

EVIDENCE LAW

**Alecia Jennings
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TOPIC 1: INTRODUCTION

1.1 Introduction

- **Nature of evidence law**
 - Facts the court has accepted that the jury will make use to make final determination
 - Rules that determine the information that fact-finders can and cannot receive (admissible) to resolve factual issues in dispute in civil and criminal proceedings
 - Procedural = concerned with process of who can give and what evidence they can give
 - Legal evidence must be relevant = determined by implementing the rules of evidence
- **Objectives of evidence law**
 - To promote accurate, rational fact-finding = fact-finder must have access to all relevant info capable of supporting rational reasoning about the facts in issue in the proceedings
 - To find the truth = evidence must be reliable
 - To discipline those who obtain evidence improperly (eg forced admissions)
 - To protect parties from possible prejudices and treat them fairly
- **Statute**
 - Uniform Evidence Act (UEA) applies in Cth, ACT, Norfolk Is, NSW, Tas, Vic, NT (doesn't apply in = Qld, SA, WA)
 - Evidence Act 2008 (Vic) – predominant
 - Criminal Procedure Act 2009 (Vic)
 - Evidence (Miscellaneous) Provisions Act 1958 (Vic)
 - Case law (CL and equitable principles)
- **Approach to resolving evidential issues under the Act**
 1. Is the witness competent?
 2. Is the evidence relevant?
 3. Is the evidence excluded by application of exclusionary rule or privilege?
 4. Is the evidence excluded by operation of a discretion?

1.2 Role of Judge and Jury

- **Civil proceedings** = P brings proceedings against D who it claims committed legal wrong with aim of redress for P, and must adduce evidence to prove each element of cause of action and rebut defences
- **Criminal proceedings** = P brings proceedings against D who is suspected of committing crime with aim of vindication/punishment, and must adduce evidence to prove each element of charge and rebut defences.
 - Need to protect D from fact-finder who forms an adverse opinion of them
 - Party who brings must prove its case (call admissible evidence)
 - If P does not call witness (without explanation) who would reasonably be expected to give evidence, adverse inference can be drawn that witness's evidence would not have assisted party's case (*Jones v Dunkel*)
- **Adversarial Process** = Judge or jury is fact-finder and must be impartial and independent
- **Order of proceedings** = Examination in chief → cross-examination → re-examination
- **Voir dire** = Questions of law are heard and determined **separate** to trial (whether evidence should be admitted or witness is competent or compellable etc (*s189(1)*):
 - Evidence in relation to an admission must be heard and determined in the jury's absence (*s189(2)*)
 - Jury can only be present to decide any other preliminary question if the court orders (*s189(4)*)
 - If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless (a) it is inconsistent with other evidence given by the witness in the proceeding; or (b) the witness has died (*s189(8)*)
 - Party seeking voir dire must convince court to exercise **discretion** to grant it by establishing reasonable grounds, and court must identify party's objection to admission of evidence (which gives rise to voir dire) and the basis for it, and rule on whether the evidence has been admitted into the proceeding (*DPP v Zhang*)

1.3 Standard of Proof

- **Burden of proof** = on party who asserts claim
 - **Legal** = party must adduce evidence that is persuasive
 - **Evidential** = party must adduce sufficient evidence before fact-finder will be required to consider it

- **Criminal proceedings** = P must discharge evidential and legal burden; defence only needs to discharge evidential burden if pleads insanity or raises defence
- **Civil proceedings** = evidential and legal burden on party making a claim
- **Standard of proof**
 - **Civil proceedings**
 - S140(1): Party must prove case on balance of probabilities
 - S140(2): Court may take into account:
 - the nature of the cause of action or defence
 - the nature of the subject-matter of the proceeding
 - the gravity of the matters alleged.
 - Stronger evidence required if allegation particularly serious but court needs only be 'reasonably satisfied'
 - **Criminal proceedings**
 - S141(1): Court must be satisfied that case has been proven beyond reasonable doubt (P)
 - S141(2): Court finds it proved if satisfied case proved on balance of probabilities (D)
 - **Admissibility of evidence – standard of proof**
 - S142(1): If an issue relates solely to the admissibility of evidence not an element of the case, then facts relevant to determination of that must be proved on the balance of probabilities.

1.4 **Types of evidence**

- **Three types of evidence that can be adduced in court:**
 - (1) Witness testimony (verbal evidence)
 - Based on human memory and subjection (can be flawed)
 - (2) Documents
 - Includes receipts, data from online transactions
 - (3) Tangible (other than documents) (physical evidence)
 - Treated as circumstantial evidence (creates suspicious circumstances)
 - Fingerprints and murder weapons (may not have been used in the that crime)
- **RULE: Evidence is only admissible if relevant to a fact in issue in the proceedings**
 - Fact in issue = matter a party must prove to establish/rebut element of charge/cause of action
 - Fact in issue = determined by substantive law (elements of a crime)
 - Evidence is **relevant** if it:
 - directly bears on matter because its subject matter relates to a fact in issue
 - is indirectly relevant to a matter because it goes to witness's credibility (eg witness has poor memory)
- **RULE: Evidence can logically prove or support a fact in issue if it is either:**
 - Direct evidence = No inferences need to be drawn (eg testimony from witness they saw the accused shoot)
 - Circumstantial evidence = Jury must draw inference from one fact to another (more than one explanation)
 - **D must be acquitted** if evidence in criminal proceeding is **entirely circumstantial** and there is reasonable explanation of evidence consistent with their innocence (*Shepherd*)
 - **Two types of circumstantial evidence:**
 - Strands in a cable: Circumstantial evidence occurs simultaneously, so each piece does not need to be established beyond reasonable doubt.
 - Links in a chain: No other evidence so individual links need to be proved beyond reasonable doubt
- S144(1): **Proof not required** about knowledge that is not reasonably open to question and is common knowledge in the locality in which the proceeding is being held or generally; or capable of verification by reference to a document the authority of which cannot reasonably be questioned (eg calendar).

TOPIC 2: ADDUCING VERBAL EVIDENCE

2.1 Introduction

- Competent witness = allowed to testify and can be threatened with punishment if not
- Compellable witness = lawfully obliged to testify
- Starting point is all witness are competent and compellable

2.2 Competence

- **CONTEXT:**
 - Point of s13 is to only allow evidence to be given by people who can rationally give information
 - Excludes young people and the mentally impaired.
 - Level of cognitive ability = whether a witness has capacity to understand and answer relevant questions
 - Can only give sworn evidence if understand you must tell the truth and can be understood yourself
- **RULE: A person is presumed competent to give evidence unless proven otherwise (s13(6))**
 - S12: Every person is competent to give evidence
 - S13(1): A person is **not** a competent witness if they can't **understand** a question or have the **capacity** to answer (eg child or having a mental, intellectual or physical disability that cannot be overcome).
 - S13(2): If not competent, can still be competent to give evidence about **other** facts.
 - S13(8): A court **determines** competency by obtaining information from a person with relevant specialised knowledge based on their training, study or experience.
 - S13(3): Witness can only give **sworn evidence** if they have the capacity to understand that they are under an obligation to give truthful evidence.
 - S13(4): A person who is not competent to give sworn evidence may be permitted to give **unsworn** evidence
 - S13(5): Can only give **unsworn evidence** if court has told the person (a) that it is important to tell the truth; and (b) that he or she may be asked questions they don't know and that they 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 they should agree with the statements they believe true and feel no pressure to agree if believe untrue.

2.3 Compellability

- **RULE: All competent witnesses are compellable (s12(b))**
 - Excludes the Queen, King G-G, Member of Parliament if prevented at P (s15), Judge without leave of the court (s16) and if substantial cost or delay needed for them to understand a question and adequate evidence has been given from other persons or sources (s14).
- **MAIN EXCEPTIONS:**
 - **Family members of the accused (s18)**
 - S18(1): Spouse, de facto partner, parent, child are competent and compellable witnesses for the D, however only competent not compellable witnesses for the P
 - S18(2): **Family of D may object** to being required, as a witness for the P to (a) give evidence; or (b) evidence of a communication between the person and D
 - S18(6): On voir dire, **judge may determine D's family member is not compellable** witness if (a) likely harm would/might be caused (directly/indirectly) to the family member, or to the relationship between the family member and the D, if the person gives the evidence; and (b) the nature and extent of that harm outweighs the desirability of having the evidence given.
 - S18(7): **Court must consider** (a) nature and gravity of offence; (b) substance and importance of any evidence that the person might give and weight attached to it; (c) whether other evidence is reasonably available to prosecutor; (d) nature of relationship between D and the person; (e) whether person would have to disclose matter that was received by the person in confidence from D.
 - S192(1): If judge compels witness to give evidence, judge can limit evidence given (eg restrict questions)
 - **The accused (s17)**
 - S17(2): D is not competent to give evidence as a witness for P
 - S17(3): **Associated accused not compellable** unless being tried separately from the D
 - S17(4): If AA is being tried jointly with the D, court must be satisfied they are aware of (3)

– Jury Directions Act 2015:

- S41: If D does not give evidence or call a particular witness, defence counsel may request under s12 that the trial judge direct the jury on that fact.
- S41(2): Trial judge must explain (a) P's obligation to prove that D is guilty; (b) D is not required to give evidence or call a witness; (c) jury should not guess or speculate about what might have been contained in (i) evidence not given by the D; or (ii) might have been given by a witness who was not called; and (d) the fact that D did not give evidence or call a witness (i) is not evidence against the D; (ii) is not an admission by the D; (iii) must not be used to fill gaps in the evidence adduced by the P; and (iv) does not strengthen P's case.

2.4 Process of adducing witness evidence

- **Process of adducing evidence from witness:**

1. Party A calls own witness
2. Witness takes oath/makes affirmation (unless giving unsworn evidence)
3. Examination in chief (Party A examines witness)
4. Cross-examination (Party B examines witness)
5. Re-examination (Party A may examine witness again)

2.5 Examination in chief

- **RULE: Leading questions are prohibited which:**

- (a) directly or indirectly suggest a particular answer to the question (eg did the accused do it?); or
- (b) assume the existence of a fact the existence of which is in dispute in the proceeding and the witness has not yet given evidence about (eg When did you stop beating your wife?)

- **EXCEPTIONS (s37(1))**

- (a) the court gives leave
- (b) the question relates to a matter introductory to the witness's evidence (eg age, occupation etc)
- (c) no party has objected and all other parties are legally represented
- (d) the question relates to a matter that is not in dispute
- (e) if asked to obtain the witness's opinion about a hypothetical statement if they have specialised knowledge
 - S37(2): Exceptions **not** available in civil proceeding if question relates to investigation, inspection or report that witness made while carrying out public/official duty.

- **Reviving Memory**

- S32(1): A witness may use a document to **refresh their memory** about a fact/opinion if the court gives leave
- S32(2): Leave not given unless (**factors**):
 - (a) Witness cannot recall the event without using the document
 - (b) Document was made when the events were fresh in their memory; and
 - (c) Document was accurate when made.
- S33: **Exception**: Police officer can read through written statement if made at time, signed and copy given to D or their legal practitioner a reasonable time before hearing of evidence for the P.
- **Test** how soon it to be considered fresh is the closer to the time the more accurate (Van Beelen)
- S32(4): Witness **reads** from the document and normally **must show** the other party
 - **BUT** a party cannot be required to tender a document only because it asked to inspect (s35)
- S34(1): Court can direct material be produced to a party who requests it for the purposes of the proceeding
- S34(2): Court can refuse to admit witness's evidence so far as it concerns a fact as to which the witness tried to revive his/her memory if, without reasonable excuse, witness does not produce the material

- **Cross-examination of 'unfavourable' witnesses during evidence in chief**

- S38(1): A party who called a witness may question the witness about (a) evidence given that's unfavourable to the party; (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.
- S38(2): Questioning a witness is taken to be cross-examination for the purposes of this Act.
- S38(3): The party questioning the witness may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

- **Court must take into account:**

- S38(6): Whether party gave notice at earliest opportunity of intention to seek leave, and the matters on which, and extent to which, the witness has been, or is likely to be, questioned by another party; and
- S192: Extent to which to do so would be likely to add to/shorten hearing, be unfair to party/witness, and importance of evidence sought
- Hadgkiss: **Unfavourable** = more than 'not favourable' or 'neutral', must detract from party's case and be unhelpful. In case of P, must be untruthful (SH, MV and KC)

2.6 Cross-examination

- **Cross-examination:**
 - Used to challenge witness's credibility and reliability
 - Leading questions are permitted (only here)
- **RULE: Improper questions may be disallowed, which are (s41):**
 - (a) misleading or confusing
 - (b) unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive
 - (c) put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate
 - (d) have no basis other than a stereotype (eg stereotype based on the witness's sex, race)
- S41(5): **Question is not improper merely because it:**
 - (a) challenges the truthfulness of the witness or the consistency/accuracy of their statement
 - (b) requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness
- S41(2): **Court must disallow** an improper question unless satisfied it is necessary for the question to be put
- S41(7): **Duty on court to disallow** whether or not party has objected to it being put to witness
- S41(4): **Witness is a vulnerable witness if** under 18 years, has a impairment or disability
- L'Estrange: A question that requires a witness to speculate about reasons why another person said/did something may be considered improper.
- S42(1): **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.
- S42(2): **Court must consider**
 - (a) evidence given by witness in examination in chief is unfavourable to the party who called the witness
 - (b) witness has an interest consistent with an interest of the cross-examiner
 - (c) witness is sympathetic to party conducting the cross-examination (generally or about a particular matter)
 - (d) witness's age, or any mental, intellectual or physical disability of the witness that affect their answers
- S42(3): **Court must disallow leading question** if satisfied facts concerned would be better ascertained if leading questions were not used
- **Previous representations:**
 - S44(1): **Cross-examiner must not question witness about previous representation** alleged to have been made by a person other than the witness unless evidence of the representation has been admitted; or
 - S44(2) the court is satisfied that evidence of the representation will be admitted.
 - S44(3): If doc not admitted and court not satisfied it will be admitted, **can be used to question a witness if**
 - It is produced to witness
 - Witness must be asked whether, having examined/heard document, they stand by evidence they gave
 - Cross-examiner and witness do not identify document/disclose its contents
 - Libke: The UEA reflects common law position that cross-examiner does not have carte blanche to ask anything they wants to and judge can intervene to ensure counsel conforms to standards of conduct
- **Prior inconsistent statements**
 - To discredit a witness
 - S43(1): Party can cross-examine witness about a prior inconsistent statement 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
 - S43(2): If the witness does not admit they made a prior inconsistent statement cross-examiner cannot adduce evidence unless the witness is first informed of the circumstances of the making of the statement, and the witness's attention I drawn to the inconsistent part of the statement.
 - Rule in Browne v Dunn: If party wants to **challenge** or **contradict** aspect of witness's evidence, cross-examiner must inform witness of this intention and give witness opportunity to respond to contrary facts.
 - If the rule is **contravened**, court can give leave to party to recall witness to give evidence about a matter that was raised by evidence adduced by another party and on which the witness was not cross-examined if:

- The evidence has been admitted; and
- The evidence contradicts evidence about the matter that the witness gave in examination in chief, or the witness could have given evidence about the matter in examination in chief (s46(1); *Heaton v Luczka*)

2.7 Re-examination

- Restricted to matters arising out of cross-examination unless court gives leave
- S39: On re-examination—
 - (a) a witness may be questioned about matters arising out of evidence given by the witness in cross-examination; and
 - (b) other questions may not be put to the witness unless the court gives leave.
- **Court may disallow question in re-examination if:**
 - Question is put on basis of making clarification/explanation, but there is no lack of clarity/ambiguity;
 - Having obtained proper answer from witness in re-examination, the re-examination encourages the witness to modify their answer.
- **Court may allow question in re-examination if (*Drabsch*):**
 - Answer given in cross-examination would leave impression of facts in issue or facts relating to credibility that could be construed unfavourably to party calling witness and represent distortion/incomplete account of the truth as witness can present it or
 - Question encourages witness to alter/reverse answer given in cross-examination.
- **Re-opening case:**
 - General rule = not permitted
 - Exceptions = witness is recalled because was not challenged on issue that then became subject of contrary evidence; evidence relates to uncontroversial issue that was overlooked; evidence relates to matter that could not have reasonably been foreseen as emerging as issue; evidence could not have been obtained when party conducted its case.

TOPIC 3: ADDUCING DOCUMENTARY EVIDENCE

- What is a document?

3.1 What is a document?

- **Document** = Any **record of information**, and includes (a) anything with writing; (b) marks, figures, symbols (c) sounds, images or writings; or (d) map, plan, drawing or photograph
 - Eg word document on hard drive, sales receipt, JPEG image file, film, video, CD, computer disk, file
 - Video footage = is a document because it constitutes a photograph (*Wade*)
 - *Sch 2 pt 2 cl 8A*: Document includes a reference to (a) any part of the document; or (b) any copy, reproduction or duplicate; or (c) part of such copy, reproduction or duplicate.
- **Whether documentary vs Real** = Depends on the evidential purpose for which the document is adduced for
 - If to adduce evidence of its contents = documentary evidence
 - If to adduce evidence as a thing = real evidence
- **Documentary evidence** = Document tendered to adduce evidence of its contents if relevant (*s47(1)*)
 - Eg **Diary** found at the scene (contains info relevant to proceedings)
 - **Labels** can be documentary evidence if tendered for their contents (label 'cyanide')
- **Other evidence** = Real evidence a fact-finder can perceive it for itself (eg physical object or photo)
 - Eg **Knife** found at the scene (fact-finder can perceive for themselves)

3.2 Proof of contents of documents

- **Primary evidence** = the original document
 - Adduced by tendering the document in question (*s48(1)*)
 - Eg Marie's suicidal note
- **Secondary evidence** (something other than the original) can be adduced by tendering (*s48(1)*):
 - (a) Admission
 - (b) Copy of the document
 - (c) Transcript of the words
 - (d) Document produced by a computer/other device
 - (e) Business record
 - (f) Copy of a public document and is authorised print version
- **If party has access to original document** = unclear if a party can use secondary evidence to prove its contents
 - *S48(2)*: s48 applies whether or not original document is available to party
 - CF *Div 1, pt 4.6*: Party can request another party to produce original documents and, if party fails to do so, secondary evidence of document may be inadmissible

3.3 Secondary Evidence

- **Admission:**
 - Admission = Previous representation made by a person adverse to their interest in the outcome
 - Eg Admission by Jim that he told the postman that Marie was cottoning on to his plan to kill her
 - Evidence of an admission can only be used by P or D (*s48(3)*).
 - Admissions are assumed to be reliable as people usually only act in their best interests
- **Copies:**
 - *S48(1)(b)* allows parties to tender a copy of a document
 - *S47(2)*: Doesn't need to be an **exact** copy (but must be **identical**, eg photocopy, microfilms, scanned etc)
 - Copy must be produced by a device not hand-written reproductions
 - *Giovannone*: CD was a copy of a poor quality recording that reduced background noise in the original
- **Transcripts of sound recordings and coded material:**
 - *S48(1)(c)* allows sound recordings and other coded material (eg shorthand notes) to be proved by transcript
 - Transcript of words recorded on a tape is admissible to prove the conversation (*Cassar*) however should only be used as an **aid** if there is doubt about the transcript's accuracy or if the recording is indistinct (*Eastman*)
 - Judge can exclude it under *ss 135-137* if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party

- Goldsworthy: Transcript of a radio broadcast on a reasonable viewer who only heard it once was excluded because it would have misled the jury to consider it as written instead of oral material.
- Nu-Tec: Transcript not relevant if recording is available due to danger of complicating the jury's task
- Unclear if transcript can be used if original sound recording available and of sufficient quality; however not likely if probative value outweighs danger it may be prejudicial
- **Computers or other devices:**
 - Intangible information (doc on hard drive) proved by adducing a print out of document (s48(1)(d))
 - If accuracy/reliability in doubt = presumption is that the device was accurate if:
 - The device was of a kind ordinarily reliable and produces the outcome (s146); or
 - Was being used by a business for its purposes (s147).
 - Presumptions can be rebutted: the computer could not produce the information (virus)
- **Business records:**
 - Because they tend to be accurate and are reliable if made in the ordinary course of business (s48(1)(e))
 - Whether or not the business still exists
 - Includes a statement of business' profits
 - Business = Profession, calling, occupation, trade, undertaking, activity engaged by Crown, parliamentary proceedings, non-profit business or carried on outside Australia (Act, Dictionary, pt 2)
- **Public documents:**
 - Eg Government finance record, marriage/land certificate (s48(1)(f))

3.4 Unavailable documents

- **Unavailable means:** (Act, sch 2, pt 2, cl 5)
 - (a) cannot be found after reasonable inquiry
 - (b) destroyed otherwise than in bad faith
 - (c) impractical to produce it
 - (d) if it would render a person liable to conviction for an offence; or
 - (e) is not in possession and (i) cannot be obtained by any judicial procedure; or (ii) is in possession of another party who knows it is likely to be relevant in the proceeding; or (iii) they reasonably ought to have known
- **If unavailable:**
 - S48(4): A party may adduce evidence of a copy, summary or from a witness (oral evidence)
 - Eg Doctor charged with negligence and adduces a copy of patient records previously sent off or adduces her secretary to give evidence of what she routinely writes in her notes (unavailable)
 - Lewis v Nortex: Can have a copy of a copy
 - Young: If the jar could not be found, oral evidence could be adduced of what was written on it
 - Party who claims document is unavailable has **burden to prove** on balance of probabilities (s142)
 - Proof of contents methods above apply to a document even if unavailable (can give secondary evidence outlined in s48(1) etc)

3.5 Proof of voluminous or complex documents:

- **Voluminous** documents may be adduced as a **summary** (s50)
- **Summary** need **not** summarise each document individually if summarised evidence is derived from documents as a whole (Thackray v Gunns Plantations)
 - Must be summary of contents **not interpretation**, submission or opinion about them (Idyllic Solutions)
- **Court will grant an application for summary if:**
 - Not possible to conveniently examine the evidence because volume and complexity (s50(1)); and
 - Party has served on other parties copy of summary that discloses name and address of person who prepared summary, and given other parties reasonable opportunity to examine/copy documents in question (s50(2))
- **No need for a party to establish the authenticity of a document**
 - Court can draw inferences from the face of the document (s58); and
 - If **relevance** depends on the court making **another finding** (s57)
 - But if insufficient evidence of origin of document = party may need to authenticate it

3.6 Other evidence

- **Common law principles apply (s52)**
- Under s53, the court may order a "**demonstration, experiment or inspection**" (collectively, a "view").
- These terms are not defined in UEA. Based on the common law and the conventional meaning of the terms:
 - An **inspection** involves court travelling to view a location that could not be brought in the courtroom;
 - A **demonstration** allows a witness to explain the incident and demonstrate the operation of a machine or other object, or attempt to recreate an event;
 - An **experiment** involves the jury watching a person carry out a test or trial for the purpose of discovering something or testing a principle or hypothesis (*Evans*).
- Views take place **outside the courtroom**. s53 therefore does not apply to the examination of exhibits inside the courtroom, or courtroom demonstrations of the size or position of objects (*Evans*; s53(5)).
- **Experiments** are limited to those conducted as part of the trial in front of the jury, and do not include those conducted **before** the trial and described by witnesses at the trial (*Evans*; *Farquharson*).

A. When May a View Be Ordered

- A judge may order a **view** on the application of a party (s53)
- **Before ordering a view, the judge must be satisfied that:**
 - The parties will be given a reasonable opportunity to be present; and
 - The judge and jury will be present
- **Case examples:**
 - *Milat*: Inspection of forest where backpackers were murdered (personal effects, ballistic, remoteness)
 - *Jamal*: Inspection of police station when D not present (lawyer was though). Jury would be unprejudiced if D was there in chains. However argued D did not have reasonable opp.
- While the presence of the judge and jury at a view is mandatory, a party may choose not to be present (*Milat*)
- It is at the trial judge's discretion whether to hold a view in a particular case (*Delon*)
- **In deciding how to exercise the discretion, a judge must consider:**
 - Whether the parties will be present;
 - Whether the view will assist the court to resolve issues of fact or understand the evidence;
 - The danger that the view might be unfairly prejudicial, might be misleading or confusing, or might cause or result in undue waste of time;
 - In the case of a demonstration, the extent to which it will properly reproduce the conduct or event to be demonstrated;
 - In the case of an inspection, the extent to which the place or thing being inspected has been materially altered (s53(3))
- **Case examples:**
 - *Evans*: P required D to dress in **balacava and overalls** and walk and say words so the jury could compare to witness' description. Court held s53 factors did not operate here.
 - *Rimanui*: **Agricultural chemical spray** court have spread to another property (court refused to order view because evidence already adduced was extensive)
 - *Chotiputhsilpa*: Whether signs indicating **pedestrian crossing** were adequate (court refused to order view as the signs had altered since the accident so much so that no purpose or may be prejudicial)
- Unlike at common law (*Alexander*), the circumstances to be demonstrated do not need to be identical to the circumstances that existed at the time of the event in question. Similarity of circumstances is merely one factor that a judge must consider (s53).
- A view may take place at any time during the trial. While this can even extend to conducting a view after the jury commences deliberations, the judge must have special regard for the prohibition on the prosecution splitting its case and the risk of prejudice to the accused when additional evidence is introduced after closing addresses (*Delon*).

B. For What Purposes May a View be Used?

- The jury may use a view as a source of evidence in the case, and may draw any **reasonable inferences** from what it sees, hears or otherwise notices during a view (s54).

- A view may also allow the jury to **better understand** the evidence given in court and to **assess the credibility** or value of that evidence (*Alexander*; *Scott v Numurkah*).

C. Directions on Views

- The judge should instruct the jury that inspections and **experiments** are only allowed under the strict control of the court. Jurors must not conduct their own inspections or experiments during deliberations. Such conduct is a criminal offence (*Skaf*; *s53(4)*; *s78A Juries Act*)
 - *Skaf*: Brothers convicted of raping a women in a car park. Two of the jurors had visited the car park after hours to consider how clearly a person could be recognised. Court held trial had miscarried.
- Before conducting a view, the judge should explain its purpose and how the jury may use the view in the circumstances of the case.
- The judge should tell the jury not to talk to any accompanying witnesses, police officers or legal representatives during the view (*Evans*; *Ashton*; *Neilan*).