Witness eligibility + compellability

Background:
- Eligibility used to depend on competence (esp kids under 12, cognitive issues)
- NOW: it is juries' job to test reliability, and s 7 gets rid of irrational (babies) and s 8 gets rid of time wasters where there is better evidence

Ethics of compellability with family violence:
- **The issue is:**
  - High rates of recanting witnesses due to: scared, economic dependence, love
  - BUT they are normally important witnesses in trials
- **Should compel:**
  - These people are dangerous and should be prosecuted
  - Therefore – some prosecution have "no drop" policies, prosecute regardless.
- **Shouldn't compel:**
  - Goes against complainant's wishes, undermines their autonomy.
  - Could endanger witness, could be traumatic, could criminalise for rational decision.
  - Could discourage witnesses seeking help.

PQ STRUCTURE – eligible and compellable:

Question type: "Can this person be a witness"?

The s 4 definition of witness is someone who gives evidence and is able to be cross-examined in a proceeding. This is a wide definition.

1) Eligibility

The first thing to look at is eligibility. This asks whether a person is allowed to give evidence in court. The starting presumption is that everyone is eligible to be a witness (s 71(1)(a)), with a few narrow exceptions.

Only mention if they apply: if the witness is the judge in that proceeding (s 72(1)) or is a juror or counsel in the proceeding without permission of the judge (s 72(2)).
- Notwithstanding age

On these facts,

2) Compellability

The second question is compellability: whether the person can be required to give evidence in court. The starting presumption is that all eligible witnesses are compellable (s 71(1)(b)), although there are three narrow exceptions.

Only mention if these apply: These exceptions include people who are the defendant or co-accused in that criminal trial (s 73), exceptions for people in various positions of public power (s 74) and bank officers in relation to banking records (s 75).

Here, the relevant exception is (pick one from the 3 below)

- **S 73: defendants**
  - If it is a criminal trial, defendants, co-accused and associated defendants are not compellable. This links with their right codified in s 25(d) of the New Zealand Bill of Rights Act 1990, protecting these people's right to silence and privilege against self incrimination. Although these people are eligible they are not compellable.
  - Here,
- **S 74: VIPs (**reason: important, confidential work)
  - Section 74 states a number of important positions, which mean that that person is not compellable. Here, the relevant position is
  - Queen, NZ Governor-General, foreign sovereign/Head of State, or a judge (in respect of their conduct as a judge).
  - Kim Dot Com tried to compel Obama when he was in NZ. Rejected for many reasons, including this (Obama not currently president, but Dot Com wanted him to speak to that)
- **S 75: bank officers**
  - Section 75 holds that bank officers cannot be compelled to produce banking records if the bank is not party to the proceedings.
  - Here,

(If asked about what compellability means:)
If the witness is compellable, this means that they are subject to subpoena. If they do not turn up to court, the witness can be fined or arrested and forced into court (Criminal Procedure Act 2011, ss 159(3) and 161). If they refuse to give evidence they can be imprisoned (Criminal Procedure Act 2011, s 165), or they can be found in contempt of court if they disrupt the proceedings or disobey court orders (Criminal Procedure Act 2011, s 165(8)).

- Don't worry re **practical concerns** of getting them in
- If to do with **self-incriminating evidence:**
  - Although a witness may be eligible and compellable, there is a privilege against self incrimination (s 60) which means that the witness does not need to answer questions which may incriminate themselves (*Taylor v NZ Poultry Board*).

If they're a child witness:
There is no longer a competence test for child witnesses, so this is now covered under ss 7 and 8.
The question is whether the witness will be able to give clear and coherent evidence. We would need further information about his ability to give this evidence. If he cannot give this evidence, it may not pass the s 7 test.
- Can he put together understandable sentences?

Even if it passes s 7, it may have a low probative value, which won't be able to outweigh the court time required to hear from [him].

Ordinary/alternative way of giving evidence

Ordinary way

The "ordinary way" of giving evidence is orally in the courtroom in the presence of the judge, possibly the jury, parties to the proceeding and their counsel and the public (unless they are excluded by the judge) (s 83(1)(a)). There are also options for evidence to be filed by affidavit or through reading a written statement (s 83(1)(b)–(c)).

Alternative way

However, there are also alternative ways of giving evidence provided for in the Evidence Act. The three options are where the witness gives evidence in the courtroom but curtained off (s 105(1)(a)(i)), through video link from a place outside the courtroom (s 105(1)(a)(ii)) or by a video recording (s 105(1)(a)(iii)).

The alternative ways of giving evidence walk a fine line between (protecting witnesses from undue trauma / unduly inconveniencing witnesses) and having robust evidence in the trial. (If Crown evidence: The right of the defendant to a fair trial means that cross-examination of Crown witnesses is also very important.

Deciding between the two ways

1) Presumption

There is usually no legal presumption in favour of either way. That said, there is a pragmatic presumption as the possibility of the alternative way must be raised by the judge or a party to the proceedings.

Is this child witness or complainant of family violence?

- NO: There are presumptions for the alternative way for child witnesses and complainants of family violence. However, (WITNESS) is neither a child witness nor a complainant of family violence, so this is not an issue.
- YES – child:

For child witnesses, the usual procedure of giving evidence is an alternative way, outlined at s 107, as children are vulnerable and the evidence they provide is usually traumatic. Child witnesses are entitled to give evidence by a video recording, curtained off in the courtroom or via video link from somewhere else (s 107(1)(a)). The judge will determine between these based on the circumstances.

GENERAL If the prosecution applies for [child] to give evidence in the ordinary way (s 107A) or if the defence makes an application for this (under s 107B), then this starting presumption may be overturned. Those sections set out the factors the judge would balance in the event that such an application is made.

- We would need more facts to determine how the judge would balance these things.

CHILD WANTS: If the child witness wishes to give evidence in the ordinary way, s 107A is followed. The judge must consider whether the interests of justice require a departure, as well as the factors at s 103(3) and considerations at s 103(4). The judge may receive a report on the effect on the witness of giving evidence in this way (s 107A(3)(b)), and must be satisfied that the witness fully appreciates the impact on them of doing so (s 107A(3)(a)).
Apply – balance impact on D (fairness), impact/stress on child

OTHER SIDE: If counsel on the other side wants the child to give evidence in the ordinary way, the procedure is found at s 107B. This is a stricter process than if the child themself wants to give evidence. For this, the judge must give each party an opportunity to be heard in chambers (s 107B(3)(a)), and may call on a report on the effect on the witness of giving evidence in this way (s 107B(3)(b)). The judge must also consider whether the interests of justice require a departure, as well as the factors at s 103(3) and considerations at s 103(4).
Apply – balance impact on D (fairness), impact/stress on child

- YES – family violence:

In cases of family violence, complainants are entitled to pre-record a video as their evidence in chief (s 106A). This video must be recoded within 2 weeks of the incident and recorded by the police (s 106A(3)). This allows complainants of family violence to not be unduly traumatised, but still give compelling evidence which is fresh enough to not be dulled by trauma responses. This may also reduce the rates of recanting witnesses.

The defendant may apply for the family violence complainant to give evidence in the ordinary or another alternative way under s 106B. For this, the judge must give each party an opportunity to be heard in chambers (s 106B(3)(a)), and may call on a report on the effect on the witness of giving evidence in this way (s 106B(3)(b)). The judge must also consider whether the interests of justice require a departure, as well as the factors at s 103(3) and considerations at s 103(4).

Apply – balance impact on D (fairness), impact/stress on complainant

2) Factors

There are a number of factors that the judge may take into account in deciding whether evidence should be given in the ordinary or alternative way. These are found at s 103(3), and further considerations at s 103(4).

Section 103(3)(a) points to the witness's age or maturity. Here,
Section 103(3)(b) points to the physical, intellectual, psychological or psychiatric impairment of the witness. Here,
Section 103(3)(c) points to the witness's trauma. Here,
Section 103(3)(d) points to the witness's fear of intimidation. Here,
Section 103(3)(e) points to the witness's linguistic or cultural background or religious beliefs. Here,
Section 103(3)(f) points to the nature of the proceeding. Here,

- Sexual, family, traumatic

Section 103(3)(g) points to the nature of the evidence the witness is expected to give. Here,

Section 103(3)(h) points to the relationship of the witness to any party to the proceeding. Here,
Section 103(3)(i) points to the witness's absence or likely absence from New Zealand. Here,
- Overseas

Section 103(3)(j) points to any other ground likely to promote the Act's purpose (at s 6). Here,
- At s 6(c), the Act aims to promote fairness to parties and witnesses.
  - Illness/housebound: Practicalities involving the witness are relevant here too. In *K v R* (2014), a terminally ill complainant recorded a video interview before their death, which was held to be admissible. The judge also gave a note to the jury to counter the possibly prejudicial effect of fragile, dying complainant.
- At s 6(d), the Act aims to protect the rights of confidentiality and other important public interests.
- At s 6(e), the Act aims to avoid unjustifiable expense and delay (overseas)

3) Balancing factors

These many factors must be balanced. At s 103(4), the judge must have regard to both the fairness of the proceeding (especially considering the right to a fair trial for the defendant) (s 103(4)(a)), and also the views of the witness, and the need to reduce their stress and promote healing (s 103(4)(b)).

- Pre-recorded evidence is detrimental to fair trial rights, as the witness will not be able to be cross-examined on matters, and (depending on when it was filmed), the witness's memory may be not great.

4) Conclusion

Overall, if an alternative way is used, then the judge would make a direction under s 103(1).

The judge would also give a direction about this form of offering evidence under s 123(1)(a). This would make it clear to the jury that they should not draw any adverse inferences against the defendant due to this questioning.

Hostile Witness

Trigger: recanting, fighting, not answering maliciously
Why: change mind in family/sexual cases, co-D change story, fear repercussions
Issue: may be used manipulatively. Woman being hostile witness in her own case. Eesh.

There are special rules relating to hostile witnesses (s 94). Generally, these are the counsel's own witness, who is behaving in a way which disrupts the lawyer's planned questioning.

1) Beginning steps

If a witness (says they can't remember/ acts in contradictory way / seems confused), then practically the lawyer would ask a few questions to demonstrate this to the judge. To

determine the intention of the witness, the lawyer can ask their witness whether it would help if the lawyer refreshed the witness's memory using their previous statements.

If the witness accepts this offer, then the lawyer can seek permission rom the judge to refresh the witness's memory from documents (s 90).

If the witness is not helped by these documents, or refuses the offer, then the lawyer must genuinely consider whether this is a hostile witness.

2) Is the witness hostile?

The definition of hostile witness is found at s 4. There are three kinds of hostile witnesses from this definition. Here,
Copy and paste one of the 3 below

LYING: At (a), the witness exhibits (or appears to exhibit) a lack of veracity when giving evidence unfavourable to party who called the witness, in an area the witness may reasonably be expected to know about. In this situation, the witness
- Hone in – must be intentional lying, not just confused
- Goes off script with their lawyer

CHANGE STORY: At (b), the witness gives evidence inconsistent with a previous statement they have made, exhibiting (or appearing to exhibit) the intention to be unhelpful. In this situation, deliberate obstruction is demonstrated by
- Flip in past and current statements

SILENT: At (c), the witness refuses to answer questions or deliberately withholds evidence. In this situation, deliberate obstruction is demonstrated by

In practical terms, the lawyer would ask the witness open ended questions to determine whether the witness fell into this category.

3) Application for leave to cross-examine

Usually lawyers are unable to cross-examine their own witnesses (s 89).

However, in this case, the lawyer would apply to the judge for leave to cross-examine under s 94. If the judge grants this leave, then the lawyer may cross-examine the witness, to the extent authorised by the judge. This means the ability to cross-examine will be tailored to the situation.

In this case,

If the witness still refuses to comply, then they may be subject to punishments under the Criminal Procedure Act 2011, or found in contempt of court.

Self-representation

Trigger: self-represented defendant looking to cross-examine complainant or child, or in a sexual violence, harassment, family violence case.

- Section 95 restricts cross-examination of witnesses by self-represented defendants in some cases.
- S 95(1): Defendants in sexual cases or family violence/harassment cases may not personally cross-examine a complainant (or party who has alleged family violence) or a child who is a witness without the judge's permission (s 95(1)).
- S 95(2): More broadly, a judge may order that a party to the proceeding must not personally cross-examine the witness. This must be done on one or more of the following grounds: (note: similar to unacceptable questions, s 85 factors)

(a) the age or maturity of the witness:
(b) the physical, intellectual, psychological, or psychiatric impairment of the witness:
(c) the linguistic or cultural background or religious beliefs of the witness:
(d) the nature of the proceeding:
(e) the relationship of the witness to the unrepresented party:
(f) any other grounds likely to promote the purpose of the Act

- In cases where the defendant cannot cross-examine, a lawyer is appointed to do it (s 95(5)).
- If the judge rules that the defendant cannot cross-examine a party personally, the judge would frame this decision for the jury, letting them know that this is procedure and to not draw any inferences from the decision (s 123(b)).

Questioning Rules + Objections

Basics about cross, examination in chief, re-examination

- **Examination in chief**
  - In examination in chief, the lawyer asks their witness questions. The purpose of examination in chief is for the lawyer to ask open-ended questions to allow their witness to tell their own story.
  - **Leading questions** are prohibited in examination in chief (s 89). These are questions that that "directly or indirectly suggests a particular answer to the question" (s 4). The exceptions to this are if the question related to an introductory or undisputed matter, where all parties consent, or if the judge allows the question (s 89(1)).

- **Cross-examination**
  - In cross-examination, the lawyer asks the other side's witness questions. The purpose of cross-examination is to test the witness's evidence, and expose the issues with their evidence or undermine the witness's credibility.
  - There is a requirement for the lawyer to put a **competing theory to** the witness (s 92). This arises if there are significant matters that are relevant and contradict the evidence of the witness.
    - Significant = does work in your case theory
    - Rationale = fair to witness and shows judge/FF where conflicts are

- If the competing theory is not put to the relevant witness, this can be grounds for appeal. If it is realised during the trial, then there are a number of options in s 92(2)).
  - (a) recall the witness and ask them about the contradictory evidence
  - (b) don't recall, but manage the weight of contradictory evidence to reflect fact that witness wasn't asked about it
  - (c) exclude the contradictory evidence
  - (d) make any other order Judge considers just

- **Re-examination:**
  - Only happens if there has been cross-examination. Can't contain new content (if it does, other side can cross-examine again).
  - Criminal Procedure Act 2011, s 107: process of jury trial provides for this
  - S 97 Evidence Act – re-examination

- **Rebuttal evidence** (LATE)
  - In limited circumstances (and with the judge's permission), there is scope for last minute witnesses to give evidence (s 98).
  - This is done carefully, to ensure that the jury does not get a disproportionately strong impression.
  - Witnesses may also be recalled by a judge if they haven't been questioned on a point (s 99).

Possible questions:

Question type: "X question was put to witness. There was an objection that (X). Should it be sustained?"

Objection: unacceptable question

Trigger: rude/hard/repetitive/confusing questions – especially in sexual violence setting.

The judge may disallow questions, or direct that a witness need not answer in a number of circumstances (s 85). This section refers to questions that are "improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand."

Here,

- Deliberately confusing questions (includes issues about language too complex)
- Unfair questions (super broad, combative, cruel, designed to shake her up rather than test testimony)
- Misleading questions (trick-sy, triple negatives)
- Needlessly repetitive

When assessing whether something is an unacceptable question, a number of factors may be taken into account by the judge (s 85(2)).

Section 85(2)(a) refers to the age/maturity of the witness. Here,

- Very young/old/vulnerable

Section 85(2)(b) refers to any physical, intellectual, psychological or psychiatric impairment of the witness. Here,
Section 85(2)(c) refers to linguistic or cultural background, or religious beliefs of witnesses. Here,

- Linguistic = child/speaker second language
- Māori kaumatua – cross-examination may undercut mana, or be inconsistent with tikanga

Section 85(2)(d) refers to the nature of proceedings. Here,

- Especially in sexual violence matter

Section 85(2)(e) refers to hypothetical questions, and whether the hypothesis has been or will be proved by other evidence. Here,

To conclude, the judge **would** likely disallow this question as it was an unacceptable question (s 85(1)).
To conclude, the judge **would likely not** choose to disallow this question under s 85(1), as it was not an unacceptable question.

Objection: leading question

The [defence] has objected to this question on the basis that it is a leading question. This question was asked during examination in chief, which means that generally lawyers must ask open-ended questioned to allow witnesses to tell their own stories.

Leading questions are prohibited in examination in chief (s 89). These are questions that that "directly or indirectly suggests a particular answer to the question" (s 4). Here, it is true that this is a leading question – the lawyer is putting the answer in [Anahera's] mouth, and it has an embedded prompt. One more sentence The general rule is that [the prosecutor] cannot ask [witness] this question under s 89(1).

However, even though it is a leading question, an exception would apply. Leading questions are allowed where the question related to an introductory or undisputed matter (s 89(1)). Here, it does not seem likely that the defence will dispute that [Anahera is Clifford's flatmate]. The [prosecution] is simply introducing basic context. Therefore, this objection would not be sustained – the [defence] lawyer has clearly not got a good grasp on basic evidence law.

Objection: competing theory was not put to the witness.

In cross-examination, the lawyer asks the other side's witness questions in order to test the witness's evidence and expose issues with it or their credibility. There is a requirement for the lawyer to put a competing theory to the other side's witness, which arises if there are significant matters that are relevant and contradict the evidence of the witness (s 92).

Here,

If the competing theory is not put to the relevant witness, this can be grounds for appeal. If it is realised during the trial, then there are a number of options in s 92(2). Under s 92(2)(a),

the judge can allow the witness to be recalled, and asked about the contradictory evidence. Under s 92(2)(b), the weight of the contradictory evidence is managed to reflect the fact that the witness was not asked about it. Under s 92(2)(c), the contradictory evidence can be excluded. Finally, under s 92(2)(d), the judge can make any other order they think just.

Random stuff I don't think I'll get assessed on:

Types of evidence:

- **Direct/indirect:**
  - Direct – directly relevant to material issue
  - Collateral/indirect – circumstantial, goes into the mix to help resolve something
- **Real/testimonial:**
  - **Real** – physical exhibit/photo (gun, knife, shoe with blood, CCTV footage etc.).
    - Usually physical object.
    - Thank you card for the fingerprints on the card, blood, sticker.
    - Thank you card to prove that the writer can write words.
    - Thank you card to prove that Zoe has met this boy.
  - **Testimonial** – witness statements offered as truth
    - Usually when there are words
    - Thank you card, where we care about the words "thank you for building lego with me" – to show that she knows lego, cares about this boy, that she had a job.
  - **Weird middle ground –** The writing of words which are legally signficiant and changes something.
    - Offer/acceptance of contract. Letter saying "I accept your offer"
    - Wedding vow.

Judicial notice

- Direct substitute of evidence, to prevent wasting court time. Also scope for parties to agree on certain facts.

Background on how trials run – trial procedure

Order of events:

- Opening statements:
  - Pros
  - Defence: (optional)
- Evidence
  - Pros witnesses:
    - Pros – evidence in chief
    - Def – cross examine (optional, often happens tho)
    - Pros – re-examine witnesses (optional)
  - Def witnesses:
    - Def – evidence in chief (optional)
    - Pros – cross examine (optional)
    - Def – re-examine (optional)

- Closing statements
- Directions to the jury

Judges/juries asking questions

(Note: also applies to juries, but they must ask their questions through the judge).

- Normally judges do not ask questions of witnesses, as they are neutral referees.
- However, judges are able to ask witnesses questions in limited circumstances (s 100).
  - May happen in both civil and criminal cases, and judge/jury trials.
  - Usually to clarify something is ambiguous.

- Limitations on judge's ability:
  - The judge must not cross-examine a witness (test/challenge evidence), or enter the trial arena (*Beckham*).
  - In jury trials, judges are more constrained as they may accidentally impact the jury's perception of the witness (*Van der Kuijl v Police*). This may be for better or worse (*R v H*).
  - There is a risk that the judge may impact the D's defence strategy unknowingly, by cutting across defence that wasn't apparent to the judge (*M v R*).

- Once judge asks a question, all parties then have an opportunity to cross-examine or re-examine the witness (depending on who the party is).

Burdens/standards of proof

- **Burden**: the "who" question
  - Whose job is it to prove this thing? Who does the burden sit on?

- **Standard** of proof: the "what" question
  - How heavy is the burden?
  - To what standard must the party with the onus prove the element?

- Criminal:
  - Prosecution must prove all elements of offence.
  - D doesn't have to do anything usually, except show defences are live issues. Tactically they may want to try and prove something though.
- Civil
  - Lesser standard of proof – balance of probabilities.
  - Plaintiff usually has to prove certain elements.

- Warnings: dodgy evidence may be admitted with a comment from the judge, to disregard X.