Adducing Evidence – witnesses, documents and real evidence

See generally, KOP Chapters 2-4.

- The provisions in Ch 2 of the Act are concerned more with issues of procedure – how evidence may be produced in a proceeding, rather than whether it will be admitted.
- Failure to comply with this section of the act may mean that the evidence will not be admitted at all
- The common law continues to operate alongside the provisions of the Act, except where there is conflict, in which case the Act will apply
- Division 1 (Competence and compellability of witnesses) starts with s 12, which creates a presumption that all persons are competent to testify and may be compelled to testify. However, s 13 provides that certain persons lack the capacity to give sworn evidence, particularly "if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence" (s 13(3)).
- A witness may not be compellable (i.e. cannot be required) to testify in certain circumstances. Special rules apply to Heads of State, Parliamentarians (s 15), judges and jurors (s 16), and, in criminal proceedings, defendants (s 17). Such a person may be able to give unsworn evidence
- With regards to a spouse, de facto partner, parent or child of a defendant in criminal proceedings, such a person may object to testifying under s 18 (except in certain specified circumstances: s 19) and it will be for the court to determine whether, in the particular circumstances, the nature and extent of any harm that "would or might be caused … to the person, or to the relationship between the person and the defendant, if the person gives the evidence" outweighs the desirability of having the evidence given (s 18(6)).
- Where a defendant in criminal proceedings (or their wife, child etc) does not testify, section 20 controls the "comment" that may be made to a jury about that fact. The High Court has ruled that apart from the terms in s20, substantial limitations are imposed – only in rare and exceptional cases would adverse comment by a judge be permitted

- **Calling a witness**
- The Act does not deal with the calling of a witness by a party or the court. It is left to the common law and the power of a court to control the conduct of a proceeding
- However, there are extreme dangers with a judge calling a witness - especially in light of the adversarial system. There may already be good reason amongst the parties for why a witness has not been called
- It may give the impression that the trial judge favours a specific party if the witness called gives evidence in favour of one party over the other - this distorts the idea of the judge's impartiality
- Criminal cases are less adversarial - speaking generally, prosecutors have a strong set of ethical obligations. The prosecutor has law enforcement resources and powers, with a lot of expertise and powers to do so. This is not usually available to the defence. The prosecution also represents the government: there are higher expectations of the government and the government is expected to be a model litigant. They should not only call witnesses that advance their case, they should not avoid calling witnesses that may assist the defence. They have an obligation to call all available witnesses ti assist in the court getting a clearer picture of the facts of the matter

EA ss 11, 26

26 Court's control over questioning of witnesses

The court may make such orders as it considers just in relation to:

(a) the way in which witnesses are to be questioned, and

(b) the production and use of documents and things in connection with the questioning of witnesses, and

(c) the order in which parties may question a witness, and

(d) the presence and behaviour of any person in connection with the questioning of witnesses.

Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd (1988) 14 NSWLR 552 (KOP [2.40])

- Authority for the proposition that a judge in a civil case may not call a witness. This is different from a criminal trial where judges can call witnesses in the "most exceptional circumstances": *R v Apostilides* (1984) 154 CLR 563 at 576.

- Powell J [567-68]: approved authority which held that in civil cases a judge may not call a witness without the consent of both parties. In a different case, however, Wilcox J of the Federal Court held that according to this authority there is power for the court to call a witness in a civil case: *Obacelo Pty Ltd v Taveraft Pty Ltd* (1986) 10 FCR 518.]

R v Kneebone (1999) 47 NSWLR 450 (KOP [2.50])

- *R v Apostilides* concerned a prosecutor's failure to call two witnesses who were present with the complainant immediately before the alleged sexual assaults. The High Court advanced six propositions on the prosecutor's obligation to call witnesses. The propositions are stated in the extract of *R v Kneebone*.
- This case makes it clear that it is necessary for a prosecutor to point to identifiable factors which justify a decision not to call a material witness on the grounds of unreliability.
- On appeal the prosecution conceded that the mother of the complainant (the de facto partner of the accused - the daughter was allegedly sexually assaulted) was a material witness who had not been interviewed about the sexual assault allegations and that there had been no adequate investigation. the Crown Prosecutor advised the defence that he probably would not call the witness as "he had formed the opinion that her evidence would be unreliable".
- [39] The High Court of Australia in *The Queen v Apostilides* (1984) 154 CLR 563 at 575 laid down a number of general propositions as being applicable to the conduct of criminal trials in Australia. The court also went on to state:
    - *So, if a prosecutor fails to call a witness whose evidence is essential to the unfolding of the case for the Crown the essential question is not whether his decision constitutes misconduct but whether in all the circumstances the verdict is unsafe or unsatisfactory. (at 577-578)*
    - The Crown Prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.
    - The trial judge may, but is not obliged, to question the prosecutor in order to discover the reasons which led the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.
    - Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness.
    - When charging the jury, the trial judge may then make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, would be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.
    - Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.
    - A decision of the prosecutor not to call a particular person as a witness would only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.
- [50] In reaching a view as to reliability, it is clear that it is not an adequate basis to conclude that the witness is unreliable, merely because the witness's account does not accord with some case theory which is attractive to the prosecutor.
- [52] In *Regina v Shaw* (1991) 57 A Crim R 425, Nathan J said (at 450):
  … eye witnesses do not belong to a camp, but are within the class of persons from whom juries expect and are entitled to hear. The characterisation of witnesses being in camps is unfortunate. It necessarily implies that the prosecutor might choose to call only those wit- nesses favourable to his camp. This is an absolute derogation of a prosecutor's responsibilities.
- [57] In summary, it is the duty of a prosecutor to determine what witnesses will be called. He has the responsibility for ensuring that the Crown case is properly presented. He also has the responsibility of ensuring that the Crown case is presented with fairness to the accused and to the court. He does not perform that duty by seeking to avoid having placed before the court evidence which he is not entitled to regard as unreliable and yet which ill accords with a theory of the accused's guilt… [60] In the present case, no basis is put forward in evidence which would have entitled the Crown Prosecutor on the basis of unreliability to have formed the view that the witness should not properly be called in the Crown case

SMART AJ (Spigelman CJ concurring):

[102] At the risk of undue repetition, these further principles should be noted:

- The Crown prosecutor in deciding how the Crown case will be presented and what oral evidence will be adduced has the responsibility of ensuring that the Crown case is presented with fairness to the accused: *Richardson v The Queen* (1974-75) 131 CLR 116 at 199.
- The Crown prosecutor will often have to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether it is credible and truthful, whether in the interests of justice it should be subject to cross- examination, amongst other matters: *Richardson* at 119.
- The prosecutor should decide in the particular case what are the relevant factors and in the light of those factors determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused: *Richardson* at 119.
- To avoid a miscarriage of justice, a Crown prosecutor should call all available material witnesses. They include those whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eye witnesses of any events which go to prove the elements of the crime and will include witnesses notwithstanding that they give accounts inconsistent with the Crown case: *Whitehorn v The Queen* 152 CLR 657 at 674 per Dawson J. (An exception exists where there are many witnesses to prove the same point.)
- However, the Crown has a discretion not to call in the Crown case as an eye witness if the prosecutor judges that there is sufficient reason for not calling the witness, as, for example, where the prosecutor concludes the witness is not reliable and trustworthy or is otherwise incapable of belief. This applies even to a witness who is essential to the unfolding of the narrative on which the prosecution is based: *Richardson* at 121 and *Whitehorn* at 674.
- The prosecutor's judgment must be based on more than a feeling or intuition. There must be identifiable factors pointing to unreliability or lack of belief in the proposed evidence of the witness. It is not enough that the prosecutor considers that the evidence may be unreliable. Suspicion, skepticism and errors on subsidiary matters will not suffice. The attention of the prosecutor should be on matters of substance and even on these there may be significant differences between the witnesses. It is for the jury to resolve these: *Apostilides* at 576.
- "In most cases where a prosecutor does not wish to lead evidence from a person named on the indictment" [or able to give material evidence] but the defence wishes that person to be called, it will be sufficient for the prosecutor simply to call the person so that he may be cross-examined by the defendant and then, if necessary, be re-examined: *Apostilides* at 576.
- Frequently, eye witnesses will be close or have been close to the accused and possibly to the victim. That does not mean that they should not be called by the Crown. It is where it is apparent that the eye witness is so devoted to the accused and his cause that she will not tell the truth as to what happened that the question of the Crown not calling that witness will arise.
- Overriding all the particular guidelines and formulations is the general obligation imposed upon a Crown prosecutor to act fairly in the discharge of the function which he performs. That is the guiding and fundamental principle to be kept in mind as new and unusual situations emerge: *Whitehorn* at 675.

Velevski v The Queen (2002) 76 ALJR 402 (KOP [2.60]) - **expert evidence**

- The appellant was convicted of murdering his wife and three children. The appeal focused on the conflicting expert evidence from forensic pathologists on the prosecution case of murder/murder and the defence case of murder/suicide that was admitted in the trial
- Dr Bradhurst, called by the Crown, was the forensic pathologist who attended the crime scene and viewed the bodies. The detective who had the conduct of the investigation (Detective Sgt Whyte) gave evidence that he knew that Dr Bradhurst's opinion had been "agreed with" by some of his professional colleagues (including Professor Hilton and Drs Lawrence and Duflou). The detective did not obtain statements from these experts because he said that he "took the view that Dr Bradhurst's report certainly covered the views held by those doctors. I did not see the point of getting any further reports from them".

- The defence does not have to explain what happens in such a way to prove innocence, they may just put the evidence of the prosecution to the test. According to the defence, the wife had killed the three children and then committed suicide rather than the accused killing all four victims. To choose between the two, expert evidence was adduced by both parties. Some of this expert evidence was about the arrangement of the room, there was no sign of a struggle etc however, there was some of the mothers blood in a different part of the room with a bed moved on top of it to conceal it
- GLEESON CJ and HAYNE J: [47] … What is required is that the prosecutor is bound to ensure that the prosecution case is presented with fairness to the accused. Fairness does not require some head count of experts holding differing opinions.
- GAUDRON J: [118] It would, I think, be going too far to say that, where there is a conflict in the evidence of expert witnesses, the interests of justice require the prosecution to call all experts who are known to have expressed opinions on the matter in issue (experts are somewhat repetitious - you do not need to call every single witness to give essentially the same evidence)

- **Competence and compellability**
  EA ss 12-20

  The burden of proof = with whoever is wanting to call the witness
  The standard of proof = balance of probabilities
  Should be determined on a voire dire basis: without a jury

- s 12 provides that "except as otherwise provided by this Act", every person is competent to give evidence and compellable to give it. A "competent" witness is a witness who may give evidence/function as a witness/understand questions that are given to them and then respond to such questions with an answer (either generally or about a particular fact). A witness may not be competent because of lack of capacity: consider age, mental disability, serious physical disability
- The factors that give rise to the question of competence may actually come down to credibility of the witness (s 103) leading a judge to give warnings to juries on how to deal with such witnesses and evidence etc (ss 165, 165A)
- A "compellable" witness is a witness who may be required by order of the court to give evidence (either generally or about a particular fact).
- The test to determine whether a witness is competent to give sworn or unsworn evidence is based on the witness' "capacity to understand a question" and "give an answer that can be understood". Section 13(3) provides that the test for competence to give sworn evidence is whether a person has "the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence". If a person does not satisfy the test in s 13(3) then the person can give unsworn evidence provided that the court tells the person the three things listed in s 13(5):

  (5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:
  (a) that it is important to tell the truth, and
  (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and
  (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

12 Competence and compellability

Except as otherwise provided by this Act:

(a) every person is competent to give evidence, and

(b) a person who is competent to give evidence about a fact is compellable to give that evidence

13 Competence: lack of capacity **(these are strict in their application)**

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):