered by the judge to be more prejudicial than probative.
 - Its object is not to prevent a jury from acting upon evidence properly probative of the accused's guilt, but to prevent the jury from being exposed to evidence likely to produce incorrect verdicts by misleading it or playing upon its prejudices: *R v Duke*.
 - The question posed for the judge is whether a properly directed jury will be capable of giving the evidence in question an appropriate probative weight, despite aspects of it that might distract the jury from this task.
 - Judges should only intervene where there is a real risk that a jury may give evidence more probative weight than it deserves: *Rozenes v Beljajev*.
 - May mitigate by editing the evidence (*R v Kallis*) or through direction to the jury: *R v Lock*.
 - Where this is not possible the evidence should be excluded.
 - Primary examples of exclusion are situations where evidence, whilst allowing appropriate probative inferences also gives rise to inappropriate inferences or chains of reasoning, which, even with appropriate directions, may be used by the jury and create risk of wrongful conviction: *R v Ames*
 - Where a particular gory picture is appropriately probative to indicate the injuries inflicted, a jury may instinctively and unreasonably seek to make the accused responsible: *R v Ames*
 - Judge might disallow relevant discrediting cross-examination of an accused revealing bad character because a jury is likely to infer, consciously or unconsciously but with a strong risk of inaccuracy, the guilt of the accused from the criminal propensities revealed by that bad character: *Phillips v R*.
 - Judge might limit the discrediting cross-examination of a witness that reveals the accused's bad character, or exclude police mug-shots revealing that the accused has a record, used to identify the accused as a suspect: *R v S*.
 - Evidence may be prejudicial because a jury could give it more probative weight than it deserves.

- Lack of experience of the risks of inaccuracy gives rise to a discretion to exclude identification evidence.
- Absence of evidence to challenge provides a strong reason for excluding police evidence alleging an unsigned confession where no independent person was present or independent recording made: *Driscoll v R*.
- Since reproduced in the uniform legislation in ss 135-137.
 - Section 135 allows a judge to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might (a) be unfairly prejudicial to a party; or (b) misleading or confusing.
 - Section 136 empowers a judge to limit the use of evidence (rather than excluding) where either of these dangers may arise, but without the substantial outweighing requirement.
 - Allows the court to restrict the use of the evidence where its probative value as hearsay or opinion is substantially outweighed by unfair prejudice or because it is misleading or confusing.
 - However, the mere use of the evidence as hearsay or opinion, expressly permitted under ss60 and 77 cannot be a legitimate basis for its exercise: *Papakosmas v R*.
 - Section 137 provides 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.
 - It is this section that will be invoked by an accused seeking exclusion on grounds of unfair prejudice.
 - In describing 'unfair prejudice', courts ask whether it would be unfair to receive the evidence because of the risk that the jury may give it more probative value than it deserves: *R v Lockyer*.
 - *Sinclair v R*: High Court reluctant to exclude as unfair the confession of a schizophrenic accused, holding that unless his incompetence as a witness was established, the jury could be left to determine what weight to give his confession.
 - *Foster v R*: invoked to exclude police evidence of an interview with an Aboriginal suspect where no solicitor was present and there was no other independent record of the interview. The absence of independent evidence made it difficult to assess accurately the police evidence in that case and was at least one reason for successful exercise of the unfairness discretion.
 - *Police v Hall*: unfair to admit the breathalyser test as he had been denied the opportunity to challenge it – held that legislation only conferred the opportunity to obtain the test, not a guarantee that the test could be taken.
- Absent impropriety, it is the risk of error rather than the mere loss of any procedural right to challenge evidence that gives rise to exercise of the unfairness discretion in these circumstances: *R v Lobban*.
 - Here, police destroyed plants, denying the accused the opportunity to test whether they were cannabis as alleged.

- Unfairness discretion refused as although the accused had been denied the opportunity to challenge, the plants had been grown by him and the defence had conceded their nature.
 - In this circumstance, there was no risk of error in admitting the prosecution evidence.
 - It is where the procedural impropriety creates an unacceptable risk of error that an accused is most obviously disadvantaged: *R v Swaffield*; *Pavic v R*.
- Lee discretion:
 - Where an accused fails to exercise procedural rights in order to cover the situation where an accused fails to exercise procedural rights through ignorance or incapacity or self-induced misunderstanding rather than through any impropriety by law enforcement officers.
 - *R v Swaffield*: mere ignorance of rights is not in itself a ground for discretionary exclusion.
 - *R v Em*: an admission made to police secretly recording a conversation was held not to be within the unfairness discretion despite police knowing that the accused was under a self-induced impression that evidence of an unrecorded conversation could not be tendered against him.
 - If police had induced or encouraged that impression, this impropriety would have given rise to exclusion as unfairness or public policy.
 - Better to seek exclusion on grounds of such impropriety rather than unfairness if seeking to enforce a suspect's procedural rights.
- For any unfairness to the accused consequent upon illegality, impropriety or loss of procedural rights, s 138 covers the arguments for exclusion.
 - However, s 90 provides that prosecution evidence of an admission may be excluded if having regard to the circumstances in which the admission was made it would be unfair to a defendant to use the evidence.
- Public policy:
 - Operates to exclude on grounds of public policy otherwise relevant and admissible evidence where it is obtained as a consequence of, or otherwise arises out of, illegality or impropriety: *Ridgeway v R*.
 - In this case, the court excluded evidence relating to a charge of possessing illegally imported drugs because the police had themselves instigated the illegal importation upon which the possession was based.
 - Where evidence is obtained illegally or improperly, one might argue either, that it is unfair to admit the evidence because it would not have been obtained without the illegality, or it might be argued that it should be excluded on grounds of public policy so that the court is not seen to condone the illegality.
 - The question is ultimately whether the admission of the evidence would be bought a price that is unacceptable having regard to contemporary community standards: *R v Swaffield*; *Pavic v R*.
 - The discretion to exclude on grounds of illegality or impropriety is enacted for both civil and criminal cases in s 138 of uniform Act:
 - (1) evidence that was obtained: (a) improperly or in contravention of an Australian law; or (b) in consequence of an impropriety or of a contravention of

- an Australian law; is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
- There must be a causal relationship between the evidence and the illegality or impropriety: *Question of Law Reserved (No 1 of 1998)*.
 - Impropriety should include any situation where a person has been actively denied fundamental rights and privileges: *Ridgeway v R*.
 - Includes activities which would bring courts into disrepute if they were simply condoned by the courts: *Parker v Comptroller-General of Customs*.
 - Section 138(3) delineates matters to be taken into account when exercising this discretion, generally reflecting the matters emphasized in the cases of *Bunning v Cross* and *Ridgeway v R*.
 - Includes the nature of the offence charged against the accused, the importance and probative value of the evidence in question, the gravity and intent of the illegality or impropriety, the nature of the impropriety, the ease with which the evidence could have been obtained without illegality or impropriety and the likelihood of those committing the illegality or impropriety being otherwise dealt with, the effect, if any, of the impropriety upon the accused.
- Determining the reception of tendered evidence:
 - Tendered evidence must be relevant directly or indirectly to a material fact in question.
 - The plea of not guilty puts all material facts in dispute: *R v Sims*.
 - When inadmissible, the evidence may be excluded, either absolutely (EG where public policy demands that evidence be not divulged), or presumptively (EG evidence revealing an accused's previous disposition to wrongdoing is inadmissible unless its probative force can be shown to be greater than the risk of prejudice).
 - Evidence may be inadmissible only for a particular purpose, in which case the evidence may be received, if relevant and admissible for some other purpose.
 - Section 60: if evidence has an admissible non-hearsay use it may also be used as hearsay if it is so relevant.
 - Where a dispute arises over the reception of evidence that dispute must be decided by the court (as a matter of law) as a separate preliminary issue.
 - Voir Dire Hearing: Where disputed admissibility turns upon preliminary findings of fact, and where these facts are in dispute, the court may hold a preliminary trial within the main trial to hear evidence: *Sinclair v R*
 - Provided for in s 189.
 - Exact procedure at discretion of court: *R v Petroulias*.
 - There is no right to such a hearing and the party bearing the onus must adduce sufficient reasons for holding it: *MacPherson v R*.
 - Generally held before any jury is empanelled: s 98 CLCA 1935 (SA).
 - Conditions for admissibility are separate preliminary questions, prima facie not of concern to the jury.
 - As a general rule, the voir dire should be held as a separate proceeding in the jury's absence. If evidence taken on the voir dire turns out to be of relevance to issues at the main trial, then that evidence may be separately and appropriately tendered at the trial: *Demirok v R*.

- Where evidence to be taken on the voir dire will certainly also be relevant to trial issues, and there is no risk of prejudice, there seems no reason why the voir dire should not be held before the jury: *Albrighton v Royal Prince Alfred Hospital*.
- Jury must not be present when it is held to determine the admissibility of an admission or improperly obtained evidence: s 189(2).
- Where a member of the accused's family objects to being called, s 189(5) provides that this issue should also be determined in the jury's absence.
- In all other cases, s 189(4) provides that presumptively the jury should not be present unless the court so orders.
 - Section 189(5) provides that the court is to take into account the possible prejudice to the D that revelation of the evidence to the jury might cause and whether the evidence is likely anyway to be revealed to the jury at some stage.
- There is a presumption that parties (particularly the accused) should be present at each and every stage of the proceedings, including the voir dire: *Lawrence v R*.
 - Presumption displaced: exceptional examples – parties and their counsel should always be present.
 - Accused misbehaving or absconding: *R v McHardie*
 - Information of national security – judge to consider alone: *Alister v R*.
- Party waiver of rules of admissibility:
 - Waiver is controlled by s 190 of the uniform legislation.
 - (1) does not permit waiver of the rules relating to competence and compellability; oaths and affirmations; relevance; identification evidence; privileges; mandatory and discretionary exclusions; rules relating to proof and the miscellaneous rules.
 - However, some sections can be read down to operate only following objection so no errors of law unless the proviso applies.
 - (2) consent by an accused is not effective unless they have been advised to consent by their lawyer, or the court is satisfied that the D understands the consequences of giving consent.
 - (3) in civil cases, a court may refuse to apply rules capable of waiver where the matter to which the evidence relates is not seriously in dispute, or would cause unnecessary expense or delay.
 - Presumption that all relevant evidence should be received by the court. Embodied in s 56(1).
 - It is left to the parties to object to the admissibility of tendered evidence.
 - Objectable material in statute interpreted to mean it is inadmissible 'following objection': *Seltsam v McGuinness*
 - As a consequence, the trial judge's failure to exclude in the absence of objection is not an error of law.
 - However, applies only to admissibility – not to irrelevant evidence.
 - Concession initially made may be withdrawn unless to do so would result in irreparable unfairness to the other side: *R v Shalala*
 - May be appropriate for a judge to intervene to assist an unrepresented party to ensure an understanding of the right to object, thereby guaranteeing a fair trial: *MacPherson v R*.
 - If an opponent has misled a party into not objecting to relevant but inadmissible information, it would be improper for the court to act upon it: *Hughes v National Trustees Executors and Agency Co of Australasia*.
 - Unless leave is given, parties may not take points on appeal where no objection was made at the trial, unless a miscarriage of justice can be shown: *R v Tripodina & Morabito*.
 - Conduct of counsel does not itself constitute a miscarriage of justice: *R v Ignjatich*.

- *Crompton v R*: an appellate court may interfere where a point was not raised at trial, but should only do so in exceptional circumstances.
 - If a party tenders evidence for a particular purpose, that party cannot prevent the use of that evidence for other admissible purposes that may be contrary to their interests: *B v R*
- A case to answer:
 - Requirement is that there be evidence before the court at the completion of the prosecution case from which a jury (or other trier of fact) *could* find the material facts proved to the criminal standard of proof.
 - Three grounds as the basis for a submission:
 - That the claimant has not alleged sufficient material facts to justify the remedy sought; (usually civil)
 - **That the claimant has not tendered any evidence in support of one or more of the material facts required to make out the claim;**
 - That, although the claimant has tendered some evidence in relation to all the required material facts, that evidence is, in relation to one or more of those material facts, so unreliable or vague, that no reasonable trier of fact could possibly be convinced by it to the requisite standard.
 - Counsel must wait until the completion of the prosecution case before making a no case submission: *R v N*.
 - The second and third grounds are usually raised consequent to, and normally at the close of the proponent's case.
 - The better view is that there is no right to make a no case submission on the third ground.
 - As long as there is some relevant evidence on each material fact in issue, judges should take that evidence at its highest, in deciding if it is capable of supporting the proponent's hypothesis.
 - Where the evidence is the direct testimony of a witness to the event in issue, there must always be a case to answer irrespective of the judge's opinion about the credibility of the witness.
 - Where the case relies upon circumstantial evidence, the judge's only task is to ask whether, taking those items of evidence supporting the hypothesis in issue at their highest, they are capable of supporting it.
 - *Questions of Law Reserved on Acquittal (No 2 of 1993)*: the standard is whether evidence capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt exists.
- *Prasad* Submissions: *R v Prasad*
 - Where it becomes apparent that the evidence crucial to the success of the proponent's case is just too unreliable for the case to go on.
 - In a criminal case tried before a jury, any submission seeking a weighing of evidence should be regarded merely as a request to a trial judge to remind the jury of its prerogative to acquit, at any stage of a trial, if convinced that the prosecution evidence is too unsafe to act upon.
- Proof:
 - The civil standard: balance of probabilities
 - If one has no preference on the allocation of errors between plaintiffs and defendants, then a probability of greater than 0.5 will, assuming beliefs reflect reality, produce in the long run an appropriate distribution of correct results.
 - *SGIC v Laube*: the weight of evidence was insufficient even though the mathematical standard was formally satisfied:
 - Testimony from an expert that statistically, most people with such a blood alcohol reading would be incapable of exercising effective control of a motor vehicle.
 - *Briginshaw v Briginshaw*: court must feel an actual persuasion of the proof.
 - It is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal.

- *Neat Holdings v Karajan Holdings*: balance of probabilities preferred by the High Court.
- The criminal standard: beyond reasonable doubt
 - Beyond reasonable doubt. Conviction can only follow the elimination of all reasonable doubts.
 - Judge not to define beyond reasonable doubt. Jury may look in dictionary so they can make their own minds about the application of the phrase in the case before them. It is the province of the jury to determine what a reasonable doubt is: *R v Chatzidimitriou*.
 - Elaboration encouraged only where proof depends entirely upon circumstantial evidence.
- Proof on the voir dire:
 - Judge makes a decision of fact. Civil standard is generally appropriate: *Wendo v R*.

Chapter 5: The Adversary Context

The Privilege Against Self-Incrimination

- Incompetence of accused and spouse as witnesses for the prosecution:
 - The accused:
 - Little point in the prosecution calling the accused unless they could be forced to speak, and this is not now tolerated (right to silence).
 - In the case of accused jointly standing trial, its effect is to forbid the prosecution from calling one accused to testify against the other.
 - Privilege against self-incrimination is waived/renounced by an accused choosing or agreeing to testify for the defence.
 - Section 12 of the UEA: all persons are competent and compellable except as otherwise provided by the legislation.
 - Section 17(2): a defendant is generally not competent and so cannot testify or the prosecution.
 - Section 17(3): an associated defendant is not compellable to give evidence for or against a defendant unless being tried separately.
 - The accused's spouse:
 - At common law, spouses were regarded as one, and therefore incompetent to testify against each other: *Bentley v Cooke*.
 - Extended to divorced spouses: *Monroe v Twisleton*
 - Based upon the idea that, where one spouse is a party, the other is an interested and therefore biased witness whose testimony cannot be relied upon.
 - However, legislation now makes spouses competent and compellable witnesses: s 16 SAEA.

Public Policy Restrictions Upon Access to Information

- Restrictions protecting marriage and family relationships:
 - Exception in criminal cases at common law that where one spouse was charged with a crime involving personal violence or loss of liberty against the other, that other was a competent witness for the prosecution, although not a compellable one: *Hoskyn v Metropolitan Police Commissioner*.
 - In jurisdictions covered by the UEA and in SA, the balance between protecting marriage and calling all available testimony to disclose offences is further tipped towards disclosure.
 - Spouses are compellable for the defence in all cases and there is a presumption in favour of compellability for the prosecution.
 - Judge generally has a discretion to exempt a spouse from testifying where the interest to justice in obtaining the evidence is outweighed by the risk of serious harm or damage to the witness or the relationship between the witness and the accused.
 - UEA applies to spouse, de facto spouse, parent or child of a defendant.
 - SA, full or partial exemptions can be given to spouse, putative spouse, parents and children.
 - Procedure for granting exemptions: s 21 SAEA
 - Informed of their right to obtain exemption, application heard in the absence of any jury.
 - Cannot comment on the exemption.

Chapter 6: Party Presentation

Burden of Proof: Nature and Incidence

- Burden of proof involves two aspects:
 - The burden of adducing evidence (evidential burden); and
 - The burden of convincing the court of the material facts (persuasive burden).
- If a party bearing the evidential burden adduces no evidence of a material fact and this lacuna has not been otherwise filled, then the court will not consider the question of the existence or occurrence of that fact: *Considine v Lemmer*.
 - *Purkess v Crittenden*: held that where a D wished to defeat a P's claim for damages for personal injury upon the ground of pre-existing injury, the D was obliged to adduce credible evidence of that injury before the court was obliged to consider it.
- The mere satisfying of the evidential burden in relation to a material fact does not oblige the court to find that fact proved, and it must then be persuaded (BRD or BoP) of the existence or occurrence of that fact.
- The incidence of the burdens in criminal cases:
 - HoL Case – *Woolmington v DPP (Moffa v R HCA)*: no persuasive burden is cast upon an accused charged with murder to establish defences – once properly raised, the prosecution is required to rebut these issues to the ordinary criminal standard, BRD.
 - Only time when the accused bears a persuasive burden is when defence of insanity is raised (on BoP: *Soderman v R*) or where statute so directs (expressly or by implication: *R v Hunt*; *Dowling v Bowie*).
 - The evidential burden is satisfied by the accused being able to point to credible evidence capable of raising a reasonable doubt; that is, a reasonable possibility of the events argued by the defence having occurred: *Jayasena v R*.
- The incidence of the burdens in civil cases:
 - The party seeking to enforce legal rights bears the burden of substantiating the material facts upon which those rights depend.
 - As a general rule, P bears both evidential and persuasive burdens in relation to each and every material fact essential to establishing the cause of action.
 - The plaintiff must prove the facts material to the claim and the defendant the facts material to a defence: *Currie v Dempsey*.
- Presumptions:
 - Presumed facts must be accepted by courts either absolutely (irrebuttable or conclusive presumptions) or until the court is persuaded otherwise (persuasive presumptions), or until credible evidence to the contrary is adduced (evidential presumptions).
 - As long as the operation of a presumption is not inconsistent with the uniform legislation it is expressly preserved: *Evidence Act 1995* (Cth) s 9(3)(a).

No Case to Answer

- Criminal cases:
 - Prior to plea, an accused may allege the court has no jurisdiction to hear the case or contest the formal validity of the charge, or allege the charge constitutes an abuse of process or, by plea in bar allege *autrefois acquit* or *convict*.
 - To be formally valid the charge must provide sufficient particulars of the offence charged so that it may be fairly defended by an accused.
 - In the absence of formal allegations of fact by the prosecution, the accused has no right to submit there is no case to answer until the completion of the prosecution case, when the prosecution case has been definitively alleged through the evidence called.

- Submission made on the basis that the prosecution has failed to adduce sufficient evidence to prove the material facts of the offence charged.
 - Whether made out is a question of law for the judge, verdict being an acquittal (and jury so directed): *R v Cheng*.
- Standard of sufficiency:
 - Concentrates upon the adversarial sufficiency of the evidence to oblige the accused to make answer to the adduced evidence.
 - Concentrates upon the capacity of the evidence, taken at its highest, to support a conviction.
 - *Zanetti v Hill*: requires some evidence which, if accepted, would either prove the element directly or enable its existence to be inferred.
 - On this approach the only question is whether the prosecution has adduced some evidence upon all the material facts.
 - *R v Bilick and Starke*: On the assumption that all the evidence of primary fact considered at its strongest from the point of view of the case for the prosecution is accurate, and on the further assumption that all inferences most favourable to the prosecution which are reasonably open are drawn, is the evidence capable of producing in the mind of a reasonable person satisfaction, BRD, of the guilt of the accused?
 - Suggests mere evidence is not enough – assuming it is believed, must have the capacity to persuade a reasonable person to the criminal standard.
 - It is for the jury, not the judge, to determine whether the prosecution evidence is persuasive BRD.
- Civil cases:
 - Failure to allege material facts is a basis for D to seek to have a statement of claim struck out as disclosing no cause of action.
 - The submission of a no case to answer is only equivalent to the common law submission seeking a verdict by direction.
 - The standard of sufficiency is satisfied by that evidence from which a properly directed jury would be entitled to find the material facts of the claim proved on the balance of probabilities: *Metropolitan Railway Co v Jackson*.
 - Additionally asks whether the evidence in support reaches that degree of sufficiency that would entitle a jury to act on it
 - Appropriate to argue that the evidence is so weak or so unsatisfactory that it should not be accepted: *Tate v Johnson*.

Chapter 7: The Testimonial Emphasis

Testimonial Evidence

- Human testimony is given orally upon oath and from memory.
 - Witnesses must testify to facts observed by them and otherwise experienced through their senses, not reports of facts experienced by others.
 - Nor may they give opinions about or relating to the inferences that may be drawn from facts experienced by them or others.
- Witnesses testify orally from memory:
 - Memory and its refreshment:
 - Witnesses are able to refresh memory by referring to documents (including photos or videos: *R v Sitek*) made or adopted by them when their memories were clear.
 - UEA embody this in s 32.
 - Giving a court power to permit a witness to read from a document seems to imply the section can be satisfied where the witness's memory is not actually revived, and in criminal cases, police officers are expressly permitted to read their signed contemporaneous reports to the court as their testimony-in-chief under s 33.
 - In-court refreshment of memory:
 - Section 32(1): a witness may only refer to a document in court for the purpose of refreshing memory with the permission of the judge.
 - At common law, permission will only be granted if the witness can satisfy the judge that accurate memory has run out (*Hetherington v Brooks*) and the document to which the witness wishes to refer was made or adopted by the witness at a time when the events in issue were still fresh in the witness's memory.
 - Same conditions in s 32(2) but only as matters that may be taken into account by the court in deciding whether to permit a witness to use a document in court to attempt to revive memory.
 - At common law, a document used to refresh memory need not be actually written or signed by the witness as long as its contents have been affirmed by the witness while the events were still fresh in the witness's memory: *R v Singh*.
 - Same as s 32(2)(b) of UEA.
 - The witness or some other person will have to give evidence of that affirmation.
 - Can affirm the contents of a document after it has been read by another in exceptional circumstances: *R v Van Beelen*.
 - In every case, the document must have been made at a time when the events remained fresh in the witness's memory: *R v Singh*.
 - Same requirement in s 32(2)(b)(i) of UEA. Temporal aspect cannot be ignored: *Graham v R*.
 - Section 66(2A) states temporal aspect not the sole consideration.
 - At common law, the question of freshness appears to depend rather upon factors qualitative of memory, such as the complexity or difficulty of the observation, the witness's education and capacity to retain a memory of events, the uniqueness of the events, the time which has elapsed between the event and the record, and so on.
 - Section 66(2A) imports these considerations to the UEA too.
 - Once refreshed, the witness should continue to testify without reference to the document.
 - Only where the witness is unable to proceed accurately from memory should the document be merely read to the court: *Hetherington v Brooks*.

- The document is used without tender and on request must be handed to the opponent (*R v Harrison*) who may then use its contents for the purpose of discrediting the witness during XXN: *Dairy Farmers Co-operative Milk v Acquilina*.
 - To establish inconsistencies which the witness denies, the document may be tendered, becoming admitted in evidence to gauge the reliability of the testimony.
 - Statement may be used negatively to discredit the witness but not positively to establish a contradictory fact.
 - The UEA retain the procedure whereby a witness can be XXN about previous inconsistent statements (s 43) and these may be proved where denied – although where the statement is caught by the credibility rule (s 102) the witness must deny the substance of the evidence before the previous statement can be proved (s 106).
 - Once admitted to discredit the witness, the representations in the statement are also admissible to the extent that they are hearsay: s 60
 - In civil cases, may tender first-hand hearsay in a document under s 64; and in criminal cases, under s 66, parties may tender that hearsay document if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the witness.
 - Effect is whether memory is revived or not, document may be tendered as evidence of the facts in issue.
 - Out-of-court refreshment of memory:
 - If the court has drawn to its attention the fact that a witness has refreshed memory out of court, and that memory has been revived, the oral testimony remains technically admissible without production of the document used to revive the memory: *Collaton v Correl*.
 - However, the opponent is entitled to call for the document without being obliged to tender it, and, failure to produce it may affect the reliability of the witness.
 - Court can order production: *Mather v Morgan*; s 34 UEA.
 - *R v Da Silva*: witness's memory had lapsed in court and the judge had permitted an adjournment to allow the witness to revive his memory by looking at a non-contemporaneous statement made by him to the police.
 - Justifiable because the witness was prepared to come back into court and testify from memory without any further assistance from the document.
 - Where memory has not been revived (witness will admit to having merely memorized an out of court document) and the opponent calls for the document, the oral testimony cannot be left to stand unless the document (original if counsel insists) is produced: *Ames v Nicholson*.
 - Under UEA, memorized testimony is admissible if the witness has not asked to refer to any document in court – so s 32 does not apply – and has, if directed, produced the document memorized – so that s 34 is satisfied.
 - Remaining question is one of credibility.
 - Prior statements of witnesses:
 - General rule: prior consistent statements inadmissible
 - In XXN an opponent can put to a witness prior inconsistent statements relating to the events in issue – not to establish the contradictory version (hearsay) but to discredit the testimony given in the witness box.
 - Cannot go to credit in chief as it violates the bolster rule (ss 101A, 102), *Corke v Corke and Cook*.
 - Cannot produce that evidence until that witness's credibility has been put in issue.
 - *R v Martin (No 2)* tendering evidence that goes to bolster a witness's credibility would serve to prolong trials needlessly and detract from the main issues of the case.

- However, where credit has been put in issue, particularly where that credibility is likely to be decisive of that case, there are strong arguments for not applying the bolster rule.
 - Section 108 permits tender in circumstances akin to those where the common law exceptionally allows tender in support of the witness credit (discussed below).
 - Where a statement is independently admissible as hearsay, s 101A provides that the credibility prohibition does not apply to it.
- Exception: prior statements rebutting alleged invention
 - Where in XXN it is suggested that the witness's account is of recent invention or concoction and this suggestion can be rebutted through evidence of a consistent statement by the witness (a statement made before the suggested grounds for invention or concoction arose) that consistent statement may be established in ReXN or rebuttal: *Wojcik v Incorporated Nominal Defendant*.
 - Enacted in s 108(3)(b) and allows proof of the prior consistent statement where the suggestion has or will be made.
 - Only goes to credit, not the truth of the statement.
 - At common law, it is stricter.
 - XXN must suggest a ground for the invention of an important material fact and the consistent statement must be capable of rebutting that ground: *Nominal Defendant v Clements*.
 - *ND v Clements*: suggestion of coaching by father rebutted by a police report taken before any coaching could have occurred.
 - Whether rebuttal is allowed is at discretion of the trial judge: *ND v Clements*.
- Exception: prior statements identifying accused
 - Evidence of a prior identification is not only hearsay evidence, but also, where an identification has been made in court, evidence of a prior consistent statement contravening the bolster rule.
 - Fundamental to the credibility of an in-court identification that the witness has identified the accused previously in more reliable circumstances (rather than just pointing to the accused sitting in the dock): *Alexander v R*.
 - UEA is stricter – in court identification may be inadmissible unless an identification parade has previously been held: s 114.
 - Where a witness identifies in court an accused previously unknown to him or her and the accuracy of their identification is in dispute, then that witness may also testify in XN to any prior recognition and its circumstances to explain the basis and hence reliability of the in court identification testimony.
 - *R v Jansen*: inadmissible prior consistent statements if suspect is previously known to the identifying witness.
 - Where an identifying witness is called and is able to testify to the fact of a prior identification, but is unable to recall the person identified and is unable to identify the accused in court, that prior identification and its circumstances may be proved through calling another witness and tendering any relevant photographs: *Alexander v R*.
 - Prior identification still admissible without the identifying witness's testimony of the fact of an out court act of identification.
 - Where the identifying witness cannot identify the accused in court through a lapse of memory or the changed appearance of the accused, but swears in court that an identification was made, it may be permissible to establish an out of court identification by calling other witnesses to it, despite that testimony being logically hearsay.
 - Relevant UEA sections: 101A, 102, 66, 108(3), 60.
- Statements induced by hypnosis:

- *R v Horstfall*: too high a risk that a course of therapeutic hypnotherapy had planted inaccurate suggestions in her memory. Testimony excluded.
 - Applies to having memory revived.
- *R v J*:
 - Must be carried out in conditions not conducive to suggestion.
 - The party adducing testimony based upon a memory revived through hypnosis, is required to establish that it is of sufficient reliability to make it safe to admit.
 - Sufficient records kept so that the likely accuracy of the allegedly revived memory can be properly evaluated.
- Not covered by the UEA.
- The situation where the witness claims a revived conscious memory is to be distinguished from that situation where the witness, while under hypnosis, makes statements apparently based upon a memory of events.
 - Even where it is the witness who testifies to such statements made under hypnosis, if the conscious memory is not revived then that evidence, as a previous out of court statement about events, is inadmissible hearsay.
 - Exception: s 64(2) or 66(2) if the prior statement was made at a time when the occurrence of the asserted fact was fresh in the memory of the witness.
- *R v Geesing*: court refused to accept evidence of a statement made under hypnosis in the absence of any expert testimony about its reliability.

Seminar:

General:

- Group: Mark Ferratto; Jennifer Michalakas.

Questions:

Problem 1:

- 1. Which evidential principles and the rules of which jurisdiction govern this case? In particular, does the *Evidence Act 1995 (Cth)* apply?**
 - a. SA. The *Evidence Act 1995 (Cth)* does not apply as this is a State Court. Section 4: this Act applies to all proceedings in a federal court. The evidential principles of the *South Australia Evidence Act* and common law apply.
- 2. What are the material facts of this case? Explain the concept of material facts.**
 - a. Material facts are those facts required to be established (elements) to be entitled a remedy under the applicable legal rule. The facts that tend to prove or disprove the elements of the offence.
 - i. Need a body
 - ii. Killed the victim, intending to cause grievous bodily harm.
 - b. Material facts:
 - i. Harda was murdered.
 - ii. John got into a heated argument with Harda at the restaurant Harda works at (witness testimony + photographs)
 - iii. The knife found by the body is consistent with the wounds suffered by the deceased
 - iv. The shoe prints found by the body are consistent with the shoes worn by the accused.
 - v. The handkerchief found by the body matches the DNA of the accused.
 - c. Evidence is the means by which we prove our material facts.
- 3. Which party bears the burden of proving the material facts? Whom must it convince? To what standard?**
 - a. The party bringing the allegation has the onus of proving those allegations: DPP. Section 141(1): the prosecution must prove its case beyond reasonable doubt. It must convince the Judge, or the jury if one is sitting.
- 4. What, in outline, is the prosecution's case theory which will constitute proof of the material facts?**
 - a. What does the DPP say happened?
 - b. John was eating alone at the seven Stars Restaurant and got into a loud and heated argument with a waiter, Harda, documented by photographs and other diners. At the time, John's mental health was fragile and he was readily susceptible to provocation. John later murdered Harda at the beach with a small knife after following him from the restaurant.
 - i. Might want to add he's unstable with a volatile temper.
- 5. Assuming Haroldson has pleaded not guilty, which material facts are likely to be seriously in issue?**
 - a. All of them except that John was at the restaurant – having admitted this already; the shoes he was wearing. Seriously in issue: Identity – not the person that killed Harda.
- 6. Consider each of the items of evidence above. Which might be described as items of real evidence? Which as testimonial evidence? Can evidence be described as direct or circumstantial? Do these distinctions have any legal significance?**
 - a. Real evidence: physical items, and demeanor of witnesses. You can assess yourself.

- i. Video-tape recording: part real evidence, part testimonial. Telling you what happened on that date. You can assess demeanor.
- b. Testimonial evidence: tells you something or what happened.
- c. Direct evidence: CCTV or witness that saw something occur. Identifying someone or something.
- d. Circumstantial evidence: inferential that in sum points to D as likely culprit BRD. 99% of evidence in trials.
- e. Relevant and admissible:
 - i. Is it relevant to the charge of murder? If it doesn't help you in establishing an element, it won't be relevant. How does it help you with this charge?
 - ii. 3. Direct evidence of the argument; circumstantial of the murder; real because it shows what happened on the day (and is not anyone giving testimony).
 - iii. 6. Exclude under fairness rule – evidence can be established in a less prejudicial way. Technically relevant, but excluded on the basis that the jury would put too much weight on it. The upsetting nature of the photo.
 - iv. 12. If everyone has it relevance drops as it doesn't identify them. Becomes more prejudicial than probative – jury puts more weight on it than reasonable. Discretion to exclude (unfairness: *Christie*; public policy: *Bunning v Cross*). Technically relevant but not sufficiently relevant.
 - v. 15. Not relevant – goes to character but not any element.
 - vi. 16. Of itself, the psychiatric record is irrelevant – however, it does show that when he loses someone significant, he snaps (sister just died): goes to intent.
- 7. **Which of the items of evidence above is likely to be 'received' in proof of the material facts as both 'relevant' and 'admissible'? Explain and distinguish the concepts of 'relevance' and 'admissibility'. Would any of the evidence be excluded as inadmissible in exercise of the courts' 'residuary discretion'?**
 - a. See question 6.
 - b. Ss 55, 56, 90, 135-8

Problem 2:

1. **Did the Magistrate err in proceeding without proof of the regulation under which the prosecution was being brought?**
 - a. *Evidence Act* (SA) Section 35.
 - b. Judicial notice: an uncontroversial matter. Something everyone knows.
 - i. Judge not supposed to decide for himself whether there are gaps in the evidence and look up things for himself.
 - c. Judge is expected to know all of the law.
 - i. The Evidence Act 1929 (SA) s 35 thus provides that judicial notice may be taken of subordinate legislation (see also uniform Acts s 143).
 1. Section 35(2)(c) no need to prove the regulations.
 - ii. Did not err. If judge errs, appeal based on errors of law.
2. **Did the magistrate err in requiring D to elect to call evidence before ruling on any of the 'no case to answer' submissions? Was D entitled to have any of his submissions considered without being required to so elect?**
 - a. Judge erred in calling for election on this issue.
 - b. No case to answer submission: not all the elements have been made out. No evidence.
 - i. Can do this at the end of the prosecution's case, and Judge has to rule on it.
 - ii. Submission on the law: taking P's case at its highest, there is no evidence on one or more material facts.
 1. Therefore, there is no case to answer as there's nothing to establish that material fact.

- iii. No election because you're not considering the strength of the evidence, only its existence.
 - 1. The Crown must meet its evidential burdens, hence, D has an absolute right to the NCtoA submission
 - c. Prasad application: when there is enough evidence but it is so weak that no one would convict on it.
 - i. Judge has discretion to hear everything first.
 - ii. Submission on the facts:
 - 1. The evidence is too weak and or unreliable to convince a fact-finding tribunal of material facts to the requisite standard.
 - a. The evidential burden is met, but what D says is that the evidence cannot meet the persuasive burden (to the requisite standard, BRD).
 - 2. The Court has a discretion as to entertain such a submission and because the court is considering the sufficiency of the evidence, if the court is constituted by judge or magistrate alone, it will want to consider that submission in light of all the evidence – hence D must elect.
 - d. Yes. Relevance is key in determining it's a NCtoA or a Prasad. Taking the evidence you have: if there is no inferential chain of relevance to a material fact = NCtoA; if the evidence is relevant to a material fact (via inferential chain) = Prasad (if doubts over reliability/credibility).
- 3. Did the Magistrate err in referring to and relying upon the anthropological work in his possession?**
- a. Yes. Section 64: if you want to dispense with formal proof, one of the parties will raise it.
 - i. Judge can't complete case, realize an element is lacking, do work on their own, and then decide on that.
 - ii. Need the opportunity for both parties to make submissions on it.
 - iii. Allows reference to such published works on matters of history (broad definition); BUT
 - iv. Case law (*Cavenett v Chambers*) says consent of parties required if reference to publication to establish controversial facts (here, descent of man is highly controversial and, at least, parties should have opportunity to comment).
 - b. Ss 59J, 64

4. D's Submissions:

- a. (1) although there may be evidence of supply at Amata, there is no evidence that Amata is on Pitjantjatjara Yankunytjatjara land;
 - i. no case: no evidence. Judge erred in calling for election on this issue.
- b. (2) there is, taking the evidence at face value, insufficient evidence that Litja is of Pitjantjatjara descent;
 - i. Prasad: insufficient evidence. Judge entitled to call for election on this issue
- c. (3) there is insufficient evidence that Litja was supplied with liquor having regard to Walter's bad eyesight and the other matters arising in his cross-examination;
 - i. Prasad: insufficient evidence. Judge entitled to call for election on this issue
- d. (4) the prosecution has failed to 'prove' that Litja was not exempt from the ambit of by-law 33 pursuant to by-law 34 which provides ...
 - i. no case to answer: no evidence. Judge erred in calling for election on this issue.

Problem 3:

- 1. How should the trial judge rule in relation to the introduction of Dr. Curtain's evidence in re-examination?**
- a. You can cross-examine on credit, but can't call evidence after that. Pursuing collateral matters.
 - i. If someone says they've never been convicted of something – can put evidence to that.
 - ii. Can't put in prior consistent statements:

1. You can't bolster statements. It makes you sound more credible. Prevents consistency appearing as truthfulness. Have to take the witness as they appear in court.
- b. In XXN, you can ask questions about credit but not in XN.
 - i. But prior consistent statement in XN re:
 1. Identification/recognition
 2. Recent invention/recent complaint (now, 'initial complaint': s 34M)
- c. Page 40-41 of lecture syllabus.
 - i. South Australia: The only relevant exception here is that which permits tender to rebut an allegation of recent invention: *Nominal Defendant v Clements* (1960) 104 CLR 476.
 1. The prosecutor in this case is trying to show that Dr Curtain's testimony re Dr Walker's alcohol consumption was not a recent invention as implied by Dr Curtain's XXN.
 2. However, the fact that Dr Curtain may have made inconsistent statements in the past may not be effectively rebutted by showing that she also made consistent statements: *Mapp v Stephens* [1965] NSW 1661.
 3. In other words, the thrust of Ms Curtain's XXN may have been a lack of consistency, in which case adducing evidence of other (consistent) statements does not prove consistency.
 4. Generally, the PCS must rebut the reason alleged in XXN for the statement in court being recently invented (cf *Clements*).
 - a. For example, if it is specifically suggested in XXN that she made up the story to avoid the charges being laid against her, then the prior statement made before charges were laid would arguably rebut this suggestion and may be admissible to re-establish credit.
 - ii. UEA: PCS
 1. Credit Evidence" inadmissible: s 102.
 2. What is CE?: s 101A
 - a. If relevant to credit and as H/S (as PCSs often are), caught as CE (reversing position under *Adam*).
 - b. [Prior to s 101A being enacted, s 102 provided that: evidence that is relevant only to a W's credibility is not admissible], interpreted broadly in *Adam* to only be concerned with relevance (not admissibility)
 - c. But, if evidence gets in as H/S, it can be used as going to credit (and vice-versa, via s 60)
 - i. Keep in mind ss 64 and 66.
 - ii. [Character evidence, 3.8, is essentially Tendency evidence, 3.6: i.e. evidence relevant to credit and character is still caught]
 3. So, here:
 - a. PCSs are prima facie inadmissible (s102) if the only purpose of tender is to bolster witness credit and they are admissible only for that purpose (s101A).
 - b. An exception applies to re-establish credit: s 108(3)
 - i. The matter must properly arise in ReXN: s 39.
 - ii. Causal nexus between rebuttal statement and allegation unnecessary – simply: a suggestion of fabrication.
 1. i.e. s 108 broader than CL, as it allows a W's credibility to be reestablished if evidence of a PIS is adduced – i.e. there is not necessarily the same causal link between the PCS rebutting the RI allegation as required by CL courts).

- c. Once admissible to re-establish credit the statement is admissible for its hearsay use: s 60.
 - d. (In addition prior statements will be independently admissible as hearsay if they satisfy other exceptions to the hearsay rule: s 66).
- 2. What is the situation if the trial takes place in the ACT Supreme Court?**
 - a. Sections 101A, 102, 108, 59, 66

Problem 4:

- 1. Must the Judge give any warning or other direction about V's testimony?**
 - a. If victim gave unsworn evidence – give a direction to this effect. Can give evidence because they know the difference between the truth or a lie but not what sworn testimony is.
 - b. Section 9(4) – judge is required to explain why the child gave unsworn testimony and must, if a party so requests, warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it
- 2. Can M give evidence regarding the complaint and its contents?**
 - a. You can give evidence on how the allegation came to light, not on the truth of what was said.
 - i. 14 or under – goes to the truth of what was said. Judge would direct jury that the mum's testimony was to show how it came to light, not that it was truthful. Only happens in sex matters with young people.
 - b. Yes: exception to PCS
 - i. At common law, a 'recent complaint' was admissible to V's credit: if (a) spontaneous and (b) made at first reasonable opportunity: R v Mustafa [2005] SASC 66.
 - ii. Relevant to credit only.
 - iii. Now, s 34M: 'Initial Complaint'
 - 1. Removes common law, narrow, approach
 - 2. Restriction to credit remains: s 34M(4)(b)
 - iv. But, here V is 7.
 - v. M's evidence may be admissible pursuant to s 34LA as hearsay if the criteria of s 34LA are satisfied, especially s 34LA(2).
 - 1. V is a 'young child' (a child of or under 14).
 - 2. V will not give evidence.
 - 3. M's evidence then admissible for its truth (H/S use): s 34LA(4).
- 3. For what purposes is evidence of the complaint admissible?**
 - a. Sections 59J, 64
- 4. Would the situation be different if V had been 13?**
 - a. Section 34CA or 34LA (SA)
 - b. If V giving unsworn testimony a warning will still be required, on request. However, V may be giving sworn testimony in which case no warning required (cf, s 12A).
 - c. Last year, under old s 34CA, special provisions permitting M's evidence to be used for truth (H/S) would not apply as "young child" defined as less than 12. Section 34CA now repealed and replaced with s 34LA which provides for a young child to be a child of less than 14. Golden Q – why 14 not 12?

Problem 5:

1. Can the written statement be used in cross-examination of Dmitri?

- a. Suggest in cross-examination that he's lying. If he denies it, there is a procedure that you can tender the inconsistent statement.
- b. In SA – Put in XXN as PIS:
 - i. Trying to use it as a PIS (i.e. not as hearsay)
 1. XXN D about event;
 - a. Draw attention to circumstances of previous statement; and
 - b. Put the statement to D: s 29.
 - ii. If statement admitted by D inconsistency proved (credit: any explanations can be put in ReXN); if adopted (issue).
 - iii. If statement denied then it must be proved (tender signed statement to evidence inconsistency – again, only goes to credit):
 1. If writing never adopted by D (unsigned), might have to call Q to prove the statement: s 28.
- c. Federal (UEA) – Put in XXN as PIS:
 - i. XXN under s 43.
 - ii. If caught by s 102/101A, PIS can be proved by s 106(2)(c) (leave not required).
 - iii. Once proved and before the court as evidence of inconsistency, it can also be used as hearsay by virtue of s 60.
 - iv. Prior statement may also be admissible under s 64 which enables a hearsay and credit use by s 60 (i.e. reverse approach to ss 101A/102 with same outcome).

2. In what circumstances can evidence of the contents of this statement be put before the court?

- a. SA sections 28-9; cth 43, 45, 101A, 102, 106, 60.
- b. In SA:
 - i. Statement contains an admission which can be tendered by P (an exception to the hearsay rule). Might still have to call Q who heard admission as no written admission (statement) made or adopted by D.
 - ii. Self-serving parts of the statement probably also become admissible (further exception to hearsay): Spence v Demasi.
- c. Federal (UEA):
 - i. Admission under s 81(1); including self-serving parts: 81(2).
 - ii. Key question is whether admission of D admissible as against his employers? Made in scope of employment? Does D have authority to engage in conversation in which the admission made?

3. Can Counsel cross-examine about these matters?

- a. You can cross-examine on anything you have a reasonable basis for. If it's the D, then there are certain rules what you can and can't suggest to them. Have to be ethical. Lay witness – doesn't matter because we only have to work out if we believe them. D's life in criminal matters – want them to be convicted on the evidence, not past act.
 - i. SA sections 26, 43; cth 101A, 102, 106, 97
- b. In SA:
 - i. XXN relevant to credit? – i.e, think: how do the convictions/managerial threats establish D was speeding/driving inappropriately at the relevant time...propensity.
 - ii. (Propensity evidence is more liberally admitted in civil cases, but only if probative of the issue and not merely prejudicial with respect to that issue).
 1. Re Driving Convictions:

- a. Section 26 permits questions about and proof of previous convictions whether or not they are relevant to credit other than as mere convictions.
 - b. Query discretionary exclusion for prejudicial chains of reasoning (less likely in civil case).
 - c. On issue: he drives badly and hits things
 - d. On credit: can you argue that convictions are (and should be) additionally relevant on facts of case, showing capacity for dishonesty/untrustworthiness (about D's testimony generally)
 - 2. Traffic offences are unlikely to show a person dishonest: see Dixon J, Bugg v Day
 - 3. But Bugg v Day (see esp, Williams J) and Aldridge take a wide view to all convictions being relevant in civil proceedings as to credit.
 - a. Aldridge (following Bugg) at 741: convictions for any offences (even for offences which do not themselves involve any question of dishonesty) are admissible in relation to credit, upon the basis that a conviction for any offence against the law may have some effect upon the credit of the witness.
 - 4. Prior convictions can be proved if denied by the witness even though collateral: exception to Finality Rule.
- iii. Re managerial threats:
 - 1. Motive to be untruthful (incorporated in common law bias exception: Hitchcock (1847) 1 Ex 91 at 100; Nicholls see at [260]-[270]; Palmer v The Queen (1998) 193 CLR 1 at [6], [48]-[50], [97]; Piddington at 545).
- c. Federal (UEA):
 - i. Section 103: credibility evidence to be of substantial probative value before it may be admitted. Here?
 - 1. No, the fact that D is a bad driver doesn't mean he's untruthful (general bad deeds not enough).
 - 2. Yes, logically weakens correctness of account and motive to be untruthful.
 - ii. UEA allows proof of:
 - 1. Motive for being untruthful: s 106(2)(a); and
 - 2. Prior offences: s 106(2)(b), in exception to finality rule.
 - iii. Once received evidence admitted in exception to hearsay rule (s 60)