

- ii. Same analysis as above.
- iii. Same analysis as (i).
- iv. This is a civil trial. As such, s 140 would be engaged. The plaintiff (P) would need to prove his case on the balance of probabilities as to why D should not remain a beneficiary under T's will. The court may take into account matters listed under s 140(2), such as the nature of the cause of action, the nature of the subject matter of the proceeding and the gravity of the matters alleged. Here, it appears that although D was tried for murder and acquitted on the basis of self-defence, this is something irrelevant to the existing claim.

Topic 5: Adducing evidence – witnesses

Revision questions

Competence and compellability

Jo and Flo, a husband and wife, have been charged with armed robbery.

- (a) Are there any circumstances in which Flo could testify for the prosecution against Jo?
 - Starting section should be s 12, which provides that everyone is presumed to competent and compellable. According to s 12, Flo is competent and compellable
 - Note: if tried together, then they are not competent to testify as a witness for the prosecution. *Kirk v Industrial Relations*. Also precluded by s 17.
 - Then if you are talking about the criminal defendant (talking about Flo, so yes, a criminal defendant), then need to look at s 17. *Kirk v Industrial Relations*.
 - o Apply s 17
 - o Look at 17(2)
 - o If this was Jo's trial and Flo is being tried separately, Flo is an associated defendant and not a co-defendant. She is not a defendant in this proceeding. Flo could be called by the prosecution. Flo could be competent for the prosecution.
 - Then examine s 18
 - o Flo is Jo's spouse/wife.
 - o s 18 deals with family members and gives them the right to object to testifying in circumstances. Provision is essentially about preserving family relationships.
 - o Flo can object to testify for the prosecution. She is a spouse.
 - o Trial judge has to determine whether to allow the objection or compel Flo to testify anyway. S 18(5)
 - It's a cost benefit analysis s 18(6)
 - S 18(7) is a non-exhaustive list of the factors that go to this balancing test.
 - The nature and gravity of offence. This is a bank robbery. Pretty serious. The more serious the offence, the more

- In order to give unsworn evidence, that basic level of competence is required, which is the ability to communicate with a witness. Witness needs to understand the question and give understandable answers to those questions.
- For sworn testimony, they need to understand the legal obligation to give truthful evidence.
 - o There is a question in this case for Nicole, who is now aged 6. There is an issue whether she understands her obligation to give truthful evidence. In *R v GW*, the HC said that understanding the obligation to give truthful evidence, in this context, it is a formal legal obligation. It is more than just a child understanding that it is bad to lie. It is a higher level of application and requires a more sophisticated understanding by the witness.
 - o May pose an issue for Nicole who is only 6. The trial judge did try and determine what Nicole's level of understanding was but that exchange doesn't really satisfy the requirement that the witness understand the obligation to give truthful evidence as interpreted in *R v GW*.
 - o It seems that she knows what to say based on how to get compensation rather than her obligation to give truthful evidence.
- ISSUE 2: POLICE OFFICER
- Refreshing memory provision.
- Looks a little like hearsay exceptions where the police officer has attended the scene of the accident, made some notes and in court, reads from his notebook. Looks like hearsay evidence
- The general provision for refreshing memory is s 32, where leave is required.
- If you are a police officer in a criminal case (this isn't a criminal case so s 33 doesn't actually apply), leave isn't required. See s 33 → however, s 33 is limited to criminal proceedings
- Leave wasn't provided.
- Might work through s 32 even though leave wasn't provided. If the case is appealed on the basis that leave wasn't provided, the appeal court will say 'what if leave was requested and the trial judge then went through the process of considering relevant factors, would the trial judge have inevitably granted leave?
- Leave wasn't sought. However if leave had been sought, this is the process the trial judge would have gone through. S 32
 - o Work through considerations and factors under s 32
- ISSUE 3: BROWN V DUNNE
- Simon's evidence might be subject to exclusion because defence council did not comply with the rule in *Brown v Dunne*.
- Defence's case is that Simon had not been negligent and was sticking to the speed limit. However, when Nicole was cross-examined, at that point, the cross-examiner questioned her memory...'this happened 2 years ago. You were only 4'. There is some suggestion there that defence is questioning her memory, suggesting that her