TOPIC 5: THE EXAMINATION OF WITNESSES

Rules relating to:

- Reviving memory;
- Prior consistent statements;
- Unfavourable witnesses; and
- Cross-examination including improper questioning, prior inconsistent statements and the Rule in ***Browne v Dunne***

Reviving Memory

Adversarial system favours *oral* evidence – we want witnesses to speak from memory, then observe their demeanour and how they respond to questions

- We consider two situations:
  - where the witness revives memory in the witness box; and
  - where the witness revives memory prior to giving evidence.
- Two main issues to consider:
  - can a document be used to revive memory; and
  - what use, if any, can be made of that document by the other party?

SECTION 32 EVIDENCE ACT

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 (**s 32(1) Evidence Act 2008 Vic**)

Do they need to revive memory?
Without limitation, the Court is to take into account: **s.32(2) *Evidence Act* 2008 (Vic)**

(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 proposes 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

(a) ***Van Beelen*** **–** convicted of rape and murder of teenage girl; a case involving forensic evidence. Forensic pathologist dictating findings to a police officer recording the observations

(b) No problem with fresh in memory there, signed off by person as accurate

(c) However, police created a **summary** document instead – **COULD NOT** be used, because not signed by the pathologist; cannot use that to refresh memory (neither fresh in the memory, nor signed off by witness)

Section 32(3)(4) –

- The witness may, with leave, read aloud from the document
    - Why is this here? It is artificial to pretend they are getting some unassisted memory back
- The court may give directions for the document to be produced to the other party(ies).

In **CRIMINAL** proceedings 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 and which was: **s.33 *Evidence Act* 2008 (Vic)**

- made **at the time of or soon after** the occurrence of the events to which it refers;
    - **NOT** 'fresh in the memory'
    - No definitive statement of '***soon after***'
- signed when it was made; and
- a copy provided to the defendant.

Reviving memory – OUT OF COURT! (Da Silva)

In ***Da Silva***, the witness was struggling to remember

- Rather than allowing him to revive memory in the witness, they just had an adjournment
- Then they came back and resumed the evidence
    - The difference is – you don't have the document
- All this is acknowledging that you will refresh your memory in a break/adjournment

A witness may use a document which is not contemporaneous to revive memory before giving evidence (**here – during adjournment**)

- The witness cannot refer to the document while giving evidence.

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**. (**s 34(1)**)

- You can call for whatever they are using to revive memory, assuming you do not have the document already
    - How do I know? You ask them!
        - 'did you refer to documents, prior to giving evidence, to help with your memory?'
            - If yes – you can call for that; and court can compel production of those documents, to see what they are relying on
                - **BUT s 34(2) – 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 (*below!!!*)

Use of the Document by Opposing Counsel: s 35 Evidence Act

- A party is not to be **required** to tender a document only because the party—
  (a) called for the document to be produced to the party; or
  (b) inspected it when it was so produced.
- The party who produces a document so called for is **not entitled to tender** it only because the party to whom it was produced, or who inspected it, fails to tender it.

You can call for it, you can inspect it without any penalty – you are not required to tender it as evidence, you get to see it then you make your decision;

Unfavourable witnesses

Hoping your witness gives evidence consistent with the statements we have, but they don't

- No longer remember? (but seemed to remember clearly earlier)
  - Not trying to remember? Deliberately not remembering? Revived memory?
- May give evidence **contrary** to the case?
  - Evidence now instead supportive of the opposing party?
- **Not just about a witness not going well, it is about a witness being AGAINST and ENDANGERING/UNFAVOURABLE to your case**
- A declaration of unfavourable witness – throws off shackles of 'leading questions', **can now lead the witness (although unfortunately they have gone bad!)**

To apply for a **declaration of unfavourability:**

Section 38, Evidence Act (Vic)
A **party who called a witness** may, with the leave (***below***) of the court, question the witness, as though the party were cross-examining the witness, about—
(a) evidence given by the witness that is **unfavourable** to the party; or
  (a) Unfavourable means 'not favourable' (***McRae***)
  (b) Does not require a finding that witness is ***adverse or hostile*** (***McRae***)
  (c) Witness not giving a complete account does not necessarily mean it is ***unfavourable*** (***McRae***)
(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is **not**, in examination in chief, **making a genuine attempt to give evidence**; or
(c) whether the witness has, at any time, made a **prior inconsistent statement**.

- Questioning under this section is taken to be cross-examination for the purposes of the Act (other than re-examination under s.39).
  - Cross-examination **must be 'about' matters** in (a),(b) or (c) as appropriate (***R v Le***)
    - So, NOT unrestricted cross-examination of the witness

        - *Eg – if struggling to remember, may enlist the prior inconsistent statement*
    - With leave, the questioning **may** extend to matters relevant only to **credibility** (also note admissibility of credibility evidence under Part 3.7)
        - But always bringing it back to **a, b, c**
            - **So if person is giving unfavourable evidence, and you have relevant material that undermines their credibility, as a liar, you may be given leave to do that, to cross-examine them on credit, to support argument that in giving this unfavourable evidence, they are lying**
                - **NOT a wholesale attack -> still must bring it back to a, b, c!**
- Leave should be granted on terms which ensure that the focus of the trial **does not shift to collateral matters** *(**Hogan**)*
    - ***Hogan***: Focus was on unrestrained nature of the cross-examination
        - Trial judge must focus on the terms of **s38 – cross examination must be of these things, NOT a wide-ranging cross-examination**
- Relevant to leave is:
    - whether notice of intention to seek leave was given at the earliest opportunity; and
    - the nature of likely questioning of the witness by another party *(**DPP v McRae**).*
        - ***McRae** Para 35 – highly unlikely the witness would be questioned by defence about their prior inconsistent statements, as those statements implicate McRae in the assault*
            - *No way defence counsel would cross-examine on this point; not in their interests to do so*
                - *Only way this was to be tested was by the Crown*
                - ***If no one else is going to touch it – more likely to get leave!***
- Also relevant is ss.192, 135 and 137 *(**R v Hogan, R v Le**).*
    - **S192** – likely to be unduly misleading? Prejudicial to other parties?
    - Discretionary exclusions – s135/s137

Cross-examination (improper questioning, prior inconsistent statements); Rule in *Browne v Dunne*

Two Types of Cross-examination

- Cross-examination as to credit: attempt to weaken, qualify or destroy your opponent's case
    - For an expert – attack qualifications;
    - witness – attack truthfulness through propensity to lie?
- Cross-examination as to issue: attempt to establish your own case through your opponent's witnesses
    - Asking questions which go directly to the fact of an issue

Cross-examination as to Credibility:

Credibility rule says credibility evidence is inadmissible

Section 103(1) EA: 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

- Immediate **threshold test of SUBSTANTIAL EFFECT**
  - Consider prior convictions for fraud which are relatively recent
- **Relevant factors** include: **Section 103(2) EA**
  - whether the evidence tends to prove that the witness **knowingly or recklessly** made a false representation when under an obligation to tell the truth; and
    - eg – Centrelink fraud; declaration of own work when it is not
    - Whilst you can argue a prior conviction for assault does not affect truthfulness, can say that long series of criminal convictions signifies a **complete disregard for the law – which can affect credibility as a witness!**
  - the **period that has elapsed** since the acts or events to which the evidence relates were done or occurred.

The finality principle

In general, a cross-examining party is bound by the answers given to questions relating solely to credit – *you are normally bound by the answers given to a credit question*

- He or she **CANNOT** then lead contradictory evidence.

Section 106(1) EA: The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is **adduced otherwise than from the witness** if—

(a) in cross-examination of the witness—

(i) the substance of the evidence was put to the witness; and

(ii) the witness denied, or did not admit or agree to, the substance of the evidence; **and**

the court gives leave to adduce the evidence.

Section 106(2) EA Leave is **NOT REQUIRED** if the evidence tends to prove that the witness—

(a) is biased or has a motive for being untruthful; or
(b) has been convicted of an offence; or
(c) has made a prior inconsistent statement; or – ***see s 43(1) below***
(d) is, or was, unable to be aware of matters to which his or her evidence relates; or
(e) has knowingly or recklessly made a false representation while under a legal obligation to tell the truth.

- *so, if alleging inappropriate r/s between witness and plaintiff, what we are seeking to call is evidence which prove that inappropriate relationship*
  - *if they deny a prior conviction, we deny they have a prior conviction*

Prior-inconsistent statements in Cross-Examination

Section 43(1) Evidence Act – *an added requirement to s 106?*
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

Section 43(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.

Example – witness may be giving evidence that X was not at the location at a particular time

- You have a statement saying the opposite (perhaps a text message they sent), which states that X **was** at that location at that time
    - That statement is **inconsistent with what they are saying now**
    - **S43(1) says that you may cross-examine around this without showing it to them**
        - No requirement on you – you might not need to reveal the fact that you have this prior inconsistent statement; **don't have to show it to them yet/give them complete details**
            - Can just say 'did you message anyone about that?' – keeping that general, it is ok!
    - **BUT if in cross-examination, the witness does not admit making it, you cannot adduce evidence of the statement, unless s43(2) satisfied**
        - To prove the text message

The Rule in *Browne v Dunn*

Where a party seeks to contradict the evidence given by a witness in chief, the party must, during cross examination, put to the witness the substance of the contradictory or inconsistent evidence

- Basically, signalling what you want to say
- Eg in a sexual offence case – there are bruises on the complainant, that the Crown alleges came about from sexual assault
    - The Defence would argue in contradiction that the bruises occurred through a sporting contest
    - ***Browne v Dunn*** requires **that version** to be put to the witness during cross-examination
        - ***You have heard the complainant, you know you are going to contradict her, you know what the Defence position would be, you MUST, in cross-examination, put that contrary version that the bruises happened in this way, then put it in to them that it happened at the sporting contest***
            - Give them an opportunity to explain on oath, whether that is right or not
- **If the rule is NOT complied with**, leave may be given to ***recall*** the witness (**s 46**)
    - You would not want this in the defence case (having the complainant back again)
        - BUT it is a typical **REMEDY** for a breach of the ***Browne v Dunn*** rule
- Rule is relatively straightforward in terms of its principle
    - 'If you are going to contradict the prosecution/plaintiff case, you must, in cross-examination, put forth that contradictory version to the relevant prosecution/plaintiff witness'