Preliminary Procedural Matters

Burdens/Onus and Standards of Proof

Criminal Proceedings

- Burden is on prosecution/crown to prove all elements of the offence beyond reasonable doubt.
- Probative onus will shift to the defence if the defence wants to argue defence of insanity (presumption of sanity, not legally responsible if found to be insane so have to prove it) and trespass act 1980, s 3. Proof for the defendant is on the balance of probabilities.
- Defence has an evidential onus/burden to make a defence a live issue - once done that onus of proof shifts back to the crown to prove beyond reasonable doubt that the defence isn't available. (This is not a burden of proof really).
- Practical burden - defence has no legal burden to make a defence but they have a practical burden that if they want to get off they should point to evidence that suggests a reasonable doubt.

Civil proceedings

- Plaintiff has to prove the claim on the balance of probabilities. Defence will raise its own evidence to tip the balance of probabilities towards their defence.

Types of Evidence

Types of evidence: Direct Evidence, Indirect/Circumstantial Evidence or Collateral evidence

- The difference goes to the logical relationship between what the evidence proves and the material facts in need of proof.
- **Direct evidence = goes towards proving a material fact, resolving a fact in issue.**
    - Example: eyewitness testimony that person x did the offence. It resolves the identity issue of who did the act.
- **Indirect evidence = it is possible to believe the evidence but we still need more information to resolve the fact or issue**. **Need a further inference to get to the fact at issue.**
    - Evidence relating to motive will not prove a fact at issue but it might help with our case theory or allow us to draw an inference through heuristics that will help accumulate evidence against/for the defence. [Note: risks with heuristics (deductive/inductive reasoning) that
- **This is a type of indirect evidence that goes to a secondary issue e.g. credibility of the witness, not to an element of the offence.**

Forms of Evidence: Real vs. testimonial evidence

- Real evidence = physical or hard evidence like blood or a photograph.
- Testimonial evidence = witness statements offered in court about what a witness saw/heard/observed and offered as truth or a record of what someone asserted out of court (subject to hearsay rules).
    - "An act performed through the medium of words, either spoken or written" that is a legally significant act.

Use of evidence

Test

1. What is the purpose of the evidence to prove material issues in the case?
    a. Depending on how you are using the evidence will depend on how you define it.
        i. A thank you card might be real evidence where it shows us something that is seperate from the actual substance of the words
            1. if it is to prove the handwriting is a person, to show two people knew each other, if it had a photo in it that showed the person went somewhere.

ii. A thank you card might be testimonial evidence if the substance of the words give us information - the letter written inside it reveals that the person had done the crime or knew some information relevant to the crime.
iii. A thank you card might be circumstantial real evidence if the anything in or about the card is somewhat irrelevant to what we are trying to prove. If the card had a fingerprint with blood on it, the card is irrelevant and it shows that the accused had blood on their hands and so might have committed the crime.

Witness eligibility and compellability (and exceptions)

What is a witness?

- Evidence Act, s4: ""witness means a person who gives evidence and is able to be cross-examined in a proceeding".
- Presumption = anyone can be a witness.

What is witness eligibility, compellability and/or availability to give evidence?

- **Eligibility = Is the person allowed to give evidence in court?**
  - If a person is eligible, they have a right to give evidence in court if they chose but giving evidence is not compulsory.
- **Compellability = Can the person be forced to give evidence in court?**
  - If a person is compellable, they will be called on by the court to give evidence and they cannot be excused from giving evidence. If you do not turn up to give evidence there will be consequences such as being issued with a subpoena, you could be charged with contempt of court and punished.
  - Previous compellability exception for spouses of the criminal defendant. This is because while we have a truth purpose, we also might have a public interest in protecting the rights of confidentiality of certain types of relationships that outweighs it. Spouses are no longer compellable in NZ because marriage is not the central metric for a serious relationship anymore and we do not want marriages to be left to private matters where there are risks /danger to partners involved.
  - Should spouses that are domestic violence victims be compellable. An example is with family violence cases.
    - Arguments for non-compellability of spouses: we don't want a wife to not seek help from the police because she doesn't want to be forced to give evidence, being a witness might be unsafe for a vulnerable partner, might be very difficult to testify against someone you care about.
    - Arguments for compellability: we want to prosecute family violence and the victims evidence would be valuable and relevant, it is useful to compel a reluctant victim to testify because this is a serious matter and we want to successfully charge people, it is unsafe to leave matters unprosecuted.
      - Need to be careful not to be paternalistic. Are there better wrap around social responses that we could use, take it out of a criminal context.
- **Availability = Is it logically impossible for a person to give evidence?**
  - A person may be eligible and compellable but may still be unavailable to give evidence if they are dead or no one can find them.

Is competency to give evidence relevant?

- It used to be relevant if children under 12 years or people with intellectual disabilities were going to be a witness.
- Test: Do they understand what it means to tell the truth and what it means to lie?

- Now, we just focus on eligibility. Competency is not a requirement and considerations of a child being young and a person having an intellectual disability will come within the eligibility test.

Test of Eligibility

1. PRESUMPTION S 71(1)(a): any person is eligible to give evidence.
2. THRESHOLD S 7: Is it within the person's capabilities to provide us with relevant evidence?
    a. If a child or other person is pre-literate, they can't provide us with relevant evidence that would prove or disprove a proposition. So they wouldn't make it through the door.
3. GENERAL EXCLUSION s 8: If it's going to be very confusing and time consuming evidence and have only a little relevance then it might also be excluded.

1. EXCEPTION: S 72
    - You cannot be eligible if you are a:
        i. Judge in a proceeding (re that proceeding) but you could be witness in a different proceeding.
        ii. Juror or counsel in a proceeding, except with the permission of the Judge. But very unlikely.

Test of compellability

1. PRESUMPTION s 71(1)(b): a person who is eligible to give evidence is compellable to give that evidence.
2. EXCEPTION s 73 - 75
    1. S 73: Defendant in a criminal trial - defendants and co-accused and associated defendants (defendant is relation to offence that is related or connected to the same set of events) not compellable for prosecution or defence are not compellable
        1. S 25(d) NZBORA - minimal standards of criminal procedure include right not to be called as a witness or to confess guilt.
    2. S 74: Queen, Governer-General, foreign sovereign or head of state, judge re conduct as a judge (but not as a private citizen) is not compellable.
    3. S 75: Bank officer re producing banking records. If bank is not a party to the proceedings, can't require bank officer to produce banking records or appear as a witness re transactions etc.

Ordinary and alternative ways of giving evidence

Process of a jury trial (Criminal Procedure Act 2011, s 107)

- Pros. has to prove all elements of the offence BRD.

1. Onus on prosecution to make opening statement.
    a. Defendant can make an opening statement but they don’t have to.
2. Prosecution Case
    a. All prosecution evidence and witnesses called.
    b. Examination in chief by prosecution (main examination of your own witnesses)
    c. Cross-examination by defence (defence cross-examines the prosecution witness. Defence HAS to put questions to the witness if the witness says something that directly contradicts their case theory.)
    d. Prosecution can re-examine their own witnesses if they choose (if something came up in defence cross that they want to clarify)
3. Defence Case
    a. All defence evidence and witnesses called.
    b. Examination in chief by defence
    c. Cross-examination by prosecution

    d. Defence can re-examine their own witnesses if they choose.
4. Prosecution may call rebuttal evidence
5. Closing arguments and final direction to the jury

Ordinary and alternative ways of giving evidence

- Ordinary = most common practice. Courtroom evidence given orally in presence of the judge and jury and where there may be members of the public in the gallery (s 83(1)(a)). By filing affidavit or reading a written statement aloud if both parties agree (s 83(1)(b) and (c)).
    - Maybe in rare circumstances the judge can exclude the public.
- Alternative: S 105(1)(a)
    - Give evidence in the courtroom, but unable to see the defendant (or other specified person). This would be done through the use of screens/partition.
        - This is for where seeing the defendant would be intimidating or traumatising.
    - Witness is giving live evidence but at a physically removed location e.g. live video-link.
    - Pre-recorded video.
        - S 105(1)(b): Judge can use any practical and technical means to facilitate (a).
        - S 201: GG can make regulations about procedure to be followed e.g. types of equipment to be used, so finer detail about regulation comes in here.
        - Evidence regulations 2007: What must be on the video record, how to make and keep copies, types of warnings that should be given to the jury etc. Where there is a gap in the regulations the judge makes practical regulations under (1)(B).
        - S 106: sets out processes for use of video recorded evidence.

Which form of giving evidence should be used?

- There is no statutory presumption to give evidence in the ordinary way.
- Counsel may apply to the judge to say it is appropriate to use an alternative method of evidence or the Judge may make their own call on the evidence being given in a particular way.
- s 103(1):The judge can direct that the witness gives evidence in chief and is cross-examined in either way
    - Judge weighs up factors (s 103) and makes a call considering what is appropriate for the particular witness? But there is no specific standard of proof that the judge has to consider.
        - Balancing interest between witness stress/safety/wellbeing (s 103(3)(a) and retaining truth interest and fair trial to defendant (s 103(3)(b))
        - Age and maturity of the witness
            - Young/elderly suggests alternative.
        - Physical, intellectual, psychological or psychiatric impairment of witness
            - Frail or vulnerable suggests alternative methods. Stress of being eye to eye with the accused person. Or they are more likely to feel overwhelmed by ordinary settings.
        - Witness trauma
            - If it is going to be traumatic for a witness to give evidence
        - Witness fear of intimidation
            - People in the gallery or the defendant or counsel.
        - Linguistic/cultural background/religious beliefs
            - If the ordinary way might clash with beliefs of background
        - Nature of proceeding
            - Sometimes the evidence is very sensitive or more stressful to speak about than other types of evidence in court.

- Relationship with witness to party in the proceeding
- Absence/likely absence of witness from NZ
- Any other ground likely to promote the purpose of the act s 6
    - S 6 purpose slide. MAIN RELEVANCE: (C)promoting fairness to witnesses and the parties. (D) other important public interests. (e) avoiding unjustifiable expense and delay (e.g. do zoom rather than someone flying to NZ).
    - This would be read in alongside s 103.

Aim of judges when using alternative evidence

- No prioritisation to one form of giving evidence over another except re children and DV complaints.
- Court wants to find balance between defendant and witness interests (screens are a good balance).
- What evidence is most reliable?
    - The further you get away from the ordinary paradigm the less likely it is for the evidence to be reliable.
    - But - evidence that this is not true. In family violence cases, pre-recorded evidence that is closer to the actual event the evidence can be better because there are fewer problems with memory and you can see the compelling effect on victim who hasn't processed it yet, avoids problems with trauma affecting evidence (rationalising) or being worried about dangers of telling the truth, less misleading to jurors (if rationalised they don't seem emotional, jury might find this weird or suspicious). So alternative forms of evidence can be just as if not more reliable.

Can alternative ways of evidence be used to counteract unavailability?

- If people are sick or overseas then they could call in via zoom. Or you can use a video of evidence previously filmed before death.
    - *K v R* : terminally ill complainant who had been video interviewed: hearsay because terminally ill complainant had died so couldn't cross examine them. COA said that was a good choice to admit that evidence. Trial judge had done a sufficiently good job of dealing with potential prejudice e.g. you will see a fragile frail witness, don't let that make you feel sorry for the witness that you give evidence more weight than it deserves.

What circumstances does the judge have a presumption of one type of giving evidence?

- 2017: child witnesses
    - Young children could give evidence if they can speak coherently and provide relevant evidence and won't take up disproportionate amounts of court time. Children are vulnerable generally. But also, why might a child be giving evidence? Because they have been abused or witnessed something very distressing so they are especially vulnerable. We want to get evidence and avoid trauma.
    - 2017 amendment: presumption with child witnesses is you will use an alternative mode rather than the ordinary way.
        - S 107: Child witnesses are entitled to give evidence by video recording (pre-recorded), in court but unable to see the defendant or other specified persons, from appropriate places outside the courtroom in NZ or overseas.
    - S 107A: If the party calling the witness wants the child to give evidence in the ordinary way, they must make an application to the Judge
        - Judge must (3)(a) be satisfied that the witness fully appreciates the likely effect on them to do so. Judge may also 3(b) call for a report from a qualified advisor on the likely effect on the child of giving evidence in an ordinary way e.g. child psychologist.

    - S 107B: If the other party wants the child witness to give evidence in the ordinary way or in a different alternative way they must apply to the Judge.
        - E.g. the party calling the witness says they will give evidence by video link. Defence will argue they prefer the use of the screen.
        - (3) judge must give opportunity for both parties to speak to judge in chambers and may call for report from expert on effect of witness in giving evidence in ordinary way
        - (4) judge must consider s 107 and 103(3) and (4) factors e.g. affect on child and fairness on defendant and stress and ability to heal for witness.
- 2018: amendments re family violence witnesses.
    - Presumption that adult family violence witnesses should give evidence under an alternative mode. Obviously they aren't vulnerable in the same way as children but there are complex dynamics that mean we want to take particular care with family violence witnesses as a class.
    - S 106A: From Family Violence Amendments Act 2018
        - (2) Entitled to give evidence by video recording made before hearing,
        - (3) video must be made by police and be made within 2 weeks of the incident.
        - It could be more informal in the sense of victim trauma but still rules about integrity of the evidence apply e.g. on site at the victim's home a day or two after the event when the offender is off site.
        - This is not exhaustive. She may also give evidence in court or by an alternative method but the video can be included.
        - Prosecution has to give written notice to the defence and court to use this kind of video.
    - S 106B: (1) defendant may apply for direction that the complainant give some or all of the evidence in the ordinary way. (rebuttal to presumption)
        - (3) to make this direction, must give both sides the opportunity to meet with the judge in chambers and may call for expert report on likely effect on complainant.
        - (4) Judges considerations in making decision:
            - Do interests of justice require departure from usual s 106A procedure in this case?
            - S 103(3) and (4) matters (Fairness to the accused, stress and ability for the witness to heal?)
- IF JUDGE makes direction about order or alternative way of giving evidence this is under s 103.

<u>Witness questioning rules</u>

Jury Trial Process

- Criminal Procedure Act 2011, s 107: Two main askers of question are the prosecutor and the defence counsel.
- Judge's role is as an umpire e.g. making decisions about form witnesses will give evidence and stewardship role to make sure witnesses are being treated fairly.
    - S 100 Evidence Act 2006: in any proceeding, the judge may ask a witness any question that, in the opinion of the judge, justice requires and the judge can ask questions for clarification but this a neutral role. = judges cannot get more involved with that.
    - *Beckham 2012 NSCA* = found that the judge had done more than ask clarification questions and asking questions like it was a cross examination. COA found this was too much - judge entered into the trial arena to an unacceptable extent - seemed to pick a side.

- S 101 EA06: Jury have a limited scope to ask questions but these questions can't come directly from the jury - has to go through a judge and have to be clarification type questions.

Evidence in Chief: leadings questions and hostile witness

What form of questions are you allowed to pose to the witness?

- Criminal Procedure Act 2011, s 107: different rules when doing examination in chief vs. cross-examination vs. re-examination.
- Section 89: cannot be asking leading questions to your own witness when examining in chief. Have to ask open ended questions e.g. good advice in social situations.
    - Section 4: a leading question is a question that directly or indirectly suggests a particular answer to the question. Yes/No question. Don't lead the witness through testimony, it needs to be their story.
    - Exceptions s 89(1)(a-c):
        - Introductory or undisputed matters e.g. name
        - With consent of other parties
        - If the judge allows it.

Hostile Witnesses

- A hostile witness = when your own witness that you are expecting to give particular evidence on particular questions will not say what you want them to say or what you are expecting them to say.
- Different to Recanting witness = someone said they will testify and then change their mind.

RULES

- S 89(1) Normal rule is that counsel cannot cross-examine their own witness.
- Exception: s 94 - if a party has called a witness and the judge determines the witness is hostile, the lawyer can cross-examine the witness to the extent authorised by the judge.

If a witness is hostile and there is question of memory blackhole, what happens?

1. Refresh memory from document?
    a. Genuinely forgetful witness - in which case, refresh memory from document. They might be grateful for a refresher. Permission for judge for memory refreshing document under s 90.
        i. S 90: permission from judge to consult document of statement they made earlier in time when their memory was fresh. If a witness has a memory "Blackhole".
2. Prove witness is hostile.
    a. Genuinely hostile: reject opportunity to refresh memory but by giving that option it narrows down that they are hostile.
        i. Counsel could ask questions highlighting the black hole. Trying to work out the exact gap. Building argument for judge that this is a hostile witness. Through doing this, builds an argument for the judge that this is a hostile witness - want to get enough out to show this.
        ii. If they are hostile in that they won't say anything, just continue asking questions.
        iii. Then apply under s 94 for the witness to be declared hostile.
3. Apply to judge to declare witness hostile (s 94)
    a. Application: chambers application saying which 3 limbs of hostile does the witness fall under (s 4)
    b. Section 4: Interpretation to hostile witness
        i. A) Exhibit or appear to exhibit a lack of veracity when giving evidence unfavorable to the party who called the witness
            1. Looks like you are being untruthful and it doesn't make sense, should know better

ii. (B) inconsistent with a previous statement made by the witness in a manner that exhibits an intention be unhelpful
    1. Law commission says it's enough that there has been a contradiction.
    2. Courts have said it is less about intention than the court should look at the degree of inconsistency in the statements then that suggests there is an intention of unhelpfulness.
iii. (C) refused to answer questions or deliberately withhold evidence.

4. Allowed to cross-examine own witness under s 94 or s 37(4) (challenging veracity - narrow scope)
    a. If application is granted
        i. Seek leave to cross-examine and specify scope of cross-examination (eg veracity and inconsistency). Judge wants it to be limited to what you can and can't cross on.
        ii. This leave to cross examine can be granted under…
            1. S 94
            2. S 37(4) - veracity
                a. If under s 4 found to be under the veracity limb.

<u>Cross-examination</u>

Purpose: A chance to test the examination chief so if there are inconsistencies within that testimony, a biased person may hold, done with a lot of leading questions, you are trying to hone in on particular details and challenge them and put your competing theory to the witness.

- S 92(1): you must cross a witness on significant matters that are relevant and in issue and contradict the evidence of the witness. (IMPORTANT DUTY)
    - If the witness says things which contradict what you are trying to say, you have to give them a chance to respond to your argument. "Say it to your face".
- S 92(2): if you don't comply with ss 1, judge can grant permission to recall the witness so that they put the challenge to the witness, recall the witness on the point, exclude or include evidence on the chance that the witness was not able to comment on = discretionary matter for the judge. This can also be grounds for appeal or maybe retrial situation.

Risks:

- Witness welfare = experience of being cross-examined can be distressed, so we want to ensure witnesses are treated fairly but have to balance interest with the truth. Robust cross = battering experience for witness.
- S 85: unacceptable questions
    - This can apply to both evidence in chief. It can be the words used or the tone/format.
    - Question unacceptable if improper, unfair, misleading, repetitive, or in language that is hard to understand. This undermines cross as challenging case theory robustly.
        - Should not confuse or bamboozle the witness. Not hammering the same question.
        - Should use clear language not to make it deliberately tricky so it makes the person look dumb. This depends on the person - if it is a child it will be different to an adult. Contextual matter.
    - A question might be unacceptable by accident e.g. expressed in language that is unclear or too complicated.
- S 85(1): Judge's witness protective function
    - Cross-examination may be offensive culturally e.g. if Māori Kaumatua was crossed by a younger person this would not respect their mana.
    - S 85(2)(c): the judge may have regard to linguistic or cultural background or religious beliefs of the witness.

        - Judge can ensure cross is sensitive to differences. Encourage counsel to state a position that kaumatua is entitled to respond rather than being directly questioned.
    - Factors to consider under s 85(2)
        - Age or maturity
        - Physical, intellectual impairment e.g. questions framed in a way where they can answer, where it is not unfair?
        - Linguistic or cultural background or religious beliefs e.g. what language do they speak? Will it be offensive?
        - Nature of proceedings e.g. family violence or sexual violence and who is doing the cross?
        - In the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceedings.

Section 95: party in person looking at cross-examining the witness

- Where a party in person is a self-represented criminal defendant or party in a civil case there may be an issue if they were cross-examining a witness (e.g. if they had a relationship with their witness). This could risk making the cross-examination traumatic to the witness. Alternative forms of giving evidence might not be effective.
- (1) A defendant in a sexual case, or a defendant in or a party to criminal or civil proceedings concerning family violence or harassment, is not entitled to personally cross-examine (a) a complainant or a party who has made allegations of family violence or harassment, (b) a child who is a witness, unless the Judge gives permission.
- (2) In a civil or criminal proceeding, a Judge may, on the application of a witness, or a party calling a witness, or on the Judge's own initiative, order that a party to the proceeding must not personally cross-examine the witness. (No presumption for other cases)
    - Judge has to decide based on the same factors as s 103, s 103(a) and (b). (but actual provision is s 95 (3) and (4).

Section 123: judicial direction about certain ways of giving evidence

- If the judge makes a ruling under s 95 that the defendant can't be the one that can cross witness, they have to give direction to the jury to ensure the Jury does not draw inferences because of this so there is no risk of prejudice to the defendant.
- But this is manageable. Answer is not always to exclude it under s 8 - can be combated with the Judge managing the risk.

<u>Re-examination and rebuttal evidence</u>

Re-examination

- PURPOSE: A chance to make sure the witness can get out what they want to on those issues, a right of reply.
- S 97 Evidence Act 2006: Re-examination
    - It is optional, happens after the cross.
    - Content control: you can only ask questions that are about matters that rose during the cross-examination. It is not an area where you can bring in new arguments and side step cross examination or talk about things you forgot to talk about in examination in chief. Also no leading questions.
    - You can get permission to talk about some sort of new matters from the Judge but then this starts the clock on cross-examination, they still get the chance to cross it.

Rebuttal evidence

- S 98: Further evidence after closure of case

    - After all of the crown and defence evidence, sometimes new evidence might come to light for which evidence might be relevant at the tail end of the trial. Judge can give permission in limited circumstances and Judge is very careful where it is prosecution evidence because it can have a real prejudicial effect since it is introduced right at the end - can loom large in the mind of jurors.
- S 99: witnesses recalled by a Judge

Extra points

When we don't go through normal proof hoops

- Admission by consent: s 9 - where both parties agree on certain facts it will be admitted by consent.
- Judicial notice: proxy of proof for indisputable facts
    - Judge takes judicial notice of the fact as if it had been proved - proxy of the truth.
    - This is narrow - only applies to indisputable facts. Normally really everyday stuff.

Corroboration

Particularly in relation to witness testimony, it is more reliable to have someone who can back up the testimony of that person.

- It is possible to convict on the evidence of one person - it is not a requirement that there be other people backing it up or other supporting evidence.
- S 121(1): narrow exceptions
    - Perjury
    - False oaths
    - False statements and declarations
    - Treason
        - You can't convict someone on the evidence of one person - because if it's one word against another - honesty offence.
- The judge does not have to give a warning to jurors about uncorroborated evidence but they aren't prevented from giving a warning. Contextual - does judge feel there is a risk that the jury will give this witnesses evidence undue weight?
- Historically we tend to give warnings re:
    - Accomplices: Where two people are charged with the same crime and they accuse each other?
    - Young children: Kids are prone to distorting details so it might be appropriate to give guidance on how to assess this.
    - Sexual assault and violence cases: it is dangerous to convict on uncorroborated victims evidence? Tricky aspect because it is a he said she said matter. This could be appropriate if done sensitively but could be a real hindrance given that so frequently by the nature of that offending you just don't have any corroborating evidence. If you require corroboration or are suspicious of uncorroborated evidence it is impossible to convict.
        - Now, not required to give warning, but Judge sometimes may give a warning. We don't want to create categories of crime where it is impossible to prosecute.

Section 125: Children

Concerns with evidence from young children about how reliable that evidence is.

- This provision suggests we shouldn't be concerned about the quality of children's evidence just because they are children.
- If there is a child witness, Judge does not have to give a warning but they should give a warning where it is appropriate. Nature of testimony or characteristics of child is considered.

Questions to ask

1. Who has the burden of proof for the element of proof?
2. What type of evidence is this?
    a. What is the purpose of the evidence to prove material issues in the case?
    b. What type of evidence is this based on this use of the evidence?
3. Is a person eligible and compellable to give evidence (and practically available) or does an exception apply?
4. Ordinary and alternative rules?
5. Evidence in Chief ?
6. Cross examination?
7. Re-examination/Rebuttal ?