

TOPIC 3: COMPETENCE

Note: in criminal proceedings, the defendant is not competent to give evidence for the prosecution (s17)

SPOT on exam: where the W is a child or has some cognitive impairment

Step 1: Presumption of competence

- 1) WRITE: In order to give evidence, the witness has to be competent
- 2) WRITE: [W] is presumed to be competent (s12(a))

Note: if W is clearly competent, can just move onto compellability

Step 2: Is the W otherwise competent?

- WRITE: the issue of competence is determined on a voir dire (s 189(1)(c))
- W is incompetent if:
 - Does not have the capacity to understand a question about the fact (s13(1)(a)); OR
 - CF E.g. if the W becomes flustered when he hears long sentences
 - Does not have the capacity to give an answer that can be understood (s13(1)(b))
 - Consider: Can they express themselves properly? - the jury needs to be able to understand the given answers
 - AND this incapacity cannot be overcome (s13(1))
 - P/D may argue that the incapacity can be overcome by e.g.:
 - Having a support person in the evidence box
 - Having someone who can help them understand things etc.
 - By using an interpreter
- The court may obtain expert evidence to determine the extent of incapacity (s 13(8))
 - E.g. if W has Alzheimer's disease but long-term memory might be unaffected. Might call expert to determine this.
- Note: A person who is not competent to give evidence about one fact may still give evidence about other facts (s13(2))
 - E.g. where a young child could be permitted to answer simple factual questions but be ruled to be not competent to answer abstract or inferential questions.

Step 3: If the W is competent, can they give sworn evidence?

W can only give sworn evidence if they understand they are under an obligation to tell the truth (s13(3)).

Obligation in this sense means 'morally or legally bound' (GW)

- WRITE: A W giving sworn evidence must also take an oath or make an affirmation (s 21(1))
- Red flag: if W has an impairment, they may have trouble understanding that obligation

Step 4: Alternative: unsworn evidence

Alternatively, if the W cannot give sworn evidence, they can give unsworn evidence if the trial judge informs them of the matters that (s13(5)):

- a) It is important to tell the truth; and
- b) W may be asked about questions he does not know/remember and W should tell the court this if it occurs; and
- c) That W should feel no pressure to agree with statements that are untrue.

Note also:

- Failure to comply may render the witness not competent to give unsworn evidence (SH)
- It cannot be the defence counsel who informs the W of the matters in s13(4)(5) - it must be the trial judge who goes through all of it (SH)
- The *Evidence Act* does not treat unsworn evidence as of a kind that may be unreliable (SH)

- Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence (s 13(7)).

Step 5: Consider other matters (if relevant)

If W has a cognitive impairment:

- The opposing counsel will seek a unreliability warning as the W's evidence is 'of a kind that may be unreliable' (s31-32 *Jury Directions Act* (crim); s165 *Evidence Act* (civil))

If W is a child

- Comments cannot be made on the basis that the W is a child (s33 *JDA* (crim); 165 *EA* (civil))
 - E.g. cannot say to the jury that the witness is unreliable because he/she is a child
- Children are not a class of unreliable witnesses (*GW*)
 - Mere fact that a person is a child does not mean that their evidence is unreliable

If W has cognitive impairment or is child, consider below (Alternative Arrangements)

Alternative Arrangements (*Criminal Procedure Act 2009* (Vic))

In certain cases, e.g. sexual offences and serious assaults, special arrangements may be made for the giving of evidence by complainants and witnesses who are **children or cognitively impaired**.

- These arrangements include:
 - Pre-recording of evidence ('VARE')
 - Special Hearings
 - Alternative courtroom arrangements.

Pre-recording of evidence

- Applies to sexual offences, and indictable offences involving assault/injury/threat of injury (s 366(1))
- Applies to Ws who are a child or cognitively impaired (s 366(2))
- Such Ws may give evidence in chief in the form of an audio visual recording (s 367).
- The recording is admissible as direct testimony provided s 368(1) is complied with (e.g.: W must attest to the truthfulness of the recording, and be available for cross-exam and re-exam)

Special hearings

- Applies to complainants in sexual offences who are children or cognitively impaired when the proceeding commenced (s 369)
- the whole of the evidence of a complainant, including cross-examination and re-examination, must be given at a separate hearing and recorded as an audiovisual recording before the trial and presented to the court in the form of that recording (s370(1))
- Court may direct that complainant give direct evidence if satisfied that complainant is aware of right to a special hearing, and complainant is able and wishes to give direct testimony (s 370(2))
- Must comply with 372 (e.g.: D and lawyer to be present, D not be in the same room but can hear and see) (s 372)
- The recording is admissible in evidence as if its contents were direct testimony (s 374)
- The court may rule as inadmissible parts of the video and may order they be edited/deleted (s 374(3))