UNIT OVERVIEW:

3x main areas to cover this trimester:

1. **Types of evidence that can be tendered in legal proceedings**
    - Verbal - mainly witness (week 2)
    - Documentary (week 3)
    - Other (including real evidence - exhibits), also experiments (week 3)
2. **Main part: admissibility**
    - 3 broad groups:
        1. Relevance - to fact/issue in trial (week 3)
        2. Issues of exclusionary rules - e.g. Hearsay/opinion/coincidence
            i. (week 4 – hearsay)
            ii. Opinion – week 6
            iii. Admissions – week 7
            iv. Tendency & coincidence – week 8
            v. Character & credibility – week 9
            vi. Privileges – week 10
        3. Discretions - even if evidence is relevant & passes exclusionary rules, judges still have some discretion to decide if evidence can be used (week 3)
3. **Proof** - is the evidence enough to prove the claim/pass the burden of proof?
    - Touch on this in week 1

ABBREVIATIONS USED IN NOTES:

AF	Asserted fact
BOP	Burden of proof (or sometimes balance of probabilities)
BRD	Beyond reasonable doubt
CE	Cross examination
ChE	Character evidence
CoE	Coincidence evidence
CrE	Credibility evidence
DM	Decision-maker
EA	Evidence Act
EIC	Examination-in-chief
EOA	Evidence of admissions
EW	Expert witness
FIS	Fact in issue
HR	Hearsay rule
IDE	Identification evidence
IO	Investigating officer
JW	Jury warning
LQ	Leading question
OOCS	Out of court statement
PK	Personal knowledge
PR	Previous representation
PV	Probative value
SK	Specialised knowledge
TE	Tendency evidence
TF	Therefore
TP	Third party
WE	Witness examination

TOPIC 1 - INTRO TO EVIDENCE LAW + PROOF (Week 1)

2x Main Q's for Topic 1:

1. **What is evidence law & why should you learn it?**
2. **What is the meaning of legal proof?**

Relevant parts of Evidence Act:

- **Chapter 4 –** Proof
  - Part 4.1 – Standard of proof (**s140-142**)
  - Part 4.2 – Judicial notice (**s143-145**)

BARRISTER'S ADVICE: Overview of the Evidence Act

How does evidence unfold in the court room?

- Court hearing: way in which info that is collected by prosecution is selected & made available to tryer of fact (jury/judge)
- There are rules about what can be put before tryer of fact

E.g. Criminal trial example - how evidence unfolds:

#1 - Prosecution commences with allegations in an indictment

- On indictment there are charges that are filed
- The charges dictates what factual information will be relevant for a tryer of fact
  - E.g. Blackmail charge might require proof of unwarranted demand with menaces
  - Important facts: was there demand? Unwarranted? was menaces made at the same time?

#2 – with the indictment will also be **brief of evidence** containing all the prosecution says is admissible & relevant. But just because prosecution says its relevant, doesn't mean it is - Before trial commences there may be issues on what evidence can/can't be led before jury, and **pre-trial discussions** may occur

- E.g. Part of the witness evidence might be relevant, and part might not be
- This will be discussed in court before trial starts
  - Might be discussion in court about whether witness could give evidence as to what they think they saw was a gun if they weren't actually sure
  - Judge will rule whether piece of evidence can actually be led by the prosecution
- But this doesn't mean that a witness giving viva voce/oral evidence will not spontaneously be asked questions/give answers during trial that will also be inadmissible (can't deal with all issues in pre-trial phase)

SO FAR: charges in indictment --> brief of evidence --> pre-trial discussion about admissible/inadmissible evidence…

…#3 - Next court process: **prosecution opening** = tells jury what evidence it is that they expect will be led during trial – 'these are the charges, this is the evidence, and if you are satisfied on this evidence that would lead to conviction of the accused for 'xx''

#4 - Then: **defence is entitled to a defence response** – this is not opening to defence case - it is a short statement by defence to a jury at close of prosecution opening to indicate what issues are/are not in dispute (e.g. No doubt accused was present with victim at the time/said they wanted money from victim BUT what is in dispute is that it was unwarranted because there was a legitimate debt. Etc.)

- = further narrowing of issues in dispute from broad indictment statements all the way to defence response

#5 - Prosecution goes first to introduce evidence – burden of proof is on them to prove case BRD

- They will introduce & question first witness and go through process of:
    - Examination in chief
        - Requires Q's to be asked in a certain way
        - Much stricter rule than for cross examination:
            - Non contentious things can be led from witness by putting the things to witness & witness agreeing (e.g. That victim was with accused, money was asked for etc.)
            - But the strict part is: only NON LEADING Q's can be asked (who/what/where/how) - which is different from putting to witness that a certain thing did/didn't take place or that a person was/wasn't there (except for the non-contentious matters)
                - Has to be open question so witness can give their account
                - Witness can tell their story without prompting/making a suggestion
        - Is objectionable to lead a witness
    - Cross examination
        - As a general rule: involves leading Q's - those that do suggest the answer in the Q
            - E.g. 'you voluntarily walked with accused into the room didn't you' 'you thought you felt a gun didn't you' 'but you can't confirm can you agree?'
            - Don't really give witness any opportunity to say anything except yes or no
        - Not objectionable here to ask non-leading, open ended questions
            - Why would you do this anyway? Maybe in some circumstances you don't particularly know the answer and it isn't damaging
    - Re examination
        - After the above, might be Q's where answer was ambiguous
        - So, the person who called the witness/did examination in chief can ask further questions
        - Required to be about anything addressed in cross-examination - not to ask a series of new questions
        - Useful to dilute questions asked in cross-examination that tend to challenge the witness's evidence
    - This process will continue until all witnesses that prosecution wants to call
        - If there is dispute e.g. About a witness prosecution wants to call/evidence they want to adduce from a witness a ***voir dire*** may occur (just like pre-trial discussions) = a term for 'discussion and ruling on whether a piece of evidence is admissible in trial'
        - Juries are never present during these - because it defeats the purpose of being able to control what the jury hears
    - After prosecution case (normally concludes with informant giving evidence), then prosecution is satisfied theoretically that all necessary evidence to prove elements of indictment have been given

The Voir Dire

Section 189 of the Evidence Act governs the process of voir dire, commonly referred to as a "trial within a trial."
A voir dire is a hearing in which a court determines the admissibility and permitted usage of evidence, as well as witnesses' competence and compellability.
The purpose of a voir dire is to allow the judge to determine questions of law or fact on the basis of the evidence and the parties' submissions.
If there is a jury, and unless the court orders otherwise, the jury is not to be present at a voir dire hearing.
A witness' evidence on a voir dire does not form part of the evidence in the trial or hearing.
Generally, the rules of evidence apply to a voir dire.
Examples of issues that may be determined on a voir dire:
1. Whether an admission was influenced by violent, oppressive, inhuman or degrading conduct;
2. Whether a witness is compellable to give evidence;

#7 - Then for defence to decide what to do next:

- What course they choose to adopt x3:
    1. **Not call any evidence** - simply say the accused will not give evidence nor will any witnesses be called for defence
        - Matter will conclude with prosecution & defence giving closing address + judge giving directions & jury goes to deliberate
        - Usually defence will say: you can't be satisfied the prosecution has discharged their burden of proof/satisfied elements of offence BRD & therefore can't convict the accused
    2. For defence to **only lead evidence from the accused themselves**
    3. Defence **can call either the accused themselves and/or other witnesses**
- Accused **may raise a defence**
- Then same process for witnesses will apply until close of defence case

****NOTE**** **there is more evidence produced at trial than just what a witness says (viva voce)**

- May be real evidence

        - e.g. Mobile phone record showing texts
        - E.g. Murder weapon
        - E.g. CCTV footage
        - Note: difference b/ween documentary & real evidence in the EA
    - People can give evidence that is not strictly direct evidence
        - E.g. Opinion - Speeding incidents - witness saying a car was going very very fast
        - E.g. Hearsay - can give it based on exceptions
        - E.g. Evidence on character if relevant

What does objectionable v. non-objectionable mean?

- The way in which info that is going to be used to decide outcome of the case, is determined by the barrister on the other side
- When barrister is sitting at bar table and prosecution is adducing evidence from witness, there are rules about what evidence is admissible
    - E.g. 'Accused has had trouble with you before hasn't he' - inadmissible - completely irrelevant (no relevance b/ween previous interactions accused might've had with witness & the charges subject of this indictment)
        - So barrister would stand up and not just shout objection your honour, but would rather stand up and say your honour before the witness answers that Q I must object, the Q itself is irrelevant and any answer given would be inadmissible and I urge your honour to invite them to not ask that Q
        - Judge may ask prosecution to explain why it is relevant
        - Then judge will rule on whether question is relevant or not
- The above is in terms of a Q, but objections could also apply in terms of an answer - where a legit Q is asked but the witness says 'I felt it was a gun in my back because I remember when the accused previously brandished a gun'
    - At this point a barrister would perhaps be less gentle than the scenario above and say 'your honour I have to object to this answer bc this is completely irrelevant for this particular jury'
    - If judge agrees - they will say to witness don't talk about what happened on a previous occasion
- Objections are based on a barrister's familiarity with rules on what can/can't be adduced, in that particular hearing, based on what is relevant/not
    - E.g. Previous good/bad conduct is inadmissible unless introduced by accused themselves
    - E.g. Tendency evidence/hearsay - the accused is the sort of person who does this bc I've heard this from others
    - E.g. Witness who says your client is known for being a rough sort of guy and in my view he is just a nasty bikie

Are outcomes ever surprising?

- All the time - both for good and for bad
- Can lose the unlosable & win the unwinnable
- Biggest gap b/ween legal truth & actual truth
- Trial process: is about arriving at the truth
    - To some extent - reality is, in a trial the process is making allegation & party leading evidence based on rules of evidence to prove the allegation & reach decision based on a standard & burden of proof being or not being met by that party
        - So: if a P/prosecution make an allegation, the evidence led & to be relied on, will either satisfy the requisite standard or it won't. What the truth is, one may never know.
    - E.g. Different from royal commission/inquisitorial - all sort of evidence is led to arrive at some conclusions

What is evidence law?

'The wire' discussion:

- **Main goal of EL:** finding the truth/accuracy
- '**Objection**' - some pieces of evidence are allowed & others are deemed inadmissible & excluded from legal decision making process
- **Trial is a show mainly directed at the jury, dominant role played by the lawyers, judge sits passively & listens**
    - Note: this is a different scenario in other legal systems (focus on weight/persuasiveness of evidence rather than admissibility)
- **Rules of evidence are secondary legal sources**
    - Unlike criminal/constitutional/tort, evidence law doesn't determine substantive Q's of law, but give us rules & processes that help us determine substantive Q's in concrete circumstances
    - Important to know the substantive law though to effectively apply evidence law
- **So what is EL?** = the rules that define the type of info that can be considered by judges/juries to resolve disputes about facts in legal proceedings
- **Rules of evidence** = balance predictability & uniformity v. Flexibility & precision

Why restrict proof at trial at all? Wouldn't a system of free proof be best to promote accuracy?

- We rely on jurors to evaluate the evidence & they don't have sophisticated understanding of the law
- Lawyers have important role in producing evidence & can sometimes be overzealous
- SO: if we relied on free proof, it may result in evidence being adduced that is inherently unreliable
    - Could also bring in more costs & delay to the legal process
- Information with little value to issue at hand but is greatly prejudicial to accused could impact outcome of case (e.g. Omar's statements of bird's criminal history)
- Some evidence may also not be allowed for safety reasons (e.g. whistle-blowers, communications b/ween family)

Where to find the rules of evidence?

Evidence Act 2008 (Vic) ('EA')

- Based on legislation in NSW/Federal Courts that has been in force since 1995
- In Vic - has only been in force since Jan 2010
- Extinguishes most CL rules, but still echoes some of its rules
- Sometimes provisions are unclear - has been case law that attempts to clarify the meaning & operation of the Act

Outline of the Evidence Act:

- It is organized into 4x parts of evidence law:

CHAPTER 1 – Preliminary (Formalities, definitions & applicability of the Act)

- 3x things to note:
    1. **S3** refers to dictionary - included in Sch 2 at end of the act (be very familiar with these definitions)
    2. Says when & where EA applies and what legal processes it governs
    3. Sets out relationship b/ween act itself & CL rules – saying that CL continues to apply unless provision of Act expressly negate/departs from it

CHAPTER 2 – Adducing evidence (Types of evidence that can be adduced in court)

1. Witness evidence (AKA oral evidence/viva voce) – see week 2
2. Documentary evidence – see week 3
3. Other/real evidence – see week 3

CHAPTER 3 – Admissibility of evidence (Admissibility rules)

- The rules include:
    - Relevance
    - Hearsay
    - Opinion
    - Admissions
    - Tendency
    - Coincidence
    - Credibility
    - Privilege
- Q of whether piece of evidence is permitted by act to be included in the legal process
- Creates **3x tests/stages of admissibility** that ANY item of evidence (witness/document/other) must pass to be admitted:
    1. Evidence must be RELEVANT (week 3)
    2. Must not violate any exclusionary rule (week 4+)
    3. Must satisfy discretion of the trial judge (week 3)

CHAPTER 4 - Proof (Standards & facilitation of proof)

- Governs not the types of evidence but HOW admissible evidence/legal arguments should be proved in court
- E.g. standard of proof
- E.g. what party has burden of proof
- Also: acceptable means/methods to prove content of some documents

Direct v Indirect evidence:

- Often exhibits are treated as circumstantial (indirect) evidence
- E.g. Exhibits from crime scene usually just create suspicious circumstances & and it is possible there is an innocent explanation for physical evidence collected at a crime scene
- E.g. Accused might be registered owner of a rifle, but doesn't mean they are guilty of murdering the victim
- E.g. A fingerprint can place the accused at a crime scene, but that alone isn't enough

CASE: Fuller-Lyons v NSW HCA [2015]

- **The High Court unanimously allowed an appeal from a decision of NSW COA** relating to the tort of negligence and inferential fact-finding.
- **FACTS:** Fuller-Lyons, a cognitively-impaired minor, was severely injured after he fell from a train moving at about 100kph.
- **The primary-court judge found:** it was likely that Fuller-Lyons' body had prevented the rear doors from closing and that he fell, and that at least part of his body should have been visible to the station attendant, and consequently held the State vicariously liable for the station attendant's negligence.
- **The NSWCA allowed the State's appeal against the primary judge's decision**: holding that in the absence of direct evidence of how Fuller-Lyons fell from the train, the primary judge should have based his findings on an examination of alternative hypotheses reasonable available:
    - it was no less possible that the door was kept ajar by an object rather than Fuller-Lyons body, and in the absence of affirmative conclusion that his body was visible from the train Fuller-Lyons could not prove the State was negligent.
- **The High Court unanimously allowed the appeal**, holding that the NSWCA erred in overturning the trial judge's finding that at least part of Fuller-Lyons must have been visible.
    - The Court stated that there was **no *direct evidence*** of how the appellant fell from the train, and that, therefore, Corey's case depended upon indirect proof of three inferences of fact:
        - that he was trapped between the doors of the car;
        - that his arm, leg and part of his torso were protruding from the car;
        - and that the protruding parts of his body were visible to a person standing on the platform.

- Analysing the available indirect evidence, the Court concluded that if the primary judge correctly *concluded* that the most reasonable and probable explanation was that Corey was trapped in the doors, that finding remains correct even if 'other possible explanations for the known facts cannot be excluded'.
- Because the Court of Appeal accepted that Corey was trapped by the doors before the fall, it should have also upheld 'the further finding that Corey came to be in this position as the result of the doors closing on him which was correctly characterized by the trial judge as the most likely inference "by a large measure."

- Ultimately, a family's lives and future were determined by the indirect evidence and the factual inferences made by the judge.

Proof

- **NOTE**: the EA does not deal with allocating burden of proof ('***BOP***') to facts in issue (this is a substantive law matter)
- **NOTE**: Legal/evidentiary burden are NOT part of Evidence Act (these are CL principles), BUT the standard of proof IS part of the Evidence Act

The Evidential Burden (CL)

- **Evidential burden =** The **sufficiency** of evidence introduced to prove a claim.
- **The party who makes the claim must provide sufficient evidence that supports it**
  - E.g. In a criminal trial, the prosecution must bring enough evidence that has the potential to prove every element of the crime in order for the judge or jury to consider the question of guilt (enough evidence to prove guilt if taken at its highest)
- The judge determines whether evidentiary burden was met (if a "no case" submission was made by defense.)

The Legal Burden (linked with standard of proof) (CL)

- **Legal burden/standard of proof =** The **persuasiveness** of the evidence
- In a criminal trial, the persuasiveness of the evidence relates to the arguments made by the prosecution – is the evidence presented strong and persuasive enough to prove the case?
- Q is decided by the jury (or judge if there is no jury.)
- The persuasiveness of the evidence is linked with the **standard of proof ('SOP')** (which relates to the Q of **how persuasive** must the evidence be)
  - E.g. - in a criminal trial, is the evidence presented by the Crown persuasive enough to prove the case beyond a reasonable doubt?

Remember: legal burden is closely related to...Standard of Proof…

- An argument about a fact in issue is considered **persuasive** if it satisfies the **standard of proof** (**s140-142**).
- **S142** – **admissibility of evidence –** deals generally with the applicable SOP in relation to factual findings that are a pre-condition to admissibility or 'any other question arising under the Act' ('balance of probabilities')

In criminal cases - S141

	When PROSECUTION has the legal burden:	When DEFENCE (ACCUSED) has the legal burden:
Standard of proof is…	Beyond reasonable doubt (BRD)	Balance of Probabilities (BOP)
	S141(1)	**S141(2)**

In civil cases - S140

- "Balance of probabilities" = Means you have to make it 51% - one claim has to be just slightly more persuasive than the other when compared on the balance of things

Meaning of: "Beyond Reasonable Doubt" (*'BRD')*

- Unlike with BOP, you can't really quantify what BRD is - different people approach it in different ways (which creates a challenge)

How certain should one be to satisfy the "beyond reasonable doubt" standard?

- **HCA said - "**A reasonable doubt is a doubt which the particular jury entertain in the circumstances" and it is clear that it's something the courts want the jury to interpret personally (**Green v The Queen (1971) 126 CLR 28**)
- Judges are NOT ALLOWED to tell jury/give elaborate instructions on how to interpret the burden of proof (specifically BRD standard)
    - **Jury Directions Act s64** only allows judge to explain that: **"An imaginary or fanciful doubt or an unreal possibility is not a 'reasonable doubt'"**

Whose burden is it? (burden or onus of proof)

Who is obligated to introduce evidence in court? Which party is responsible for tendering sufficient & persuasive evidence (meeting the evidentiary & legal burden)?

	Criminal cases	Civil cases
Burden of proof:	Onus on prosecution/Crown (legal + evidentiary burden)	Onus on plaintiff/applicant (party making claim) OR defendant (party making a defence) (legal + evidentiary burden)
Exceptions?	Some defences (shifts it to the defence)	Where substantive law dictates

Criminal Proceedings - The Prosecution:

In criminal proceedings, it is usually the prosecution that must discharge both the evidential burden and the legal burden

1. The prosecution must introduce sufficient evidence to support each element of the alleged crime (**evidential burden)**
    - If the evidential burden is met, judge will allow the evidence to be considered by the jury
    - BUT if it is NOT met, judge should stop trial & say there is no case to answer, so there is no point in sending the case to the jury (even if persuasive, it has to first be sufficient - no point evaluating the legal burden if evidentiary burden isn't met first)
        - So trial will stop there, and the decision will be 'no case to answer'
2. ...If there IS sufficient evidence (evidential burden is met), then it is up to The jury will decide whether or not the **legal burden** has been satisfied by the prosecution.

Criminal Proceedings - The Defence:

- **The general rule is that the defence does not have to prove anything.**
    - Why? Presumption of innocence!
    - So: task of prosecution to prove otherwise (up to prosecution to prove someone is guilty, not for an accused to prove they are not guilty)
- **Exceptions:**
    - Insanity plea - if defence makes this plea, shifts both evidentiary and legal burdens to the defence
        - Because: this information is held by the accused, no external evidence can prove/disprove this, so the burden in its entirety shifts to the accused
    - Defences – such as self-defence, provocation, or duress - shift only the evidentiary burden to the defence (so, defendant/accused must bring evidence that has the potential to prove their defence) à BUT the prosecution has to convince the jury that the evidence presented is *not* persuasive enough for defence to arise (legal burden remains with prosecution)

Civil Proceedings

- The evidential burden and legal burden are upon the party making a claim (the plaintiff) or the party making a defence (the defendant).

Case brief: *George Pell v The Queen [2020] HCA 12*

- Very interesting final HCA decision - it really came down to the burden of proof (BOP)
- **COURT HELD:** on the assumption that the jury had assessed the complainant's evidence as thoroughly credible and reliable (taking it at its highest), the evidence of the opportunity witnesses nonetheless required the jury, acting *rationally*, to have entertained a reasonable doubt as to the applicant's guilt in relation to the offences involved in both alleged incidents.
- With respect to each of the applicant's convictions, the Court found that there was "a significant possibility that an innocent person has been convicted because *the evidence did not establish guilt to the requisite standard of proof*" [emphasis added – S.K.].
- Q: Do you think court decision had to do with the evidentiary or legal burden? Is the HC saying that there wasn't sufficient evidence (evidential)? Or that the evidence wasn't persuasive enough (legal)?
    - A: legal burden not met (evidence not persuasive enough)
    - This is why the decision is difficult to understand, because normally the legal burden isn't for a judge in a jury trial, it is for the jury
- **Why the decision by HCA was made:**
    - Evidence brought by the prosecution was sufficient, and TF the judge allowed the case to go ahead & it went to a jury decision
    - HOWEVER, the HC found, because of the opportunity witnesses saying that the accused didn't have opportunity to commit the crime because he was with other people and was seen - HCA found the evidence to not be convincing enough (because of this opportunity evidence)
    - They **held:** it was open to jury to decide that complainants evidence was credible & convincing, BUT the jury could not have completely disregarded the opportunity evidence that was presented, and because they did it meant there was something irrational about their decision, which then allowed the HC to reverse the jury's final decision
    - Because prosecution didn't bring any evidence to disprove the opportunity witness evidence, HC held it just couldn't be open to the jury to say that they didn't believe that evidence, and therefore there was no other option for the jury but to decide in this case that **there was reasonable doubt**
- Important to note that the HC decision was NOT the same decision as other judges who did find the jury decision rational (e.g. Court of first instance/court of appeal):
    - TF this says something about **subjectivity in the way we assess & evaluate persuasiveness of evidence** (clearly evidence can be persuasive & rational to some people, but not others)
- So basically the HC is saying jury was irrational, but they should've explained it better – should've said they were irrational because the burden was not on the accused to prove BRD the opportunity evidence, it was the prosecutions job to negate this evidence, and this wasn't done

Presumptions that shift the burden of proof:

- **Presumptions of law** = rules of evidence that affect how a fact in issue is proved.
    - **Meaning:** A presumption of law operates so that when a fact—the 'basic fact'—is proved, it must, in the absence of further evidence, lead to a conclusion that another fact—the 'presumed fact'—exists.
- This is **NOT a case of inference** (e.g. Because the sun is shining I presume it will be a nice warm day)
    - But RATHER: A legal presumption in Evidence Act might say: if we have printed records from a financial institution, then we presume that this is the original/identical for the original
- NOTE: these presumptions could be wrong, BUT for efficiency purposes, we just presume that is the case
- These presumptions SHIFTS the burden of proof to the other side
    - SO: if you want to say the other party presented a document that is forged/not identical to the original, then YOU have to bring the evidence to prove that

Judicial Notice:

Are there facts that do not have to be proved in court at all? (things we don't even need a presumption for as we just allow the court to assume they exist):

1. **Common Knowledge** (**s144** of the Evidence Act (Vic))**:** Facts which are not reasonably open to question – 'The judge may acquire knowledge of that kind in any way the judge thinks fit' (**s144(2)**).
2. **Matters of law** (**s143** of the Evidence Act (Vic))**:** Laws, regulations, proclamations, orders – 'A judge may inform himself or herself about those matters in any way that the judge thinks fit' (**s143(2)).**

TOPIC 2 - ADDUCING: Witness Evidence (Week 2)

2x Main Q's for Topic 2:

1. **Who is competent & compellable to serve as a witness and to give verbal evidence in court?**
2. **How is verbal evidence produced & what are the rules governing witness examination?**

Relevant parts of evidence Act:

- **Chapter 2** – Adducing evidence
  - **Part 2.1** – Witness evidence
    - Division 1 – Competence & Compellability (**s12-20)**
    - Division 2 – Oaths & affirmations (**s21-25**)
    - Division 3 – General rules about giving evidence (**s26-36**)
    - Division 4 – Examination in chief & re-examination **(s37-39)**
    - Division 5 – Cross-examination **(s40-46)**

What is verbal evidence (viva voce/witness evidence/oral evidence)?

VERBAL EVIDENCE IS: (Choose one of the following answers)

- An eyewitness who responds to counsel questions concerning what she saw.
- A person physically appearing in the courtroom to give information orally.
- Anything an eyewitness says about the relevant incident.
- A witness' account given to a person of authority (e.g. police officer).
- A person who knows the accused and gives character evidence.

Overview:

- NOT about giving evidence about an incident to just anyone
  - REFERS TO people invited to give some account/testimony **in the court room** (either physically/via video conference/pre-recorded session)
    - If not in court, then doesn't fall under oral category of evidence/witnesses
  - Given by a person **ORALLY** using their words to describe an event
- NOT about if a person is eyewitness or not because you can also have:
  - Expert witnesses + Some witnesses that may give hearsay evidence (based on exceptions)
- **Witnesses:** Being a witness - is one of very few compulsory activities, and sometimes a subpoena is issued
  - To decide what witness to subpoena each party will conduct preliminary interview with witnesses to see if their testimonies are valuable & favourable
  - Statement that summarise witness interview may be written & later be admissible to **'refresh memory'**

General rationale/limitations:

- Very important but very problematic - based on perceptions & memory of a human being (unpredictable, fallible, potentially dishonest, grasp reality differently based on prior beliefs/biases)
- Any evidence given falls into 1/more of these 3 categories:
  - Honest & truthful evidence
  - Honest but mistaken evidence
  - Dishonest & false evidence
- The court does not accept as conclusive techniques of detecting dishonesty such as:
  - Facial, micro expressions OR Polygraph tests OR Brain fingerprinting

- Legal system tries to deal with issue of lying through the 'perjury offence'
- Main tool to assist jury & sometimes the judge = cross-examination = which is about testing a witness, for honesty & for accuracy - if a witness is lying/mistaken, then cross-examination can expose this
    - But: can be a double-edged sword, lawyer can do anything with this if skilful enough

2x main groups of rules for verbal evidence:

1: Competence & Compellability

- See sections below for more info
- **Summary:**
    - **Division 1 EA –** covers competence & compellability of a witness
        - Presumes everyone to be competent
    - **Test:** can they understand Q's & give intelligible answers?
        - If you have some disability - doesn't mean you are incompetent, as long as court can provide some alternatives to overcome it (e.g. Interpreter)
    - **Main exception: s17** - pertaining to the accused
        - Not the accused's job to give Crown evidence
        - Part of the right to silence

2: Witness Examination

(how witness examination works in practice, how Q's can be asked, orders of questioning, etc.)

#1 - Competence and Compellability

- **COMPETENCE** - WHO is qualified to give evidence in court/who is PERMITTED to testify
- **COMPELLABILITY** - IF someone who is competent to give evidence in court can be FORCED to give such evidence

COMPETENCE:

- Refers to **WHO** is qualified to give evidence in court/who is **PERMITTED** to testify
- NOTE: Time of the hearing is the relevant time for evaluating competency (not time of the crime)

GENERAL RULE (s12)

- **S12** - unless otherwise provided for in act, **EVERY PERSON is considered competent to give evidence** (**s12(a)**)
    - TF: general rule: ANY person is qualified to serve as witness (UNLESS exceptions apply)
- (also note under **s12(b)** a person who is competent to give evidence about a fact IS COMPELLABLE to give evidence about that fact)

EXCEPTION #1 – Lack of capacity (s13)

- **S13** - broad test of competence, which recognises **some individuals shouldn't be qualified** to give evidence in court (practical & policy reasons). **If they lack capacity, then they may not be 'competent'.**
- **S13(1) = TEST:**
    - If a person…
        a) Doesn't have capacity to understand a question about the fact; OR
        b) Doesn't have capacity to give an answer that can be understood (an intelligible answer) to a question about the fact; AND
        c) That incapacity cannot be overcome
    - …they are considered NOT COMPETENT to give evidence about such fact
- **S13(1) = EXAMPLES:**
    - Very young children
    - Mental impairment
    - Intellectual & physical disabilities
    - What about mute/deaf physical impairments?
        - They may have some difficult in giving response, BUT this can be overcome by using interpreters or other means
        - **Remember: S13(1)** - can only exclude individuals where the impairment CANNOT BE OVERCOME

- **S13(2)** - a person who is **not competent to give evidence about SOME facts may give evidence about OTHER facts**
    - TF: the 2-fold test on a person's competency to give evidence about a fact is directed to the persons' capacity in respect of INDIVIDUAL QUESITONS – TF it may be necessary to determine a person's capacity on multiple occasions
    - **Example:** Child: may be able to answer simple factual question about what they saw, but not a question that requires drawing an inference
- **S13(3)** - distinction b/ween **competence to give evidence v. competence to give SWORN evidence**
    - If a person passes the competence test & is deemed competent to give evidence on a fact, they **have to pass a further test** to be competent to give sworn evidence:
        - They have to have the capacity to understand that in giving evidence, they are under an obligation to give truthful evidence
        - If they don't have the capacity to understand that they are obligated to TELL THE TRUTH, they may be INCOMPETENT to give SWORN evidence. Instead, they may give unsworn evidence
    - **Before unsworn evidence is given:** court must tell witness it is important to tell the truth & they may be asked Q's they don't know the answer to, and should tell the court if that is the case AND should only agree with statements they believe are true & not feel pressure to agree with statements believed to be untrue
    - EA does not otherwise distinguish b/ween sworn & unsworn evidence (unsworn evidence is treated no differently from other evidence, although the weight given to unsworn may be lower, depending on circumstances)
    - ***R v GW*** – there was no issue as to R's competence to give evidence (she was a girl under 10 years old), BUT there was issue whether she was competent to give SWORN evidence
        - HCA held: Trial judge was correct to be satisfied that R should give unsworn evidence
    - **Rationale:** more evidence can be considered by the trier of fact (either judge or jury)

EXCEPTION #2 – Judges & jurors (s16)

- **S16(1)** – a person who is **judge/juror in a proceeding is NOT competent** to give evidence in that proceeding
    - BUT a juror IS competent to give evidence in the proceeding about matters affecting the conduct of the proceeding

EXCEPTION #3 – Accused in criminal proceedings (s17)

- **S17 –** this section ONLY applies to CRIMINAL proceedings
- **S17(2) RULE:** an accused is NOT competent to give evidence as witness for the prosecution

COMPELLABILITY:

Refers to who can be **FORCED/COMPELLED** to give evidence in court

GENERAL RULE (s12)

- **S12** - unless otherwise provided for in Act, **ALL witnesses are considered compellable** (any person who is competent to give evidence about a fact is compellable to give that evidence) = **s12(b)**
    - (unless any exceptions apply that exclude some individuals)

(Minor) EXCEPTIONS:

Not all witnesses are compellable to testify in certain circumstances, some exceptions apply:

- **S14 –** person not compellable to give evidence on particular matter if court is satisfied:
    a) Substantial cost/delay would be incurred in ensuring they have capacity to understand Q about matter OR give intelligible answer to a Q about the matter; AND
    b) Adequate evidence on the matter has been given/can be given from one/more other persons
- **S15 –** Sovereign & others (heads of state/holding public officer/parliamentarians/heads of other countries/etc.)
- **S16 –** Judges & jurors

(Main) EXCEPTION #1 – Accused in criminal proceedings (s17):

- Accused is not competent to give evidence for Crown (**s17(2)**)

- An associated accused is not compellable to give evidence for or against an accused, UNLESS that associated accused is being tried separately from accused (**s17(3))**
- **Rationale of s17(3):**
    - Why shouldn't prosecution be able to compel accused to testify & give their version?
        - Stems from accused right to silence - no one should be compelled to give themselves in
        - Otherwise, would put the accused in an impossible dilemma b/ween telling truth (being convicted)/lying (perjury)/refusing to answer (contempt of court)
    - Why can't they volunteer to testify for prosecution?
        - Emphasises it is prosecutions job to bring the evidence against accused
        - Prevents accused from being witness for prosecution against a co-accused
- **NOTE**: accused CAN give evidence that prejudices a co-accused & vice versa, BUT NOT as witness for the prosecution

S41 & s42 jury directions act:

- NO adverse inferences to be drawn from accused's silence during trial – this gives the accused the full benefit of their right to silence
- **Crown** may NOT comment on accused's failure to give evidence
- A **co-accused** MAY comment on failure of accused to give evidence
    - AND **judge** may comment IF it has been raised by a co-accused, BUT must not make a comment suggesting that accused failed to give evidence because they are guilty
    - Generally, any comment made in this respect, must not suggest it is because accused is guilty
- **Judge** can direct jury that no adverse inference to be made from accused not giving evidence/calling any other evidence
    - Judge must explain that BOP is on prosecution to prove that accused is guilty, and accused is not under any obligation to give evidence themselves/bring any other evidence on their behalf (D not bound to give evidence)
    - Direct that jury can't speculate on what evidence the accused might've given
    - Direct that there may be reasons why D didn't give evidence, and the jury isn't to speculate about those reasons
    - Known as '*Azzopardi direction*' (**Azzopardi v The Queen (2001) 205 CLR 50**):
        - … if an accused does not give evidence at trial it will almost always be desirable for the judge to warn the jury that the accused's silence in court is not evidence against the accused, does not constitute an admission by the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as a make weight in assessing whether the prosecution has proved its case beyond reasonable doubt.

(Main) EXCEPTION #2 – Family members of the accused (s18)

- **Under CL -** for centuries has recognised 'spousal privilege' - meaning: generally, husband/wife of accused were not compellable witnesses for prosecution
    - **Rationale?**
        - Social values in maintaining healthy relationships w/in the family unit
        - Being able to trust your partner
        - Person may experience a lot of stress/anxiety if having to choose b/ween telling the truth & hurting a family member or lying and maybe facing perjury charges or refusing to answer and risking punishment of contempt of court
- **BUT: the CL privilege was abrogated by UEL,** and **now s18 applies**
    - **S18 -** provides guided discretionary exception to the new presumption of compellability in criminal proceedings

- **How does s18 work?**
    - Spouse/de facto partner/Child/Parent of accused - **can object** to being called as a witness
    - Family status is determined at time of giving evidence
    - Judge will allow application/objection if likely giving the evidence would harm the witness or family relationship AND the nature/extent of harm outweighs desirability of the evidence
        - i.e. the judge has DISCRETION on whether/not to uphold the objection

- Judge will take into account:
  - Nature & gravity of offence
  - Substance & importance of evidence
  - If other evidence on same matter is available
  - Nature of relationship b/ween witness & accused
  - If the person would have to disclose information that was given by the accused in confidence
- If such application is granted, that person will then **be deemed unavailable to give evidence** - meaning, **a party may then seek to tender previous statements by that person under hearsay exception in s65 of Act** (see Week 5)

- **S41 + S42 - Jury directions Act**
  - No comment may be made by Crown/judge in relation to an accused NOT calling a family member, suggesting this is because the accused is guilty
  - These sections replaced what used to be **s20 of the Vic EA**
  - **Rationale:** To prevent adverse inferences being drawn - which would violate accused right to silence
- **Australian Crime Commission v Stoddart (2011) 244 CLR 554 -** HCA dealt with this discretionary exclusion of **s18**

Conducting Witness Examination (‘*WE*’)

EXAMPLE – A Few Good Men Movie

Tom Cruise v Keanu Reeves - What is the main purpose of each of the witness examination stages, as reflected in the video you watched from “A Few Good Men”?

- The clip shows/demonstrates the 3 steps of witness examination:

Examination in chief	• Basically examine your own witness (the witness you call) • You call them because you know what they will testify on • You can feel rhythm is friendly where you have a witness that wants to testify for you • Open ended Q's for witness to tell their story/version in a non-stressful manner, asked witness to give account in his own words • More friendly type of examination, More relaxed pace • Carefully selected Q's to follow strategy & create complete, persuasive narrative • In the video clip: Used testimony to produce evidence about existence of red code in unit used to punish soldiers for misbehaving

Cross examination	• Tests the witness's story - test the veracity of the info/evidence produced during EIC - reliable? Accurate? Truthful?
	  ○ Used to undermine impact of EIC
	  ○ Designed to make jury disbelieve some of the evidence provided by the witness
	  ○ Influence the weight the jury gives to the evidence in their decision
	• Much faster, more aggressive pace - not as friendly
	• Lawyer could often cut witness answer & not allow him to complete his response
	• In movies - often attempt to break the witness
	  ○ IRL - not about breaking them, but about making the witness look bad/feel rattled/make them say something inconsistent/to convince jury that they shouldn't give a lot of weight to what was said in EIC
	• In the scene: Attempting to refute witness testimony that a red code existed in unit, by forcing witness to admit that no such rule was included in the guidebooks/manuals

Re-examination	• For party who called witness to reassert some of the evidence/repair any damage caused in CE • Used as rebuttal for specific issues raised during cross • To explain some of the inconsistencies • Almost always improvisation - can't really be certain what will be raised in cross & how best to correct the impact of it • But can only touch upon issues in CE ○ Can't bring in new things

	○ S39 - limits on re-examination • In scene: Tom referred to the same manuals brought up in cross-examination - to show they didn't include references to many important practices (e.g. Mealtime)

'Calling' a witness

- The EA does NOT deal with **calling of a witness** by a party/the court, instead, it is **left up to CL & the power of a court** to control the conduct of a proceeding as per **s11**
- **Judge in civil cases** may NOT call a witness - ***Clark Equipment Credit of Australia v Como Factors***
- **Judge in criminal trial** CAN call witnesses in 'most exceptional circumstances' - ***R v Apostilides (1984)***
    - In this case HCA gave 6 propositions on prosecutor's obligation to call witnesses:
        1. Crown prosecutor alone bears responsibility of deciding whether a person will be called as witness for Crown
        2. Trial judge may (but not obliged) to question prosecutor to discover the reasons that led them to decline to call a particular person. Judge is not called upon to adjudicate the sufficiency of those reasons.
        3. At close of Crown case the trial judge may invite prosecutor to reconsider a decision & have regard to the implications as then appear to the judge at that stage of proceedings, BUT CANNOT direct prosecutor to call a particular witness
        4. When charging the jury, trial judge may make such comment as he then thinks to be appropriate w/respect to the effect which failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. Any comment, would be affected by such information as to the prosecutors reasons for his decision as the prosecutor thinks proper to divulge.
        5. Except in most exceptional circumstances, the trial judge himself shouldn't call a person to give evidence.
        6. A decision of prosecutor to not call a particular person as 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.

Questioning a witness:

- **S26 –** general power of court to control questioning of witnesses
- **S27 –** permits a party to question any witness (unless otherwise provided)
- **S28 –** regulates the **ORDER** of questioning witnesses:
    1. Examination in chief
    2. Cross examination
    3. Re examination
- **S29 –** regulates the **manner & form** of questioning witnesses in general

Other points to note:

- Witnesses do NOT ALWAYS testify on oath – may sometimes give unsworn evidence (e.g. see **s13(3))**
- Witnesses generally testify to FACTS – NOT OPINIONS
    - EXCEPTIONS – lay opinion & expert opinion (**ss76-80)**
- Witnesses testify ORALLY FROM MEMORY – NOT reading from previously prepared statements
    - EXCEPTION – **ss32-34** applied to revive their memory

3x Main Stages of Witness Examination:

1: Examination-in-Chief ("*EIC*")

- **AIM:** allow witness to give their account in their own words
- **BY WHO?** The party that calls the witness
- **RATIONALE:**
    - When lawyers/counsel start working on their own case they come up with their own narrative & neatly tailor their arguments
    - BUT: we want the jury to be able to evaluate the witnesses version as clean as possible - not one crafted by counsel for each party
    - SO that is why there are a number of limitations including:
        - Reviving witness memory **(ss32-34)**
        - Leading questions generally prohibited **(s37)**

Refreshing/reviving witness memory (ss32-34)

- There is limited opportunity to allow a witness to look at notes
- **Rationale**: they are expected to be able to remember a particular crime/incident
- **S32 – attempts to revive memory IN court**
    - A witness may NOT refer to any notes to assist in reviving their memory WHILST giving evidence UNLESS the court gives leave
    - Usually occurs during EIC
    - Generally: court must be satisfied witness has first exhausted their memory
    - Court take into account if witness will be able to recall the fact w/out reading the document + if the document was written by the witness when the events recorded in it were fresh in memory
- **S34 – attempts to revive memory OUT of court (before witness comes to court)**
    - E.g. Reading a statement they made earlier before coming to court to give evidence
    - There is no problem with this, BUT if deemed appropriate the court may order production of any such document used by witness to refresh memory
- **EXCEPTION = S33 – evidence given by police officers**
    - PO's ARE allowed to refer to a statement they have made & read from their police statements without having to first exhaust their memory - on 3 conditions:
        1. Made statement themselves when events were fresh in their mind (made it at the time/soon after the occurrence of the events); AND
        2. Signed their statement when it was made; AND
        3. Copy of statement was given to the accused
    - **Rationale –** easier for PO's to forget details as they deal with many cases on a daily basis
        - **SO** this exception allows police to read from their past notes if they were written 'soon after' the event occurred (cf: normally witnesses are not allowed to read from notes)
    - **BUT:** still have to make sure it complies with hearsay rules regarding admissibility of previous representations
        - As **s33** applies in criminal proceedings & the person who made the PR is available to testify (the police officer), then the exception in **s66** applies (where maker is available in a criminal proceeding)

Leading Questions ('*LQ's*') – NOT allowed (s37)

- **S37 RULE:** NO LEADING Q's allowed in EIC
    - GENERALLY prohibited (but some exceptions do apply)
- **LQ** = defined in Act as questions that either:
    - directly/indirectly suggests the answer; OR
    - assumes existence of a fact or issue about which the witness hasn't yet given evidence
    - (basically a question which if answered, would basically confirm that the assumed fact occurred)

Examples of LQ's that suggest the answer:	Instead should say:
'did the accused rob the bank?'	'what did the accused do?'
'did you see another car coming very fast from opposite direction?'	'what did you see?'
'did you hear the gunshot?'	'what did you hear?'
'isn't it?' or 'didn't you?'	'what did you do then'?
	'what happened after that?'
Examples of LQ's that assume a fact/issue:	**When it is in dispute that:**
'when did you stop hitting your wife?'	The accused hit his wife
'after accused pulled out a gun, what did you hear her say to the victim?'	The accused was holding a gun
'was accused threatening the victim with her gun?'	This suggests the answer (re threatening) AND assumes an issue (holding a gun)
'after the accused forcefully entered the house, what happened?'	

Rationale – why aren't LQ's allowed in EIC?

- Less likely to get the witness's genuine story & instead more likely to hear the narrative crafted by the lawyer
- Promotes more genuine & unfiltered evidence actually given by witness rather than by the person asking the Q's

EXCEPTIONS – limited situations where LQ's WILL be allowed in EIC (s37(1))

1. **Judge has discretion to allow it in some circumstances (court gives leave)**
    - E.g. to protect vulnerable witnesses
2. **Questions about introductory matters designed to set background for examination**
    - "E.g. Officer banks, were you on duty the night Mr. Smith was killed?"
3. **If no objection made, and all parties are represented**
    - (this demonstrates the importance of being very observant during legal proceedings)
4. **Q relates to a matter not in dispute**
    - E.g. If accused admits to stabbing victim but claims it was in self-defence, you could ask 'why did you stab john' or 'what did you do before you stabbed john'
5. **Of expert witnesses to ascertain their opinion**
    - E.g. Drops of blood were found on victims chair & on wall behind it in a manner that would indicate shooting from close range - is that correct?
    - E.g. Bullet entered victims body from L to R, leaving both entrance & exit wounds, which suggests the shooter had to stand at least 10m from the victim, is that accurate?

Unfavourable witnesses (s38)

- **At CL –** known as 'hostile witness' rule & was a **very** high threshold to meet
- **NOW: EA -** replaced 'hostile' with 'unfavourable' = lower threshold
    - Not defined in the Act
        - Enough to show that the witness is not favourable to the party that called them (unfavourable = 'not favourable') = ***R v Lockyer (1996) 89 A Crim R 457***
        - In ***DPP (Vic) v Garrett (2016) 257 A Crim R 509 -*** SCV held: unfavourable does not mean adverse in the sense of hostile, but rather **means simply not favourable (**i.e. where a witness is giving evidence not favourable to your case)
- **S38(1) - a party who called the witness may seek leave of court to declare that witness unfavourable in 1/3 situations:**
    1. When witness is giving evidence that is unfavourable to the party; OR
    2. Appears witness is not making 'genuine attempts' to give evidence (e.g. if witness is elusive in their A's); OR
    3. When witness has made prior inconsistent statement (that is inconsistent with their in-court testimony)
- **IF court declares a witness unfavourable, then the party may cross-examine them DURING the examination in chief!!**

- Meaning: they party who called a witness during EIC may question that witness as though they were cross-examining them
- Implications of this: they would be able to ask LQ's (among other things)

- Under **s38(2)** – if a party is granted leave, then questioning a witness under this section is taken to be cross-examination for the purposes of the Act

WHY would a party want to treat EIC as cross examination?

- ***Adam v The Queen (2001) 207 CLR 96*** - HCA emphasised that **witness unfavourability does not have to be unexpected,**
  - Subject to grant of leave, a party can call a witness knowing they are unfavourable to it, in order to cross-examine the witness (i.e. you can expect a witness to be unfavourable & still call them)
- **Why would you do this?**
  - Strategic move for example if you know they have given a PIS, because you will then be able to 'cross-examine' them
  - Bc of the different purposes of EIC & CE - each stage is governed by different rules
    - CE is more lenient & a party ask questions normally prohibited in EIC (e.g. Leading Q's)
- **SO: Why would you want to call an unfavourable witness? And how do you know they are unfavourable before trial begins?**
  - People change their versions or recollections, and may sometimes have external reasons to do so. As counsel, this change in a witness' recollection may surprise you in court. However, other times you may be aware that the witness plans to give information that is inconsistent with what they said in their police statement or to other people. In such cases, you may want to call the witness in order to cross-examine them about the new and unfavourable version, in order to elicit evidence about the other version or to lead evidence about a prior inconsistent statement (which you cannot do without calling the witness).

Limitations on s38(1)

- Cross-examination may be permitted on the 3x scenarios in **s38(1)** AND could be about 'a matter going only to credibility with a view to shaking the witness's credibility on the s38(1) subjects' – **R v Le (2002) 130 A Crim R 44**
- **BUT the questioning must be about the subject which provided the basis for the granting of leave**
  - Meaning: if the party sought leave of court to declare a witness unfavourable for not making genuine attempts to answer a Q, then they can only question the witness as though they were cross-examining them in relation to the matter that they are not making a genuine attempt to give evidence about
- **SO: S38 doesn't permit general cross-examination BUT is limited to the 3 matters listed in s38(1)**
  - E.g. **R v Hogan [2001] NSWCCA 292**
    - Ground of appeal concerning **s38:** Crown shouldn't have been allowed pursuant to **s38** to CE the 2x Crown witnesses & introduce evidence that was inconsistent with parts of their testimony
    - **How did trial judge apply s38 to Golby's evidence? Why did s38 apply & what CE was allowed by the trial judge?**
      - Rachel Golby's EIC was inconsistent with her statement to police AND was unfavourable
      - Kathleen Golby's EIC was unfavourable
      - The judge didn't' specify the ambit/bounds of CE
    - **Did the Court of Criminal Appeal find that the CE pursuant to s38 was permissible?**
      - NO! They found the CE should've been limited and that the **trial judge should've considered the ambit of CE when granting leave**
    - **What did CCA find that the trial judge should've done?**
      - Trial judge should've applied **s38 & s192**
      - Should've analysed whether **s38(1)(a) or (b) or (c)** was the bases/basis of leave
      - Should've applied **s38(6)**
      - Judge failed to address the statutory criteria & this was an error that gave rise to miscarriage of justice

Summary of s38 procedure:

1. You have called a witness who is being unfavourable during EIC (for 1/3 of the reasons above)
2. You then seek leave of the court under **s38** to CE that witness
3. Judge has discretion to decide whether to grant you leave to CE the witness

a. Judge may hold a voir dire to consider if leave should be granted following **s38(6)** and taking into account factors in **s192(2)**

4. If court declares witness unfavourable and gives you leave to cross-examine the witness
    a. You can only CE about the specific evidence that is unfavourable (NOT in general) (***Hogan***)
        i. Meaning: you can CE the witness about the subject that provided the basis for the granting of leave
5. Then the witness will be CE'd as normal by the other party
    a. SO essentially there will be 2x CE's
        i. (one by the party who called the witness, and then by the other party)
        ii. (OR more if there are additional parties)
6. Re-examination may also occur

EXAMPLE: Unfavourable Witness

1. Q: 'what did you see on the night in question'
    a. A:' I saw accused crossing road;
2. Q: 'what were they wearing?'
    a. A: 'I don't remember/know'
        i. This is not necessarily hostile or a lie
        ii. BUT you could then ask for leave to CE witness about that particular issue on what they saw the accused wearing
3. If the court grants you leave, you could then ask a Q such as: 'Didn't you see the accused wearing a brown jacket with snake on his back?'
    a. This is a leading Q with a Y/N answer, that you are able to use to lead this particular evidence from the witness
    b. If that doesn't work, and in a previous statement you know the witness described the outfit, you could say 'in a previous statement you said X'
    c. SO: after you put the inconsistent to the witness, they can either explain it OR if they still deny making the statement, you could adduce the prior inconsistent statement which may be helpful to your case, but you couldn't otherwise have adduced it into the court docket as evidence without questioning the witness about it
4. **NOTE:** if you are granted leave to CE in relation to a PRIOR INCONSISTENT STATEMENT (option #3 of the above options), take note of **s43** **(**below)
    - **s38** & **s43** are distinct sections!!
    - Sometimes, when a witness provides unfavourable evidence during her EIC (which is inconsistent with her prior statements), the party who called that witness will have to rely first on **s38** in order to then tender the inconsistent statement through **s43**.

2: Cross-Examination (CE)

- **AIM:** to allow other party to test the evidence given in EIC = <u>3x main goals/purposes:</u>
    1. **Elicit evidence favourable** to the party cross examining the witness
    2. **Undermine unfavourable evidence** given in EIC
    3. **Undermine credibility** of witness & thus weight of evidence given
- **BY WHO? Defined in Act** to be questioning of a witness by a party other than the party that called them
- **LIMITATIONS?**
    - Very few. Main one = improper questions

Witness called in error (s40)

S40 – a party CANNOT CE a witness called in error by another party who has not been questioned by that other party about a matter relevant to a Q to be determined in the proceeding

Improper Questions (s41)

- You can attack witness answers BUT have to be careful of the thin line b/ween effective CE to expose the truth v. overzealous CE that may break a truth-telling witness & harm the fact-finding process = Not everything is fair game
- **S41(1) –** court may **disallow IMPROPER Q or IMPROPER QUESTIONING** put to witnesses in CE (or tell witness it need not be answered)
- **S41(3) –** defines **improper question/improper questioning** to be that which is:
    - Misleading/confusing; OR
    - Unduly annoying/harassing/intimidating/offensive/oppressive/humiliating/repetitive; OR
    - Questions put to witness in a way (manner/tone) that is insulting/belittling/otherwise inappropriate; OR
    - Questions that have no basis other than a stereotype (e.g. based on sex/race/culture/ethnicity/age/mental, intellectual or physical disability of witness)
- If witness is **vulnerable witness** - such questions MUST be disallowed
- **S41(5) –** a question is **NOT improper** just because it:
    - Challenges truthfulness of witness OR consistency/accuracy of any statement they make; OR
    - Q requires witness to discuss a subject that could be considered distasteful to/private by the witness

Leading questions (allowed) (s42)

S42 - LQ's ARE ALLOWED (UNLESS court disallows it or directs witness not to answer)

- So: you can ask yes/no Q's BUT court has discretion to disallow leading questions even during CE
- Don't want to allow witness opportunity to reassert the negative things they've said about your client, you want to control the things being said in court
    - E.g. 'isn't that right?' or 'Didn't you do that?'

Browne v Dunn Rule (*Browne v Dunn (1893) 6 R 67):*

- **RULE:** if a party is going to contradict a witness's testimony, the witness must be given the opportunity to explain the alleged contradiction
    - Meaning: you need to inform witnesses of any intention you have to assert contrary facts to what they have said in court
- **RATIONALE:**
    - Is **a rule of FAIRNESS** because:
        - Designed to allow witnesses to confront any proposed challenge to their evidence + enable jury to see & assess reactions of witnesses to those challenges
        - It obliges a party to give appropriate notice to the other party of any imputation that the former intends to make against any of the latter's witnesses about their conduct relevant to the case or their credit (***MWJ v The Queen* (2005) 80 AL JR 329**)
    - This rule established the idea of 'fair play at trial'
    - It permits the denial of case on oath
    - Provides opportunity to call corroborative evidence which in the absence of a challenge is unlikely to be called
    - Also allows the explanation/qualification of other evidence upon which the challenge is based
- **MEANING/PRACTICAL EFFECT:**
    - If a party wants to challenge/contradict a part of witness evidence, the cross-examiner must inform the witness of this intention & give them chance to respond to the contrary facts
        - = The rule requires counsel to put any matters concerning their own case that are inconsistent with witness evidence, to that witness
    - Also requires prosecution to put any allegation they intend to make against a witness to that witness
    - **SO:** If you want to attack other party's witness – have to raise it when you have opportunity to do so
    - **SO:** If you plan to call a witness that'll give inconsistent evidence to what a witness is currently giving on the stand – you have to put that to the witness in CE (can't surprise them later)

        - E.g. So if a witness is on the stand saying 'Y' happened, and you have a witness saying 'X' happened, you have to ask the 'Y' witness - 'are you sure that this is how it happened?'

- **Remember:** You can use leading questions
    - But you have to ensure you put the other version to the witness, to give witness an opportunity to explain those inconsistencies
    - OTHERWISE, to later bring a witness that contradicts something the first witness said but wasn't CE'd on, would be a **breach of the rule**
- **Is a CL rule –** which continues to apply & be interpreted by the courts **BUT NOTE:** ***Heaton v Luczka [1998] NSWCA 104*** **–** held that the rule in **DUNN remains alive & well under UEA**

At CL:	Under the EA:
Applies to criminal AND civil proceedings	
But in criminal: limited to **defence counsel only**	Rule applies to **BOTH parties (**with differing requirements) • Defence counsel = must disclose that evidence of witness is to be challenged AND how it is to be challenged • Prosecution - little guidance given of obligations the DUNN rule has on them - but likely they must also comply with same obligations as defence

EXAMPLE – R v Birks (1990) 19 NSWLR 677:

- Defence Counsel failed to cross-examine the complainant on two aspects of the accused's instructions, thus breaching the rule in *Browne v Dunn (*as the accused had a diff version of the events, but he wasn't CE'd about that)
- To remedy the breach, the jury was invited to draw an adverse inference from the failure of defence counsel to cross-examine the complainant on these matters.
- The jury returned a verdict of guilty and the accused appealed.
- **COA HELD** - allowed the appeal and ordered a new trial, stating that *"[i]t is one thing to remark upon the fact that a witness or a party appears to have been treated unfairly. It is quite another thing to comment that the evidence or unsworn statement or a person should be disbelieved , perhaps as a recent invention, because it raises matters that were not put in cross-examination to other witnesses by that person's counsel."* (at 689)
    - This case: **ultimately really limited the effect of a breach** of Browne v Dunn
        - Because: the rule was breached & jury was invited to draw an adverse inference from the failure to CE & invited to basically disbelieve the defendant
        - But the COA says this went too far

EXAMPLE – ***Ward (a Pseudonym) v The Queen [2017] VSCA 37***

- The COA rejected defence's arguments regarding the victim's credibility, which were based on inconsistencies between her recorded EIC and her responses during CE in the trial, as these inconsistencies were not put to the victim during her cross-examination
    - Was in respect of an examination of a young child, recorded in video
    - There were some inconsistencies b/ween the prior recorded testimony & what happened in court room during CE
    - However, the accused's counsel didn't put those inconsistencies to the victim during her cross-examination (accused's counsel (defence) failed to put the inconsistencies to the victim & then attempted to use that inconsistency to discredit the victim/complainant)
- **COURT HELD:** that if counsel does not give the child a fair opportunity to respond to the attack on their evidence, counsel runs the risk that their opponent, or the judge, will take the view that there has been a breach of the rule in *Browne v Dunn* (in para 125)

BIRKS	WARD
Jury was invited to discredit/disbelieve the accused because defence counsel failed to raise the accused's version/instructions during CE of the complainant (although this was held to be taken too far)	Said you can't discredit the complainant in this way as it wasn't put to them during CE that there were inconsistencies in her testimony – TF unfair to say she shouldn't be believed because of the inconsistencies, if she had no opportunity to explain them

WHAT IF COUNSEL FAILS TO COMPLY WITH THE RULE?

- Trial judge has discretion on how to best remedy the unfairness
- E.g. may mandate jury direction to disallow an argument/exclude the evidence

OPTIONS TO REMEDY A BREACH OF THE RULE:

1. **Re-examination**
    a. designed to deal with some of these issues and enhance fairness in proceeding, allowing witness to fix some of the damaged credibility
2. **s46 EA – opportunity to recall a witness**
    a. **This is the main solution for a breach of Dunn**
    b. Court MAY give leave to party to recall a witness to give evidence about a matter raise about evidence adduced by another party
    c. So: for example, if the rule was violated by suggesting evidence not put to the witness/inconsistencies not put to witness during CE, you could recall that witness in order to alleviate some of the damage caused by breach of the rule

Prior inconsistent statements of witnesses ('PIS') (s43)

- **NOTE** s38 above when leave is granted in respect of a PIS in the context of an unfavourable witness
    - s38 & s43 are distinct sections. Sometimes, when a witness provides unfavourable evidence during her examination in chief (which is inconsistent with her prior statements), the party who called that witness will have to rely first on s38 in order to then tender the inconsistent statement through s43.
- In addition to the DUNN RULE, the EA itself also has some **specific rules on asserting contrary facts** such as S43:
    - Governs prior inconsistent statements made by witness = as it refers to cross-examination of a witness about a previous statement they have made which is inconsistent with evidence they have given in court
        - = cross-examination of a witness about a PIS alleged to have been made by the witness
    - Meaning: a witness may be cross-examined about a PIS alleged to have been made by that witness, regardless of whether complete particulars of the statement have been given to the witness OR a document containing a record of the statement shown to the witness
- Similar to DUNN rule, this is a **rule of fairness** because:
    - It creates conditions for cross-examiner that they must meet if they want to later adduce evidence of the prior inconsistent statement made by the witness from a different witness/source
    - **Rationale:** fairness – giving the witness the chance explain the inconsistency is at the core of s43

E.g. of WHEN might s43 come into play?

- if cross-examiner wants to adduce a document containing a relevant statement such as summary of police interview of witness; OR
- Cross-examiner wants to call another witness that heard the witness making the PIS

What does 'adducing PIS from that witness' mean?

= Means the cross-examiner is allowed to ask the witness Q's about the content of a previous statement they allegedly made & whether they made such a statement

What if the witness denies/does not admit to making such statement, how can it be adduced by the cross-examiner?

1. The cross-examiner should first give witness a chance to inspect the statement & ask if they still deny it **(s43(2))**
    a. I.e. have to first give witness opportunity to explain why their story has now changed (or a chance to change it back to their original version)
2. If the witness STILL denies it, prosecutor may try to adduce evidence of the statement 'otherwise than from the witness' – meaning:
    a. **s43(2) -** if the cross-examiner wishes to adduce the PIS but have been UNSUCCESSFUL at adducing such evidence FROM THE WITNESS itself (they can't get the witness to admit making the PIS), the cross-examiner may be able to **adduce such evidence from another source** if **2 conditions are met (**procedural requirement placed on the cross-examiner):
        1. Cross-examiner must inform witness of enough of the circumstances of making the statement to enable the witness to identify the statement; AND
        2. Cross-examiner must draw the witness's attention to so much of the statement as is inconsistent with the witness evidence
    b. SO! If you are a cross-examiner and you have realised that the witness's testimony is inconsistent with a prior statement they have made, you should inform the witness of the existence of the PIS, and the contrary content in that statement
3. If, after the cross-examiner has fulfilled the 2 conditions, and the witness STILL INSISTS what they are saying in court is the truth (or still denying making the PIS), the cross-examiner **will be able to tender the document/PIS as evidence**
    a. E.g. cross-examiner can tender the statement itself
    b. E.g. cross-examiner could call the police officer who recorded the statement as a witness

Previous representations of other persons (s44)

- **s44 -** This is another section governing the use of PIS during cross-examination, but this section regulates **previous representations that have been made by 'others'**
    - **GENERAL RULE:** CE of witness's about previous representations made by others is prohibited
    - **UNELSS –** the representation was admitted or will be admitted into evidence
- If the representation is not admitted into evidence but is contained in a document, the cross examiner may present the document to the witness without others present & ask the witness if, having examined the doc, they stand by the evidence they have given

Witness credibility issues (s102-106)

- **General 'credibility rule' = s102 + s104** - an accused/any other witness must NOT be questioned about their credibility (generally deemed inadmissible)
- **EXCEPTIONS:**
    - **S103** - allows credibility evidence to be adduced during CE of the witness if the evidence could substantially affect the assessment of credibility of the witness
        - E.g. Prior perjury or fraud conviction of that witness
    - **S104** - further protections of the accused in criminal proceedings
        - Court may grant leave to Q the accused about their credibility if they adduced evidence challenging credibility of a prosecution witness
    - **S106 -** Where a party made assertion to witness about their credibility & witness had denied the assertion, **s106** allows a party to lead rebuttal evidence
        - = evidence tending to show a witness has made a prior inconsistent statement/is biased/has motive to lie/could not know about the matters they are giving evidence of/witness has been convicted of crime/has been dishonest while under an obligation to tell the truth
        - Process of **s106** requires:
            1. First Make an assertion to a witness; and then
            2. ONLY IF witness denies an assertion, is the path open to adduce credibility evidence to rebut the witness's denial

3: Re-Examination

- Permitted to recall & re-examine a witness on any matters arising in CE - to clarify these matters
- Can't bring in any new evidence w/out court's leave
- Usually short & focused