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- ii. Example: Sally can testify that Jane told her she was sexually assaulted by her ex-boyfriend. Sally was the first person Jane told.
  - iii. State: This is not a hearsay exception. It relates to credibility, not an issue of fact.
- d. Exception - Protected witness in a sex case (s 34LA)
- i. IF:>The victim of sexual offence is under 14 years old; or > The victim of sexual offence has a disability that affects their capacity to testify... THEN: > A third-party witness may testify about the observations and experiences the victim directly told them (s 34LA).
  - ii. State: This provision allows for the admission of first-hand hearsay to bolster the testimony of vulnerable victims.

### **FINALITY RULE:**

- a. **State:** The finality rule says that evidence given by a witness (other than the accused) in cross-examination regarding collateral facts is final.
- b. **Definition of a collateral fact:**
  - i. Per Piddington, collateral facts = Facts which are **not**:
    - Facts in issue; or
    - Relevant to a fact in issue.
- c. **Examples of collateral facts**
  - ii. A fact which relates to the credibility of the witness = a collateral fact (Goldsmith; Piddington)
  - iii. Piddington:
    - A witness testifies that he went to the bank in the morning. Later, the witness saw the accused engaging in the road rage incident.
    - The material fact is whether the witness was at the road rage incident – the scene of the crime.
    - The collateral fact is whether the witness went to the bank in the morning.
    - Therefore, a bank manager cannot then be called to discredit the witness testimony that he went to the bank in the morning. Such testimony would serve only to rebut the credibility of the witness.
- d. **Practical application of the finality rule:**
  - The finality rule does not mean that:
    - 1. Counsel cannot pursue further cross-examination of the witness regarding a collateral fact; or
    - 2. The witness' answer regarding a collateral fact must be accepted.
  - The finality rule does mean that counsel cannot rebut the answer regarding a collateral fact by:
    - 1. Calling other evidence; or
    - 2. Seeking to elicit contradictory evidence through other witnesses.

### **5B. Exceptions to Finality Rule (Only applies to Cross Examination)**

- a. **Note:** These exceptions allow collateral facts to be pursued beyond cross-examination for the purpose of challenging the credibility of the witness.
- b. **Exception – Prior convictions denied/not admitted** by witness can be rebutted by evidence proving them
  - i. Evaluate: A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examiner to prove such conviction does in fact exist' (s 26).
  - ii. Evaluate: However, the judge can exclude evidence of a prior conviction if that conviction does not tend to weaken confidence in the witness' credibility (ss 23-24). E.g. minor offences such as a traffic offence or parking offence.
- c. **Exception – Witness has bias, interest or corruption**
  - i. Evaluate: Where a suggestion of bias, interest or corruption (brides) on the part of a witness is denied by that witness, independent evidence may be led to establish such bias, interest or corruption..
  - ii. Evaluate: Bias or interest = A motive for giving false evidence.
    - i. De Angelis: Witness stated to a police officer that "if required to go to court, I will lie".
      - The prosecution was permitted to call the police officer to give evidence that the witness made this statement.
- e. **Exception – Witness has physical or mental unreliability**
  - i. Evaluate: Where the credibility of the witness is affected by a physical or mental condition, evidence as to that condition may be tendered as an exception to the finality rule (i.e. suffers from hallucinations).
  - ii. Examples:
    - 1. If a witness gives evidence of something which he believed he had seen at 50 yards, it is possible to call the evidence of an expert to state that the witness could not see anything at a distance greater than 20 yards (Toohey).
    - 2. Witness suffered a schizophrenic episode at time of purporting to witness a murder (Karpany).
    - 3. Witness had a severe immature histrionic personality disorder which could affect his reliability as a witness (Edwards).
- d. **Exception – Prior inconsistent statements of the witness**
  - i. IF prior **oral** statement (s 28)
    - i. the prior inconsistent statement is relevant;
    - ii. the witness is given an opportunity to say whether they made the statement;

- b. Evaluate: Similar fact evidence requires improbability reasoning.
  - i. E.g., it is improbable a man will marry three women, all of whom die in the bath during their honeymoon (Smith).
  - ii. Unusually similar accounts of sexual abuse given by multiple victims (*Boardman*).
- c. IF child sexual abuse case: The use of similar fact evidence is commonplace in cases of child sexual abuse.

**(d) Meaning of strong Probative Value**

**Hughes:**

- **Facts:** The accused was on trial for a sexual offence with an underage girl, in which he had acted opportunistically, notwithstanding the risk of detection.
- **Issue:** Did evidence that the accused had previously engaged in sexual activity with underage girls opportunistically, notwithstanding the risk of detection, have significant probative value?
- **Court:** The accused's previous sexual activity with underage girls was likewise opportunistic, notwithstanding the risk of detection. This feature of the accused's conduct was what moved the evidence from having simply probative value to the requisite significant probative value.

**(vi) If Intending to lead propensity Evidence or similar fact evidence**

- (a) State: XYZ must give reasonable notice in writing to each other party in the proceedings that it intends to rely on [propensity evidence and/or similar fact evidence] (s 34P(4)).
- (b) State: If evidence is admitted under s 34P, a judge must give a direction to the jury identifying and explaining the purpose for which the evidence may be used (s 34R).

**IDENTIFICATION EVIDENCE**

- (i) **Identification Evidence is direct evidence that the witness saw the accused committing a crime.**
  - E.g., witness points to D in court
  - E.g., witness says, "I saw my neighbour do it".
  - Identification is NOT "I saw a 6-foot Aboriginal woman rob the store, but I don't know if it was the accused".
- (ii) **In court or 'dock' Identification:**
  - (1) State: In court identification should be done in every case which depends upon identification (Britten).
  - (2) State: However, in court identification is almost always excluded by judicial discretion because circumstances conspire to compel the witness to identify the accused in the dock (Alexander).
- (iii) **Out of Court Identification**
  - (1) State: A police officer can testify that the victim positively identified the offender in an identification parade directly after the event (Alexander).
    - a. Note: This is an exception to the bolster rule and hearsay rule.
  - (2) State: Identification evidence obtained via an identification parade must be excluded unless it is made in accordance with the regulations – including video recording of the identification parade (s 34AB(2)(a)(i)).
    - a. IF regulations are not followed: identification evidence can still be admitted if the judge determines it is in the interests of justice (s 34AB(2)(b)).
- (iv) **Warnings:**
  - (1) State: A warning is always needed when ID evidence is adduced (s 34AB(3)).
  - (2) State: The warning should alert the jury to the potential unreliability of identification evidence, particularly observational and recognitional unreliability. The warning should also recognise that identification unreliability will most likely result from honest mistake (Festa).
  - (3) State: If the judge does not address the particular circumstances of the identification evidence in the case, this will usually be an appealable error (Blundell).

**CORROBORATION WARNINGS**

- a. In certain circumstances, a corroboration warning must be given
- b. Corroboration warning as matter of law....

<b>Evidence of accomplice</b>	<ol style="list-style-type: none"> <li>1. Evaluate: In this case, XYZ is an accomplice because...               <ol style="list-style-type: none"> <li>a. An accomplice is a prosecutor witness whose testimony implicates the defendant and who the jury might find was involved in the same crime (<i>Davies</i>).</li> </ol> </li> <li>2. IF the accomplice is a <b>co-accused</b>, state: As the accomplice is a co-accused, a corroboration warning is not mandatory but may be required (<i>Webb</i>).</li> <li>3. State: An accomplice giving evidence for a prosecutor is inherently unreliable. The accomplice has a motive to understate their own role at the expense of the defendant.</li> <li>4. State:               <ul style="list-style-type: none"> <li>○ A corroboration warning must be given as a matter of law.</li> </ul> </li> </ol>
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