1. ADDUCING EVIDENCE

1. EXAMINATION OF WITNESSES

A) Examination in Chief

- Cannot ask **leading questions** (suggest particular answer/assume existence of fact in dispute/evidence x yet given)
  - Exception: s 37(1) (a) court gives leave; (b) introductory to witness' evidence; (c) no objection made to Q and each party represented by legal counsel; (d) Q relates to matter not in dispute; (e) if witness has specialized knowledge, Q is on hypothetical facts with evidence given later
- **Trial judge ask questions**: unfair
  - *R v Esposito:* judge asked extensive questions of D – important issues with advanced case for prosecution – dropped mantle of judge and donned robe of advocate + expressed disbelief in D's evidence – judge can only ask questions to clarify/clear up point that is overlooked/uncertain – here extensive Q alike cross-examination
  - *Galea* Kirby J test: whether excessive Q created real danger that trial unfair:
    - Is it judge only or jury trial? If civil: might be greater scope for questioning
    - Merely testing evidence or self-persuading
    - Number, length, terms and circumstances of intervention (if early in trial harder to justify)
  - *Ryland v QBE Insurance:* many interventions is OK as long they are for simple clarification
- **Documents to refresh memory**
  - S 32(1) IN COURT: unless court gives leave, witness MUST x use doc to revive memory about fact/opinion (when giving evidence)
    - Court in granting leave will consider: s 32(2)
      - (a) whether W can recall fact/opinion without doc AND
      - (b) whether doc was (i) written/made when events fresh in W memory OR (ii) was found by witness to be accurate
    - Can read aloud doc with leave: s 32(3)
    - On request of party, court must ensure doc produced to party: s 32(4)
  - S 34(1) OUT OF COURT: no prohibition but if doc used and requested by party, court can order it be produced to party
    - If not, court can refuse to admit evidence: s 34(2)
- **Evidence given by police officers**
  - S 33(1): PO can give evidence by reading/being led through written statements previously made by PO
  - S 33(2) provided it was written at time or soon after, signed and copy given to other party)
    - Written at time/soon after:
      - Appropriate time: days, not weeks (*Orchard v Spooner)*
      - *Dodds v R:* police officer give evidence of statement he made transcribing intercepted telephone conversation which happened 18 months ago – 'soon after' because event was transcribing not interception
- **Unfavorable witness**
  - S 38(1) Party who called W, may with leave cross examine witness about
    - (a) evidence given by W that is unfavourable OR
      - *Adam v the Queen:* unfavourable=more than neutral/not helpful – must be unhelpful/detract from case of aprty calling it
    - (b) Matters which witness reasonably suppose to have knowledge but not making genuine attempt to give evidence
    - (c) Prior inconsistent statement
  - s 38(3) Can only question witness about credibility
  - Non-exhaustive factors to be considered
    - S 38(6)(a) whether parties have notice at earliest opportunity of intention to seek leave AND matters and extent to which W has been or likely to be questioned by other party
    - S 192(2)(a) impact on length of hearing; (b) unfairness to party/witness; (c) importance of evidence; (d) nature of proceedings
  - Cases:
    - *R v Hogan:* PIS – xxm entirely collateral to facts and diverted focus of trial – did not consider matters set out in s 38(6) or 192 – too broad resulting in wholesale attack on credit
    - *Cf. R v Le:* CP asked Q x only about PIS, but also factual circs. Of PIS to prove its veracity and motive for changing story – even though factors x considered, irrelevant if same result would happen – contrast to *Hogan*- here issue on guilt and W lying more closely linked (credibility is crucial) whereas in *Hogan* focus was more on peripheral issues

B) Cross-Examination

- **Witness called in error** (s 40: party cannot xxm)
- **Improper questions not allowed**
  - S 41(1) court MUST disallow W or inform W x answer if court is of opinion that a question is
    - (a) misleading/confusing
    - (b) unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive
    - (c) manner/tone belittling/insulting/inappropriate
    - (d) no basis other than stereotype
  - s 41(2) court in exercising s 41(1) may consider:
    - (a) relevant condition/characteristic of W (e.g. age, gender etc.)
    - (b) mental/intellectual/physical disability
    - (c) context in which Q put (r'ship between W and party/nature of offence)
  - s 41(3) not disallowable Q merely because:
    - (a) Q challenges truthfulness of W or consistency/accuracy of statement by W
    - (b) Q requires W to discuss subject considered distasteful to/private by W
    - (c)
  - s 41(4) party can object, but s 41(5) duty is on court whether or not there is objection
  - s 41(6) failure by court to disallow Q/inform W x answer = evidence still admissible but if leads to adverse result, can seek finding of miscarriage on appeal
  - Cases:
    - *Libke v The Queen:* P subjected D to scornful xxm, interrupted his answers and comments – 'tissue of lies/ I'm not buying it/ it's hopeless asking a Q' – no objection by D's counsel – held xxm calculated to humiliate & belittle – TJ should have intervened – BUT jury x distracted from task of assessing whether evidence proved BRD – hence no miscarriage of justice
    - *Picker v The Queen:* sexual assault D argue C consented – P asked D 'why would C lie' – reversing onus is improper
- **Leading Q** allowed but Ct may still disallow them/direct witness x to answer: s 42(1)
  - Esp. when P calls W (unfavourable), D cannot xxm W favourable to their case by asking leading Q
  - S 42(3): Ct can disallow Q if satisfied that facts would be better ascertained without using leading Q
    - S 42(2) consider (a) evidence given by W is unfavourable to party who called W; (b) W has interest consistent with cross-examiner; (c) W is sympathetic to party conducting the xxm; (d) W's age/mental/physical/intellectual disability affecting W's answers
- **Cross-examination of Documents**
  - S 43: W own PIS

- S 43(1) can start xxm whether or not complete particulars of statement given to W/document shown to W
  - If W admits PIS, can xxm W
- S 43(2): If W denies PIS, xxm cannot adduce evidence of statement unless in xxm, cross-examiner (a) informed W of enough of circs. of statement to enable W to identify statement AND (b) drew W's attention to so much of statement as is inconsistent with W's evidence
  - Note: does not mean PIS is admissible!

➢ S 44: Someone else's PIS
- S 44(1) cannot question W about someone else's PIS unless
  - S 44(2)(a): evidence of representation already admitted as evidence OR
  - S 44(2)(b): inconsistent statement was going to be put into evidence
- S 43: If s 44(2) x apply, doc can only be used to Q W if meet requirements in s 44(3)
  - (a) doc must be produced to W
  - (b) if tape recording, provided with means to listen privately
  - (c) W must be asked whether after examining doc, W stands by evidence he/she has given
  - (d) x identify doc/disclose of content

➢ s 45: Production of evidence
- if xxm PIS under s 43/33 and x put doc into evidence s 45(1), then party must produce doc if other side/court orders: s 45(2)
- s 45(4): court can admit doc even if x tendered by party but rule of admissibility applies
- s 45(5): mere production of doc to W who is being xxm x give rise to req. that doc be tendered

❖ **Browne v Dunn Rule: (civil)** xxm'er cannot rely on evidence contradictory to W testimony without putting evidence to W in order to allow them to attempt to justify contradiction

➢ Section 46: if something raised that W was not xxm on, can recall witness to fix breach of rule in *B v D*

➢ Consequence of breach of rule:
- *Payless Superbarn v O'Gara:* P slipped and gave evidence grapes on floor – D merely asked how many grapes – but later called evidence from manager who said nothing on floor – judge directed jury to disregard manager's evidence – consequences can be harsh in <u>civil cases</u> – though extreme & unusual, within discretion of TJ – circuit hearing & time constraint
- *R v Birks:* inexperienced D counsel failed to xxm C. CP attacked D's credibility on xxm saying it is recent invention – judge invited jury to take into account CP's xxm when assessing D's credibility (jury can draw adverse inference from failure of D to xxm C on contradicted matter) – D's counsel acknowledged his fault after jury retired for deliberation – judge x call jury back and accused convicted – new trial ordered on appeal – <u>central objective of crim. case=securing fairness</u> – <u>there may be other reasons why D fail to xxm on issue other than credibility</u> (can be told to the jury)
- *MWJ v The Queen:* prevent D from using PIS because of breach of rule too harsh – must apply rule carefully – in crim. cases, practice is to excuse W temporarily on understanding they need to be recalled – accused could elect to xxm or not – P should have offered to recall W
- *Khamis v The Queen:* 'I'll kill you if you don't say it wasn't consensual' – statement x put to C – voir dire judge said evidence x admissible due to breach of rule – too harsh – making evidence inadmissible should be last resort – here statement very important
- *R v SWC:* D put forward many points C were not xxm on – interesting court held recalling W insufficient cure – judge gave jury direction what failure means and that jury could consider failure in assessing D's credibility - held that it may not be appropriate to provide a possible explanation for D's failure to fully xxm a W where the effect of doing so would be to emphasise the significance of counsel's omission, rather than to explain it (make things worse)

<u>C) Re-examination and re-opening a case</u>

❖ s 39: re-examination W called by party is question again by party after other party's xxm, (a) limited to Q on matters arising out of evidence given by W on xxm AND (b) other Q allowed only with leave (note s 192 considerations)

❖ Appropriate topics for re-opening case:
➢ *Drabsch v Switzerland General Insurance:* P contradicted himself in xxm – P allowed to re-examine W to re-establish credibility even when no fresh ground – important factor: W said he was denied opportunity to explain why he changed his story during xxm – rx not limited to clarification but also applies where answer in xxm would unless explained, leave court with impression of facts which are capable of being construed unfav + result in incomplete truth of acct

❖ Rule against P splitting case (re-opening case)
➢ *R v Chin* (Crim)*:* after P closed case – when P xxm D, sought to establish new fact that Ds knew each other (passport evidence) – conviction set aside – unfair for CP to use xxm to introduce new fact to prove guilt=split P case
➢ *Urban Transport v Nweiser* (Civil): less stringent – after D closed case sought to reopen it b'cos forgotten to call 2 W – judge allowed = not splitting case b'cos D just closed case (as opposed to P wanting it) – no real inconvenience/cost just extend hearing day – P had been challenged on veracity of accident (so no surprise) and P can xxm– even if deliberate to x call W in the beginning (relevant but not determinative)

<u>2. REAL EVIDENCE</u>

❖ s 53: views
➢ (1) judge may on application order that a demonstration, experiment or inspection be held
➢ (2) judge not to make order unless satisfied that
- (a) parties will have reasonable opportunity to be present
- (b) judge + jury will be present

➢ (3) MUST take into acct relevant considerations:
- (a) whether parties will be present
- (b) whether d,e,i will assist court to resolve issue
- (c) danger of unfair prejudice, misleading or confusing or result in undue waste of time
- (d) in case of demonstration – extent to which will properly reproduce conduct/event
- (e) in case of inspection – extent to which place or thing has materially altered
  - e.g. lighting – day and night

➢ (4) court + jury x conduct experiment in course of deliberation
➢ (5) x apply to inspection of exhibit

❖ Cases:
➢ *R v Milat:* inspect areas of forest – applied s 53(2) and (3) – fact that D refused to be present is ok since his legal team is going no real threat of prejudice – forest changed many years ago (tracks improved accessibility better – favour D as killings could be done by another) – since prejudice x against D, judge ordered inspection
➢ *Evans v The Queen:* s 53 x applicable to in-court event – court can allow P to order view of D wearing same clothes walking around court and saying 'serious'
➢ *R v Skaf:* jurors conduct their own experiment at crime scene – evidence inadmissible – lack of procedural fairness b'cos evidence x be tested/rebutted – lighting possibly different and affected verdict – miscarriage of justice
➢ *R v K:* internet searches communicated between jurors = jury deliberation

❖ Examining exhibits
➢ *Kozul v The Queen:* accidental gunfire incident – exhibited gun – held jury can only be allowed to use common sense by testing and handling it to decide if it could accidentally discharge when holder hits it – but here jury invited to discover the extent to which a blow to the hand might cause a