3. Examination of witnesses

- S 28: order of examination in chief, cross-examination and re-examination
- **Direct examination of one's own witness** (examination in chief or re-examination)
    - Can only ask open questions, not leading questions
        - **Dictionary: leading questions**
        - Leading question means a question asked of a witness that:
            - (a) Directly or indirectly suggests a particular answer to the question; or
            - (b) Assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked
            - [But you can build on evidence that has already been given by the witnesses]
        - **S 37: Leading questions**
        - (1) A leading question must not be put to a witness in examination in chief or in re-examination unless:
            - (a) The court gives **leave**; or
            - (b) Question relates to a matter **introductory to the witness's evidence**; or
            - (c) **No objection** is made and each party is represented by legal counsel; or
            - (d) The question relates to a **matter that is not in dispute**; or
            - (e) If the witness has specialised knowledge based on the witness's training, study or experience—the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given
    - Cannot challenge evidence
    - Can neither bolster nor challenge credibility
    - **Unfavourable witness:** (see below)
        - 1. Use s 32 to revive memory; if failed
        - 2. Use s 38 to cross-examine, if the xx is about a PIS, use s 43(1)
        - 3. If witness does not admit the PIS, use s 43(2) to adduce the document
- **Cross-examination of opponent's witness**
    - Can ask leading questions
    - Can challenge evidence
    - Can challenge credibility
    - **S 42: leading questions**
        - (1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it
        - (2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:
            - (a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness; and

- (b) the witness has an interest consistent with an interest of the cross-examiner; and
- (c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter; and
- (d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.

▪ (3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used

○ **s 41: improper questions**

▪ (1) The court must disallow a question put to a witness in xx, or inform the witness that it need not be answered, if the court is of the opinion that the question:
- (a) Is misleading or confusing; or
- (b) Is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
- (c) Is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- (d) Has no basis other than a stereotype (eg, based on sex, race, culture, ethnicity, age or mental, intellectual or physical disability)

▪ (2) Without limiting the matters the court may take into account for the purpose of (1), it is to take into account:
- (c) The context in which the question is put, including:
  - (i) The nature of the proceeding; and
  - (ii) In a criminal proceeding—the nature of the offence to which the proceeding relates; and
  - (iii) The relationship (if any) between the witness and any other party to the proceeding.

▪ (3) A question is not a disallowable question merely because:
- (a) The question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or
- (b) The question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

▪ (4) A party may object to a question put to a witness on the ground that it is a disallowable question

▪ (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

▪ ***Libke***

- **S 26: Court's control over questioning of witness** (bit unusual)
  - Judge's interference in civil trials is more likely to be justifiable than in criminal trials, because of the absence of jury (who may be biased)
  - ***GPI Leisure Corp Ltd v Herdman Investments (No.3)***
  - ***R v Esposito***
    - There is a difference between elucidating an area of evidence that has been overlooked or left in an uncertain or equivocal state (OK), and

establishing a point that is favourable or adverse to the interests of one or other of the parties (NOT OK)
        - The line is narrow
        - The ultimate question is whether there was a fair trial
        - It is for the advocates to examine the witnesses, and not for the judge to take it on himself lest by doing so he appears to favour one side or the other
        - Judge should only ask questions when it is necessary to clear up points overlooked or left obscure, or answers that may be equivocal or uncertain.
    - Cf: ***Ryland v QBE Insurance (Australia) Ltd***
    - *Wilson* (1995)
        - The absence of experience or competence of, or attention by, counsel for one party does not provide any special justification for an intervention by the trial judge to carry out the task which that counsel has been briefed to perform.

- **Revive memory**
    - **S 32: attempts to revive memory in court**
        - (1) A witness must not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion unless the court **gives leave**
            - **Need to consider s 192**
        - (2) Without limiting the matters that the court may take into account in deciding whether to give leave, it is to consider:
            - (a) Whether the witness will be **able to recall the fact** or opinion adequately without using the document; and
            - (b) Whether so much of the document as the witness purposes to use is, or is a copy of, a document that:
                - (i) Was written or made by the witness when the events recorded in it were **fresh in his or her memory**; or
                - (ii) Was, at such a time, **found by the witness to be accurate**
        - (3) The witness may, **with the leave** of the court, read aloud, as part of his or her evidence, so much of the document as relates to that fact or opinion
        - (4) The court is, on the request of a party, to give such directions as the court thinks fit to ensure that so much of the document as relates to the proceeding is produced to that party
    - **s 33: police officers**
        - (1) A police officer may give evidence in chief for the prosecution by reading or being led through a written statement previously made by the police officer
        - (2) Evidence may not be so given unless:
            - (a) The statement was made by the police officer **at the time of or soon after** the occurrence of the events to which it refers; and
                - ***Dodds v The Queen***
            - (b) The police officer signed the statement when it was made;

and
        - (c) A copy of the statement had been given to the person charged or to his or her Australian legal practitioner or legal counsel a reasonable time before the hearing of the evidence for the prosecution.
    - **S 34: Attempts to revive memory out of court**
        - (1) The court may, on the request of a party, give such directions as are appropriate to ensure that specified documents and things used by a witness otherwise than while giving evidence to try to revive his or her memory are produced to the party for the purposes of the proceeding
        - (2) The court may refuse to admit the evidence given by the witness so far as it concerns a fact as to which the witness so tried to revive his or her memory if, without reasonable excuse, the directions have not been complied with
- **Unfavourable witness**
    - **S 38: unfavourable witness**
        - (1) **A party who called a witness** may, **with leave [consider s 192],** question the witness, as though cross-examining the witness about:
            - (a) Evidence given by the witness unfavourable to the party;
            - (b) A matter of which the witness may reasonably be supposed to have knowledge but is not making genuine attempt to give evidence of; or
            - (c) Whether the witness has made a **prior inconsistent statement**
        - (2) Questioning a witness under this section is taken to be cross-examination for the purpose of this Act (other than s 39)
        - (3) The party may, with leave of the court, question such a witness about matters relevant to the witness's credibility
        - (6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account:
            - (a) Whether party gave notice of intention to apply under this section at earliest opportunity;
            - (b) The extent to which W is likely to be questioned by other parties
        - **Compare with general law**
            - Lower threshold, but more constrained scope
            - At common law, party must establish that the witness is unwilling to tell the whole truth, but once that is established, you can ask about whatever you want
        - ***R v Hogan* [compare with] *R v Le***
- **Prior inconsistent statement:** hearsay & credibility use
    - **S 43: prior inconsistent statements of witnesses**
        - (1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not:
            - (a) complete particulars of the statement have been given to the witness; or
            - (b) a document containing a record of the statement has been

shown to the witness

- (2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner:
  - (a) **informed the witness of enough of the circumstances** of the making of the statement to enable the witness to identify the statement; and
  - (b) **drew the witness's attention** to so much of the statement as is **inconsistent** with the witness's evidence

- **Tender documents**
  - S 43(2)
  - **S 44: Previous representation of other persons**
    - (1) Except as provided by this section, a xxer must not question a witness about a previous representation alleged to have been made by a person other than the witness
    - (2) A xxer may question a witness about the representation and its contents if:
      - (a) Evidence of the representation has been admitted; or
      - (b) The court is satisfied that it will be admitted.
    - (3) If (2) does not apply and the representation is contained in a document, the document may only be used to question a witness as follows:
      - (a) The document must be produced to the witness;
      - (b) If the document is a tape recording, or any other kind of document from which sounds are reproduced—the witness must be provided with the means to listen to the contents of the document without other persons present at the xx hearing those contents
      - (c) The witness must be asked whether, having examined the contents of the document, the witness stands by the evidence that he or she has given
      - (d) Neither the xxer nor the witness is to identify the document or disclose any of its contents
  - **s 45: Production of documents**
    - (1) This section applies if a party is xxing or has xxed a witness about:
      - (a) A PIS alleged to have been made by the witness that is recorded in a document; or
      - (b) A previous representation by another person that is recorded in a document
    - (2) If the court so orders or if another party so requires, the party must produce:
      - (a) the document; or
      - (b) such evidence of the contents of the document as is available to the party
  - The document itself also need to be admissible: Chapter 3

GPI Leisure Corp Ltd v Herdman Investments (No.3) ***(1990) 20 NSWLR 15*** **(cross-examination)**

~ The dispute related to the price of units in a unit trust in which the transfer of units at a below market value to the defendants was being resisted by the owners of those units. The defendants made a cross-claim that would effectively ensure the transfer of the units, and this was being resisted by the plaintiffs and the mortgagee. It was contended that since the plaintiffs and the mortgagee were parties in the same interest, their respective counsel should not both be allowed to cross-examine defence witnesses.

Young J: All the rules as to cross-examination are not rules dealing with rights of parties at all, but are guidelines to judge as to how they should, in fairness, conduct trials before them. Therefore, there was no right to cross-examination, and the only actual "right" is the right to have a fair trial.

Ordinarily a judge will see that the trial is conducted in the manner that is commonly used throughout the state, namely that Ws are examined, cross-examined and re-examined.

When there is more than one counsel for the same party, or parties in the same interest, then ordinarily the judge will not permit any more than one counsel to cross-examine the same witness.

Where the issues are complex and there is no overlapping of cross-examination and the proposal is outlined before cross-examination begins, it might be proper for the judge to permit cross-examination of one or more witnesses by more than one counsel in the same interest.

Further comments on reluctance to limit duration of xx.

In the present case, xx by both counsel was permitted, because they were not to cover the same ground.

R v Esposito (1998) 45 NSWLR 442 **(question by TJ)**

~ The appellant was convicted of murder. Appealed on the ground that the trial judge has unduly intervened in the hearing, resulting in a mistrial.
~ in the trial, the defendant claimed she had no memory of the night; the judge did not believe her story, and challenged her statement by citing the statement made by the defendant to the police, and asked her to explain the inconsistency

Wood CJ: The judge's part is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure.

The test to be applied is whether the excessive judicial questioning or pejorative comments have created a real danger that the trial was unfair. When such a complaint is made, the appellate court must consider whether such interventions indicate that a fair trial has been denied to a litigant because the judge has closed his or her mind to further persuasion, moved into counsel's shoes and "into the perils of self persuasion".

The decision of the appellate court must be made in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions. A vigorous interruption early in the trial may be less readily excused than one at a later stage, where a judge can legitimately ask questions to better comprehend the issues and to weigh the evidence of the witness concerned.

In this case, the matters that the judge pursued with the appellant were of considerable importance so far as they went to her memory at the relevant times, and in relation to the effect of the drugs which she had taken on 24 and 26 April. The questions the judge put did test the truthfulness of the appellant's answers, and they did serve to advance the case for the prosecution. There was a tangible risk of the judge having been seen to have sided with the prosecution, and to have lost the appearance of impartiality which was expected.

It was not appropriate for the judge to have gone to the aid of the Crown, either in the presentation of the evidence, or in the summing-up. To have done so risked a fair trial, in appearance and fact.

(unfinished)