Relevance and Exclusionary Discretions

‘Candidates are to have a good understanding of relevance and exclusionary discretions’

The following provisions of the Evidence Act are examinable:

Part 3.1 (Relevance) - ss 55, 56

Part 3.11 (Discretionary and Mandatory Exclusions) - ss 135 – 139

Relevance

S 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
   (c) a failure to adduce evidence.

S 56

Relevant evidence to be admissible

1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
2) Evidence that is not relevant in the proceeding is not admissible.

Background

The JCV Uniform Evidence manual classifies **s 55** as a 'major change' from the common law position on relevance, which required:

a) 'legal' relevance; and

b) 'sufficient' relevance.

Relevance as defined by s 55 in the UEA is broad. The broadness of the category is balanced by s 135 (general discretion to exclude evidence), which operates as a tool to exclude evidence of limited probative value.

S 56 contains the primary rule of admissibility – all relevant evidence is admissible except as otherwise provided under the Act. If evidence is not relevant, it is not admissible.

Definition

Per s 55, evidence is relevant when, if accepted, it could rationally affect (**directly or indirectly**) the assessment of the probability of the existence of a fact in issue in the proceeding.

This definition directs attention the **capacity** rather than the **weight** of the evidence.

Evidence may still be relevant even if it relates only to the **credibility** of a witness, the admissibility of other evidence, or a failure to adduce evidence.

Direct Evidence - Evidence which *directly proves* a fact, without requiring the jury to draw any inferences.

Indirect Evidence – Evidence of a related fact or facts, from which the jury can *infer the existence* of a fact in issue.

Whether evidence is direct or indirect hinges on what the evidence is being used to prove. The same piece of evidence can be both direct and circumstantial.

For example, evidence given by a witness that s/he saw the accused holding a gun could be:
- *Direct evidence that the accused possessed a firearm; and*
- *Circumstantial evidence that the accused murdered someone with that firearm.*

Common examples of direct evidence:
- Complainant's evidence in assault or sex assault case
- Eyewitness
- Recognition evidence
- Admissions made before court (though prima facie hearsay)

Common examples of circumstantial evidence:
- Scientific / forensic evidence
- Motive
- Opportunity
- Tendency / coincidence

- **Credibility evidence –** is defined at **s 101A**:
- Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that—
- (a) is relevant only because it affects the assessment of the credibility of the witness or person; or
- (b) is relevant—
- (i) because it affects the assessment of the credibility of the witness or person; and
- (ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

Common examples of credibility evidence:

- Prior inconsistent, prior consistent statements (though prima facie hearsay)
- Witness' prior criminal history
- Motive to lie

Minimum logical connection

The definition of relevance requires a minimal logical connection between the evidence and the fact in issue.

Relevant evidence need not make a fact in issue probable or sufficiently probable – it is enough if it could make the fact in issue more or less probable than it would have been without that evidence.

Relevance must be assessed in the context of the whole of he evidence. A piece of evidence may be relevant even if, standing alone, it is not capable of establishing guilt.

Relevance and the opinion rule

When assessing the relevance of evidence tendered under an exception to the opinion rule, the court must consider whether the witness is **adding anything to what the jury can itself determine from the primary evidence.**

Smith v R (2001) 206 CLR → evidence from police officers RE identity of a person from CCTV images was **irrelevant** as it added nothing to what the jury could observe from the CCTV images.

Meade v R [2015] VSCA 171 → evidence from a professional boot manufacturer RE possible brand of boots from CCTV footage was admissible, as it required specialised knowledge of features of brands of boots.

Relevance and circumstantial evidence

Whether a piece of circumstantial evidence is relevant (ie, whether it, if accepted, could rationally **indirectly** affect the assessment of the probability of the existence of a fact in issue) depends on the whole of the case. The relevance of a piece of circumstantial evidence should not be determined in isolation from all other evidence. *Elomar v R* [2014] NSWCCA 303

However, there must be a logical basis for rebutting other explanations of the circumstantial or indirect evidence for it to be relevant.

The gun example

(When a witness gives evidence that she saw the accused holding a gun, and that evidence is used to prove that the accused murdered someone with that gun).

There must be a logical basis for rebutting other explanations for the accused holding the gun.

Another explanation could be that she was in a play, acting on stage, and that the gun was a prop.

There would be a logical basis for rebutting this alternative explanation if no corroborating evidence exists to suggest that she was indeed an actor on a stage, aside from an assertion from the bar table.

Circumstantial evidence

- In some criminal cases, no one will have directly witnessed the facts which the prosecution must prove, and so they will need to rely on circumstantial evidence. In such cases, the ultimate inference which the jury will often be asked to draw is that of the accused's guilt
- There is nothing in the law that makes proof by circumstantial evidence unacceptable or suspect of itself, however, research a risk that jurors will consider circumstantial evidence inherently weaker or less reliable than direct evidence. This commonly justifies the giving in a criminal trial of a *Hodge* direction (*R v Hodge* (1838) 2 Lew 277), which contains two elements:
  - To find the accused guilty, his or her guilt must not only be a reasonable inference, it must be the only reasonable inference which can be drawn from the circumstances established by the evidence; and
  - If the jury considers that there is any reasonable explanation of those circumstances which is consistent with the innocence of the accused, they must find him or her not guilty

- At common law, if a circumstance was an indispensable intermediate link in the jury's reasoning process towards guilt, that circumstance needed to be established to the jury's satisfaction brd: Chamberlain v R (No 2) (1984) 153 CLR 521; Shepherd v R (1990) 170 CLR 573
- Consider the analogy of a chain made either of links, or strands:
  - If a circumstance is a link in the chain, it is an indispensable intermediate link, eg where without the jury accepting proof of motive, or the scientific evidence, the case falls apart
  - If a circumstance is a strand in a cable, it is not indispensable
- Under the *Jury Directions Act 2015*, this approach has been abolished. Unless an Act otherwise provides, the only matters which a judge can direct the jury must be proved beyond reasonable doubt are the elements of the offence charged or an alternative offence and the absence of any relevant defence (s61).

Fact in issue

Evidence must be relevant to a ‘fact in issue’ (s55(1)).

A fact in issue is-

- A fact which is to be determined as a matter of substantive law.

    An example of a fact in issue is an element of an offence. The elements of an offence are often referred to as the ‘ultimate facts in issue’.

A fact in issue is also:

- One of the myriad smaller facts relevant to proving the ultimate facts in issue.

No discretion as to whether evidence is relevant

All evidence that, if accepted, could rationally affect (directly or indirectly) the assessment of the probability of the of the existence of a fact in issue, is relevant.

Once the above test is met, there is no room for the decision-maker to consider whether the evidence is credible or reliable in relation to its relevance.

It is conceivable that there might be evidence ‘so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury’, but this type of evidence would not meet the relevance criteria to begin with.

See *IMM v R* (2016) 257 CLR 300 [39].

Relevance and evidence sought to be tendered by the Accused

The threshold for relevance for an Accused is quite low.

This is because evidence adduced on behalf of an Accused need only be capable of rationally affecting he probability of a fact in issue by raising a doubt in respect of it.

See *Green v R* [2015] VSCA 279

Odgers on determination of admissibility

Generally useful information…

Odgers suggests that, in determining whether evidence may be admitted and how it may be used, it will be necessary to determine:

- Whether the evidence in question is relevant (ss55, 56)
- How the evidence is relevant (may be relevant in different ways and in respect of more than one fact in issue)
- What use or uses are sought to be made by the evidence
- Whether any of the exclusionary rules in Chapter 3 apply to the evidence
- Whether one permissible use of the evidence will allow it to be used for an otherwise impermissible use
- Whether the discretionary exclusion of the evidence is appropriate

It may be necessary to determine:

- Whether an order should be made under s169(1)(c) or (3) that the evidence not be admitted in evidence
- Whether discretionary prohibition of a particular use of the evidence is appropriate (s136)
- Whether, in civil proceedings, an order can and should be made t hat a provision of the Act is not to apply to the evidence (s190(3))
- Whether there has been an effective waiver of a provision of the Act

Discretionary and mandatory exclusions (ss 135 – 139)

Background

These provisions are applied as a ‘safety net’, after applying, in order:

- The threshold relevance test;
- The exclusionary rules;
- The exceptions to those rules.

These exclusionary rules are seen to be necessary because the Evidence Act introduced a lower threshold test for relevance than at common law, and it relaxed some exclusionary rules (e.g. hearsay and opinion).

If the terms of these provisions are satisfied, the court may or must exclude otherwise admissible evidence, or may limit its use.

S 135 (CIVIL and CRIMINAL)

General discretion to exclude evidence

The court **may** refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time; or

(d) unnecessarily demean the deceased in a criminal proceeding for a homicide offence.

S 136 (CIVIL and CRIMINAL)

General discretion to limit use of evidence

The court **may** limit the use to be made of evidence if there is a danger that a particular use of the evidence might—

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing.

S 137 (CRIMINAL ONLY)

Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court **must** refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

S 135 – general discretion to exclude evidence (CIVIL and CRIMINAL)

'Probative value': extent to which evidence could rationally affect the assessment of the probability of the existence of a fact in issue

'Substantially outweighed': risk of danger must be more than one of mere possibility

'Unfairly prejudicial' addresses risk that jury may use the evidence to make a decision on an improper basis (e.g. an emotional basis)

'Misleading or confusing' addresses risk that jury will unduly focus on evidence and accord it more significance than it deserves (e.g. raw percentage results in DNA tests)

'Cause or result in undue waste of time' addresses risks of needless duplication of evidence, evidence having incremental or minimal value for the jurors, or evidence that requires other evidence to be admitted to evaluate it. The duplication must be clearly needless

The court is to consider what may done to militate against the risk by using jury directions.

S 136 – General discretion to limit use of evidence

When s136 is enlivened to restrict a particular use of evidence because of the risk of unfair prejudice, a strong jury direction with respect to the limited use to which the evidence may be put should be given both at the time of the tender and in the summing up. If such direction cannot overcome the danger of unfair prejudice, the evidence should be excluded altogether.

Where HS evidence is adduced under s60 a warning under s165 (or Jury Directions Act 2015 s32) should, ordinarily, be sufficient to alert the jury to the dangers of hearsay evidence. For that reason, s136 should be invoked only in cases where the danger could not be cured by such a warning.

Evidence used against one accused may be admitted if it does not affect another accused. Despite such evidence being admissible 'in the proceeding‘ due to s56, s136 can be used to limit the use of the evidence to the case involving the parties for which it is relevant if the conditions of that section are satisfied.

Ss 135 and 137 compared

S 135 requires a higher standard to exclude evidence than s 137, which applies to evidence adduced by the Prosecutor in criminal proceedings. S 137 provides further protection to the accused in criminal proceedings.

When s 137 applies, it displaces the work of s 135.

S 135 = *may* (discretionary exclusion)

S 137 = *must* (mandatory exclusion)

Probative value

The concept of probative value appears in ss 135, 137 and 138, and arises to be considered in s 136.

The concept of unfair prejudice

S 135 = 'the danger that the evidence might… be unfairly prejudicial'

S 137 = 'the danger of unfair prejudice'

In practical terms, nothing turns on the different language of these provisions- its meaning is the same in each section *DPP (NSW) v JG* [2010] NSWCCA 222

Acting on own motion

Where no objection is made to the admission of evidence, there is **no general rule** requiring a judge to act on their own motion to consider whether to reject evidence pursuant to s 137. However, in criminal proceedings there remains an obligation to intervene **in appropriate cases** to alert the parties to such issues.

Onus

In practice, the party seeking exclusion or limitation of evidence bears the onus of proof in relation to the grounds of exclusion or limitation.

S 138

Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained—

(a) improperly or in contravention of an Australian law; or

(b) in consequence of an impropriety or of a contravention of an Australian law—

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning—

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

The balancing exercise in s 138…

1. Was the evidence obtained improperly or illegally?

Onus on party seeking to exclude evidence

1. Does the desirability of admitting the evidence outweigh the undesirability of admitting evidence obtained in that way?

Onus on party seeking to admit evidence

Desirability = justly punishing criminals for their crimes, upholding integrity of the legal system.

Undesirability = public interest considerations – decreasing extent to which law enforcement officials act outside authority, deterring future impropriety or illegality, protecting individual rights, encouraging fair policing.

NOTE: S 90 contains a discretion to exclude admissions adduced by the prosecution if, having regard to the circumstances in which the admission was made, it would be **unfair to the accused to use** the evidence.

Where s 90 is concerned with **unfairness**, s 138 is focussed on **desirability** of admitting evidence (or not).

Where s 138 requires that the party wishing to exclude the evidence establishes that it was obtained improperly or illegally, s 90 requires an assessment of unfairness in the context of the circumstances in which the admission was made.

S 139

Cautioning of persons

(1) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—

(a) the person was under arrest for an offence at the time; and

(b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person; and

(c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(2) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—

(a) the questioning was conducted by an investigating official who did not have the power to arrest the person; and

(b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence; and

(c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.

(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if—

(a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning; or

(b) the official would not allow the person to leave if the person wished to do so; or

(c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

(6) A person is not treated as being under arrest only because of subsection (5) if—

(a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth; or

(b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.

S 139

- Provides that, unless a proper caution is administered by an investigating official in a range of circumstances in which a person is under arrest, any statement will be taken to have been improperly obtained.
- S 139 defines situations in which a person is considered to be ‘under arrest’. These extend to when a person is in the company of an investigating official for the purpose of being questioned, and:

a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning; or

b) the official would not allow the person to leave if the person wished to do so; or

c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

Questioning of witnesses

Examination and cross-examination of witnesses, including the rules in *Browne v Dunn and Jones v Dunkel*

The following provisions of the Evidence Act are examinable:

- Part 2.1 (Witnesses) – ss 12, 13, 17, 18, 20, 32 to 35, 37 to 39, 41 to 43, 45, 46

Witnesses generally

- All witnesses are presumed competent to give evidence, unless the court finds otherwise: s 12; all witnesses are presumed to be compellable: s 12
- Exceptions: lack of capacity s 13:

> (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability)—
>
> (a) the person does not have the capacity to understand a question about the fact; or
>
> (b) the person does not have the capacity to give an answer that can be understood to a question about the fact—
>
> and that incapacity cannot be overcome.

- Fact finding: look for young or old witnesses, communication-impeded, mentally or physically unwell witnesses
- Determined at voir dire in absence of jury if there is one

Witness: lack of capacity

- 13(2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

- Competent to give unsworn evidence:
- (3) A person who is competent to give evidence about a fact is not competent to give sworn or affirmed evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.
- (4) A person who is not competent to give sworn or affirmed evidence about a fact may be competent to give unsworn evidence or evidence that is not affirmed about the fact if they are directed in accordance with s 13(5), ie: "that it is important to tell the truth; and that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue."
- If judge does not do this, the evidence is not admissible

- So three options: competent to give sworn evidence, competent to give unsworn evidence, not competent

Compellability – accused and family in a criminal case

- S 17: An accused is not competent to give evidence as a witness for the prosecution.
- S 18: person who is the spouse, the de facto partner, a parent or a child of the accused at the time he or she is required to give evidence may object to giving evidence as a witness for the prosecution in a criminal case (s18(2)).
- This objection may be in general or in relation to a particular communication between the person and the accused (s18(2)(a)(b)).
- The court is to satisfy itself that a witness to whom this section may apply is aware of his or her right to object under the section (s18(4)).
- A person who objects to giving evidence must do so before the person begins to give the evidence or as soon as practicable after becoming aware of the right to do so (s18(3)).
- In determining the objection, the question to be answered is whether the court is satisfied (taking into account the matters set out in s18(7)) that there is a likelihood that harm would or might be caused to the person or to the relationship between the person and the accused if the person gives evidence as a witness for the prosecution; and the nature and extent of that harm outweighs the desirability of having the evidence given.
- If ‘no’ – the court may require the person to give evidence.
- If ‘yes’ – the person must not be required to give the evidence.

General

A party may call question a compellable witness (**s 27**) regardless of whether without prior subpoena **(s 36(1))** in a manner they think appropriate (**s 29(1)**) subject to directions under **ss 26 and 192** provided the questions are likely to elicit relevant and admissible evidence and W has not been called in error **(s 40).**

Answers may be permitted in narrative form **(s 29(2))** or in indirect speech (Odgers [EA.29.130]). The Court may be flexible in enforcing compliance under **s 190** and can make special allowance for use of interpreters **(s 30)** and in relation to deaf and mute Ws **(s 31**)**.**

Examination in Chief and Re-Examination

<u>Leading Questions</u>:

Leading questions are not permitted **(s 37)** save for exceptions on the following slide.

A leading question is defined as a question that

"(a) directly or indirectly suggests a particular answer to the question or

(b) assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked" (Evidence Act 2008 Dictionary).

Exceptions to prohibition on leading questions

- A leading question may be put to a witness in examination-in-chief or re-examination only if:
- the court gives leave; or
- the question relates to a matter introductory to the witness' evidence; or
- no objection is made to the question and each party (other than the party conducting the examination-in-chief or re-examination) is represented; or
- the question relates to a matter that is not in dispute; or
- the question is asked of a witness who has specialised knowledge based on his or her training, study or experience and the question is asked for the purpose of obtaining the witness' opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given (s37(1)).
- See also s 33, evidence from police witnesses

Refreshing Memory

- **Out of Court**, W may, without leave, refer to any "document or thing" to refresh their memory but must produce it for inspection if directed (**s 34**) on pain of the evidence being excluded.
- **In Court**, a "document" my be referred to **(s 32(1))** and read aloud **(s 32(3**)) with leave if it was produced when the events in question were fresh in W's memory or it if later found by them to be true **(s 32(2)).** With leave, W may read from the document if their memory is not revived **(s 32(3)).**
- The document must be produced if ordered **(s 32(4)).**
- Inspection of a document or thing so used does not require its tender **(s 35).**
- Any client legal privilege that may exist over the document is waived once it is used to refresh memory (**s 122(6)**).

Unfavourable witnesses

- S 38(1) A court may grant leave for a party to question its own witness as though the party were cross-examining the witness, about the following:
- evidence given by the witness that is unfavourable to the party; or
- a matter which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
- whether the witness has, at any time, made a prior inconsistent statement.
- The party questioning the witness may, with leave of the court, also question the witness about matter relevant only to the witness' credibility.
- Determined at voir dire
- Main method of ensuring one's own witness does not depart from a statement made pre-trial; if there is an inconsistency, seek leave under this provision to put the part of the statement that is inconsistent to the witness, if they refuse to adopt it, then move to xxn and PIS (following)
- If P seeks to impeach the credibility of their own witness in their closing address, failure to utilise s 38 may breach the rule in Browne v Dunn.

Prior Consistent Statements

Prior consistent statements are generally not admissible in chief if their only purpose is to bolster W's credibility (s 102).

They may be admissible with leave however, if tendered for a hearsay purpose and ss 64 or 66 apply. Such statements may be led in RXN to rebut a suggestion of afterthought (s 108(3)(b). Where the PIS is made by a complainant in a sex case ss 38-54D JDA must be followed.

Failure to call witness – civil cases

- *Jones v Dunkel* (1959) 101 CLR 298
- In a civil case, if there is an unexplained failure by a party to give evidence, to call witnesses or to tender documents or other evidence. In appropriate circumstances, this may lead to an inference that the uncalled evidence would not have assisted the party – if there is a jury, this would take the form of a jury direction
- At common law, this had been held to apply sparingly to criminal cases, but only to the prosecution

Failure to call witness – criminal cases

- Where the prosecution fails to call or question a witness without providing a reasonable explanation, the defence may now only seek a direction under *Jury Directions Act 2015,* s 43 (a 'section 43 direction').
- This direction informs the jury that it may conclude that the witness would not have assisted the prosecution's case (*Jury Directions Act 2015*, s 43).
- (For an example of a reasonable explanation, consider circumstances where the prosecution could not find a witness, or did not know what evidence the witness would give)

Cross-Examination

XXN must occur after XN unless otherwise directed (**s 28)** and takes the form of leading questions (**s 42**) unless disallowed – eg. if the Court determines the facts would be better ascertained via non-leading questions (**s 42(3)**).

Improper questions, ie questions that are misleading or confusing; or unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or have no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability), are not permitted (**s 41**) regardless of whether objected to (**s 41(7)**).

Prior Inconsistent Statements – Process

Provided the PIS is otherwise admissible, **s 43** requires the witness be asked about the facts and, if there is inconsistency between what they say about them in Court and the contents of an earlier statement by that W, the latter may be proved through W, or if W does not admit the earlier statement, another witness (**s 43(2)).**

W is not required to be given a copy of the statement itself (**s 43(1)**).

Witnesses may also be questioned about inconsistencies between their evidence and other evidence already admitted (**s 44(2)**).

Where the statement is not admissible and is a document or recording, only limited questioning is allowed (**s 44(3)**).

PIS – Evidentiary Status

Where W is cross-examined on the document, it may be called for and admitted by the Court unless it is inadmissible under Ch 3 (**s 45**) – e.g. where the process in s 44(3) is not complied with and the document is identified.

Under **s 188** the Court may impound the document.

Any document admitted in this way may then be used as evidence of it truth (**s 60**) and to impugn W's credibility (**ss 103, 106**). W may be recalled (**s 46**) and the opposing party's case reopened (**s 43(3)**). Consistent statements may then be tendered to re-establish W's credibility under **s 108(3)(a).** –

These are significant matters which we will return to in credibility, but for now focus on **process** not **admissibility**

The rule in *Browne v Dunn* (1893) 6 R 67 (HL)

Application:

Where a party proposes to lead evidence that contradicts or discredits an earlier witness, how and why that later evidence will be led/its *essential features* and the factual inferences to be drawn from it must be put to the witness in XXN so they have an opportunity to offer an explanation and lead evidence in rebuttal.

Breach may affect the weight given to W's evidence and often leads to curative jury direction. Significant breaches may require discharge of the jury. Further, submissions or evidence led in breach of the rule may be rejected on appeal.

Exceptions:

- Notice given in other ways – e.g. pleadings, pre-trial documents, manner in which case is conducted;
- Inherently contradictory or incredible evidence;
- Generally challenges to credit.

Re-Examination

W may be asked non-leading questions about matters raised during XXN (**s 39(a)**). Leave is required before W may be asked leading questions (**s 37(1)**) or about matters not raised in XXN (**s 39(b)**).