

EVIDENCE LAW SUMMARY



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SAMPLE ONLY

The nature of evidence and preliminary issues

The laws of evidence consist of the rules and principles applied by courts in the process of fact-finding at a trial. The evidence of a fact that tends to prove an inference is called admissible evidence. There are several exclusionary rules, under which the courts will not accept certain matters as evidence of a fact.

SOURCE OF EVIDENCE LAW AND APPLICATION

Evidence is determined by both the common law and the Evidence Act 2006 [herein referred to as “the Act”]. The new Act came into force on 1 August 2007.¹

In contrast to the initial codification project by the Law Commission,² amendments to ss 5, 10 and 12 have ensured that the Act is no longer a code.³ Of particular note to this end are ss 10(1)(c) and s12(b).

Section 10(1)(c) *permits* the judge, in interpreting the Act, to “have regard to” the common law, to the “extent that the common law is consistent with:

- (i) its provisions; and
- (ii) the promotion of its purpose and its principles; and
- (iii) the application of the rule in section 12.”

Section 12(b) *requires* the judge to “have regard to” the common law where the Act deals only in part with the question of admissibility of evidence. Evidence Act 2006 does not cover:

- Burden of proof
- Standard of proof
- Estoppels
- Interpretation of contract, eg parol evidence rule
- Distinction between Judge and jury as tribunal of fact

The extent to which the common law is applied under ss 10 and 12 is not clear under the Act. Mahoney et al⁴ suggests that the practical result of these provisions is a direct

¹ *Evidence Act 2006 Commencement Order 2007* (SR 2007/190), *Regulation 2*

² New Zealand Law Commission, *Evidence: Volume 2 – Evidence Code and Commentary*, para C64.

³ Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007), p 33, 45-46.

application of the common law. Although the Act's purposes and principles are the priority in ss 10 and 12, these will not be a barrier to the applications of the common law.

PURPOSE OF THE ACT

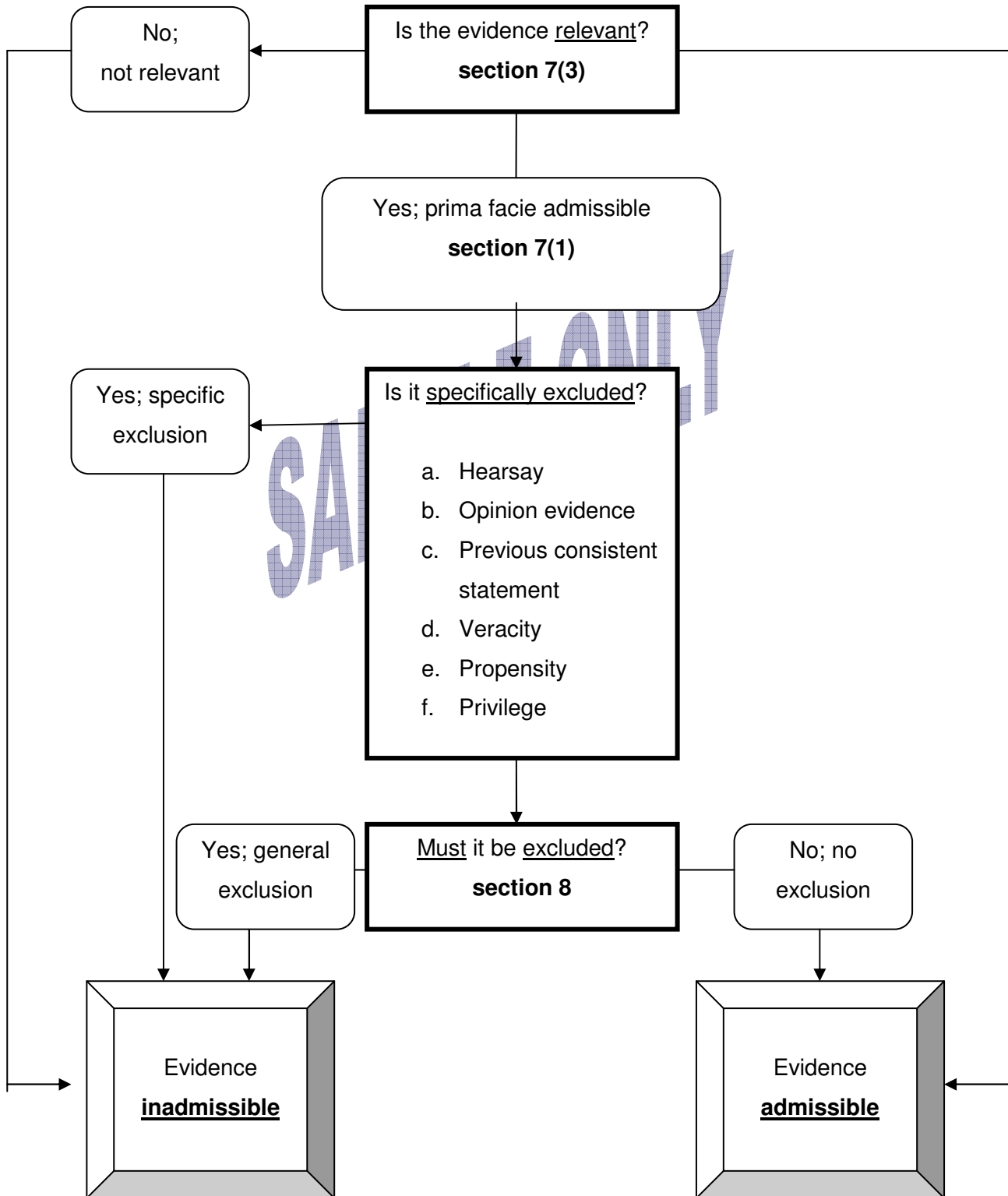
Section 6 sets out the purpose of the Act. The overarching objective of the Act is “to help secure the just determination of proceedings.” This is to be achieved through the six objectives set out in s 6, namely:

- providing for facts to be established by the application of logical rules; and
- providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990”; and
- promoting fairness to parties and witnesses; and
- protecting rights of confidentiality and other important public interests; and
- avoiding unjustifiable expense and delay; and
- enhancing access to the law of evidence.

⁴ Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007), p49.

Admissibility rules, privilege and confidentiality

GENERAL STRUCTURE OF ENQUIRY AS TO ADMISSIBILITY OF EVIDENCE



RELEVANCE

Section 7(1) of the Act states the general rule that, unless otherwise provided, relevant evidence is admissible in proceedings. Evidence that is not relevant is inadmissible.

Relevance is defined at **section 7(3)** to have “a tendency to prove or disprove anything that is of consequence to the determination of the proceeding”. This consists of two factors: materiality and probativeness.

Materiality asks whether the evidence is sufficiently relevant to an issue before the Court (“of consequences to the determination of the proceeding”). Probativeness is whether the evidence has the “tendency to prove or disprove” that issue of consequence.

Both factors of relevance must be satisfied for proposed evidence to be “relevant” within section 7(3). For example, in *R v Herewini*,⁵ a murder case involving a claim of self-defence, the High Court did not accept defendant’s evidence on the victim’s general propensity for violent behaviour. Although the victim’s actual aggression was material to Herewini’s argument of self-defence, it was not “probative of violence or the type of violence” alleged to have been exhibited by the victim during the encounter leading to the homicide.”⁶

Relevance versus weight

The test of relevance at section 7 requires only that the evidence have a “tendency” to prove or disprove a material proposition in the proceeding. This is a low threshold.⁷ Relevance focuses on whether a party’s proposed chain of reasoning is material and probative.

Once admitted, the degree of probativeness, or “weight”, to be given to the evidence is exclusively for the question for the trier of fact. The weight of proposed evidence, whether weak or strong, does not affect the preliminary question of law of admissibility.

⁵ *R v Herewini* (15 August 2007, HC Rotorua) CRI 2006-063-3151.

⁶ *Ibid.*

⁷ *R v Smith* [2007] NZCA 400, para 16.

GENERAL EXCLUSION

Section 8(1) sets out the requirements for general exclusion of evidence that is otherwise relevant. Unlike the common law, s 8 exclusion is mandatory rather than discretionary; the judge “must” exclude evidence that comes within s 8.⁸ Evidence must be excluded where: (a) its probative value is outweighed by its “unfairly prejudicial effect”; or (b) it will “needlessly prolong the proceeding”.

Unfair Prejudice

The test at **s 8(1)(a)** envisages a high threshold, requiring a risk of “unfair prejudice” to the proceeding *and* that such risk outweighs the probative value of the evidence. Although the Act does not provide definitions to these terms, the risk of “unfair prejudice” will likely refer to the danger that the jury will:

- (a) give more weight to the evidence than it deserves;
- (b) be misled by evidence (for example, appealing to jury’s sympathies or arouse their sense of contempt or horror); or
- (c) used for an illegitimate purpose.⁹

Photographs and videos

Generally photographs and videos are admissible in evidence but may be excluded where the Judge considers that they will prejudice the jury against the accused to an extent out of proportion to their probative value.¹⁰

R v Howe: the accused was charged with a number of riotous damage and the disputed evidence was a video of the riot with commentary by a police officer. While permitting the evidence, the Court observed that the commentary was not to be taken as “proper” and it should in general be kept to a minimum.¹¹

⁸ D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA8.4.

⁹ See *R v During* [1973] 1 NZLR 366.

¹⁰ *Accused* [1992] 1 NZLR 257.

¹¹ *R v Howe* [1982] 1 NZLR 618.

Jobe (No 1)¹²: The Court permitted a video of a murder scene and two graphic photographs of the victim's face. In so doing Eichelbaum CJ noted:

- in the modern era of television, many jurors will have been accustomed to depiction of violence, real or fictional, since an early age;
- Modern technology may often best achieve a comprehensive and accurate description of the scene in question;
- When a video is used to film a murder scene, care should be taken to allow that the camera does not dwell excessively on the body or horrific injuries. Any voice commentary should be strictly factual.

R v Baker:¹³ the probative value of photographs will be less if some other means of showing is available

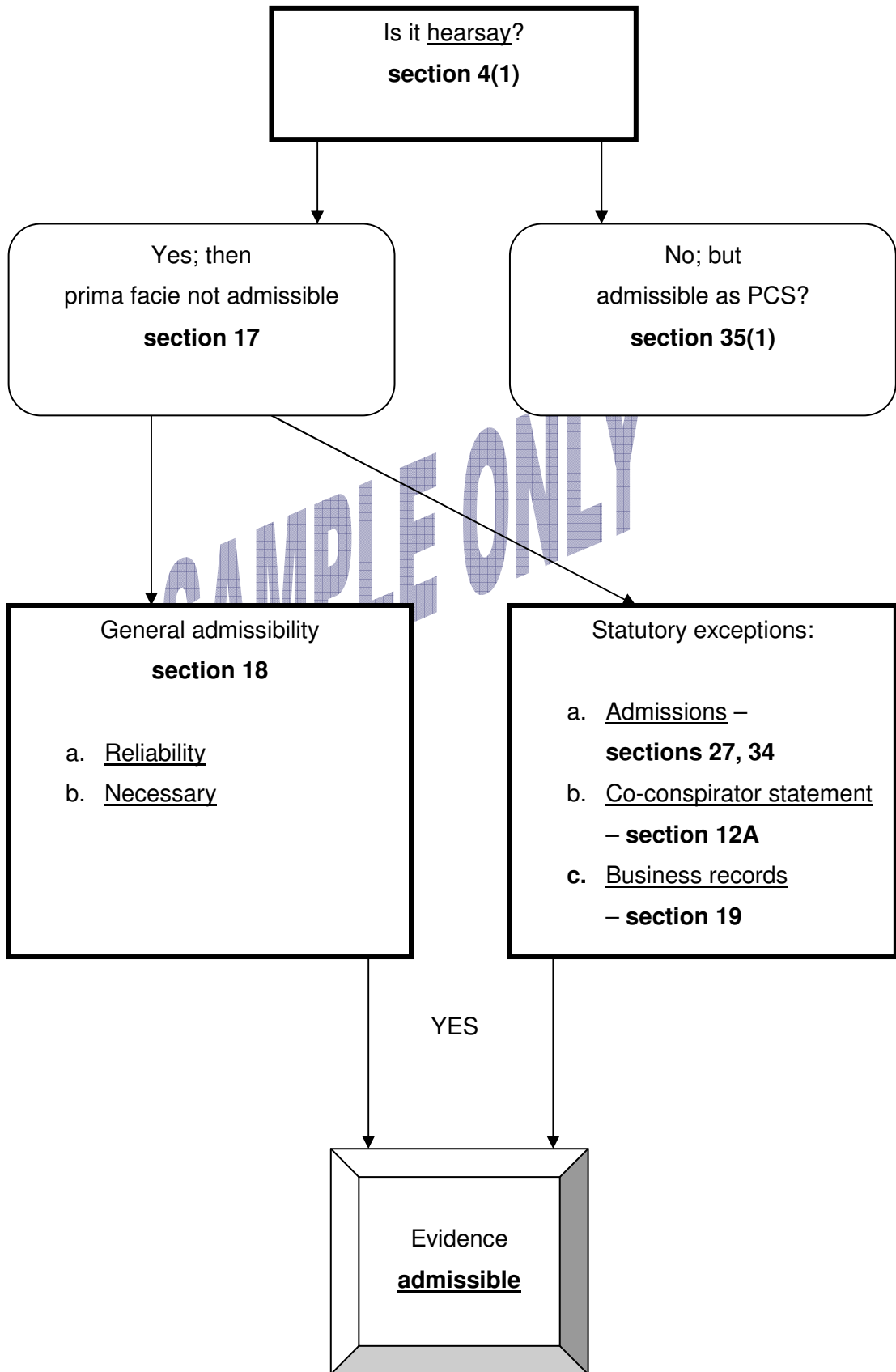
Needlessly prolong the proceeding

Under **s 8(1)(b)** evidence that "needlessly" prolong a case must be excluded. This is further supported by one of the purposes of the Act preserved in **s 6(e)** that the Act is "to help secure the just determination of proceedings by... avoiding unjustifiable expense and delay".

¹² *Jobe (No 1)* (High Court, Nelson T7/91, 8 July 1991).

¹³ *R v Baker* [1989] 1 NZLR 738.

THE HEARSAY RULE AND ITS EXCEPTIONS



A hearsay statement

A “hearsay statement” is defined at **s 4(1)** as an out-of-court statement made by a person other than the witness tendered for proof of its content.

At common law the rule against hearsay was to control the inability to test the “testimonial infirmities” – misperception, faulty memory, insincerity and ambiguity – of the maker of the statement.¹⁴ However, under the definition in **s 4(1)** a “hearsay statement” is limited to statements made by non-witnesses. The main rationale for the rule is, therefore, not applicable.¹⁵

Offered to prove the truth of its contents

Whether a statement is a hearsay statement, the focus is on the *purpose* or *use* of the statement rather than the mere fact that the statement was made out of court. If the only relevance of the statement is the truth it asserts, it is a hearsay statement.

If the statement is relevant for some purpose other than the truth of their contents, it is not a hearsay statement. For example, evidence of out-of-court statements offered merely to show that the statement was made, is not a hearsay statement. Such “state of mind” evidence may be admissible to *explain* the state of mind, knowledge or emotion of the hearer (the witness) or the speaker (the maker). In ***Subramaniam v Public Prosecutor***¹⁶, for example, a statement was held not to be a hearsay statement if its use was to explain why the witness did or believed something.

Subramaniam v Public Prosecutor. The accused’s defence, charged with an unauthorised possession of ammunition, was that he had been acting under duress. The Privy Council allowed the accused to testify the threats by terrorists since the relevance of the evidence was to show the *belief* of the accused in the threats

Ratten v R:¹⁷ The accused, charged with the murder of his wife, sought to exclude evidence of a telephone operator testifying to receiving a call from the deceased asking for the police

¹⁴ D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA Part 2 Subpart 1.2.

¹⁵ LC *Evidence Reform*, para 50; Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007).

¹⁶ *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 (PC); adopted in *Russell & Somers Ltd v Wellington Harbour Board* [1977] 2 NZLR 158.

¹⁷ *Ratten v R* [1971] 3 All ER 801 (PC).

in a distressed voice. The operator's evidence was admissible to show that the call had been made in a distressed voice. Lord Wilberforce directed the jury that it could use the evidence circumstantially to justify the inference that the maker had been in a state of fear at the time of making it.

The exclusionary rule

Section 17 sets out the general exclusionary rule for hearsay statements. A hearsay statement (as defined in **s 4(1)**) is not admissible unless provided by the Act. There are two ways a hearsay statement may be admissible: (1) general admissibility in s18; and (2) other statutory exceptions.

General admissibility of hearsay statements

Section 18 contains the general exception to the exclusionary rule. A hearsay statement is admissible if it is *reliable* and *unavailable*.

(a) Reliability

The first requirement in **s 18(1)(a)** is reliability of the hearsay statement. The surrounding "circumstances" must provide "reasonable assurance" that the hearsay statement is reliable.

Section 16(1) provides the definition of such "circumstances" with a non-exhaustive list of factors indicating reliability. A judge should consider (at least):¹⁸

- (a) The *nature of the statement* – whether it is written or oral, signed, witnessed, first-hand etc; and
- (b) The *contents of the statement* – e.g. consistency, confirmed by other evidence; and
- (c) Any circumstances relating to the *making of the statement* – e.g. how long after the event, what was the relationship between the maker and the witness etc; and
- (d) Any circumstances that relate to the "*veracity*" of the person who is not a witness – e.g. does the maker have a motive to fabricate; and
- (e) Any circumstances that relate to the *accuracy of the observation of the person who is not a witness*.

At common law spontaneous utterances were often admitted as part of the ***res gestae exception*** to the rule. Statements made contemporaneously with the occurrence of the

¹⁸ Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007).p59.

relevant event were admissible on this basis.¹⁹ The Act does not provide any specific res gestae exceptions. Such statements will be subject to the general admissibility test in s 18.

The veracity and accuracy of the *witness* are not relevant in the s18 enquiry. According to the Law Commission this is because the veracity and accuracy of a witness can be tested by the fact-finder.²⁰

However the Court of Appeal in ***R v Shortland***²¹ has recently questioned this approach. In that case the Court considered that the credibility of the witness can be relevant where the witness has trouble understanding what the maker of the statement has said.

(b) *Unavailability*

The second requirement for general admissibility in **s 18(1)(b)** is “unavailability”. **Section 16(2)** defines a person who is “unavailable as a witness”. The focus of ss 16(2) and 18(1)(b) enquiry is whether the person can give evidence and be cross-examined rather than whether the evidence can be obtained. A person who is “unavailable as a witness” is :

- dead; or
- outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
- unfit to be a witness because of age or physical or mental condition; or
- cannot with reasonable diligence be identified or found; or
- not compellable to give evidence.

Alternatively the Judge may consider at **s 18(1)(b)(ii)** that “undue expense or delay” would be caused if the statement maker were required to be a witness.

¹⁹ Robertson J, Brookbanks W, and Finn J (editors), *Adams on Criminal Law – Evidence* (6th student ed), (2009), EC9.04.

²⁰ LC *Evidence Code*, para C75.

²¹ *R v Shortland* [2007] NZCA 37.

Statutory exceptions to hearsay statements

A hearsay statement is admissible if it falls within one of the specific exceptions.

Admissions Exception

An admission by a party is admissible evidence against *that* party.

The admissibility and use of admissions in criminal proceedings are governed by ss 27-30.

Section 27(1) allows admissions *made by a defendant and offered by the prosecution*. If the admission is offered by the defendant, the prosecution cannot use it. Such admissions are barred by the previous consistent rule in s 35. Similarly, the admission cannot be offered by witnesses. Although there is no definition of an “admission in a criminal proceeding”, s 27(1) does not include “admission against [the defendant’s own] interest”. Under **s 27(3)** subparts 1 (hearsay), subpart 2 (opinion evidence and expert opinion evidence) and s 35 (previous consistent statements rule) do not apply to admissions.

Despite s 27(1), however, **s 27(2)** requires the prosecution to overcome the reliability rule (s 28) and the oppression rule (s 29).²²

- **Section 28** – where the defendant or the Judge raises the issue of the reliability of a defendant’s statement, the prosecution may not be able to offer the evidence. Where the defendant raises the issue (**s 28(1)(a)**), there must be an “evidential foundation”. Once the issue has been raised, **s 28(2)** shifts the burden of proof to the prosecution to satisfy the test for reliability on the balance of probabilities. In assessing this, the judge will take into account the factors in **s 28(4)**.
- **Section 29** – where the defendant or the Judge raises the issue whether the statement was “influenced by oppression”, the prosecution may not offer the evidence. It must have been influenced by “oppression” within the definition in **s 29(5)**. The burden of proof is the same as with s 28.

The admissibility and use of admissions in civil proceedings are covered by s 34.

Section 34(1) permits oral or documentary evidence of an admission in civil proceedings. An “admission” in a civil proceeding is defined in **s 4(1)** as a statement made by a person party to the proceeding; and “adverse to the person’s interest in the outcome of the proceeding”. As with criminal proceedings, **s 34(1)** renders inapplicable subpart 1, subpart 2, and s 35; so

²² Section 30 – improperly obtained evidence rule – is another provision for the prosecution to overcome. See Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007), EV30.

rules on hearsay evidence, opinion and expert evidence and previous consistent statements do not apply.

Business record exception

Section 19 allows hearsay statements in “business records”. The prior question is whether the document is a “business record” as defined in **s 16(1)**. The document must be:

- made to “comply with a duty”; or “in the course of a business and as a record of that business”; and
- made from information is supplied by a person with personal knowledge of the matters dealt with in the information.

This is a wide definition of “business record”. It is likely to cover common law decisions where statements in police notebooks and job sheets were held to be “business records”.²³

A hearsay statement in a “business record” is admissible pursuant to **s19(1)** if:

- The person who supplied the information is “unavailable as a witness”; or
- The person who supplied the information cannot remember; or
- There would be undue expense or delay if that person were to be required by the court.

Section 19 business record exception does not contain the requirement of “reasonable assurance that the statement is reliable” as in s 18. Instead the “necessity” part of the admissibility inquiry is extended to control the exception. If the records are challenged as not being sufficiently reliable, that can be dealt with as a matter of weight, or as a matter of the s 8(1)(a) balancing test between its probative value and prejudicial effect.²⁴

R v Kincaid:²⁵ The disputed evidence was a day book reporting the number of patients, which was challenged as a business record on basis of unreliability. The Court of Appeal held that business records need not be perfectly accurate and that any discrepancies can go to the weight to be given by the jury.

²³ *R v Hovell* [1986] 1 NZLR 500.

²⁴ Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007).

²⁵ *R v Kincaid* [1991] 2 NZLR 1.

OPINION EVIDENCE

Section 23 sets out the general rule that opinions are not admissible evidence, unless covered by ss 24 or 25. The rationale for this general exclusionary rule is a witness should testify only to what the witness has perceived (i.e. their experience); and the fact-finder is to draw the inferences (i.e. conclusions) from such facts.²⁶

An 'opinion' is defined at **s 4(1)** as 'a statement of opinion that tends to prove or disprove a fact.' It is difficult to draw clear distinctions between facts and opinions and the rule is seldom strictly applied.²⁷

Non-expert opinions

Section 24 allows opinion evidence if it is "necessary to enable the witness to communicate... what the witness saw, heard, or otherwise perceived." This is a two-stage test:

- First, the question is whether the opinion is *necessary*. An opinion is necessary if it is the only reasonable way to effectively communicate the information to the fact-finder.²⁸
- Second, the opinion must be from something *personally perceived*. It must be rationally based and within the general competence of a person in the witness' position.

Smith v R (2001) 206 CLR 650 (HCA): an example where the court excluded non-expert opinion evidence on the basis that the jury could draw the inference itself.

Shah v Police:²⁹ the opinion of a witness as to the age of the children based on observation of physical characteristics was found to be admissible.

R v Brokenshire:³⁰ non-expert opinion as to a person's sobriety admissible but must state the observed facts that led to that conclusion and cannot express an opinion on matters, such as their fitness to drive.

²⁶ D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA 23.2.

²⁷ D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA23.2.

²⁸ *R v Toka* (1994) 11 CRNZ 601; *Smith v R* (2001) 206 CLR 650.

²⁹ *Shah v Police* [2006] 2 NZLR 425.

³⁰ *R v Brokenshire* (CA 418/04, 23 June 2005).

Porter v Police:³¹ A sergeant's opinion in the smell of cannabis was admitted as non-expert evidence because the smelling and recognising the distinct smell of cannabis was within the general competence of police officers.

Expert opinion evidence

In order to be admissible as expert opinion evidence within **s 25(1)**, the opinion must be that of an "expert" and it must offer "substantial help" to the fact finder in understanding other evidence or ascertaining any fact in the proceeding.

(a) An "expert"

Section 4(1) defines "expert" as a "person with specialised knowledge or skill based on training, study or experience." This definition does not require a formal qualification to be an "expert" but it may add to the weight of the evidence if the expert's opinion is admitted. Although the threshold to qualify as an "expert" is not high, there is no comprehensive framework. The Court of Appeal in **R v B**³² suggested that it is enough that the subject matter of the opinion relates to a sufficiently recognised branch of science at the time the evidence is given. However this approach has been criticised for courts' oversight in allowing "junk science", which defeats the purpose of expert opinion evidence.³³

Stratford v Ministry of Transport [1992] 1 NZLR 486: A police officer's experience in investigating traffic accidents may make him or her an expert for the purpose of reconstructing a particular motor vehicle accident.

R v Menzies [1982] 1 NZLR 40: A police officer who had familiarised herself with the contents of a tape recording was held as a temporary expert. Because the case involved such complicated facts, there was strong reason for allowing the jury to have the assistance in the interests of accuracy.

³¹ *Porter v Police* (HC, Wellington, M258-85, 1 August 1985).

³² *R v B* [1987] 1 NZLR 362.

³³ See e.g. B Robertson and G.A. Vignaux, *Interpreting Evidence: Evaluating Forensic Science in the Courtroom* (1995).

(b) “Substantially helpful”

Section 25(1) requires the evidence to be “substantially helpful” in understanding other evidence or in ascertaining any fact that is of consequence. This implies a higher threshold than the general admissibility balancing test between probative value and prejudicial effect.³⁴

Section 25(2)(a) replaces the common law principle of the *ultimate issue* rule, which barred experts from giving evidence on the ultimate issue of the proceeding. But in *R v Eade*³⁵ the Court of Appeal cautioned that although there is no absolute rule of ultimate issue rule, the closer the evidence is to the central issue at the proceeding, the more risky it is to let it be admitted. Similarly, **s 25(2)(b)** replaces the common knowledge principle to allow expert opinion even if it is within the *common knowledge* of the jury.

(c) *Factual foundation of expert opinion*

The primary facts upon which the expert opinion is based on must be based on proper foundation – that is, by admissible evidence or be capable of being judicially noticed.

Section 25(3) confines expert opinion to the expert’s general body of knowledge in the expert’s field of expertise. **Section 129** allows the judge to admit reliable public documents. The courts are not likely to permit an expert to speculate or express opinions where there is no adequate supporting evidence.

Abadom:³⁶ reliance on the work of others does not infringe the rule against hearsay.

*R v Makoare*³⁷, for example, the court excluded a psychiatrist’s opinion that the sub-cultural context of the defendant’s residence removes his intent for its lack of sufficient factual foundation.

Reconstructions as expert opinion evidence

Where the reconstruction, experiment or demonstration involve technical knowledge in its performance, **s 25** will apply.³⁸ Where such reconstruction is relevant, reliable and not unduly prejudicial the evidence is admissible. The relevance is established by substantial

³⁴ D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA 25.7.

³⁵ *R v Eade* (2002) 19 CRNZ 470.

³⁶ *Abadom* [1983] 1 All ER 364.

³⁷ *R v Makoare* [2001] 1 NZLR 318.

³⁸ Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007), p80.

similarity between the reconstruction and the actual conditions at issue.³⁹ Any residual differences will presumably go to the weight of the evidence.

R v Baker:⁴⁰ an experiment conducted by a female police officer with similar body features to the deceased was admissible. Its probative value was to show that the suicide could not have been carried out in the manner suggested by the defendant. It was relevant despite the trial Judge acknowledging that the jury was likely to attach great weight to an experiment of this kind.

Harbour:⁴¹ The Court of Appeal adopted *R v Baker*. A test was admitted to give an indication of the length of time a print was likely to remain identifiable because it was a scientifically conducted experiment designed to establish a probability.

Risks of expert opinion evidence

The higher standard of accuracy and objectivity required in assessing the admissibility of expert opinion is because the testimony of an expert is likely to carry more weight than that of an ordinary witness. Justice Sopinka, in an unanimous decision of the Supreme Court of Canada in **R v Mohan**⁴², summarises this need for a high level of scrutiny:

“[an expert opinion evidence] dressed up in scientific language which the jury does not easily understand and submitted by a witness with an impressive background and credentials... may be accepted by the jury as being *virtually infallible* and as having more weight than it deserves [emphasis added].”

Similarly, Cresswell J in **National Justice Compania Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer**⁴³ has emphasised the importance of objectivity:

³⁹ *R v Harbour* [1995] 1 NZLR 440.

⁴⁰ *R v Baker* [1989] 1 NZLR 738.

⁴¹ *R v Harbour* [1995] 1 NZLR 440.

⁴² *R v Mohan* [1994] 2 SCR 9.

⁴³ *National Justice Compania Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 followed in *Air Chathams Ltd v Civil Aviation Authority of New Zealand* (2003) 16 PRNZ 676 (HC).

“an expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise... An expert witness... should never assume the role of an advocate.”

SAMPLE ONLY

PREVIOUS CONSISTENT STATEMENT

Section 35(1) sets out the general rule that the previous consistent statements (hereinafter PCS) of a witness are inadmissible unless the exceptions in **s 35(2) or (3)** apply. A “previous statement” is defined at **s 4(1)** as a statement made by a witness any time other than at the hearing at which the witness is giving evidence.

The rule against PCS recognises that as a general matter, PCS have little probative value to an issue in the proceeding. More specifically, the rule is based on the fear of deliberate manufacture of evidence⁴⁴ and the principle that a witness should not be allowed to boost his or her own credibility by referring to what he or she had earlier said.⁴⁵ The Law Commission has stated that the intention of s 35 is to avoid the courts from being inundated with voluminous amounts of repetitive material in order to “shore up” a witness’ consistency.⁴⁶ In other words, consistency does not necessarily equate to credibility; PCS must render consistency a relevant matter to the issue in the case.

Exceptions to the rule

There are now two exceptions to the rule against PCS – where there is a challenge to the witness’ veracity or accuracy,⁴⁷ or where there is reasonable assurance that the PCS is reliable and it contains information which the witness is unable to recall⁴⁸. Other exceptions that existed at common law do not survive the Evidence Act 2006. In **R v Barlien**⁴⁹ the Court of Appeal held that the exclusion of these inclusionary exceptions to the rule against PCS in the Evidence Act 2006 was deliberate and reiterated that the Act is a complete code.

(a) *Section 35(2): attack against witness’ veracity exception*

⁴⁴ *R v Roberts* [1942] 1 All ER 187, 191; *R v Smith* [1989] 3 NZLR 405 – evidence of what the accused told psychiatrists not allowed in support of self-defence or provocation.

⁴⁵ D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA35.4.

⁴⁶ *LC Evidence Code*, para C167.

⁴⁷ *Evidence Act 2006*, s35(2)

⁴⁸ *Evidence Act 2006*, s 35(3).

⁴⁹ *R v Barlien* [2009] 1 NZLR 170.

The first exception is in **s 35(2)** where there is a challenge to the witness' veracity (defined at **s 37(5)** as "the disposition of a person to refrain from lying") and that challenge is based on either a previous *inconsistent* statement, or a claim of recent invention. In such a case, a PCS is admissible to the extent that the statement is "necessary to respond to a challenge to the witness' veracity or accuracy."

When the challenge to the witness' veracity is on the basis of a claim of recent invention, what is crucial is that the cross-examination attacking the witness' veracity is based on the witness' recent invention.⁵⁰ The common law limitations on what amount to "recent complaint" does not apply. For example, there is no longer any requirement for "the complaint to be made at the first reasonable opportunity"; or to call the person to whom the complainant was made.⁵¹

Where a PCS is admissible under s 35(2) it is because the PCS can rebut the allegation that the witness has the motive to lie. Thus if the motive to lie arose *after* the PCS was made, it is less likely that PCS is false.

(b) *Section 35(3): statements the witness is "unable to recall"*

Section 35(3) permits a PCS if the circumstances relating to the statement provide reasonable assurance that the statement is reliable and the statement provides the court with information that the witness is unable to recall.

The Law Commission stated that this provision was intended to cover the situation where a witness wishes to consult a previous statement containing details the witness cannot recall.⁵²

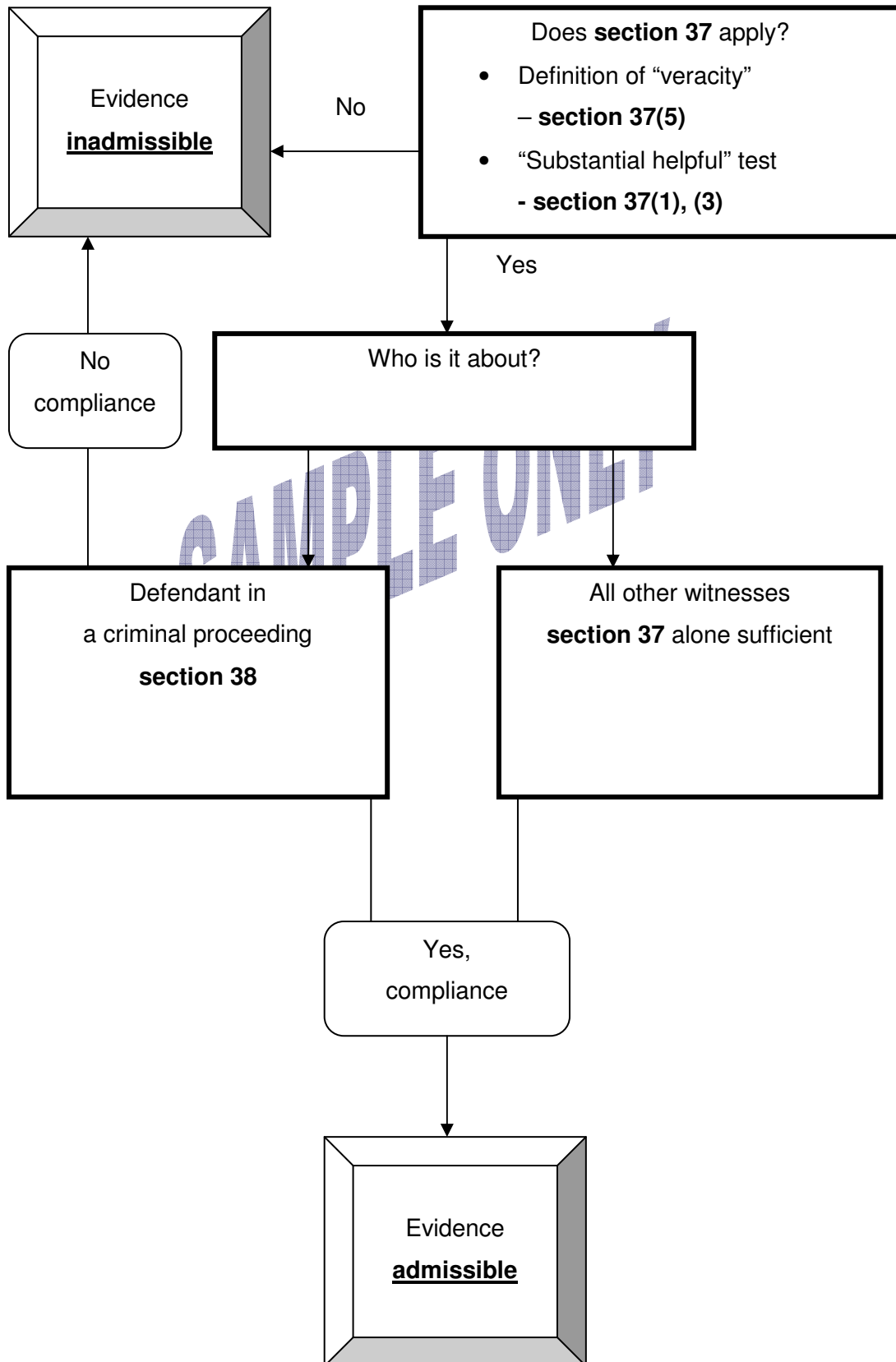
Section 16(1) defines where the "circumstances relating to the statement" may provide reasonable assurance that the statement is reliable.

⁵⁰ *R v S* [2008] NZCA 152.

⁵¹ D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EA35.6; Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007) pp 134-135.

⁵² *LC Evidence Code* para C169.

VERACITY



Definition

Section 37(5) defines veracity as “a person’s disposition to refrain from lying”.

The veracity rule

Section 37(1) sets out the basic veracity rule of “substantial helpfulness”: veracity evidence must be *substantially helpful* in assessing the veracity of the person in question.

In assessing the substantial helpfulness of the evidence, **s 37(3)** provides factors that a judge may consider. This is not an exhaustive list. Among others, veracity evidence may be substantially helpful if it tends to show:

- (a) the lack of veracity under legal obligation to tell the truth;
- (b) convictions indicating propensity for dishonesty;
- (c) prior inconsistent statement;
- (d) bias on the part of the witness
- (e) motive on the part of the witness to be untruthful.

Evidence of a witness’ physical or mental condition may be relevant. Section 85(2)(b) gives the Judge general discretion to disallow evidence based on “any physical, intellectual, psychological or psychiatric impairment of the witness.”

Since the factors in s37(3) are not exhaustive, **s 13(a)-(c) Evidence Act 1908** can be considered; even though they are not binding (**s 10(c)**). These include:

- Remoteness of the evidence to the legal issue;
- The nature of allegations and its impact on the fact-finder’s opinion of the witness;
- How long it will take to prove or disprove the evidence;
- The connection in time between the evidence with an essential part of the defence’s case.

Under **s 37(4)** a party who calls a witness may not offer evidence to challenge that witness’ veracity unless the judge determines the witness to be “hostile”; but may offer evidence as to the facts in issue contrary to the evidence of that witness.

Notably, the Select Committee has specifically removed reputation evidence from the list; and thus would be difficult to admit such evidence under s37.

The veracity of a defendant in criminal proceedings

If the proposed veracity evidence relates to a defendant in a criminal proceeding, **s 37(2)** requires compliance also with **s 38**.

To satisfy s 38 the defendant must first have *triggered* s 38. Under **s 38(2)(a)** the defendant can do this in two ways:

- The defendant offers evidence about his or her own veracity; or
- The defendant challenges the veracity of a prosecution witness.

Once the defendant has triggered s 38, the Judge must permit the questioning.⁵³ In determining this, the Judge may consider the factors in **s 38(3)**:

- (a) the extent to which the defendant's veracity or the veracity of a prosecution witness has been put in issue because of the defendant's trigger;
- (b) the time passed since the conviction about which the prosecution seeks to give evidence;
- (c) whether defendant's evidence about veracity was elicited by the prosecution

The Court of Appeal in ***R v Lahina***⁵⁴ noted that it is wrong for the prosecution deliberately elicit evidence from a defendant for the purpose of forcing the defendant into giving evidence about his or her own veracity. The defendant has not "triggered" s 38 since the defendant was only responding to a question.

In addition to meeting the requirements of s 38, the evidence must be substantially helpful within the meaning of s37.

⁵³ *Evidence Act 2006*, s 38(2)(b)

⁵⁴ *R v Lahina* [2008] NZCA 251.

PROPENSITY EVIDENCE

1. Is it propensity evidence?
2. Who is it about?
3. Is it about veracity?
4. Is it about propensity?

Propensity evidence

Section 40(1) defines propensity evidence as “any evidence that tends to show a person’s propensity to act in a particular way or have a particular state of mind.” The definition specifically excludes evidence of “an act or omission that is one of the elements of the offence for which the person is being tried, or the cause of action.”

Propensity rules

The general rule under **s 40(2)** is that propensity evidence is admissible in a civil or criminal proceeding. The rule is subject to special rules in three situations:

- a. Propensity evidence about a defendant in a criminal proceeding must comply with relevant propensity evidence provisions in the Act. More specifically:
 - i. propensity evidence about defendants – offered by himself or herself⁵⁵ or offered by the prosecution⁵⁶;
 - ii. propensity evidence about co-defendants⁵⁷;
- b. Propensity evidence about the sexual experience of a complainant in a sexual case;⁵⁸
- c. Evidence that is solely or mainly relevant to veracity – s 40(4); veracity rules are set out in s 37.

⁵⁵ *Evidence Act 2006*, s 41.

⁵⁶ *Ibid* s43.

⁵⁷ *Ibid* s42.

⁵⁸ *Ibid* s 44.

Defendants in criminal proceedings

Propensity evidence about defendants in a criminal proceeding is admissible if it complies with ss 41 or 43.

Section 41(1) permits a defendant in a criminal proceeding to offer propensity evidence about himself or herself. If the defendant “triggers” s 41(1), subject to leave being granted by the judge, the prosecution or other party may then offer propensity evidence about that defendant pursuant to **s 41(2)**. If the judge permits the prosecution to offer the propensity evidence, it does not need to comply with s 41(3). Instead, courts will apply the balancing test in **ss 7 and 8**.

Section 43 deals with what was traditionally known as “similar fact evidence.” **Section 43(1)** provides that propensity evidence about a defendant in a criminal proceeding can only be admitted if the probative value of the evidence outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.

In assessing the probative value of the proposed propensity evidence, the judge *may* consider the factors listed at **s 43(3)(a)-(f)**, which are:

- a. the frequency of particular conduct relied on;
- b. the connection in time between such occasions;
- c. the extent of similarity between the acts, omissions, events or circumstances;
- d. the number of persons making allegations;
- e. the possibility of collusion or suggestibility; or
- f. the extent of unusualness

Section 43(3)(a) – frequency

Probative value of propensity evidence increases with the number of acts, omissions etc that demonstrate the defendant’s propensity.

R v Smith:⁵⁹ the accused was charged with murdering his third wife, who had drowned in the bath soon after marrying him and rewriting her will in his favour. The evidence that the accused’s two previous wives had died in the same circumstances was admissible. It was highly unlikely for someone to be involved in such an experience so many times.

⁵⁹ *R v Smith* (1915) 11 Cr App R 229.

Section 43(3)(b) – Timing

Probative value increases as the acts, omissions etc making up the propensity evidence occur closer in time to the occurrence of the offence being charged.

R v Straffen:⁶⁰ the accused, who had escaped from a mental institution, was charged with the murder of a girl who had gone missing in the nearby area. The disputed evidence was of a charge of a similar killing, on which he had been found unfit to plead. This was admitted because the short time span combined with the small geographical space and the particular modus operandi indicated overwhelming evidence of guilt.

Section 43(3)(c) – the extent of similarity

Probative value increases with the degree to which the circumstances of the propensity evidence match those of the current offence. At common law such evidence was admissible if there was a “striking similarity” between the incidences.⁶¹ Particularly where the propensity evidence concerned the identity of the person who committed the crime, the courts usually required a higher standard of admission. While the test is not in the Evidence Act 2006, it remains relevant as a warning to judges about too readily admitting evidence for this purpose.

The House of Lords in **Boardman v DPP**⁶² sets out the test of “striking similarity”. The case concerned a headmaster who was charged with one count of buggery and two of incitement to buggery with boys at his school. Each count relating to a different boy but it was held in one trial. Their Lordships held the evidence by each victim was relevant and admissible to guilt on the other count. In so doing Lord Wilberforce stated that there is no automatic answer to whether “similar fact” evidence is admissible and is dependent on the facts of each case. Their Lordships also emphasised the “basic principle” that the admission of similar fact evidence is exceptional and requires a strong degree of probative force.

R v Healy:⁶³ the accused was in the same community at the time the young members of the community were abused.

⁶⁰ *R v Straffen* [1952] 2 All ER 657.

⁶¹ e.g. *R v Scarrott* [1978] 1 All ER 672; *R v Accused* [1992] 2 NZLR 187; *R v Healy* [2007] 3 NZLR 850. See also *D.L. Mathieson (general editor), Cross on Evidence* (looseleaf), LexisNexis, EV40.2.

⁶² *Boardman v DPP* [1975] 3 All ER 887.

⁶³ *R v Healy* [2007] 3 NZLR 850.

R v Taea.⁶⁴ the Court of Appeal did not consider it necessary to refer back to the law prior to the Evidence Act 2006 for guidance in dealing with propensity evidence. The Court stated s 43 gives adequate guidance on the approach to be taken.

Section 43(3)(d) – number of propensity accusers

The greater the number of complainants may be indicative of the accused's guilt. This is likely to be supplemented by the fact that complainants be independent and that there is no possibility of collusion.⁶⁵

Section 43(3)(e)

The judge must assess whether the allegations against the defendant are untrue because they are the result of collusion or suggestibility.

Section 43(3)(f) unusualness

The probative value of propensity evidence is greater when the circumstances of that evidence and those of the charge are both unusual. This is an important factor where identity is in question. For example when several complaints are made of offences with an unusual modus operandi, s 43(3)(f) will apply.

R v McIntosh.⁶⁶ The accused, charged with burglary, had previous convictions for such offending. The Court permitted evidence of one group of previous convictions (burglary in one residential area) on the basis that the circumstances of those offences displayed a “sufficient signature” of a common modus operandi.

R v Holtz.⁶⁷ To be admissible, the probative value of evidence of past conduct outweighs illegitimate prejudice to the accused. The approach applied in one set of circumstances should not be regarded as a rule to be applied in a different case.

There is no different rules governing the use of such evidence when identity is an issue.

⁶⁴ *R v Taea* [2007] NZCA 472.

⁶⁵ D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA43.4(d).

⁶⁶ *R v McIntosh* (1991) 8 CRNZ 514.

⁶⁷ *R v Holtz* [2003] 1 NZLR 667.

R v Healy.⁶⁸ The Court noted s 43 does not require a ‘checking off’ of all of the listed factors in s 43(3) followed by a “mathematical calculation of those factors present against those which are not.”

In assessing the prejudicial effect of the proposed propensity evidence, the judge *must* consider the factors at **s 43(4)**. This includes:

- whether the evidence is likely to unfairly prejudice the defendant; and
- whether the Judge or jury will tend to give it disproportionate weight.

This list is expressly not exhaustive and other factors may be considered by the judge.

Co-defendants in criminal proceedings

Section 42(1) deals with propensity evidence about co-defendants in criminal proceedings. A defendant may offer propensity evidence about a co-defendant if three prerequisites are met:

- the evidence is ‘relevant to a defence raised or proposed to be raised by the defendant;
- the judge grants permission to do so; and
- the defendant gives written notice to all co-defendants.

Section 42(2)(a) and **(b)** allows for the requirement to give notice to be waived by all co-defendants or by the judge if it is in the interests of justice.

Sexual cases

In sexual cases, **section 44(1)** prohibits evidence that relate directly or indirectly to the sexual experience of complainant with any person other than the defendant, without the permission of the judge. This is a departure from the common law position where a complainant in a sexual case could be cross-examined as to their sexual association with persons other than the accused.⁶⁹ Instead, to be admissible under the Act 2006, the test in **section 44(3)** is to ask whether the evidence is “of such direct relevance to a fact in issue... that it would be contrary to the interests of justice to exclude it.”

⁶⁸ *R v Healy* [2007] 3 NZLR 850.

⁶⁹ E.g. *R v Uiti* [1983] NZLR 532.

Section 44(2) is a total bar on evidence that relate to the reputation of the complainant. Notably, there is no judicial discretion to admit such evidence as there was at common law. This reflects the Select Committee's view that such evidence can never be relevant.⁷⁰

Veracity versus propensity

Section 40(4) addresses the relationship between veracity rules and the propensity rule. It gives priority to the veracity rules – contained in **section 37** – when the evidence is “solely or mainly relevant to veracity.” The Act does not provide a guideline as to whether propensity evidence is “mainly” relevant to veracity. Mahoney suggests that this is a question of degree; and that the declared purpose of the party offering the evidence is not determinative.⁷¹

R v Holtz:⁷² Court of Appeal held that a special test is not necessary, though care must be taken to avoid being misled by invalid reasoning.

M v R:⁷³ Character evidence carries relatively little weight where the alleged offending is of a kind which could be expected to be concealed by an accused from those who may observe him in a domestic situation.

R v O'Hagan:⁷⁴ Since prior convictions carry such a risk of illegitimate prejudice, the prosecution should always seek leave before adducing evidence of prior convictions

⁷⁰ Judicial and Electoral Select Committee, *Select Committee Report on the Evidence Bill*, 24 October 2006.

⁷¹ Mahoney p165, EV40.05(2)

⁷² *R v Holtz* [2003] 1 NZLR 667.

⁷³ *M v R* [2008] NZSC 108.

⁷⁴ *R v O'Hagan* [2009] 1 NZLR 490.

PRIVILEGE

Part 2, Subpart 8 of the Evidence Act sets out the framework for statutory privileges and discretions. Sections 68 to 70 deal with Confidentiality, which will not be discussed here.

The privilege rule is grounded in the protection of freedom of communication between clients and their legal advisers. In adversarial systems, where the truth is found by each party putting their best case forward, a client must be assured such freedom to enable them to disclose the whole truth without fear that what they say will be used against them.

As privilege limits the admissibility of relevant evidence in Court, the applicable sections in the Act 2006 ought to be strictly and narrowly construed.⁷⁵

Definitions and interpretations

Section 51 contains definitions for key terms related to the types of privilege conferred under **ss 54-56**.

Under **s51(1)**:

- “lawyer” has the same meaning given to it by the Lawyers and Conveyancers Act 2006 – “a person who holds a current practising certificate as a barrister or as a barrister and solicitor”⁷⁶
- “legal adviser” is a lawyer or registered patent attorney.

Section 56(4) extends privilege to communications by the “authorised representatives” of either or both of these parties.

Legal effect of privilege

Section 53 sets out the legal effect of privilege as a general matter. While sections 54 to 60 deal with each type of privilege, s 53 should be read together with them. In general terms, a privilege holder has:

- The right to refuse to disclose material covered by the privilege to another;⁷⁷ and

⁷⁵ D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA Part 2 Subpart 8.3.

⁷⁶ *Lawyers and Conveyancers Act 2006*, s 6.

- The entitlement to restrain or prevent another person from doing so.⁷⁸

Section 53(4) bolsters the privilege-holder's control of the privileged material by granting the Court a discretion to "restrain or otherwise prevent the use of privileged material" when it comes into hands of someone without the holder's consent. This statutory discretion adds to the entitlement at common law to ask a court to restrain the use of confidential information on equitable grounds.⁷⁹

Section 54: Legal advice privilege

Section 54 codifies what was previously known at common law as "solicitor-client privilege". It is well-established in common law jurisdictions that this privilege is not "regarded merely as a rule of evidence... but rather as a fundamental legal right."⁸⁰

For a statement to be protected by the s 54 privilege, it must meet the two requirements in **s 54(1)(a)** and **(b)**.

- (a) The communication must have been *intended* to be confidential.
 - The presence of a third party does not necessarily negate such intention but it is a relevant factor in assessing whether the communication was intended to be confidential.⁸¹
- (b) The communication must have been made for the *purpose* of obtaining or giving professional legal advice.

Once intention to be confidential is established, it is immaterial whether the client and the legal adviser took due precautions to prevent a third party overhearing their conversation.⁸² This is supplemented by the Court's discretion at s 53(4) to limit the use of such evidence in the proceeding.

⁷⁷ Evidence Act s 53(1)

⁷⁸ Evidence Act s 53(3)

⁷⁹ *Calcraft v Guest* [1898] 1 QB 759; *Lord Ashburton v Pape* [1913] 2 Ch 469.

⁸⁰ *Solosky v R* (1979) 105 DLR (3d) 745.

⁸¹ D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA 54.5.

⁸² *Public Transport Authority v Leighton Contractors Pty Ltd* (2007) 242 ALR 181.

Section 56 Litigation privilege

Section 56 restates the privilege known at common law as “litigation privilege”. The rationale for this head of privilege is to facilitate the obtaining and preparing of evidence for a party in support of his or her case.⁸³ Litigation privilege is thus essential to the adversary system, which turns on parties to best represent their case.

Section 56(1) requires the communicated material to have been created for the “dominant purpose” of a real or apprehended proceeding. The Act preserves the test set out by the Court of Appeal in *Guardian Royal Exchange Co v Stuart*⁸⁴ and later confirmed by Randerson J in *Carter Holt Harvey Ltd v Genesis Power Ltd (No 7)*.⁸⁵ This is not a high threshold and it would be satisfied where the privilege-holder had reasonable grounds for expecting litigation.⁸⁶

Section 56(2) echoes this sentiment, requiring the privilege holder either be or “reasonably contemplate becoming” a party to a proceeding or an anticipated proceeding. Common law authorities suggest that there must be a definite prospect of proceedings, not a vague anticipation of it.⁸⁷

Waiver of privilege

Section 65(1) provides that only the privilege holder may expressly or impliedly waive privilege. An agent who is authorised to waive a privilege on behalf of the holder can do so under **subsection (2)**. Section 65 reaffirms that privilege belongs to the holder and that confidence is a key part of legal privilege.

Section 65(2) sets out the general test for a waiver, the key elements of which are that:

- the disclosure is voluntary;
- is of any significant part of the privileged material;
- made in circumstances that are inconsistent with a claim of confidentiality.

⁸³ D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA 56.1

⁸⁴ *Guardian Royal Exchange Co v Stuart* [1985] 1 NZLR 596.

⁸⁵ *Carter Holt Harvey Ltd v Genesis Power Ltd (No 7)* [2007] 3 NZLR 794.

⁸⁶ Robertson J, Brookbanks W, and Finn J (editors), *Adams on Criminal Law – Evidence* (6th student ed), Brooker’s, (2009), EC20.10(3).

⁸⁷ *Bay on the Principles and Practice of Discovery*, 1885, as cited in D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA 56.5.

The Evidence Act 2006 does not define how a disclosure is “voluntary”, what amounts to a “significant part” or “circumstances that are inconsistent with a claim of confidentiality.” As such, we need to refer to common law pursuant to ss 10(c) and 12.

Regarding the meaning of “voluntary”, Mahoney suggests that New Zealand courts are likely to follow the Australian courts where, in a similar legislative context, “voluntary” has been found to mean “not by mistake”.⁸⁸

What amounts to a “significant part” depends on the substance rather than quantity of the privileged material.⁸⁹

Section 65(3) provides that a privilege holder waives his or her privilege by:

- putting “in issue” the privileged material in a proceeding; or
- instituting proceedings against a person in possession of the privileged material in such a way as to put the privileged matter in issue between the parties.

The rationale for this “at issue” waiver is, as put by G.P. Harris, because the “contents of the communication itself is the evidence that must be considered” to decide on the issue of a proceeding.⁹⁰ Paragraph (b) of s 65(3) preserves the common law position where a client who sues a solicitor was held to have impliedly waived privilege.⁹¹

Scope of a waiver

The Act does not state the scope of a waiver and we need to look to the common law pursuant to ss 10(c) and 12. At common law, an express can be for limited purposes.⁹² The privilege in the document stands and can affect the way a Court orders regarding the use of those documents.⁹³ However a party wishing to make only a limited waiver should act accordingly, for example by making it clear that the waiver is limited, and taking steps to

⁸⁸ *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12 as cited in Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007), p261.

⁸⁹ *Bete Fog Nozzle Inc v Delavan Ltd* (HC, Auckland CIV 2008-404-169, 18 June 2008).

⁹⁰ G. P. Harris, as cited in D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA 65.5.

⁹¹ Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007), p264.

⁹² *B v Auckland District Law Society* [2004] 1 NZLR 326.

⁹³ For e.g. *B v Auckland District Law Society; ISTIL Group Inc v Zahoor* [2003] 2 All ER 252.

ensure that the loss of confidentiality in the material is confined to what is necessary for the purpose of the limited waiver.⁹⁴

Section 65(4) states that a waiver does not include disclosures of privileged material that occur “involuntarily or mistakenly or otherwise without the consent” of the privilege holder. It is unclear, however, whether accidental waiver (that was possible at common law) is still possible under the Act. The exclusion of accidental disclosure in the Act 2006 weakens the protection offered by the privilege but **s 53(4)** still gives judges a discretion to protect the privileged material (although he or she is not required to do so).

Powers of judge to disallow privilege

Section 67 sets out two exceptions to certain privileges – those in ss 54 to 59 and s 60 – by granting judges the powers to disallow privilege in the specified circumstances.

Section 67(1) codifies the “dishonest purpose exception” – judges *must* disallow privilege if satisfied that there is a prima facie case that the privileged occasion was used for either a dishonest purpose or criminal purpose. The threshold to disallow privilege is high.⁹⁵

Section 67(2) introduces a new class of exception, previously known as “innocence at stake” defence.

Prior to the Evidence Act 2006 it was accepted at New Zealand common law that legal professional privilege was absolute.⁹⁶ Now under s 67(2) judges have discretion to disallow privilege if this is “*necessary* to enable the defendant in a criminal proceeding to present an *effective defence*.” The Act 2006 does not provide guidance as to what amounts to an “effective defence” and it is still unsettled elsewhere in commonwealth jurisdiction.

An argument for a more lenient application of s 67(2) draws from the rationale that s 67(2) helps to ensure that an innocent is not wrongfully convicted.⁹⁷ Section 24(3) of the New

⁹⁴ *R v Bain* (CA 312/2008, 24 December 2008); [2008] NZCA 585.

⁹⁵ For e.g. *Gemini Personnel Ltd v Morgan & Banks Ltd* [2001] 1 NZLR 672. D.L. Mathieson (general editor), *Cross on Evidence* (looseleaf), LexisNexis, EVA67.3 also notes the use of the words “strong prima facie case” by the Law Commission.

⁹⁶ *R v King* [2007] 2 NZLR 137, following *R v Derby Magistrates’ Court, ex parte B* [1996] AC 487.

⁹⁷ See e.g. Adrian Zuckerman, “Legal Professional Privilege: the Cost of Absolutism”, *112 Law Quarterly Review* 535, (1996).

Zealand Bill of Rights Act 1990 grants an accused a right to adequate time and facilities to prepare a defence. However the Court in ***Attorney-General v Otahuhu District Court***⁹⁸ has held that s 24(d) does not create a special discovery process for material in the hands of third parties. The court also held that s 24(3) is that an accused has *sufficient*, not full or complete, material. In addition, non-compliance with the NZBORA is prima facie exclusion of evidence only.⁹⁹

There is also strength in the view that the interpretation of s 67(2) should be narrow because privilege is fundamental to the justice system as a whole. The Law Commission has expressed a view that a test that pits the interests of the defendant against those of the privilege holder is not sufficient to protect the certainty of confidentiality.¹⁰⁰

SAMPLE ONLY

⁹⁸ *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740.

⁹⁹ *Police v Kohler* [1993] 3 NZLR 129.

¹⁰⁰ New Zealand Law Commission, *Evidence Law: Privilege*, Preliminary Paper No. 23 (1994), p75.

Trial process

WITNESSES

Eligibility and compellability

The two core principles underlying the handling of witnesses are eligibility and compellability. **Section 71(1)** states the general rule that all persons are both eligible and compellable to give evidence, subject to certain exceptions in ss 72-75 of the Act. Section 71 abolishes the common law rule of non-compellability for the spouse of a defendant in a criminal case.

Exceptions

- **Section 72:** judges, jurors and counsels are ineligible to give evidence.
- **Section 73:** defendants and co-defendants in criminal proceedings are not compellable.
- **Section 74:** The Sovereign, Governor-General, Sovereign or Head of State of a foreign country, or a Judge (“in respect of the Judge’s conduct as a Judge”) are not compellable to give evidence.
- **Section 75:** Bank officers are not compellable to give evidence.

Child witnesses and persons of defective intellect

Section 71 does not differentiate between categories of person, either on age or other grounds. Witnesses under the age of 12 years are eligible and compellable to give evidence. However the judge has residual discretion under **section 8** to exclude the testimony.

Regarding child witnesses, Evidence Act 2006 does not require the common law test of competence, where the judge had to determine the witness’ understanding of the difference between lies and truth or of the importance of telling the truth.¹⁰¹

Regarding persons of defective intellect, the judge had a discretion to declare a witness incompetent if the witness was in fact too “weak-minded” to testify or lacked the ability to testify.¹⁰² As mentioned above, **s 71** does not make exclude such witnesses. However **section 85** grants the judge has a discretion to disallow “unacceptable questions”, having

¹⁰¹ *R v Brasier* (1779) 1 Leach 199.

¹⁰² *R v Whitehead* (1886) LR 1 CCR 33;

regard to, among other things, “the age or maturity”¹⁰³ and “any physical, intellectual, psychological, or psychiatric impairment”¹⁰⁴ of the witness.

Where such evidence is admitted, any perceived deficits in testimonial capacity will go to the weight of the evidence.

R v Turner dealt with a criminal case dealing with the evidence of a 7year old child complainant. Instead of a test of competence the court makes clear that pursuant to s 77(2), a witness under 12 years must be:

“(a) informed by the Judge of the importance of telling the truth and not telling lies; and
(b) after being given that information, make promise to tell the truth before giving evidence.”

SAMPLE ONLY

¹⁰³ *Evidence Act 2006*, s85(2)(a).

¹⁰⁴ *Ibid* s 85(2)(b).

QUESTIONING OF WITNESSES

Section 84 sets out the general framework in the trial process:

1. Witness gives the evidence in chief (direct examination); then
2. Cross-examination by other parties; then
3. Re-examination by the calling party.

DIRECT EXAMINATION

Direct examination is dealt with by **s 84(1)(a)**, where a witness gives “evidence in chief”, This is where a party who has called a witness to give evidence on the party’s behalf can elicit evidence relevant to the proceeding and favourable to the calling party’s case. The focus of direct examination is on the witness to obtain testimony in support of the calling party’s case. Examination in chief is subject to the prohibition on leading questions and certain unacceptable questions, discussed below.

Unacceptable questions

Section 85 gives the judge a discretion to disallow, or direct that a witness is not obliged to answer, any question that the judge considers “improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.”

In assessing this, the judge may consider the factors in **s 85(2)**:

- The age or maturity of the witness
- Any physical, intellectual, psychological, or psychiatric impairment of the witness
- The linguistic or cultural background or religious beliefs of the witness;
- The nature of the proceeding;
- Where a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

Leading questions

Section 89 codifies the common law rule that, subject to the exceptions in subs (a)-(c), leading questions are prohibited during direct examination or re-examination of a witness.

Section 4(1) defines “leading question” as a “question that directly or indirectly suggests a particular answer to the question.” There is no comprehensive test for assessing leading questions but Mahoney et al suggest one useful guideline: where a question seeks a “yes or no” answer, it is a leading question.¹⁰⁵

Refreshing memory

If a witness needs to refresh his or her memory while “giving evidence” (defined in s 4(1)) by reviewing a document, leave is required under **section 90(5)**.

In addition, the document must have been “made or adopted by” the witnesses when his or her “memory was fresh” (the contemporaneity requirement). This is a question of fact. This reflects the position at common law prior to the 1995 High Court judgement in *Equity Corporations*, where the contemporaneity requirement was considered not to be necessary. The Court in that case concluded that if the witness actually remembers the relevant events the document used to stimulate the witness’ recollection is not relevant.¹⁰⁶

Where a witness’ memory is not refreshed after consulting a document pursuant to s 90(5), the document itself may become admissible under s35(3).

CROSS-EXAMINATION

The main goal of cross-examination is to investigate the truth of the witness’ testimony in recognition of the adversarial nature of the trial process. The object is to elicit information favourable to the cross-examining party and to cast doubt upon the accuracy of the evidence-in-chief against that party.

Cross-examination duties

Section 92 preserves the common law duty to “put the case” to the witness. It requires a party to cross-examine the opposing party’s witness on:

¹⁰⁵ Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007), p23.

¹⁰⁶ Ibid p330.

“significant matters that are relevant in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.”

The rationale of the rule, originating in the House of Lord case of *Browne v Dunne*, is based on the idea that lawyers ought to “put the case” of their client to the witness and to allow the witness to justify the contradiction. In that case the House of Lord held that if the Court is to be asked to disbelieve a witness the witness, the witness should be cross-examined.

However the rule has since been criticised and a strict application of s 92 is unlikely. The Court of Appeal in *Gutierrez v R* concluded that cross-examination may not be necessary if:

“from what has gone before or from the circumstances of the case it is fairly made plain that the truthfulness of particular facts given is not accepted, and adequate opposition to meet the challenge has otherwise been affected.” Check the wording.

More recently, the High Court in *Kennedy v Kennedy* considered that the duty to cross-examine is founded upon “considerations of basic fairness in the conduct of a trial”; and not every aspect of the witness’ evidence needs to be cross-examined.

The Law Commission has also stated that s 92 does not require cross-examining counsel to put “every aspect of his or her case”.¹⁰⁷

Commentators have noted that a mechanical application of s 92 could “blunt the impact of cross-examination” to operate unfairly to a “party’s control of adversarial questioning in a trial”.¹⁰⁸

Remedies to failure to discharge s 92 duty

Subsection (2) grants judges discretion to remedy a party’s violation of s 92(1) duty to cross-examine. Judges may:

- (a) recall the witness;
- (b) admit the contradictory evidence but let the failure to cross-examine go to the weight of the evidence;

¹⁰⁷ LC *Evidence Code*, para C334.

¹⁰⁸ Mahoney et al, *The Evidence Act 2006: Act and Analysis* (2007), p335.

- (c) exclude the contradictory evidence; or
- (d) any other order the Judge considers just.

Form of questions

Section 85 prohibits “unacceptable questions”. Subsection (1) grants the Judge discretion to disallow such questions or direct that a witness is not obliged to answer. Subsection (2) sets out factors the Judge may have regard to in assessing whether a question is “improper, unfair, misleading, needlessly repetitive” or overly complicated within s 85(1).

Impeaching own witness

Section 37(4) preserves the general rule that a party who calls a witness may not offer evidence to challenge that witness’ veracity. **Section 89(1)** also prohibits leading questions during direct examination. The rationale underlying such provisions is based on the code of honour lawyers owe to their clients. The bar on leading questions reflects a more general prohibition against a calling party impeaching its own witness through cross-examination. But there are some exceptions to this general rule: hostile witnesses and unfavourable witnesses.

(a) Hostile witness

Section 94 codifies the common law exception allowing cross-examination of own witness where the witness is declared by the Judge to be “hostile” within s 4(1). This is a question of law for the judge based in the definition of “hostile” in s 4(1), which is where the witness:

- Lacks veracity;
- Offers evidence inconsistent with prior statement with apparent intention to be unhelpful;
- Refuses to answer.

Once the witness is declared “hostile”, the calling party can:

- cross-examine him or her pursuant to s 94;
- or attack their veracity and offer prior inconsistent statement pursuant to s 37(3)(c).

(b) *Unfavourable witnesses*

Where a witness testifies unfavourably to a calling party but is not declared “hostile” by the court, the calling party is not allowed to challenge that witness’ veracity or cross-examine him or her with leading questions. However, nothing in such provisions prohibits a party from calling *other* evidence to contradict the testimony of an unfavourable witness on the facts at issue.

Such practice was previously allowed under s 9 of the Evidence Act 1908 and is specifically preserved in s 37(4)(b) of the new Act.

Previous inconsistent statements

Section 96(1) is the general rule on cross-examination on any previous statement of a witness. The cross-examiner must “adequately identify” to the witness “the time, place and other circumstances concerning the making of the statement.”

If the witness does not “expressly admit” making the statement, **s 96(2)** will apply. It requires the cross-examining party to prove that the witness did make the statement.

- If the previous statement is in writing, it must be shown to the witness;
- Once the requirement of s 96(2)(a) is satisfied, the witness must be given the opportunity to explain or deny the inconsistencies.

What is its use?

If the PIS by a witness is tendered for the *truth* of what it asserts, it is admissible. The definition of a “hearsay statement” in s 4(1) means a statement “made by a person *other than* a witness...”. accordingly, the PIS need not meet the requirements for admitting hearsay evidence under ss 16-22.

If the PIS is used to attack the *veracity* of the witness, the substantially helpful test in s 37 must be met. But as discussed above, any prior statement of a witness is classified as non-hearsay under s 4(1) of the Act. Therefore in most cases the application of s 96 will be offered for the truth of the statement, rather than to attack veracity.

Judicial notice

Section 128(1) allows the Judge or jury to take notice of “uncontroverted facts.”

Section 128(2) allows the Judge to take notice of ‘facts capable of accurate and ready determination [where] accuracy cannot reasonably be questioned’.

Generally speaking, the fact judicially noticed is of a class which is so generally known as to give rise to the presumption that all persons are aware of it.¹⁰⁹

Pera Te Hikumata v Tucker:¹¹⁰ The Judge took judicial notice of the fact that Gisborne is over 200 miles from Dunedin.

Cropp v Judicial Committee:¹¹¹ The Supreme Court noted that “the unfortunate consequences of the taking drugs in the community are too well known to need confirmation by evidence.”

Kapi v Ministry of Transport:¹¹² Judicial notice could not be taken of the “violent state of life” in Porirua.

¹⁰⁹ *Holland v Jones* (1917) 23 CLR 149; *Auckland City Council v Hapimana* [1976] 1 NZLR 731.

¹¹⁰ *Pera Te Hikumata v Tucker* (1894) 12 NZLR 368,

¹¹¹ *Cropp v Judicial Committee* [2008] 3NZLR 774.

¹¹² *Kapi v Ministry of Transport* (1991) 8 CRNZ 49.

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