Topic 3 – Testimonial Evidence

Who can call a witness		
Evidence Act s11	**S 11 General powers of a court:** (1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.	
S 26 Judge can call a witness	The court may make such orders as it considers just in relation to: (a) the way in which witnesses are to be questioned.	
Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd (1988)14 NSWLR 552 (KPT [2.40]) A judge can call a witness but it is extremely rare. Cannot call a witness in civil proceedings without the consent of the parties or lack of objection **Courts calling witnesses is an exception, not the rule.** Judges will only do so to prevent a miscarriage of justice.	**Facts:** Clark Equipment Credit of Australia Ltd (the plaintiff) financed equipment for customers under hire-purchase agreements. Como Factors Pty Ltd (the defendant) was involved in a factoring arrangement. **Dispute**: A dispute arose over the validity of a transaction related to equipment financing, involving questions of ownership and the rights of the parties under the relevant agreement. To establish their case, the plaintiff relied on certain documents and sought to adduce evidence from a witness to clarify the arrangements and transactions in question. **Key Procedural Issue:** A controversy arose over whether the plaintiff should call a particular witness whose testimony could be relevant but potentially adverse to their case. The defendant argued that the plaintiff's failure to call the witness should lead to an adverse inference being drawn.	**Duty to Call Witnesses:** A party is not required to call every witness who could potentially speak to the issues. However, a **failure to call a material witness** who is expected to support the party's case, without explanation, **may allow the court to draw an adverse inference**. **Courts power to call a witness:** In this case, the court acknowledged that while it has the power to call a witness, such intervention is rare. The parties are primarily responsible for presenting evidence. The judge declined to call the witness, noting that the parties must bear the consequences of their litigation strategies, including whether or not to call certain witnesses. The court underscored the adversarial nature of the system, emphasizing that it is not the judge's role to remedy perceived gaps in a party's case unless justice unequivocally requires it. **Decision:** The court highlighted the importance of fairness in litigation, balancing the expectation to call relevant witnesses with the realities of litigation strategy. The court did not rigidly impose an obligation to call all witnesses but emphasized that strategic choices come with risks, including adverse inferences.
Prosecutor's duty to call material witness		
R v Kneebone (1999) 47 NSWLR 450 [1999] NSWCCA 279 (KPT [2.50]) **Prosecutors' Obligations**:	**Facts:** The accused, Kneebone, was charged with serious criminal offenses, including sexual assault. During the trial, the prosecution did not call a key witness (mother, apparently unreliable) who could potentially provide evidence relevant to the accused's defense.	**Conviction quashed due to failure to call relevant witnesses. Retrial ordered.** **Prosecutor's Duty of Fairness:** A prosecutor is not an advocate for conviction but must act fairly and impartially to ensure the accused receives a fair trial. This duty includes presenting all material evidence, whether favourable or adverse to the prosecution's case, if it is relevant to the matters in issue.

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<td>- Present all relevant evidence.
- Avoid decisions that might lead to an unfair trial for the accused.
- Ensure witnesses not called are disclosed and available to the defense.
Fair Trial Principles:
- The fairness of a trial takes precedence over prosecutorial strategy.
- A failure in prosecutorial duties can lead to the reversal of a conviction.</td>
<td>Key Issue: decision not to call this witness raised questions about their obligations in presenting the case fairly. The defense argued that the prosecution's failure to call the witness deprived Kneebone of a fair trial, as the witness might have provided testimony favourable to the accused.
Procedural Context:
The trial judge allowed the prosecution’s decision, leading to the conviction of Kneebone.
On appeal, the defense contended that the prosecutor had failed in their duty of fairness by withholding this witness, which had impacted the outcome of the trial.</td>
<td>Obligation to Call Witnesses:
Prosecutors have a general duty to call all witnesses whose evidence is:
- Relevant to the facts in issue.
- Necessary to ensure the court has a full understanding of the case.
A prosecutor may decide not to call a witness if:
- The evidence would be purely duplicative.
- The witness is unreliable or their testimony would not meaningfully advance the resolution of the case but needs to identify factors which make them uneliable.
Disclosure and Availability of Witnesses:
If the prosecution decides not to call a witness, they must disclose this decision and, where appropriate, make the witness available to the defense to be called.
This ensures the defense has an opportunity to present relevant evidence that the prosecution chooses not to use.
Role of the Court:
Courts must ensure fairness in the trial process.
If the prosecution’s decision not to call a witness creates an imbalance or denies the accused a fair chance to present their case, the court may intervene, such as allowing the defense to call the witness or, in extreme cases, halting the trial.</td>
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<td>NSW DPP guidelines
Essentially:
- must put forward all relevant witnesses
- unless unreliable, repetitive, unchallenged evidence
- cant bury a witness</td>
<td colspan="2">26 Witnesses
The prosecution should generally call all apparently credible witnesses whose evidence is admissible and essential to the complete unfolding of the prosecution case or is otherwise material to the proceedings. Unchallenged evidence that is merely repetitious should not be called unless that witness is requested by the accused.

If a decision is made not to call evidence from a material witness where there are identifiable circumstances clearly establishing that his or her evidence is unreliable, the prosecution, where the accused requests that the witness be called and where appropriate, should assist the accused to call such a witness by making him or her available or, in some cases, call the witness for the purpose of making him or her available for cross-examination without adducing relevant evidence in chief (see Rule A.66B(j) of the Solicitors’ Rules – Appendix B).

Mere inconsistency of the testimony of a witness with the prosecution case is not, of itself, grounds for refusing to call the witness. A decision not to call a witness otherwise reasonably to be expected to be called should be notified to the accused a reasonable time before the commencement of the trial, together with a general indication of the reason for the decision (e.g.The witness is not available or not accepted as a witness of truth).
In some circumstances, the public interest may require that no reasons be given. Where practicable the prosecution should confer with the witness before making a decision not to call the witness.</td>
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Topic 6- Relevance

Test for relevance		
EA, s 55	**55 Relevant evidence** 1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. 2) In particular, evidence is not taken to be irrelevant only because it relates only to-- a) the credibility of a witness, or b) the admissibility of other evidence, or 3) (c) a failure to adduce evidence.	
Smith v The Queen (2001) 206 CLR 650 (KPT [5.40])	**Facts:** The accused, Smith, was charged with the murder of his de facto partner. The prosecution sought to admit evidence of Smith's prior violent behaviour in a previous relationship to prove his tendency to use violence in intimate relationships. **Issue:** Was the evidence of Smith's prior violent conduct relevant to a fact in issue in the trial for murder, and therefore admissible?	**Decision:** The High Court held that the evidence was **not relevant**. The prior incidents occurred in a different relational context and were not sufficiently connected to the current charge to rationally affect the assessment of the probability of a fact in issue. **Principle:** **Relevance must be assessed in** context. Evidence is not relevant merely because it concerns a similar subject matter. There must be a logical and rational connection between the evidence and a fact in issue. This case reinforced that **relevance is not about moral character or propensity**, but about whether the evidence logically affects the probability of the specific factual elements of the charge.
Evans v The Queen (2007) 235 CLR 521 (KPT [5.70]) **Need not be conclusive on its own**	**Facts:** Evans was charged with armed robbery. The prosecution sought to admit CCTV footage showing a person wearing similar clothing to that found in Evans's possession, though the identity of the person in the footage was not definitively established. **Issue:** Was the CCTV footage relevant, despite not conclusively identifying Evans as the person in the video?	**Decision:** The High Court found that the CCTV footage was relevant. The fact that clothing found in Evans's possession resembled that worn by the robber in the footage meant that the footage could rationally affect the probability of Evans's guilt. **Principle:** **Evidence need** not be conclusive **to be relevant**. It is sufficient if the evidence, **when taken together with other evidence**, can rationally affect the probability of a fact in issue. Relevance can arise **cumulatively** from a constellation of circumstantial facts.

Papakosmas v The Queen (1999) 196 CLR 297 ([KPT 5.50])	**Facts:** Papakosmas was convicted of sexual assault. The trial judge admitted evidence of the complainant's immediate complaint to her friend after the alleged offence, which aligned with her account to police. The defence argued that this complaint evidence was inadmissible hearsay and irrelevant. **Issue:** Was the complainant's **recent complaint** relevant and admissible as evidence?	**Decision:** The High Court upheld the admissibility of the complaint evidence. It found that the complaint was relevant, not to prove the truth of its content (which would raise hearsay concerns), but to bolster the complainant's credibility and indicate consistency in her account. **Principle:** A **contemporaneous complaint** in a sexual offence case may be relevant because it helps **assess credibility** and gives context to the complainant's behaviour. The case also illustrates how **s 55** can encompass evidence relevant for a **non-hearsay purpose**, even if it indirectly supports a fact in issue.
Provisisonal relevance		
EA, s 57	**57 Provisional relevance** (1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant-- (a) if it is reasonably open to make that finding, or (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding. (2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in determining whether the common purpose existed.	
Inferences as to relevance		
EA, s 58,	**58 Inferences as to relevance** (1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity. (2) Subsection (1) does not limit the matters from which inferences may properly be drawn.	
s 183	**183 Inferences** If a question arises about the application of a provision of this Act in relation to a document or thing, the court may-- (a) examine the document or thing, and (b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn. Note--: Section 182 of the Commonwealth Act gives section 183 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.	
Commissioner of Taxation v Cassaniti [2018] FCAFC 212 (KPT [3.80]	**Facts:** The Commissioner relied on financial documents (e.g. invoices, bank statements) to prove tax underreporting by Cassaniti. She objected, claiming the documents were not properly authenticated.	**Decision:** Yes — the court held that authenticity can be inferred from the document's content and context. **Principle:** Under **s 58 Evidence Act**, courts may draw reasonable inferences about a