LECTURE 1 - GENERAL AND INTRODUCTORY

If objection during trial, ruling must be determined voir dire before trail continues.

Evidence law regulates (1) How things are proved
(2) What evidence the court may consider and how it is presented
- Hearsay, opinion, admissions, character, tendency & coincidences, credit, privileges

(3) How the court goes about deciding the factual issues on the basis of the evidence (i.e. proof and how much evidence is required).

FORMS OF EVIDENCE

LEC 2 AND 3 TESTIMONIAL EVIDENCE

Chap 2 of Act considered re adducing evidence (procedural) which is different to admissibility of evidence (Chp 3), but if 2 not complied with it may not admissible at all.

(a) Calling a witness

Act does not deal with, so left to common law, but cases show up to parties to call witness not judge, but judge can put pressure on them.

R v Apostilides (1984) – HC advanced 7 propositions:
1. Prosecutor alone bears the responsibility of deciding to call a Crown witness
2. Trial judge may but is not obliged to question the prosecutor to discover reasons why not called but cannot adjudicate the sufficiency of the questions.
3. Whilst at the close of the crown case, the trial judge can direct prosecution to reconsider and have regard to the implications of not doing so, he cannot direct the prosecution to call a prosecution witness
4. When directing the jury may make such comment as he considers appropriate re effect of not calling a material witness on the course of the trial
5. Save in the rarest and most exceptional circumstances the trial judge should not himself call a witness
6. A decision of the prosecutor not to call a material witness will only constitute a ground for setting aside a conviction when viewed with the conduct of the trial as a whole which is seen to give rise to miscarriage
7. Refusal to call material W is justifiable where there is material to suggest W unreliable or non-credible, but not enough that has mere suspicion of unreliability

Clark Equipment Credit of Australia Ltd v Como Factors – judge in civil may not call a witness without the consent of both parties.

R v Kneebone (1999) 47 NSWLR 450 (KOP 16) – also set out above extract and clarifies
- prosecutor must point to identifiable factors which justify a decision not to call a material witness on grounds of unreliability
- here there was no basis so miscarriage occurred
- If prosecution doesn't call material W, judge can issue stay of proceedings

Velevski v The Queen (2002) 76 ALJR 402 (KOP 23) – accused killed wife and 3 kids. Pathologists on scene but prosecution called only those who didn't deem it to be murder/suicide as Ws. Judge considered whether prosecutor had duty to call all material Ws, including those whose evidence may have been more favourable to accused - HELD:
- not required to use every W of a different opinion as long as acts with fairness to D
- fairness does not require the court to hear all experts of a differing opinion
- evidence related to expert evidence not evidence of fact, so dismissed appeal.

(b) Competence and compellability

COMPETENCE

Competence" not defined in Act but means "able" to understand, observe, remember and testify – various common law interpretations (e.g. re spouse) but now covered in act

Evidence Act, ss 12-20

- section 12 Rule:Unless exception(a) every person is competent to give evidence, and (b) a person who is competent to give evidence about a fact is compellable

- Exceptions:

CAPACITY

- section 13; persons not competent to give evidence – in exam state s12, 13(1) test for capacity (sworn and unsworn) and 13(3) sworn test. If fail go to s13(5) as can give unsworn provided satisfy 13(1) and court complies with 13(5) – strict tho -SHvR.

    - *TEST FOR CAPACITY (Sworn & Unsworn) 13(1) A person is not competent to give evidence about a fact if, for any reason (incl mental/intellectual/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,
      13 (6) It is presumed, unless the contrary is proved, that a person is not incompetent
      - therefore for opponent to challenge competence not judge to raise

    - *TEST FOR CAPACITY (Sworn) – 13(3) not competent to give sworn 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.*

- section 13(4)-(5);some persons may give unsworn evidence (still need to meet 13(1):

    (4) A person who is not competent to give sworn may, subject to (5), give unsworn.
    (5) A person who, because of subsection (3), is not competent to give sworn is competent to give unsworn evidence if the court has told the person:
    (a) that it is important to tell the truth, and
    (b) 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
    (c) that he or she may be asked questions that suggest certain statements are true or untrue and that should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that believes are untrue.

- Issues with children and mental disorders – minor doesn't mean fail, but judge can determine under s.189 voir dire and s13(8) (by using expert) and if child does not understand sworn can still give unsworn provided court says three things under 13(5)
    - SH vR (2012)re whether judge given adequate instructions under 13(5)-HELD
        - Judge omitted instruction re not feeling pressure to agree with statements she believed untrue and this was a failure to comply with the strict requirements of 13(5), so witness not competent to give unsworn
        - court has no residual discretionary power to refuse to allow child to give unsworn if they are competent under s13(1) test.
    - Douglass v The Queen [2012]
        - Judge didn't tell the child the direction but asked him. Still covered all the points but not in the form of the direction
        - Held should not ask, needs to be in direction, so conviction overturned.

COMPELLABILITY - exceptions

- persons competent but not compellable: sections 15, 16, and 17;
  - s.15 Sovereign and others (i.e. holding public office)
  - s.16 judges and jurors
  - s17 defendants in criminal proceedings
  - 17(2) - D not competent to give evidence as W for prosection
  - s17(3) states associated defendant "is not compellable to give evidence for or against a D in a criminal proceeding", unless he "is being tried separately from the defendant' and 17(4) court must satisfy itself D aware of (3)

- relatives in criminal proceedings – persons competent but may not have to give evidence: section 18 – would be determined by voir dire again
- s18(1) allows a spouse to object to giving evidence, and if she objects, s18(6) means she cannot be compelled to if the court finds "there is a likelihood that harm would or might be caused" to her or their relationship and "the nature and extent of that harm outweighs the desirability of having the evidence given." Section 18(7) then provides the factors that the court must consider when assessing s18(6)
  - *(a) the nature and gravity of the offence for which the defendant is being prosecuted,*
  - *(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it,*
  - *(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor,*
  - *(d) the nature of the relationship between the defendant and the person,*
  - *(e) whether, in giving evidence, the person would have to disclose matter received by the person in confidence from the defendant.*
  - *18(5) must be determined in jury's absence and (8) can't comment on objection2 jury.*
- Then look at common law and whether marital privilege below. Could also say if spouse is found to be compellable but not willing to testify, Crown could elicit evidence using s.38 (ability to cross examine own witness if not favourable witness). Note if re admission of husband is relevant, but if overheard = hearsay, but as admission s.81 contains an exception saying can be admitted.
- R v Gulam Mohammad KHAN 1995 re whether wife could be compelled – held
  - Her evidence was within the meaning of s.18 and was relevant and would not reject the evidence when exercising its discretion, but
  - Evidence was likely to cause harm to the marriage and the extent of the harm outweighs the desirability of compelling to give evidence.
  - However, this was partly because the case could be proved by other evidence and her evidence carried little weight.
- Australian Crime Commission v Stoddart [2011]
  - Didn't involve Evidence Act, but majority held Australian law does not recognise spousal privileged so spouse was competent and compellable but Heydon (dissenting) found it did exist.
  - Crennan, Keifel & Bell though said spouse might seek a ruling from court that cannot be compelled to give incriminating evidence, but no general principle of spousal privilege.

(c) Sworn and unsworn evidence

s 21 (4)– sworn must be given by oath or affirmation in the form stated in Schedule 7
21(5) – affirmation has same effect as oath
S 24 – requirements for oaths – ie. Doesn't need to use religious text and is effective even if you do not understand the nature and consequences of an oath.

(d) Questioning of witnesses - Evidence Act, ss 26-31

- the power of the court to control proceedings and question: s26 – gives the court

a general power to control the questioning of a witness and production of documents and the common law gives guidance

- who can question witness - parties, juror, juror s 27 – provides that "A party may question any witness, except as provided by this Act"
  - R v Esposito 1998 re whether judge can question a W – HELD
    - Trial judge entitled to ask questions designed to clear up uncertain answers but extensive questioning is dangerous
    - Where judge XM accused on matters of considerable importance, he had advanced the P's case & not appeared impartial so retrial
- Who can call witnesses? R v Apostilides, Clarke Equipment v Como (see start);
- Order of examination in chief, cross-examination and re-examination: section 28.

  Unless the court otherwise directs:
  (a) cross-examination not to take place before the examination in chief , and
  (b) re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness.

  GPI Leisure Corp Ltd v Herdman Investments (No 3) (1990) HELD
  - The question of what XM is allowed in a civil case is entirely at the discretion of the court, but generally should permit unless oppressive.
  - Prima facie rule that Counsel calling a W in civil nominates the order in which they are to be XM, but judge may on the application of Counsel, permit XM to be deferred.

- S29 Manner and form of questioning witnesses and their responses –

  "29(1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court"
- Role of interpreter: sections 30 and 31;

  S 30 Interpreters - W may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the W to understand reply to questions.
  - Only issue is whether can understand English (not costs, time, etc).

  31 Deaf and mute witnesses - A W who cannot hear adequately or speak may be questioned or give evidence in any appropriate way and court can give directions re how this is done.

  Gradidge v Grace Bros(1998)- applicant was a deaf mute – issue whether judge could stop the interpreter - HELD
  - There was a discretion in the trial judge to permit an interpreter where necessary in the interests of justice but this discretion must not be coloured by idiosyncratic opinions or personal views.

(e) Evidence in chief

Evidence Act, s 37 – Leading questions (i.e. questions suggesting the answer rather than directing the W's attention to the subject matter in question) are not allowed in in examination in chief or in re-examination unless

(a) the court gives leave, or
(b) the question relates to a matter introductory to the witness's evidence, or
(c) no objection is made to the question and (leaving aside the party conducting the examination in chief or re-examination) each other party to the proceeding is represented by an Australian legal practitioner, legal counsel or prosecutor, or
(d) the question relates to a matter that is not in dispute, or
(e) if the witness has specialised knowledge based on the witness's training, study or experience--the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given.

(f) Refreshing memory - Evidence Act, ss 32-35

- S.32 (1) - Attempts to revive memory in court - A witness must not use a document to try to revive his or her memory about a fact or opinion unless the court gives leave.
- 32(2) list factors court can into take into account when deciding leave:
  (a) whether W will be able to recall the fact or opinion adequately without using the document (i.e necessity),
  (b) whether the document is a copy (authorship) and that:
  (i) was written or made by the W when the events recorded in it were fresh in his or her memory (time), or (ii) was, at such a time, found by the witness to be accurate
  If above met, usually allowed provided otherside can inspect the doc.
- S.34 – covers attempts to revive memory outside of court – allowed to use any document allowed (if had right of inspection) and also allows court to require production of any document or thing used to revive memory – common law can also be used if in interests of justice to use docs. S.34(2) means court can refuse though if this section not complied with.
- S.33 Evidence given by police officers - 33(1) Despite s32, in criminal proceeding, a police officer may give evidence by using written statement previously made by him provided 33(2):
  (a) the statement was made by the police officer at the time of or soon after the occurrence of the events to which it refers, and
  (b) the police officer signed the statement when it was made, and
  (c) a copy of the statement had been given to the person charged or to his or her Australian legal practitioner or legal counsel a reasonable time before the hearing.
  Note if s33 not met police could rely on s.32 but still issues re temporality
  Dodds v R [2009] – relied on multiple intercepted calls in code and police officer translated the code, but argued didn't satisfy temporal requirement - HELD
  - Statement was made in relation to matters which were contemporaneous to its making even though not at same time (18 months later), because the officer made the statement and reviewed the material for the purposes of giving evidence at the trial.

  36 Person may be examined without subpoena or other process

(f) Cross-examination- Evidence Act, ss 40-42

S.40 prohibits XM of a W called in error

S41 (1) permits the court to disallow certain types of improper questions (called "disallowable questions), which are
(a) is misleading or confusing, or
(b) is unduly annoying, harassing, intimidating, offensive, oppressive, or repetitive, or
(c) is put to the W in a manner or tone that is belittling, insulting or otherwise inappropriate, or
(d) has 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)

41(2) list the factors to be taken into account in deciding, but common law helps to define the characteristics of such improper questions.

- Libke v R (2007) re questions in XM and if rendered trial unfair - held
  - Some questions could have been better phrased and some cut off W and some were formed on assertions that were not established and some were multiple questions
  - But XM as a whole betrayed no unfairness to the D because gave the account which the D intended to give so appeal dismissed.
- Picker v The Queen [2002] re sexual assault case and what questions were impermissible as applicant argued created illicit prejudice against

the applicant –HELD
- Applicant's belief re the complainant's evidence was not relevant as could not be expected to know what she believed
- But was impermissible to drive the applicant towards saying evidence was fabricated as complainant not XM in matters given in evidence by the applicant and Counsel did not object to such impermissible and unfairly prejudicial questions so miscarriage.

S.42 (1) permits a leading question unless the court disallows, but in deciding whether to disallow, court considers factors under 42(2):

(a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness, and
(b) the witness has an interest consistent with an interest of the cross-examiner, and
(c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter, and
(d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.

(fa) The rule in Browne v Dunn

- Evidence Act 1995, s 46 – deals with one possible consequence of a breach of the common law rule of procedural fairness usually referred to the rule in Browne v Dunn
  46 (1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned has been admitted and:
  - *(a) it contradicts evidence about matter given by W in examination in chief, or*
  - *(b) the witness could have given evidence about the matter in examination in chief.*
- Browne v Dunn (1893) held:
  - Where a party intends to lead evidence that will contradict or challenge the evidence of the opponent's W, it needs to put that evidence to the W in XM
  - if evidence has not been challenged you shouldn't keep calling the same W.
  - procedural fairness as can't be discredited whout having chance to challenge.
- Remedy for breach of rule depends on circumstances but following give guidance
  - Payless Superbarn v O'Gara (1990) – personal injury re slip on grapes - Held
    - If D's evidence was not any grapes on the shop floor, should have XM claimant on that question.
    - Rule in BvD breached but remedy at trial judge's discretion
    - Remedy was to exclude store manager's evidence
  - R v Birks (1990) - D's Counsel inexperienced and did not XM the C about the accident, rather than the sexual assault – C complained that wasn't XM. Counsel admitted had got it wrong
    - Jury found him guilty thinking he had made up accident
    - Appealed and overturned and held rule applied in civil and criminal, but consequences of breach vary depending on the circumstances but would be related to the central objective of the rule = fairness
    - Where Counsel fails to XM upon matters of importance, care is required if comment is to be made about the breach in relation to drawing inferences of fact based upon that breach.
  - MWJ v The Queen (2005) – held
    - Rule should be applied with care when considering conduct of Counsel and where evidence is challenged, fairness usually requires that the basis of the challenge is put to the W during XM, but consequences of failure to XM may need to be considered in light of the nature of the proceedings
    - However, rule shouldn't be applied in criminal without qualification given their accusatory nature

(g) Re-examination: re-opening and rebuttal (i.e. after XM) Evidence Act, ss 39, 46

RE-EXAMINATION

- s.37 prohibits leading questions in XM unless court gives leave (e.g. if unfavourable)
- s.39 imposes limits on the matters that can be the subject of re-XM
  (a) a witness may be questioned about matters arising out of evidence given by the witness in cross-examination, and
  (b) other questions may not be put to the witness unless the court gives leave.
- S.46 – see above
- Drabsch v Swizerland General Insurance Co Ltd [1999] - example of s.39 operating
  - ReXM not limited solely to eliciting clarifications and explanations of ambiguities but is allowed to question any answer given in XM relating to creditability, which is capable of being construed unfavourably to the party calling the witness and
  - Which represents a distortion or incomplete account of the truth

REOPENING

- Act silent re reopening so left to common law, but reopening usually v difficult
- R v Chin (1985) - drug trafficking and mule case –
  - Basic rule is that prosecution should present its case completely and not split it by calling evidence in reply to defence where it was anticipated the defence would raise such an issue, as unfair to defence otherwise,
  - Prosecution not entitled to use XM to introduce an important fact as should be done in XinC so ordered new trial, but
  - Court has discretion to allow reopening based on fairness - here wasn't.
- Urban Transport Authority of NSW v Nweiser (1992) re employer being sued in negligence for accident and whether could reopen – Held Guiding principle in civil is whether it is in the interests of justice to reopen but following factors
  - If decision not to call evidence until reopening is deliberate = factor against
  - If decision not to call is mistake or want of foresight = factor for
  - Principle relating to calling of fresh evidence on appeal, though relevant to an application made after the judgment is delivered, are not relevant before the hearing is concluded.

LEC 4 DOCUMENTARY AND REAL EVIDENCE (STILL FORMS OF EVIDENCE)

DOCUMENTARY

- S.47 - defn of document – a thing relied on for its meaning - in whatever form it is encrypted, so document doesn't have to be paper (e.g, emails)
- CF Common law rule was that it had to be the original documents, had to prove was connected to the parties (e.g. proving was handwriting)
- S.51 provides that the common law rules re proving contents of docs are abolished
- S.48 deals with the ways in which the contents of the document in question may be adduced to court – eg by tendering the original or a cop - is v wide and covers copies, oral evidence (in some cases) and various types of electronic storage including computers and electronic - See section if need be
- Butera v DPP (1987) re taped telephone call re alleged drug trafficking but in foreign language so interpreter translated - Judge allowed the transcripts into the jury room and D appealed re whether could use transcript evidence – HELD (Split decision)
  - Tape recordings not admissible unless contents played, so transcript is not admissible on basis of its ability to inform the court of the tape's contents, but
  - The transcript could be used, not as evidence of the conversation, but
    - as a means of assisting the perception and understanding of the evidence tendered by playing the tape;
    - jury should be told this (i.e. transcript is only to aid their understanding