(3) ADDUCING EVIDENCE: Witnesses, documents and real evidence

CALLING A WITNESS

- **[Civil]** In civil cases, the court may only call witnesses with the consent of both parties: ***Clark Equipment***.
- **[Criminal]** In criminal cases, the prosecution has the duty to present its case fairly and to assist the court in finding the whole truth: ***Whitehorn***. The prosecution should call all witnesses available in order to 'unfold the narrative' of the case: ***Ziems***.
- **[Court's control over witness questioning]: 26:** Court may make such orders as it considers just in relation to: **(a)** way witnesses are questioned**; (s 26(a)); (b)** production/use of documents or things in connection with witness questioning; (**s 26(b)); (c)** order parties may question witnesses; **(s 26(c)); (d)** presence/behaviour of person in connection with witness questioning (s 26(d)).
    - **Who should the Crown call?** All witnesses whose testimony is necessary for the presentation of the whole picture, to the extent that it can be presented by admissible and available evidence, should be called by the Crown: ***Whitehorn, Kneebone, Velevski***
- **[Failure to call witnesses]:** Court may call witnesses in some circumstances.
    - **Civil:** only with consent of both parties: ***Clark Equipment***
    - **Criminal:** only in the interests of justice, requiring a high standard: ***Apostilides***
    - See ***Apostilides, Kneebone, Velevski***
- **[Inferences on absence of evidence + failure to give it]:** See **Proof: part 2.**

COMPETENCE AND COMPELLABILITY

- **[Presumption]** There is a presumption that all persons are compelled to testify and may be compelled to do so: **s 12**.
- **[Competence]** Whether X is competent requires her to be able to understand the question and to be able to give an answer that is understood: **s 13(1)**.
    - **[Sworn evidence]** To give sworn evidence, X must have the capacity to understand that she is under an obligation to give truthful evidence: **s 13(3)**.
        - **[Child]** For a child, whether this is the case is open on the facts, given the child's young age, though it should be noted that there exists no presumption that a child is incompetent to give sworn evidence.
    - **[Unsworn evidence]** The Act requires that the judge state that the witness was under no pressure to agree with statements that she felt were untrue. **S 13(5)(b)** doesn't just give the witness the option of saying something, but requires the witness to positively identify when he/she doesn't know the answer to a question.
- **[Compellability]**
    - **[Spouse/parent/child/de-facto]** W could object to giving evidence against D pursuant to **s 18**. This must be done before giving evidence or as soon as possible after being made aware of the right to object: **s 18(3)**. The Court needs to satisfy itself that W was aware of the right to make an objection (**s 18(4)**). **[Spouse]**: As a spouse, B may object to giving evidence: **s 18(2)**. Assuming B wants to object, B will not be required to give evidence if the court finds there is a likelihood of harm to him or his relationship with A, and that the nature and extent outweighs the desirability of having evidence given: **s 18(6)**, cf. ***R v Khan***.
        - Once the court is aware of the objection, the court need engage in the balancing exercise in **s 18(6)**, looking at the factors in **s 18(7)**. This needs to be done in the absence of the jury (**s 18(5)**).
    - **[Co-defendants]** A is not compellable to give evidence against B unless she is tried separately: **s 17(3)** – although she still remains competent and can give evidence if she chooses, so long as she is made aware of **s 17(3)**: **s 17(4)**.
- The issue should be determined on *voir dire* and in the absence of the jury unless the Court deliberately makes and orders that they should be present: **s 189(4)**. Before coming to that decision, the judge must consider the matters in **s 189(5).**
- **[Voir dire]** A preliminary issue such as *the determination of whether a witness is competent or compellable* should be determined on *voir dire* and in the absence of the jury unless the Court deliberately makes and orders that they should be present: **s 189(4)**. Before coming to that decision, the judge must consider the matters in **s 189(5).**

Therefore, on the balance of facts, it is likely that W would be compelled to testify.

EXAMINATION-IN-CHIEF

- **[Generally]**: **Court control of witnesses (s 26):** Court may make such orders as it considers just in relation to **(a):** the **way** in which witnesses are to be questioned; **(b):** the **production and use of documents and things** in connection with the questioning of witnesses; **(c):** the **order** in which parties may question a witness; **(d):** the **presence and behaviour** of any person in connection with the questioning of witnesses.
- **[Parties may question any witnesses]: S 27:** A party may question any witnesses, except as provided by this Act.

- **[Manner and form of questioning] S 29: (1):** Party may question witness in any way party thinks fit, except as provided by Ch2 or the court; **(2):** Court may, on its own motion or on application by party that called the witnesses, direct that witness give evidence wholly or partly in narrative form; **(3):** Such direction may include directions about way evidence to be given in that form; **(4):** Evidence may be given in form of charts, summaries, or other explanatory material, if it appears to court that material would be likely to aid its comprehension of other evidence that has been given, or is to be given.
- **[No leading questions]: S 37.** A leading question is defined in the **EA Dictionary** as 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 not in dispute before the proceeding and as to the existence of which the witness has not given evidence before the question is asked. **S 37 EA(1)** prohibits leading questions in examination in chief or re-examination unless **(a)** the court gives leave, **(b)** the questions relate to an introductory matter, **(c)** no objection is made and the other party is represented by a legal practitioner, **(d)** the question relates to a matter not in dispute, or **(e)** the use of a hypothetical question where the witness is an expert witness.
    - **Rule:** No leading questions in examination in chief or re-examination: **37(1)**
    - **Exceptions:** 37(1)(a)-(e)
        - **Leave granted:** if court gives leave: **37(1)(a)** [see **s 192]**
        - **Introductory:** question relates to a matter introductory to the witness's evidence: **37(1)(b)**
        - **No objection made:** is made to the question and (leaving aside the party conducting the examination in chief or re-examination) each other party to the proceeding is represented by an Australian legal practitioner, legal counsel or prosecutor: **37(1)(c)**
        - **Matter not in dispute:** question relates to a matter not in dispute: **37(1)(d)**
        - **Specialised knowledge:** 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: **37(1)(e)**
    - **Further exception:** Unless the court otherwise directs, **s 37(1)** does not apply in civil proceedings to a question that relates to an investigation, inspection or report that the witness made in the course of carrying out public or official duties: **37(2)**
    - **NB: s 37(1)** does not prevent a court from exercising power under rules of court to allow a written statement or report to be tendered or treated as evidence in chief of its maker: **37(3)**

(1) Reviving memory

The fact that W is giving vague evidence in chief suggests either that he is having trouble remembering his evidence, or that he is seeking to avoid giving evidence.

- **[Rule]** The prosecution should seek leave pursuant to **s 32** to refresh W's memory with his written statement. The Court should take into account:
    - The fact that W appeared to be having difficulty recalling his evidence without the statement and the prosecution appeared to have tried to exhaust his memory (although this is not entirely clear): **s 32(2)(a)**.
    - The statement was made *x* months after the events took place (**s 32(2)(b)(i)**).
    - There is nothing to suggest that W did not find the statement accurate when he made it, and the fact that it was detailed and given to police may suggest the contrary: **s 32(1)(b)(ii)**.
    - Granting leave would not add unduly to the proceedings: **s 192(2)(a)**
    - Granting leave would not appear to create any unfairness to P/W: **s 192(2)(b)**
    - The evidence was very important to these proceedings, because W was the prime witness of the crime and there is little other apparent evidence of what happened: **s 192(2)(c)**
    - These were criminal proceedings for an indicatable offence, therefore it is important that the best evidence be available to the Court: **s 192(2)(d)**.
    - The court should make other orders to allow the evidence to be given, but this is the simplest process: **s 192(2)(e)**
- Given these facts, the Court would have likely granted leave. And if W was genuinely forgetful, the Court may again have granted leave for him to read from the statement: **s 32(3)**.

(2) Calling for a document

- **Calling for document does not mean it must be tendered in evidence.**
    - **35(1):** Party is not required to tender a document as evidence only because: **(a)** document was called to be produced to the party; or **(b)** document was inspected when it was so produced.
    - **35(2):** Party who produces a document so called for is not entitled to tender it, only because the party to whom it was produced (or inspected it) fails to tender it.

(3) Unfavourable witnesses

- **[Application]** Counsel may seek to have W declared as an unfavourable witness: **s 38**. An unfavourable witness may be cross-examined about matters relevant to the witness' credibility, pursuant to **s 38**. To be

deemed an unfavourable witness, the evidence given by W must be unfavourable against C, or W must appear not to be making a genuine attempt to give evidence, or W must have made an inconsistent statement: **s 38(1)(a), (b), (c)**.
    - *Here, it could be arguable that … W was not making a genuine attempt to give evidence:* **s 38(1)(b)**. *Or, if W's vagueness went so far as to constitute a denial of the events, or a different version of them, it could be arguable that he had therefore made a prior inconsistent statement:* **s 38(1)(c)**.
- **[Leave]** In determining whether the court should give leave under **s 38**, **s 38(6)** refers to the giving of appropriate notice and the matters being questioned. The court must also turn its attention to the matters listed in **s 192**.
    - *On balance, considering the weight of the eyewitness account and unlikely unfairness or delay, it would likely be allowed.*
- Once declared unfavourable, cross-examination is permitted. See also ***Hogan, Adam, Le***

CROSS-EXAMINATION

- **[Generally]**: **There is no right to cross-examination: *GPI Leisure v Herdman*:**
    - **(i)** There is no right to cross-examination; there is a right to a fair-trial.
    - **(ii)** What cross-examination should be allowed is a matter entirely in the court's discretion; generally, however, court should permit cross-examination whenever it is not oppressive.
    - **(iii)** Ordinarily, court should permit only one counsel with same interest to cross-examine.
    - **(iv)** It may be that, in the interests of time or to prevent 'torture' of the witness or for other good reasons, a judge may in special circumstances limit cross-examination.
- **Scope:** cross-examination is not limited to the matters addressed in evidence-in-chief: *Mathews*
- **Purposes of cross-examination**: to cut down opponent's evidence in chief; to elicit evidence favourable to cross-examiner's client; to attack credibility of witness; to manage flow of any further evidence favourable to opponent; to force witness to qualify generalisations.
- **[Leading questions]** A party may put a leading question to a witness in cross-examination unless the court disallows the question: **s 42(1)**, with the court taking into account (but not limited to) the matters in **s 42(2)**.

(1) Forms of questioning

- **Limits of permissible cross-examination: *Libke:***
    - **(i) Offensive questioning** that is 'harassing and badgering'; [see **s 41(1)(b)**];
    - **(ii) Comments and injecting beliefs**:
        - **(a)** jury may regard counsel as a person of special knowledge and status, particularly where a prosecutor;
        - **(b)** witness may have no opportunity for dealing with the sting of certain comments
        - **(c)** comments, where legitimate, are to be made during the final address; (d) it is not for counsel to inject his or her beliefs into the case.
    - **(iii) Compound questions**: **(a)** these create uncertainty and confusion**; (b)** they force witnesses to choose between questions, or choose the order of answer.
    - **(iv) Cutting of the answers of a witness;**
    - **(v) Questions resting on controversial assumptions**: leading questions which assuming controversial facts in issue may by implication put evidence into the mouth of an unwilling witness.
    - **(vi) Argumentative questions**: questions should seek to elicit factual information, rather than being mere invitations to argument
- **[Improper questions]** In cross-examination, the court must disallow questions if the court is of the opinion that the question **(a)** is misleading or confusing, **(b)** is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, **(c)** put in a matter that is belittling, insulting or otherwise inappropriate, **(d)** no basis other than stereotype (**EA s 41(11)**), taking into account (but not limited to) the matters in **s 41(2)** (see ***Libke***, ***Picker*** for more examples).
    - **[Admissibility]** It should be noted that a failure by the court to disallow a question, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.
    - **[Credibility]** In ***R v Le***, it was considered that leave might also be granted not only at the three subjects described in **s 38(1)**, but also asking questions only to the credibility of the witness to establish the probability of the state of affairs *e.g. threats made*.
    - **Who nay 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)**
    - **Test (s 41(2))**: Without limiting the matters to take into account, court considers: **(a)**: any relevant condition or characteristic of the witness of which the court is, or is made, aware [including: age, education, ethnic/cultural background, gender, language background and skills, level of maturity and understanding and personality]; AND **(b)**: any mental, intellectual or physical disability of which the court is, or is made, aware, and to which the witness is, or appears to be, subject; AND **(c)**: the context

(6) ADMISSIBILITY: Hearsay

OVERVIEW

- **[Rule]** Under **s 59(1),** evidence can be excluded of a previous representation adduced to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation. The onus of proof will be for the party arguing the admission of the evidence to satisfy the court on a balance of probabilities (**s 142**) that it cannot be reasonably supposed that the representation was intended to assert the existence of a fact which it impliedly asserts.
    - *The point the defendant seeks to make is that…*
    - *One view is that the document contains B's previous representation which is being admitted to prove that someone called, which is also B's intended assertion. This would mean **s 59** excludes the evidence. Another view is that the document is being admitted to prove the previous representation of 'the man', which is that 'there is a dangerous hole'. This representation is not being admitted to prove the fact intended to be asserted by the man (but rather to prove the council's knowledge of the hole) and therefore **s 59** does not apply.*
- It may not be hearsay if relied on for another purpose [*but state what the purpose is*].

DOES THE HEARSAY RULE APPLY?

(1) Is the evidence a 'previous representation' made by a person?

- **[Previous representation]:** a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced: **EA Dictionary.** Representation can be express or implied; inferred from conduct; not intended by maker to be communicated; or not communicated for any reason

(2) Is the evidence adduced for a hearsay purpose i.e. to prove the existence of a fact asserted by the representation?

- **[Rule]:** evidence of a representation is not caught by the hearsay rule if it is not adduced to prove the truth of any fact asserted in the representation, but adduced for some other purpose; **s 60(1)**; ***Subramaniam***.
- **[Hearsay purpose]:** if adduced to prove the fact asserted in the previous representation;
- **[Non-hearsay purpose]**: if adduced to prove the fact that the representation was made.

(3) Can it reasonably be supposed that the person who made the representation intended to assert the existence of that fact?

- **[Unintended implied assertions]:** are not caught by the hearsay rule: ***Walton v The Queen*** ('hello Daddy').
- **['Can reasonably be supposed']:** objective test. Onus on the party arguing *for admission* of the evidence to satisfy the court that it would *not* reasonably be supposed that the representor intended to assert the particular fact.

EXCEPTIONS GENERALLY: s 61

- **[Rule]:** Hearsay exceptions do not apply if, when the representation was made, the person who made it was not competent to give evidence about the fact because of **s 13(1)**: **s 61(1)**.
- **[Exception]: s 66A** does not apply to a *contemporaneous* representation made by a person about his or her health, feelings, sensations, intention, knowledge, or state of mind.

(1) Exception: non-hearsay purpose

- **[Rule]:** the hearsay rule does NOT apply to evidence of a 'previous representation' that is admitted because it is 'relevant' for a purpose 'other than proof of an asserted fact': **s 60(1)**. I.e. evidence relevant for a non-hearsay purpose and **admitted** on that basis can be used as evidence of the facts asserted therein.
    - **Not restricted to first-hand hearsay: s 60** applies whether or not the person who made the representation had 'actual knowledge' of the asserted fact: **s 60(2)**.
    - **S 60 does NOT apply in a criminal proceeding to evidence of an admission: s 60(3)**. But may still be admissible under **s 81** as an exception to the rule if it is first hand: **s 82**.

(2) Exception: first-hand hearsay

- **[First hand hearsay]:** evidence of a previous representation by A that a fact occurred, where A had 'personal knowledge' of the fact. **[Second hand hearsay]**: evidence of a previous representation by A *that B said* a fact occurred, where B had 'personal knowledge' of the fact.
- **[Availability]:** is the person who made the representation 'available'? A person is not taken to be available to give evidence about a fact if: **(a)** person is dead; **(b)** person is not competent; **(c)** it would be unlawful, **(d)** a provision of the Act prohibits, **(e)** all reasonable steps taken to find the person / compel the person to give evidence w/o success: **EA 2.4**.
    - **Notice must be given:** party must give 'reasonable notice in writing' to each other party of its intention to adduce the evidence: **s 67(1)**.
- **[CIVIL – Maker unavailable]:**