

Cross-examination

- **There is no right to cross-examination:** *GPI Leisure v Herdman*:
 - There is no right to cross-examination; there is a right to a fair-trial.
 - What cross-examination should be allowed is a matter entirely in the court's discretion; generally, should permit cross-examination whenever it is not oppressive.
 - Ordinarily, court should permit only one counsel with same interest to xxm
- **Scope:** xxm is not limited to the matters addressed in evidence-in-chief: *Mathews*
- **Purposes:** (i) damage credibility of the witness so tribunal of fact will reject evidence (ii) elicit from opponent's witness material favourable to the cross-examiner's.

Form of questioning

- **Limits of permissible cross-examination:** *Libke*
 - Offensive questioning that is 'harassing and badgering', "tissue of lies"; compound Q's; resting on controversial assumptions
- **Improper Questions: s41**
 - Who may challenge?
 - *Parties:* parties may object to disallowable questions: **s 41(4)**
 - *Court:* court must, even without objection, fulfil duty imposed by **s 41(1): s 41(5)**
 - If court fails? Failure by court to disallow, or inform witness, does not affect admissibility of the evidence given in response to the question: **s 41(6)**
 - Court's obligation: **s 41**
 - **41(1): Court must disallow** a question put, or inform witness that question need not be answered, if the question:
 - (a) is misleading or confusing;
 - (b) unduly annoying, harassing, intimidating, offensive, humiliating, repetitive;
 - (c) is put to witness in a manner that is belittling, insulting or inappropriate;
 - (d) has no basis other than a stereotype (e.g., based on sex, race, culture, age),
 - Cf **s41(3)** not a disallowable merely because challenges the truthfulness of W or is 'distasteful'
 - **Test: 41(2):** Without limiting the matters to take into account, court considers:
 - (a): any relevant condition or characteristic of W of which the court is made aware;
 - Including: age, education, cultural background, gender, language background
 - (b): any mental, intellectual or physical disability of which the court is made aware
 - (c): the context in which the question is put, including: nature of the proceeding; nature of offence; relationship b/w witness and any other party.
- **Leading questions: s 42**
 - **Rule:** 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: **s 42(1)**
 - **S 42 Factors:** Court will take into account the extent to which:
 - (a) evidence given by W in ex. in chief is unfavourable to party who called W;
 - (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; and
 - (d) age, or any mental, intellectual or physical disability may affect answers answers.
 - (3) The court is to disallow the question, or direct the witness not to answer it, if satisfied that the facts concerned would be better ascertained if leading Q's not used.

Prior inconsistent statements: ("PIS")

- **Definition:** A prior inconsistent statement = a previous representation that is inconsistent with evidence given by the witness.
 - Previous representation = a representation made otherwise than in the course of the proceeding
- **Rule:** On cross-examination of PIS, there is no need for W to be given complete particulars or shown a document containing the PIS: [s 43\(1\)](#)
 - However, if W does not admit they made PIS, cross-examiner is NOT to adduce evidence of the statement otherwise than from W, **UNLESS:** W is informed of the circumstances of statement, and W's attention is drawn to the inconsistencies: [s 43\(2\)](#)
- **Previous representations of other persons: s 44**
 - **Rule:** apart from under s 44, cross-examiner must not question W about a previous representation alleged to have been made by a person other than the witness: [44\(1\)](#)
 - **Test:** Cross-examiner may question witness about that representation + its contents if:
 - [44\(2\)\(a\)](#): evidence of the representation has been admitted; OR
 - [44\(2\)\(b\)](#): court is satisfied that it will be admitted.
 - If [s 44\(2\)](#) does not apply + previous rep is in a document: document may only be used:
 - [44\(3\)\(a\)](#): document is *produced* to the witness;
 - [44\(3\)\(b\)](#): if tape recording witness is provided with means to listen to it
 - [44\(3\)\(c\)](#): witness must not be asked whether they stand by the evidence given;
 - [44\(3\)\(d\)](#): neither cross-examiner nor W is to identify document or disclose contents.

The Rule in [Browne v Dunn](#):

- **Rule:** Party cannot lead evidence contradicting an opponent's witness (relating to conduct or credit) when no opportunity was given to that witness to address the issue during cross-examination
 - The rule is one of professional practice, procedure and fairness.
- *Applicability in criminal matters?*
 - Caution should be exercised in applying the rule in criminal cases, having regard to the essential accusatory character of criminal trials: [MJW](#)
 - The defence need not clear up or resolve inconsistencies in the prosecution case: [MJW](#)
- **Remedy:** court must endeavour to demonstrate flexibility in response: [Khamis](#)
 - [\[1\] S46\(1\)](#) Court may give leave to party to recall W if evidence has been admitted and:
 - (a): it contradicts evidence about the matter given by W in examination-in-chief; OR
 - (b): the witness could have given evidence about the matter in examination-in-chief.
 - Court must consider [s 192\(2\)](#) (a) impact on length of hearing; (b) extent to which it would be unfair to a party or witness; (c) importance of evidence; (d) nature of proceeding
 - [\[2\]](#) Exclude impugning evidence party wishes to lead – last resort [Khamis](#)
 - [\[3\]](#) cross-examiner taken to have accepted evidence if not challenged
 - [\[4\]](#) Drawing of adverse inference against party who failed to put the issue in xxm
 - Where possibility of drawing an adverse inference is left to the jury on account of D counsel's failure to cross-examine a witness, the jury should be assisted by a direction referring to other factors that might explain the failure to cross-examine: [Birks](#)

3.5 Re-examination: the questioning of by the party who called the witness to give evidence, being questioning conducted after cross-examination

- Re-examination limited to 'matters arising out of' cross-examination, unless leave requested and given by the court: [s 39](#); No leading questions: [s 37](#)
- *Drabsch*: not limited to eliciting clarifications where testimony ambiguous;
 - Applies where, if left, testimony would give an 'unfavourable impression of facts'

3.6 Re-opening a case

- **Criminal:** Prosecution must call all the evidence available to it during the presentation of its case, except in 'exceptional circumstances: *R v Chin*
 - Prosecution should not split its case by calling evidence where it could have anticipated that the defence would raise such an issue; D should know the case it is to answer;
- **Civil:** *Urban Transport Authority*:
 - Guiding principle = whether it is in the interests of justice to allow a party to reopen.
 - (a) other party not have been prejudiced by reopening case (no extra time/delay/costs);
 - Where failure to lead evidence was a tactical decision, court may be disinclined.

3.7 Real evidence

- **Views: Demonstrations, experiments or inspections:**
 - Inspection = where tribunal of fact taken to the place where relevant act occurred
 - Demonstration = where witnesses demonstrate something referred to in their evidence.
 - Experiment = procedure carried out to test hypothesis
- Judges may, on application, order a demonstration, experiment or inspection: [53\(1\)](#)
 - Judge must be satisfied that parties will be given a reasonable opportunity to be present, and the judge (and jury) will be present: [s53\(2\)](#), taking into account matters in [s53\(3\)](#)
 - a. whether the parties will be present;
 - b. whether it will assist in resolving issues of fact or understanding evidence;
 - c. danger it might be unfairly prejudicial, misleading or result in undue waste of time;
 - d. demonstrations – extent to which it will properly reproduce the conduct or event
 - e. inspections – extent to which the place to be inspected has materially altered.
 - Considerations overlap with the consideration in [s 192](#).
- **Prohibition:** Court is not to conduct an experiment in the course of its deliberations: [53\(4\)](#)
- A view is evidence and court may draw any reasonable inference from what it sees, hears or notices during a demonstration, experiment or inspection: [s54](#)
- *R v Milat*: An accused has the right to be present on inspections, but may decline.
 - While change to scenery, jury were aware of the changes and directions could be made.
- *R v Skaf*: adequacy of lighting at issue; two jurors went to park and conducted experiments.
 - **Held:** new trial ordered. Obtained in circumstances amounting to a want of PF, in that the accused was unable to test the material or call evidence to rebut or qualify it
- *Kozul v The Queen*:
 - Judge invited jury to examine gun and conduct an experiment to discover the extent to which a blow to the hand might cause the weapon to discharge.
 - When the experiments conducted by the jury go beyond a mere examination and testing of the evidence, and become a means of supplying new evidence, they become impermissible. Jury were entitled to examine and view the gun.
- **In-Court** common law applies, as [s 53](#) only applies to out-of-court views: *Evans*