Chapter 4: Hearing Procedures

This chapter deals with hearing procedures including: general rules, evidence-in-chief, cross-examination, prior inconsistent statements, the rule in *Browne v Dunn*, re-examination, tendering of documents and things, closing addresses and written submissions, shortening of hearing procedures, the *voir dire*, vulnerable witnesses, motive to lie, judges sitting alone, and unfavourable witnesses. A major part of this chapter is devoted to the techniques that can be employed when questioning witnesses.

Preliminary Matters
It is appropriate for the prosecution and defence to speak before a hearing to try to resolve any admissibility issues, and to determine the number of witnesses to be called in the case. However, the prosecution must still prove its case beyond reasonable doubt, and the defence lawyer should not engage in a process that makes it easier for the prosecution to establish such proof.

Each case will depend on its own facts. As a general example, however, it would be negligent for a defence lawyer to agree to the tender of a witness statement where the witness provides evidence proving elements of the offence, or to not insist on calling a witness who could provide evidence that would assist an accused. The accused is entitled to a robust, competent defence. More often than not, this requires a defence advocate to question prosecution witnesses in a way that tests the prosecution case and promotes the position of the accused.

There is a tendency in the Solomon Islands for the prosecution to press the defence to identify what witnesses they require, rather than indicating, independently, the witnesses the prosecution intends to call. One view is that this approach is designed to seduce the defence into error. If the question of what witnesses should be called is asked in its broadest sense then the answer on behalf of the defence would be, 'no witnesses are required and objection will be taken to the tender of all statements'.

The best practice approach is for the prosecution to prepare a list of witness statements, indicate which witness they are intending to call and then ask the defence if they require any additional witnesses that are included on the list of witness statements but not among those the prosecution intends to call. This approach aids disclosure, identifies the witnesses the prosecution says allow it to prove its case, and gives the defence an opportunity to request the calling of additional witnesses.

Where a witness provides tangential information that does not impact on the defence case (for example the statement of a police officer who simply says he assisted in an arrest, where the circumstances of the arrest are not in dispute) it may be appropriate for the defence to agree that the witness does not need to be called to give evidence. The defence should not agree to the tendering of statements that damage the defendant's case.

Case Management

Both the Magistrate's Court and the High Court are adopting case management approaches that are designed to help improve efficient case administration. In the Magistrate's Court, the case management hearing is called a pre-trial conference, during which a number of points may be discussed including legal issues, the potential length of the trial and witness requirements. Pre-trial conferences are held before substantive hearings and committals. In the High Court the process is called a directions hearing.

The prosecution and defence should be fully aware that case management conferences are designed to facilitate the efficient hearing of cases, and not for the purpose of gaining forensic advantage. This was made clear in the case of *Tua v Regina* where Palmer CJ states:

> Any court is entitled to conduct a pre-trial conference for the purpose of maximising court time, resources and facilities and securing the efficient conduct of a trial. To that extent the actions of the court in asking defence to disclose the nature of defence in that pre-trial conference was not unlawful. **Where the court over-stepped its mark was in imposing sanctions/penalties on the defence if they did not disclose their defence and other particulars at that particular point of time**. The most that can be done is to request disclosures for purposes of assisting the efficient conduct of the trial but without prejudice to the right of the accused to remain silent or reserve his defence till close of prosecution case. If the accused chooses to remain silent and reserve his defence, and require prosecution to prove its case, then there is nothing further the court can do. No adverse inference can be drawn against the accused even if after close of prosecution case he then elects to give evidence and run a defence which had not been disclosed earlier on. It may draw some appropriate comment from the presiding Magistrate, but it cannot be used as the basis to prevent him from calling witnesses and running defence, which was the effect of the order of the presiding Magistrate in this case …[1] (Emphasis in original.)

Before going to trial it is also important to review all the evidence and after analysing the facts gathered, in every case, the practitioner must identify the rules of evidence that may be applicable and the elements of the crime that may fit the facts. The most critical rules of evidence that appear in cases are: relevance; hearsay; character and credit; admissions; identification; tendency and coincidence; circumstantial evidence; and corroboration. It is essential that the practitioner identify the relevant rules of evidence applicable to the facts prior to the commencement of a hearing. It is also important that the practitioner, whether defence or prosecution, determine how best to utilise the rules to support their case.

It is also important to consider whether there is any need to ask for a separate trial in the case of co-accused, whether counts should be severed, if a stay application should be made, if there are good grounds to ask for a

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1 [2005] SBHC 77.

nolle prosequi (in which the prosecution determines not to pursue the matter), and if there is a need to obtain any expert reports.

Relevance

The rule of relevance is fundamental, and should not be forgotten at any stage of preparing for or conducting a trial. If the evidence is not relevant it is not admissible. Further, even where evidence is relevant there may be other rules that make the evidence inadmissible. The rules of admissibility are discussed in other chapters.

The sections of the *Evidence Act 2009* that deal with relevance are found at sections 20 to 23. Section 20 states:

> **20.** (1) All relevant evidence is admissible in a proceeding except evidence that is –
>
> (a) inadmissible under this Act or any other law; or
>
> (b) excluded in accordance with this Act or any other law.
>
> (2) Evidence that is not relevant is not admissible in a proceeding.
>
> (3) Evidence is relevant for the purposes of this Act if it has a tendency to prove or disprove anything as a result of the determination of a proceeding.

Section 21 allows for the admission of evidence that is otherwise inadmissible by agreement between the parties. It is dealt with later in this chapter. Section 22 allows for provisional relevance, and states:

> **22.** (1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant –
>
> (a) if it is reasonably open to make that finding; or
>
> (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.
>
> (2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in determining whether the common purpose existed.

Section 23 allows for an inference to be drawn by the court about the relevance of a document. It states:

> **23.** (1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.
>
> (2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

The *Evidence Act* provides some guidance about the procedures that should be adopted when hearing a case. It provides considerable discretion to the judge hearing the case, and where hearing procedures are concerned, it essentially adopts the common law. When exercising a judicial discretion a judicial officer is bound to apply appropriate common law rules, otherwise a discretionary decision may be open to appeal.

General Rules

Part 5, section 43, provides for the court to be open to the public unless otherwise ordered, and for evidence to be given orally or by affidavit.
It states:

> **43.** The ordinary way for a witness to give evidence is –
>
> (a) in a criminal or civil proceeding, orally in a courtroom in the presence of –
>
> (i) the court; and
>
> (ii) the parties to the proceeding and their counsel; and
>
> (iii) any member of the public who wishes to be present, unless excluded by order of the court; or
>
> (b) in a criminal proceeding, in an affidavit filed in the court or by reading a written statement in a courtroom, if both the prosecution and an accused consent to the giving of evidence in this form; or
>
> (c) in a civil proceeding, in an affidavit filed in the court or by reading a written statement in a courtroom, if –
>
> (i) rules of court permit or require the giving of evidence in this form; or
>
> (ii) both parties consent to the giving of evidence in this form.

Section 62 of the *Act* endorses the practice of witnesses remaining outside the courtroom before they give their evidence. It is designed to limit the potential for a witness's evidence to be influenced by what another says about an event, and is in the following terms:

> **62.** All witnesses as to fact in a criminal proceeding, other than an accused, should remain outside of the courtroom until required to give evidence.

Section 63 deals with situations where a witness has heard the testimony of another. It states:

> **63.** A court cannot exclude a witness from giving evidence who has heard the evidence from another witness, but may take that into account when considering what weight the evidence of such a witness should be given.

The fundamental process in all criminal hearings is adversarial, with the prosecution and defence each bringing and testing evidence. The magistrate or judge is the umpire in this process as well as the tribunal of fact, and should only engage in the adversarial process to the extent necessary to ensure the law is complied with, and to a limited extent to seek clarification of the evidence. Section 44 allows a magistrate or judge to control the way witnesses give evidence and the production of documents, stating:

> **44.** The court may make such orders as it considers just in relation to –
>
> (a) the way in which witnesses are to be questioned; and
>
> (b) the production and use of documents and things in connection with the questioning of witnesses; and
>
> (c) the order in which parties may question a witness; and
>
> (d) the presence and behaviour of any person in connection with the questioning of witnesses.

Section 45 allows a judge or magistrate to ask questions of a witness. It states:

> **45.** (1) In any proceeding, the court may, in the interest of justice, ask a witness any question.
>
> (2) If the court questions a witness –
>
> (a) a party, other than the party who called the witness, may cross-examine the witness on any matter raised by the court's questions; and
>
> (b) the party who called the witness may re-examine the witness.

Judicial Intervention

Section 45 does not repeal the common law or change the adversarial nature of criminal proceedings. Therefore the extent of any judicial intervention in proceedings should be limited. There is a long line of cases that disapprove of excessive judicial intervention, and no cases that provide support for it.

In *R v Kwatefena* Daly CJ held that:

1. A magistrate should avoid giving the impression he is doing the work of one side. By the magistrate asking so many questions, this impression may have arisen.

2. The power of the court to call a witness should be used sparingly and rarely exercised, particularly when the witness is likely to give evidence in support of the prosecution case. The parties must be given an opportunity to cross examine.

3. In view of these matters and the omissions from the record, the conviction must be considered unsafe and unsatisfactory and quashed.[2]

Discussing judicial intervention, Daly CJ stated:

> Sometimes when one side is professionally represented and the other is not, a court may indicate issues or points which it considers important to assist the party at disadvantage. However it is wrong for the court to give the impression that it is doing the work of one side. In this case by the learned magistrate asking so many questions before the prosecutor had cross examined at all, that impression may well have arisen. If a court wishes to address a series of questions to a witness such questions should usually be couched in neutral terms and asked after the re-examination. Earlier questions to clear up ambiguities are of course acceptable. Both parties should be given an opportunity to ask questions on anything arising from this questioning by the court.[3]

The decision of Daly CJ in *R v Kwatefana* remains good law. The approach he outlined was well established and continues to be followed in common law countries.

In *R v Thompson* the New South Wales Court of Criminal Appeal set out a useful list of English and Australian cases and the reasons provided in them for disapproving excessive judicial intervention.[4] The court stated:

> The relevant principles were enunciated by Kirby ACJ in *Galea v Galea* (1990) 19 NSWLR 263 at 281 to 282. In summary his Honour stated:
>
> '1. The test to be applied is whether the excessive judicial questioning ... [has] created a real danger that the trial was unfair. If so, the judgment must be set aside ...
>
> 2. [G]reater latitude in questioning and comment will be accepted where a judge is sitting alone ...

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2 [1983] SBHC 3; SIHC Criminal Review Case No 29 of 1983.
3 Ibid.
4 [2002] NSWCCA 149.

3. ... [T]he appellate court must consider whether ... the judge has ... moved into counsel's shoes and `into the perils of self-persuasion' ...

4. The decision on whether the point of unfairness has been reached must be made in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions ...

5. It is also relevant to consider the point at which the judicial interventions complained of occur. ...

6. The general rules for conduct of a trial and the general expression of the respective functions of judge and advocate do not change ... The conduct of criminal trials, particularly with a jury, remains subject to different and more stringent requirements ...'

There are other statements of principle in the authorities that are relevant to the circumstances of this case. The following are particularly pertinent:

(a) A miscarriage of justice may 'involve an impairment of a party's opportunity of putting his defence fully and fairly to the jury' (*R v Mawson* [1967] VR 205 at 207 to 208).

(b) A miscarriage may 'result from the jury being led to believe from the judge's intervention that he is himself convinced of the guilt of the accused person' (*R v Mawson* at 207 to 208). Trial judges should not create the impression by the way in which they question the accused that they have thrown their weight on the side of the prosecution: *Mercer* (1993) 67 A Crim R 91.

(c) It is for counsel to examine the witnesses 'and not for the judge to take it on himself lest by so doing he appear to favour one side or the other' (per Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55 at 63 to 65).

(d) A departure from the due and orderly processes of a fair trial may amount to a miscarriage of justice or may infringe the principle that criminal justice must not only be done but must also appear to be done: *R v Mawson* (at 207 to 208).

In *R v Esposito* (1998) 45 NSWLR 442 Wood CJ at CL conducted a careful examination of relevant authorities dealing with judicial intervention in criminal trials and concluded (at 472):

> "The line that a trial judge walks when asking questions of a witness is a narrow one. There is nothing wrong with questions designed to clear up answers that may be equivocal or uncertain, or, within reason, to identify matters that may be of concern to himself. However, once the judge resorts to extensive questioning, particularly of the kind that amounts to cross-examination in a criminal trial before a jury, then he is treading on thin ice. The thinness of the ice will depend upon the identity of the witness being examined (here the person on trial), and on whether the questions appear to be directed towards elucidating an area of evidence that has been overlooked or left in an uncertain or equivocal state, or directed towards

> establishing a point that is favourable or adverse to the interests of one or other of the parties.
>
> As Hunt CJ at CL said in *R v E* (1995) 89 A Crim R 325 at 331 ... 'it is worth repeating what has been said by this Court on many other occasions. The task of restoring the credit of a Crown witness or of destroying the credit of the accused or witness should **always** be left by the judge to the Crown Prosecutor'."[5] (Emphasis added.)

In *R v Esposito* the Court disapproved of cross-examination of an accused by a judicial officer.[6] The Court held, among other things, that:

> The questions put by the trial judge did test the truthfulness of the appellant's answers, and they did serve to advance the case for the prosecution. While there is no question other than that his Honour was endeavouring to see justice to the community done in this case, it was not appropriate for him to undertake this line of examination. The matter should have been left to the Crown prosecutor particularly after the concerns of defence counsel had been expressly ventilated.

In the case of *Regina v Mede* the Court of Appeal found that the excessive intervention by a magistrate undermined the adversarial system and deviated from the requirements of the Constitution of the Solomon Islands.[7] The court stated:

> [T]he Constitution of the Solomon Islands. Section 10 thereof provides that 'any person ... charged with a criminal offence ... shall be afforded a fair hearing within a reasonable time by an independent and impartial court ...'. The section goes to specifically provide:
>
> "Every person who is charged with a criminal offence – ...
>
> (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice;
>
> (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court …"
>
> That enshrines in this jurisdiction the common law adversarial system. Where a citizen of the Solomon Islands is deprived of the right to cross-examine a critical prosecution witness by counsel of his choice the trial must be regarded as unfair and any resulting conviction unsafe and unsatisfactory.
>
> What transpired in this case was so serious a departure from a traditional trial at common law and in breach of the respondent's Constitutional rights that the conviction cannot be allowed to stand. On the appeal to the High Court the stated ground of appeal was bias and it may well be that, if

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5 Ibid [35]–[37].
6 (1998) 45 NSWLR 442; (1998) 105 A Crim R 27.
7 [2010] SBCA 4.

> necessary, it would be open to hold that the conduct here demonstrated bias. But it is preferable to determine the matter on the ground of unfairness in that the accused person was deprived of the opportunity of putting forward his defence through the lawyers of his choice.[8]

Arraignment

At the commencement of a trial an accused person is arraigned. This involves the charge(s) being read and the person being asked if they wish to plead guilty or not guilty. Section 195 of the *Criminal Procedure Code* sets out the requirement to read the charge to an accused. It states, *inter alia*:

> **195.** (1) The substance of the charge or complaint shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.
>
> (2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him, and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary.
>
> (3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.
>
> (4) If the accused person refuses to plead, the court shall order a plea of 'not guilty' to be entered for him.

If the accused does not answer the charge, a plea of not guilty is entered and the trial proceeds in the way it would if the person had pleaded not guilty. Section 256 of the *Criminal Procedure Code* deals with a refusal to plead. It states:

> **256.** If any accused person being arraigned upon any information stands mute of malice, or neither will, nor by reason of infirmity can, answer directly to the information, the court, if it thinks fit, shall order the Registrar or other officer of the court to enter a plea of 'not guilty' on behalf of such accused person, and the plea so entered shall have the same force and effect as if such accused had actually plead the same; or else the court shall thereupon proceed to try whether the accused person be of sound or unsound mind, and, if he shall be found of unsound mind, and consequently incapable of making his defence, shall order the trial to be postponed and the accused person to be kept meanwhile in safe custody in such place and manner as the court thinks fit, and shall report the case for the order of the Governor-General.
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> The Governor-General may order such accused person to be confined in a mental hospital, prison, or other suitable place for safe custody.

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8 [2010] SBCA 4.

The process of reading the charge involves the presentation and reading of an information prepared by the Director of Public Prosecution. Section 250 of the *Criminal Procedure Code* deals with the process and states, *inter alia*:

> **250.** (1) The accused person to be tried before the High Court upon an information shall be placed at the bar unfettered, unless the court shall see cause otherwise to order, and the information shall be read over to him by the Registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter appointed by the court, and such accused person shall be required to plead instantly thereto, unless, where the accused person is entitled to service of a copy of the information, he shall object to the want of such service, and the court shall find that he has not been duly served therewith.

Once the charge is read and the accused pleads not guilty the prosecution then opens its case.

Opening Address

It is usual for the prosecution to give an opening address before witnesses are called. The opening address is designed to give the magistrate or judge an idea of how the prosecution case could progress and some of the issues involved.

This address includes an outline of the charges and the evidence upon which the prosecution will be relying. If the defence intends to object to the admissibility of any of the prosecution evidence, and the prosecution has been alerted to the fact, the evidence should not be used in the opening address.

Following the close of the prosecution case, the defence can also open its case with an address. On this point, section 200 of the *Criminal Procedure Code* states:

> **Opening and close of case for prosecution and defence**
>
> **200.** (1) Subject to the provisions of subsection (2) the prosecutor shall be entitled to address the court at the commencement of his case, and the accused person or his advocate shall be entitled to address the court at the commencement and in conclusion of his case.
>
> (2) If the accused person, or any of one of several accused persons, adduces any evidence, the prosecutor shall, subject to the provisions of section 143, be entitled to address the court at the close of the evidence for the defence and before closing speech (if any) by or on behalf of the accused person or any one of several accused persons.

Evidence-in-chief

Section 46 of the *Evidence Act* provides for evidence-in-chief to be given first and then followed by cross-examination and re-examination. It states:

> **46.** (1) In any proceeding –
>
> (a) a witness first gives evidence-in-chief; and
>
> (b) after giving evidence-in-chief, the witness may be cross-examined by all parties that wish to do so, other than the party calling the witness; and
>
> (c) after all parties who wish to do so have cross-examined the witness, the witness may be re-examined.
>
> (2) If a witness gives evidence in an affidavit or by reading a written statement in a courtroom, it is to be treated for the purpose of this Act as evidence given in chief.
>
> (3) The procedure for examining unfavourable witnesses is set out on Part 13.

As stated in the *Evidence Act*, examination-in-chief occurs before cross-examination. The prosecution witnesses give their evidence first in criminal trials. Evidence is taken on oath or affirmation and the witness is required to be present in the witness box within the courtroom. Section 134 of the *Criminal Procedure Code* also provides some procedural requirements, and is in the following terms:

> **134.** Every witness in any criminal cause or matter shall be examined upon oath or affirmation, and the court before which any witness shall appear shall have full power and authority to administer the usual oath or affirmation:
>
> Provided that the court may at any time, if it thinks it just and expedient (for reasons to be recorded in the proceedings), take without oath the evidence of any person declaring at the taking of any oath whatever is according to his religious relief unlawful, or who by reason of immature age or want of religious belief ought not, in the opinion of the court, to be admitted to give evidence on oath; the fact of the evidence having been so taken being also recorded in the proceedings.

Section 54 of the *Evidence Act* limits the use of leading questions in examination-in-chief and re-examination. It states:

> **54.** (1) A leading question must not be put to a witness in examination-in-chief or in re-examination unless –
>
> (a) the court gives leave; or

(b) the question relates to a matter introductory to the witness's evidence; or

(c) no objection is made to the question and (leaving aside the party conducting the examination-in-chief or re-examination) each other party to the proceeding is represented by a legal practitioner; or

(d) the question relates to a matter that is not in dispute; or

(e) if the witness has specialised knowledge based on the witness's training, study or experience, the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be given.

(2) Unless the court otherwise directs, subsection (1) does not apply to civil proceedings to a question that relates to an investigation, inspection or report that the witness made in the course of carrying out public or official duties.

(3) Subsection (1) does not prevent a court from exercising power under rules of court to allow a written statement or report to be tendered or treated as evidence in chief of its maker.

In certain circumstances, police witnesses may be subject to an exception to the rule that only non-leading questions can be used in examination-in-chief. Section 67 of the *Evidence Act* states:

67. (1) In any proceeding, a police officer may give evidence-in-chief by reading or being led through a written statement previously made by the police officer.

(2) Evidence may not be so given unless –

(a) the statement was made by the police officer at the time of or soon after the occurrence of the events to which it refers; and

(b) the police officer signed the statement when it was made; and

(c) a copy of the statement had been given to the person charged or other party or to his or her legal practitioner a reasonable time before the hearing of the evidence.

(3) A reference in this section to a police officer includes a reference to a person who, at the time the statement concerned was made, was a police officer.

Objectives of examination-in-chief
The objectives of examination-in-chief can be summarised as seeking to do the following:

1. Establish a case by eliciting evidence from a witness;
2. Cause the evidence to be presented in a persuasive and clear way;
3. As far as possible, protect the evidence from being undermined during cross-examination;
4. Allow a witness to give evidence of, *inter alia*, what he or she heard, saw, said, smelled, and touched; and
5. Allow the tribunal of fact to assess the truthfulness and reliability of a witness.

Methods of questioning
Non leading
As far as reasonably possible, the evidence given by a witness in examination-in-chief should be untainted by the form of questions used by an advocate. Questions that suggest an answer are known as leading questions. It is an accepted principle of the common law that the use of non-leading questions is the best way to obtain reliable evidence when engaged in examination-in-chief. This principle is adopted in section 54 of the *Evidence Act*.

Leading questions may be asked in certain circumstances, such as where:

1. The court gives leave (s 54(1)(a));
2. The question relates to a matter introductory to the witness's evidence (s 54(1)(b));
3. No objection is made to the question (s 54(1)(c));
4. The question relates to a matter that is not in dispute (s 54(1)(d)); or
5. If the witness has specialised knowledge based on the witness's training, study or experience – and the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given (s 54(1)(e)).[9]

Where an accused is not legally represented leading questions should always be avoided.

In adversarial proceedings the tender of written statements or records of interview is restricted as indicated in section 43(b) of the *Evidence Act*.

Although examination-in-chief should proceed in a question and answer format there are circumstance where a narrative form of answer allows the evidence to be better understood. Section 47 of the *Evidence Act* states:

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[9] Evidence Act 2009.

> **47.** A court may, either of its own initiative or on application, direct that a witness give evidence-in-chief wholly or partly in narrative form.

Simplicity
Questions should be kept short and simple to encourage answers that are clear. The tribunal of fact often does not receive the statement of the witness, and is therefore required to understand the evidence as it is orally given. The tribunal will usually be hearing the evidence for the first time and confusion can occur if the main points are surrounded by unnecessary information. Moreover, the witness may not understand the question and provide an answer that does not assist.

Know the answers to the questions
The advocate calling the witness should be aware of the answers that are most likely to be given to the questions he or she intends to ask. The advocate should have a statement and should have had a conference with the witness prior to the witness giving evidence. Where an advocate asks a question without knowing the answer, he or she may receive a damaging answer. However, even if an advocate has completely and diligently prepared, there are never any guarantees as to the answer a witness will give.

Listen to the answers
Ensure that questions are framed from the answers given. Some examiners appear to disregard answers; focusing on their prearranged questions. This approach can result in relevant evidence being lost. It can also result in the witness becoming frustrated by the fact that they have not completed giving relevant evidence about an issue before the examiner has moved on to another area. The tribunal of fact may also consider the evidence given as unreliable because it appears disjointed and very limited.

Control the witness
A witness should be stopped when he or she attempts to introduce inadmissible evidence. Additionally, a witness should not be allowed to wander off on a tangent when giving evidence. During the pre-trial conference, the witness should be advised that answers should be limited to issues directly asked about in the questions, and that short clear answers are preferable. Furthermore, it is important to advise witnesses of the following.

1. To say if they do not understand the question.
2. To say if they do not clearly hear the question.
3. If they are asked to recall something and they cannot, they should simply say that they do not recall. Speculation will not assist.
4. They should only tell the truth when answering questions.
5. If any areas of the witness's evidence may be inadmissible, this should be explained to the witness; answers given should not go to those areas.
6. Following cross-examination there will be an opportunity to re-examine if required.

7. If an objection is taken by one of the parties to a question they should not attempt to answer the question.
8. They should not argue with the person asking questions.

Witnesses for the prosecution and the defence should be advised to tell the truth when giving evidence on oath. Untruthful evidence given by a witness is often easily identified by the tribunal of fact. Witnesses tell lies for many reasons, sometimes about minor issues that are not significant when considering whether or not the prosecution has proved its case beyond reasonable doubt.

Apart from the likelihood that false evidence will weaken either the prosecution or defence case, the courts take the view that a custodial sentence will normally be imposed on the dishonest witness if perjury or false swearing is committed.

This point was made by Badgery-Parker J, with whom Finlay and Carruthers JJ agreed, in the New South Wales Court of Criminal Appeal case of *Aristodemou*.[10] Deciding an application for leave to appeal against sentences of imprisonment, Badgery Parker J stated:

> His Honour rightly observed that offences of false swearing such as committed by the applicant go to the very foundation of the justice system and in my view his Honour was entirely correct in regarding the need for general deterrence as the prime consideration in sentencing in a case of this sort. In what his Honour said, he echoed views expressed on many occasions by Judges of this Court: for example, per Abadee, J. with whom Gleeson, CJ. And Hunt, CJ. At CL. Agreed in *Regina v Bulliman* (CCA, unreported 25 February 1993):–
>
> False evidence strikes at the whole basis of the administration of justice and indeed, it undermines the whole basis of it. Justice inevitably suffers, whatever be the motive for the making of false statements on oath and whatever be the circumstances in which the offence or offences are committed.
>
> The purpose of an appropriate sentence in this class of case is not only to punish the offender, but to deter others and make plain that the commission of this type of offence will normally be visited with serious punishment. General deterrence is the point of importance to be particularly emphasised in this type of case.
>
> Any person who commits an offence of perjury or false swearing in the course of judicial proceedings should do so with the clear understanding that if his offence is detected he will go to gaol except in very particular circumstances.[11]

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10 *Regina v Aristodemou* (New South Wales Court of Criminal Appeal, Unreported, 30 June 1994).

11 Ibid pp 3–4.

The practitioner should not leave any witness in doubt about the possible consequences of giving false evidence. Such advice may also assist with controlling a witness's evidence so that it can be better understood by the tribunal of fact.

Allow the witness to present the evidence chronologically
An account of events provided from the beginning to the end can be better followed and may be considered more reliable and truthful by a tribunal of fact. Evidence that contains a series of flashbacks and other disjointed characteristics can be difficult to follow and may result in it being given little weight.

Connect the evidence
Show the connection between facts. For example:

Q. What did you do?
A. I opened the door.
Q. What did you see?
A. I saw George standing at the door.
Q. Was anything said?
A. No.
Q. Did you do anything?
A. No.
Q. Did George do anything?
A. Yes.
Q. What did he do?
A. He punched me in the face.
Q. Where on the face?
A. On my chin.
Q. How did he do that?
A. With his hand.
Q. Which hand?
A. His right hand.
Q. Was his right hand open or closed?
A. Closed and formed into a fist.
Q. Did he hit you more than once?
A. No.
Q. What happened then?
A. I shut the door in his face.

Emphasise the important areas of evidence
Emphasise the importance of an area of evidence by using a number of specific questions. For example:

Q. What did he do?
A. He hit me with a stick.
Q. Can you describe the stick?
A. It was about a metre long.
Q. Are you able to estimate its diameter?

A. Yes it was about 8 centimetres.
Q. What was the stick made of?
A. It was a steel pipe.
Q. How many times were you hit with this stick?
A. Twice.
Q. Where were you hit?
A. My right leg, below the knee.

Introduce exhibits to highlight answers
Exhibits should be introduced at the time when evidence is being given that relates to the exhibit. The witness should be shown the item and asked if he or she recognises it. If the witness does then the item should be tendered.

Ensure that the witness has given all relevant evidence
Before completing examination-in-chief, the advocate should check his or her notes to ensure that the witness has provided the tribunal of fact with all the relevant and probative evidence they were expected to adduce.

Order of witnesses
It is preferable to start with the witness who provides evidence about events that occurred first in time. In other words, matters being described by witnesses, as far as possible, should be kept in chronological order.

It is also useful to call witnesses in sequence for particular topics. For example, witnesses who give identification evidence should be called as close as possible to each other in order to present such evidence as a coherent whole to the tribunal of fact.

If the accused chooses to give evidence, he or she should be called prior to any other witness in the defence case in order to avoid the suggestion that his or her evidence has be tailored to fit with the evidence of defence witnesses.

Refreshing memory
Despite the best preparation of a witness for examination-in-chief or cross-examination there will be occasions when a witness needs to refresh his or her memory. The common law and the *Evidence Act* allow for this situation. Sections 49 to 51 of the *Evidence Act* set out the ways in which a witness is allowed to refresh their memory. They state:

Reviving memory

49. (1) The court may, on the request of a party, give such directions as are appropriate to ensure that specified documents and things used by a witness otherwise than while giving evidence to try to revive his or her memory are produced to the party for the purposes of the proceeding.

(2) The court may refuse to admit the evidence given by the witness so far as it concerns a fact as to which the witness so tried to revive his or her memory if, without reasonable excuse, the directions have not been complied with.

Reviving memory of facts or opinion

50. (1) A witness must not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion unless the court gives leave.

(2) Without limiting the matters that the court may take into account in deciding whether to give leave, it is to take into account –

(a) whether the witness will be able to recall the fact or opinion adequately without using the document; and

(b) whether so much of the document as the witness proposes to use is, or is a copy of, a document, that –

(i) was written or made by the witness when the events recorded in it were fresh in his or her memory; or

(ii) was, at such a time, found by the witness to be accurate.

(3) If a witness has, while giving evidence, used a document to try to revive his or her memory about a fact or opinion, the witness may, with the leave of the court, read aloud, as part of his or her evidence, so much of the document as relates to that fact or opinion.

(4) The court is, on the request of a party, to give such directions as the court thinks fit to ensure that so much of the document as relates to the proceeding is produced to that party.

Referring to copies of documents to refresh memory

51. Whenever a witness wishes to refresh his or her memory by reference to any document, the witness may with the permission of the court refer for such purpose to a copy of the document, provided that the court is satisfied that there is sufficient reason for the non-production of the original.

No Case to Answer

At the end of the prosecution case, if the defence lawyer is of the view that there is no case to answer a submission can be made on this basis that the case against the accused be dismissed and a verdict of not guilty entered. This possibility is discussed in detail in Chapter 3.

Cross-examination

Cross-examination requires a similar diligent focus on the facts, analysis of the facts and application of the law as is required with examination-in-chief.

This section considers the relevant parts of the *Evidence Act*, the objectives of cross-examination, techniques that can be employed, matters that can be considered when preparing to cross-examine, the limits imposed on the cross-examiner, prior inconsistent statements, the rule in *Browne v Dunn* and consideration of motive to lie.

The questions asked in cross examination are not restricted to matters raise in examination-in-chief. In contrast to examination-in-chief, leading questions are a key part of cross-examination. Section 55 of the *Evidence Act* states:

> **55.** Leading questions may be asked in cross-examination, but the questions put must not assume that facts have been proved, or that particular answers have been given, if such is not the case.

Section 56 of the *Evidence Act* provides some limitation on leading questions, stating:

> **56.** The court may prohibit leading questions from being put in cross-examination to a witness who shows a strong interest or bias in favour of the cross-examining party.

A leading question, as previously mentioned, is one that suggests its answer. The use of leading questions can be an effective way of assisting the tribunal of fact to understand the defence or prosecution case. They can also be of assistance in achieving other objectives. Leading questions are useful in attacking credibility and are required when dealing with prior inconsistent statements.

Objectives of cross-examination

A distinction can be drawn between cross-examination designed to find or test the truth of evidence being given by a witness and cross-examination designed to elicit evidence favourable to a case. Cross-examination designed to find the truth is largely, although not exclusively, confined to those forums engaged in the process of inquiring about events.

For example, Royal Commissions and coronial inquests proceed by way of inquiry with a view to establishing, as far as possible, the circumstances surrounding events of public interest. By contrast, where the hearing is adversarial there are objectives involved that require the advocate to take an approach that would conflict with the inquisitorial method.

Regardless of the jurisdiction in which an advocate is practicing, there remains a duty not to mislead the court. For example, cross-examination by a legal practitioner that knowingly promotes a lie is impermissible.

Experienced advocates are concerned with practical objectives when cross-examining in a criminal case. Some of the objectives that should be borne in mind are:

1. Eliciting facts favourable to the case.
2. Attempting to undermine relevant parts of the examination-in-chief, or if this is not possible then weakening those parts of the examination-in-chief.
3. Eliciting facts which can be used to cross-examine other witnesses.
4. Discrediting the witness by showing that he or she is dishonest, mistaken or both.
5. Putting to the witness material parts of the case relevant to that witness, to ensure the witness is completely certain about what is being suggested and to provide an opportunity for the witness to respond to the suggestions.
6. To put the case before the tribunal of fact.
7. To determine if it is necessary to cross-examine the witness at all.
8. To present any documentary evidence supporting the case in an effective way through the witness.

Techniques of cross-examination

While the objectives of cross-examination in an adversarial setting are reasonably clear the methods that can be employed to achieve those objectives vary. The requisite skills of cross-examination can only be attained through practice and, in every case, careful planning. The 'natural' advocate may have some advantages over a person who has difficulty with the role, but all advocates need to carefully consider the technique they will employ to achieve their objectives.

Some techniques that can be used include:

1. Ideally, getting the witness to admit, by use of available evidence, that they are being untruthful or are mistaken. In most instances a witness will not admit that they are dishonest or mistaken if such conclusions are bluntly put. It is more often the case that by careful questioning of the witness the door is opened for the tribunal of fact to conclude that the witness is unreliable, untruthful or both.

2. Attempting to cast doubt on the evidence of the witness such as to allow the tribunal of fact to conclude that the witness is unreliable or dishonest. Some ways of doing this include:

   (a) Linking the witness to a version of the facts that limits the inferences that can be drawn from their evidence.

   (b) Attacking the credibility of the witness. This is often done by the use of prior inconsistent statements.

3. Asking clear questions. A witness who does not understand the question may give an answer that disadvantages the case. It is also self evident that if the question is unclear the answer may also be unclear to the point of not assisting the advocate in achieving the objectives that

he or she has set. Moreover, the advocate will not be able to address the tribunal of fact on non-existent evidence.

4. Being courteous to the witness. The use of more vigorous questioning techniques should be reserved for witnesses who appear from the evidence and instructions to be avoiding questions or answering in a misleading or untruthful way.

5. Asking concise questions.

6. Using common sense when formulating questions.

7 Avoiding questions to which the answer is not known. While this may not always be possible, the rule applies most to less experienced advocates.

8. Knowing when to stop asking questions. For example, when a favourable answer has been given, labouring the point may weaken or eliminate the favourable answer.

9. Adapting a questioning style to take into account the condition or characteristics of the witness. It should be self evident that a child needs to be questioned in a different way to an adult with experience of the criminal justice system. Likewise, the witness with an intellectual disability or a very poor standard of education needs consideration especially with the pace of questioning, complexity of structure and definitions.

10. Utilising leading questions to achieve objectives. This approach is different to the requirement for the use of non leading questions in examination-in-chief. In cross-examination a combination of both leading and non-leading question is often the best approach.

Each advocate should develop their own style. An attempt to mimic the style of another advocate will usually result in less effective cross-examination. Nevertheless, observing the styles and techniques of other advocates can be very useful when developing as a cross-examiner.

As is the case with evidence-in-chief, it is better to formulate questions from answers than to follow prepared questions in an inflexible way. The advocate should refer to their notes at the end of a sequence of questioning to ensure that all relevant points have been covered.

A competent cross-examiner should be able to keep control of the witness by using appropriate techniques. If the witness takes control the result can be of significant disadvantage to the party cross-examining. Even a very difficult witness can, however, be turned into an asset if the cross-examiner is skilful. Witnesses may be erratic, which can be manifested by a failure to answer questions, posing questions to the advocate, being abusive or not

answering sensibly. Such witnesses can be exposed as unreliable. Help can be sought from the presiding judicial officer as part of the process of exposing unreliability, or simply to assist with regaining some control of the questioning.

Preparation for cross-examination

Preparation for cross-examination is as essential as it is for evidence-in-chief. There are some basic matters that can be considered when preparing to cross-examine a witness. In every case, it is necessary to carefully analyse statements and records of interview. Where a witness is proposing to give evidence that is either in accordance with the instructions of an accused, or where such evidence does not implicate the accused in a crime, it may not be necessary to ask any questions.

However, in a case involving the identification of an accused the following matters would be relevant:[12]

1. If the witness had known the accused: for how long and the nature of the relationship.

2. Where the witness had not seen the alleged offender prior to the incident, the method employed by the police to obtain the identification.

3. Examine police statements with the witness to identify any variations or inconsistencies. For example, if the police crime scene statement suggests that the witness was 100 metres away when making the observation, and the witness suggests he or she stood 10 metres away, there is fertile ground for cross-examination.

4. Examine police statements or other records to see if there are any notations made about the witness. For example, 'The witness appeared intoxicated when he attended the police station'.

5. The circumstances in which the observations of the accused were made. It will be relevant to consider matters such as the length of time the witness had to observe the accused, the distance between the accused and the witness when the observation was made, light conditions, and any other factors that may have impacted visibility.

6. How many people were present at the time of the incident and how close were they to the accused.

7. Any stress the witness may have been under when making the observation of an alleged offender.

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[12] Although these points for preparation are worded in a way that applies to a defence lawyer most of them are also relevant for a prosecutor.

8. Whether the witness was under the influence of drugs or alcohol at the time of the alleged offending.

9. If the witness needs to wear glasses, whether they were being worn at the relevant time.

10. How long after the incident was a statement given to the police?

11. How many statements were given? Are there any inconsistencies between the statements?

12. List any differences between the statements made by a witness that may show inconsistency, and consider any possible inconsistencies between statements and evidence-in-chief.

13. Any relevant variations between the statements of different witnesses.

14. Matters that need to be put to the witness to comply with the rule in *Browne v Dunn* (as discussed below).

15. Visit the crime scene.

16. Make sure the accused is aware of the contents of the witness statement, and ensure instructions are taken where the accused disagrees with something suggested by the witness.

Limits of cross-examination
Section 66 of the *Evidence Act* allows the court to control questioning in situations where the questioning is improper. It states:

> **Improper questions**
>
> **66.** (1) A court may disallow a question, or inform the witness that it need not be answered, if the court considers the question put to a witness in cross-examination to be –
>
> (a) misleading or confusing; or
>
> (b) unduly annoying, harassing, intimidating, humiliating, offensive, oppressive or repetitive; or
>
> (c) put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
>
> (d) without basis, other than a sexist, racial, cultural or ethnic stereotype.
>
> (2) A question is not to be disallowed merely because –

(a) the question challenges the truthfulness of the witness or the consistency or accuracy of a statement made by the witness; or

(b) the question requires the witness to discuss a subject that could be considered to be distasteful or private.

(3) A party may object to a question under this section or the court may act on its own initiative.

(4) A person must not, without the express permission of a court, print or publish a question that the court has disallowed under this section.

In the case of *Wakeley v R* the High Court commented on the limits of cross-examination stating, *inter alia*:

> The limits of cross-examination are not susceptible to precise definition, for a connection between a fact elicited by a cross-examination and a fact in issue may appear, if at all, only after other pieces of evidence are forthcoming. Nor is there any general test of relevance which a trial judge is able to apply in deciding, at the start of cross-examination, whether a particular question should be allowed. Some of the most effective cross-examinations have begun by securing a witness's assent to a proposition of seeming irrelevance. Although it is important in the interests of the administration of justice that cross-examination be contained within reasonable limits, a judge should allow counsel some leeway in cross-examination in order that counsel may perform the duty, where counsel's instructions warrant it, of testing the evidence given by an opposing witness. Lord Hanworth MR, in words which commanded the approval of the House of Lords in *Mechanical and General Inventions Co and Lehwess v Austin and Austin Motor Co* (1935) AC 346, at p 359, said:
>
> 'Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the court, not forgetting at the same time the burden that is imposed upon the witness.'
>
> In *Kalia* (1974) 60 Cr App R 200 and in *R v Maynard* (1979) 69 Cr App R 309, while the Court of Criminal Appeal affirmed the duty of counsel not to extend cross-examination unduly nor to pursue irrelevant lines of inquiry, it is emphasised that counsel must always be at liberty to do their duty in the proper interests of the client. It is the duty of counsel to ensure that the discretion to cross-examine is not misused. That duty is the more onerous because counsel's discretion cannot be fully supervised by the presiding judge. Of course, there may come a stage when it is clear that the discretion is not being properly exercised. It is at that stage that the judge should intervene to prevent both an undue strain being imposed on the witness and an undue prolongation of the expensive procedure of hearing and determining a case. But until that stage is reached – and it is

> for judge to ensure that the stage is not passed – the court is to an extent, in the hands of cross-examining counsel.[13]

In *Libke v R* the High Court of Australia considered the limits of cross-examination and improper questions put by a prosecutor during cross-examination.[14] After recounting some of the cross-examination, Kirby and Callinan JJ commented (in dissent on the outcome):

> [I]t is true that the appellant's credit was in issue and a rigorous cross-examination was therefore to be expected. However, it was seriously objectionable for a counsel to say, during an address to the jury, that he or she 'did not buy' something said by a party in evidence, or that 'we've heard about that one'. It is not acceptable for counsel to make that comment, that is, to express a personal opinion about a party's, or indeed any witness', evidence during cross-examination as the prosecutor did here. It was equally inappropriate for counsel to comment after the appellant had made a responsive answer 'whenever you're prepared to finish it'. In the same category are these comments: 'That doesn't tell us much, does it?'; 'I'm just trying to analyse your version of it" and, 'hopeless' in commentary upon an answer. These are but a few examples of the inappropriateness of the cross-examination. Here, the sarcastic and repeated commentary as a whole went too far. The appellant's counsel's failure generally to object, regrettable as that may have been, provided no antidote to the infection of the trial that the prosecutor's questions and comments caused. The circumstances called for the trial judge to intervene.
>
> In his reasons Heydon J too has demonstrated the entirely unsatisfactory nature of the conduct of the trial of the appellant involved in the approach taken both by the prosecutor and the trial judge during cross-examination. In effect, they complement our own. Merely to offer judicial disapprobation to discourage unsatisfactory prosecutorial conduct of this kind in the future can be of no solace to an accused the subject of it.[15]

Heydon J noted the leading form of cross-examination, and that a cross-examiner is entitled:

> [T]o seek to cut down the effect of answers given in chief, to elicit additional evidence favourable to the cross-examiner's client, and to attack the credit of the witness, while ensuring that the hand of the party calling the witness is not mended by the witness thrusting on the cross-examiner in non-responsive answers evidence which that witness may have failed to give in chief. To this end a cross-examiner is given considerable power to limit the witness's answers and to control the witness in many other ways.[16]

He then goes further by detailing the common law in respect to cross-examination, offensive questioning, compound questions, cutting off

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13 [1990] HCA 23 at [20]; (1990) 93 ALR 79; (1990) 64 ALJR 321.
14 [2007] HCA 30; (2007) 235 ALR 517.
15 Ibid [37]–[38].
16 Ibid [119].

answers before they were completed, questions resting on controversial assumptions, argumentative questions and the role of the judge.[17]

Prior Inconsistent Statements

Prior inconsistent statements at common law are used in cross-examination to undermine the credibility of a witness. The prior statement is usually made out of court and takes the form of either an oral or written representation made by a witness that contradicts the evidence given by the witness in court.

Section 163 of the *Evidence Act* refers to prior inconsistent statements. It states:

> **163.** (1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not –
>
> (a) complete particulars of the statement have been given to the witness; or
>
> (b) a document containing a record of the statement has been shown to the witness.
>
> (2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner –
>
> (a) informed the witness of enough of the circumstances of the making of the statement to enable the witness to identify the statement; and
>
> (b) drew the witness's attention to so much of the statement as is inconsistent with the witness's evidence.
>
> (3) For the purpose of adducing evidence of the statement, a party may re-open the party's case with the leave of the court.

See also sections 164 and 165, which deal with the weight that is to be given to evidence and the use of documents produced by a person other than the witness.

A typical example of a prior inconsistent statement is where a witness has provided a statement to the police which states, *inter alia*:

> 'I have never seen document X before the incident.'

The witness then says in court:

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[17] Ibid [121]–[133].

> 'I have seen document X on a number of occasions prior to the incident.'

The cross-examiner would normally draw the witness's attention to the prior inconsistent statement identifying the time, date and place when the statement was made and asking the witness to acknowledge that the previous statement had indeed been made. If the witness refused to acknowledge that the prior statement had been made, it is usual to ask the opposing counsel to acknowledge that the prior inconsistent statement has been properly identified and put to the witness.

Some judicial officers simply rely on the prosecution to object if the prior inconsistent statement has not been made or has been inaccurately put to the witness. This obviates the need to get the prosecution to confirm the existence of the prior inconsistent statement. The court is then obliged to accept that the prior inconsistent statement was in fact made, and the witness can be asked which statement is true. It is for the tribunal of fact to decide which is true, but the prior inconsistent statement is admitted as an exception to the hearsay rule if the witness denies that he or she made it.

Production of a Document

Section 166 is relevant for both prior inconsistent statements and also unfavourable witnesses where the evidence results in inconsistent statements being made by a witness. It states:

> **166.** (1) This section applies if a party is cross-examining or has cross-examined a witness about –
>
> (a) a prior inconsistent statement alleged to have been made by the witness that is recorded in a document; or
>
> (b) a previous representation alleged to have been made by another person that is recorded in a document.
>
> (2) If the court so orders or if another party so requires, the party must produce to the court or to that other party –
>
> (a) the document; or
>
> (b) such evidence of the contents of the document as is available to the party.
>
> (3) The court may –
>
> (a) examine a document or evidence that has been so produced; and
>
> (b) give directions as to its use; and
>
> (c) admit it even if it has not been tendered by a party.

(4) Subsection (3) does not permit the court to admit a document or evidence that is not admissible.

(5) The mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document.

Cross-examination on a Representation Made by Another

Section 165 of the *Act* limits the cross examination that can be made of representation made by another that is contained in a document. It states:

165. (1) Except as provided by this section, a cross-examiner must not question a witness about a previous representation alleged to have been made by a person other than the witness.

(2) A cross-examiner may, with leave of the court, question a witness about the representation and its contents if –

(a) evidence of the representation has been admitted; or

(b) the court is satisfied that it will be admitted.

(3) If the representation is contained in a document that has not been admitted, or a document that the court cannot be satisfied will be admitted, the document may be used to question a witness as follows –

(a) the document must be produced to the witness;

(b) if the document is a tape recording, or any other kind of document from which sounds are reproduced, the witness must be provided with the means, such as headphones, to listen to the contents of the document without other persons present at the cross-examination hearing those contents;

(c) the witness must be asked whether, having examined (or heard) the contents of the document, the witness stands by the evidence that he or she has given;

(d) neither the cross-examiner nor the witness is to identify the document or disclose any of its contents.

(4) A document that is so used may be marked for identification.

This section appears to adopt the common law position in *The Queen's Case.*[18] Section 165(2) limits the cross examination on a representation by another witness by requiring the leave of the court; and this leave will only be granted if the evidence has already been given, or the court is satisfied that the evidence will be given. Section 165(3) deals with the situation where the representation contained in the document has not been admitted

[18] (1820) Br & B 284; 129 ER 976.

or the court is not satisfied that it will be admitted. In such circumstances the document can be shown to the witness or heard by the witness, and it must not be identified and its contents must not be revealed. In this case the questioning is limited to something like:

> Q: Please read the document that I now show you.

Once this is done.

> Q: Does what you have just read change the evidence you have previously given.

A document that is used pursuant to this section should then be marked for identification.

The Rule in Browne v Dunn

The rule in *Browne v Dunn* is considered to be one of the most important rules of cross-examination.[19] The rule requires the cross-examiner to put matters to a witness where the cross-examiner intends to contradict a witness's testimony. This gives the witness the opportunity to meet any suggestion by direct rebuttal, or if necessary by calling corroborative evidence to support the version being given by the witness. In *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation*, Hunt J suggested that the rule provided a witness with the opportunity to 'show his mettle under attack'.[20]

In *R v Birks*, the accused had been indicted on 18 counts involving sexual intercourse without consent and maliciously inflicting bodily harm.[21] Defence counsel failed to put to the complainant witness two important matters which the defence was relying upon. The first was that no anal intercourse had taken place and the second was that the facial injuries which the complainant suffered arose from the non-intentional conduct of the accused. The accused was cross-examined by the Crown about those matters which had not been put to the complainant and suggested that they were a recent invention. In the absence of the jury, defence counsel advised the trial judge that his failure to cross-examine was his fault, not because his client had recently invented the defence. Gleeson CJ stated, *inter alia*:

> The consequences of a failure to observe the rule in *Browne v Dunne* will vary depending upon the circumstances of the case, but they will usually be related to the central object of the rule, which is to secure fairness. In a judgment of Mahoney JA in *Seymour v Australian Broadcasting Commission* (1977), his Honour said:
>
> 'This kind of problem may arise at different times in the litigation. It may arise during the trial. Thus, where a party fails to cross-examine a witness

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19 (1894) 6 R 67 (HL).
20 [1983] 1 NSWLR 1.
21 (1990) 19 NSWLR 677.

> at all or on a particular matter, it may be prudent for the trial judge at the time to draw the attention of counsel in an appropriate way to the effect this may have on the later conduct of the trial. It may be that the question arises at a later stage in the trial when counsel seeks to call evidence contradicting the witness or discrediting his evidence, or seeks to address upon the basis that the witness's evidence is untrue. The trial judge may then have to determine what course should be followed. Sometimes the interests of justice may be served by having the witness recalled for cross-examination. Sometimes the circumstances may be such that the only way in which justice can be achieved is by directing that, for example, it is not open to counsel, in address, to make such suggestion. What is to be done will depend, as I have said, upon the circumstances of the case.'

It is not necessary to put *Browne v Dunn* type questions to a witness where the witness is not contradicting a version of events that may be given by the accused. For example, if a knife is involved in the incident, but the witness does not mention a knife in their evidence-in-chief it is not necessary to ask a question of the witness which suggests the accused did not have a knife. The reason why such a question need not be put is that the witness did not suggest the accused had a knife.

Section 57 of the *Evidence Act* refers to some of the ways that a failure to cross-examine can be dealt with, stating:

> **57.** If a party fails to cross-examine a witness on substantial matters of the party's case that contradict the evidence of the witness if the witness is, or might be, in a position to give admissible evidence on such matters, the court may –
>
> (a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or
>
> (b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or
>
> (c) exclude the contradictory evidence; or
>
> (d) make any other order which the court considers just.

Consideration of Motive to Lie

The cross-examiner can suggest to the witness that he or she was lying in respect of one or another of the statements. In such a case it is not unusual for either the prosecution or the defence, while cross-examining, to suggest to the witness that they are not only lying but they have a motive for not telling the truth. Where a motive can be established, it goes to undermining the credibility of the witness.

Where a motive is being impugned to a complainant witness it is well established that:

> Cross-examination is permissible and evidence is admissible to establish that a complainant has a motive to make and persist in false allegations.[22]

A difficulty arises where a complainant or other witness, giving evidence against an accused, suggests that they have no motive to lie. The complainant may answer a question with, 'Why would I lie?' or 'I have no reason to lie'. Such answers may be non-responsive to the question actually asked. Where motive to lie is raised, the tribunal of fact could be misled into considering the complainant's (or other witness's) evidence in an impermissible way – that is, to take at face value the assertion that the witness has no reason to lie, and to conclude without basis that the witness had no motive to lie and therefore should be believed. The position is made worse where the prosecution or the judge highlights an assertion that the witness did not have a motive to lie. It should be remembered that it is not for an accused to prove anything (such as a motive to lie), and that the burden of proof rests on the prosecution.

If an accused gives evidence and cannot provide a motive for a complainant or other witness to lie, or where counsel for the accused cannot suggest to the witness a motive, any error made by the trial judge or prosecution counsel in respect of the burden of proof is aggravated if the impermissible line of reasoning is allowed to proceed without appropriate directions. In the High Court of Australia, Brennan CJ, Gaudron and Gummow JJ stated on this issue:

> It is one thing to permit cross-examination of a complainant in order to elicit, if possible, a motive to lie. It is another thing to permit cross-examination of an accused to show that an accused cannot prove any ground for imputing a motive to lie to the complainant. A complainant knows whether he or she has a motive to lie and, as a motive to lie is a fact that may be proved to impeach the complainant's credit, the complainant may be asked about it. And evidence may be given by other witnesses of events from which such a motive may be inferred. But the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross-examination might be inferred is generally irrelevant. In general, an accused's lack of knowledge simply means that his evidence cannot assist in determining whether the complainant has a motive to lie, but if the facts from which an inference of motive might be drawn are facts that the accused would know if they existed, his lack of knowledge could be elicited to disprove those facts.[23]

It is clearly stated in *Palmer* by the majority when dealing with a complainant's evidence and motive that:

> [A] complainant's account gains no legitimate credibility from the absence of evidence of motive. If credibility which the jury would otherwise attribute to the complainant's account is strengthened by an accused's

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22 *Palmer v The Queen* [1998] HCA 2, [6]; (1998) 193 CLR 1.

23 Ibid [7] (references omitted).

> inability to furnish evidence of a motive for a complainant to lie, the standard of proof is to that extent diminished … The correct view is that absence of proof of motive is entirely neutral.[24]

In *R v Jovanovic*,[25] the appellant was indicted on three counts of homosexual intercourse with a 15 year old boy. A ground of appeal was that the trial judge erred in inviting the jury to consider a submission by the Crown Prosecutor that the complainant appeared to have no reason to fabricate his evidence. The convictions were quashed by majority and a new trial ordered. Justice Sperling noted that the trial judge had erred in:

> endorsing an impermissible line of reasoning advanced by the Crown Prosecutor and, more importantly, by giving his own approval as a legitimate approach to instruct a jury to start with the presumption that a Crown witness is telling the truth is inconsistent with the concepts underlying a criminal trial, embodied in the standard directions concerning onus of proof and the jury's obligation to consider what evidence to accept and what evidence to reject. Juries are correctly encouraged to be sceptical. They should not be encouraged to begin with a presumption that evidence led against the accused is true for no better reason than that it is given on oath.[26]

The Crown in *Jovanovic* submitted that each time the question arose as to why the complainant would have made the serious allegations in the case, the trial judge would be bound to give directions. While not suggesting that in every case there was a need to give directions on motive to lie, Sperling J did provide draft directions for assistance in order to avoid error in legal principle. He stated:

> Whilst it may not be necessary to give a particular direction in every case involving complainant evidence, the following would, in my view, be a suitable direction:
>
> It would be natural to ask yourselves why the complainant, X, would make up such serious allegations against the accused. I give you the following directions about the question:
>
> 1. As you have been told, the essential elements of the Crown case must be proved beyond reasonable doubt or the accused must be acquitted. If the case turns on the evidence of X, you must be satisfied beyond reasonable doubt that X was told the truth.
>
> 2. As you have been told, it is your duty to decide whether you accept the evidence of a witness in whole or in part. X is no exception to that.
>
> 3. It would be wrong to conclude that X is telling the truth because there is no apparent reason, in your view, for X to lie. People lie for all

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24 Ibid [9].
25 (1997) 42 NSWLR 520.
26 Ibid [539].

> sorts of reasons. Sometimes it is apparent. Sometimes it is not. Sometimes the reason is discovered. Sometimes it is not. You cannot be satisfied that X is telling the truth merely because there is no apparent reason for X to have made up these allegations. There might be a reason for X to be untruthful that nobody knows about.
>
> I provide the foregoing draft, not because I am satisfied that such a direction is necessarily required in every case as the present case, but in order to answer the suggestion that the approach in this judgment leads in some way to an unmanageable situation in the context of a criminal trial.[27]

In summary, both prosecution and defence practitioners, where they are going to suggest that a witness is lying, should attempt to identify a motive to reinforce their attempt to discredit a witness's evidence. In the case of a defence lawyer, the accused is the most obvious source of information about a possible motive for the complainant to lie. In many instances an accused is either unable or unwilling to identify a reason why a complainant is lying but this should not necessarily stop the suggestion being put. It is also possible to identify reasonable grounds for suggesting a motive to lie from the evidence generally. This requires the careful analysis of the evidence prior to hearing and also as it unfolds during the trial.

For the prosecution, there is an ethical requirement to identify reasons why a complainant may be lying and indeed why any material prosecution witness may be dishonest. In doing this the prosecution needs to rely on the investigative police and also on an independent evaluation of the evidence supplied by the police and from conferences with witnesses.

The investigative police have the primary responsibility to endeavour to ensure that the witnesses who will be called are not providing misleading and or dishonest evidence. This can involve investigations going beyond the incident that is the subject of criminal charges.

Cross-examination is an art that can be developed with practice.

Re-examination

Section 59 of the *Evidence Act* deals with re-examination. It states:

> **59.** (1) On re-examination, a witness –
>
> (a) may be questioned about matters arising out of evidence given by the witness in cross-examination, including any qualification in cross-examination of evidence given by the witness in examination-in-chief, but
>
> (b) may not be questioned about any other matter except with the permission of the court.

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[27] Ibid 542.

> (2) If permission is given under subsection (1)(b), the court –
>
> (a) must allow other parties to cross-examine the witness on the additional evidence given; and
>
> (b) may allow further re-examination on matters arising out of that cross- examination.

The limits imposed on a questioner in re-examination are designed to allow for the efficient hearing of evidence. Where new matters are introduced in re-examination, then cross-examination on those matters should be allowed.

It is not unusual for leave to be given to raise relevant and potentially probative matters that were not covered in examination-in-chief. Further leave may also be granted to cross-examine the witness if a witness introduces unfavourable material during cross-examination, pursuant to section 162 of the *Evidence Act*.

Care should be taken to avoid damaging the case by asking questions that could elicit unnecessary answers. As a general rule, if the practitioner is of the view that a witness survived cross-examination, he or she should avoid going back to the answers in re-examination. However, if cross-examination has introduced ambiguity that may be damaging to the case, re-examination is the time to attempt to rectify the problem.

Tendering of Documents and Things

Documents or other things can be tendered during examination-in-chief, cross-examination and sometimes in re-examination. The method of tendering is straightforward; the party tendering says, for example, the following:

> 'I tender the letter of John Smith dated 10 January 2011.'

The opposing party can then either say 'Objection' or 'No Objection'.

If there is an objection the judicial officer will ask for the reason for the objection, hear the response and then determine if the letter is admitted into evidence.

If the letter is admitted into evidence it will be given an exhibit number and a description by the judicial officer, for example, Exhibit A, Letter signed by John Smith, dated 10 January 2011.

It is appropriate to tender the letter through the person who created it, unless there is no objection to tendering through another party or directly from the bar table.

Where a document is shown to a witness and that document is to be tendered later it should be marked for identification. The judicial officer

should be asked by the party showing the document, 'Could that be marked for identification'. It will then be given a marking, for example, 'MFI 1', and returned to the party who asked for it to be marked for identification. When the time arrives for it to be tendered through another witness the letter should be described and then words such as 'It is MFI 1' said for the record.

Closing Addresses and Written Submissions

Once all witnesses have been called and examined the defence closes its case. The requirement is then for the prosecution to address the court on the evidence and the law, this is followed by the defence.

The practice in the Solomon Islands is for written submissions to be provided as part of the closing address. This usually requires an adjournment for one day, or in more complex cases a week or more. The submissions usually cover the evidence presented at trial and the relevant law.

Re-opening of a Case

Section 64 of the *Evidence Act* allows for the re-opening of a case in limited circumstances. It states:

> **64**. (1) In any proceeding, a party may not offer further evidence after closing that party's case, except with the leave of the court.
>
> (2) In a civil proceeding, the court may not grant leave under subsection (1) if any unfairness caused to any other party by the granting of leave cannot be remedied by an adjournment or an award of costs, or both.
>
> (3) In a criminal proceeding, the court may grant leave to the prosecution under subsection (1) if –
>
> (a) further evidence relates to a purely formal matter; or
>
> (b) further evidence relates to a matter arising out of the conduct of the defence, the relevance of which could not reasonably have been foreseen; or
>
> (c) further evidence was not available or admissible before the prosecution's case was closed; or
>
> (d) for any other reason the interest of justice require the further evidence to be admitted.
>
> (4) In a criminal proceeding, the court may grant permission to an accused under subsection (1) if the interest of justice require the further evidence to be admitted.
>
> (5) The court may grant permission under subsection (1) at any time until judgment is delivered.

Some of these matters are covered in the *Criminal Procedure Code*.[28]

Shortening of Hearing Procedures
Where evidence is uncontroversial it may be appropriate to tender statements, transcripts or other documents. It is also sometimes appropriate to simply make admissions in respect of certain facts or issues. Special care should be taken to ensure that the tendering of documents or otherwise admitting evidence is only done in respect of uncontested matters. The admission of such material into evidence can only be done with the consent of all the parties.

Section 21 of the *Evidence Act* allows for evidence to be admitted without the need to formally call witnesses. It states:

> **21.** (1) In a proceeding, the court may –
>
> (a) with the consent of all parties, admit relevant evidence that is not otherwise admissible; and
>
> (b) admit evidence offered in any form or way agreed by all parties.
>
> (2) In a criminal proceeding, an accused may admit any fact that is not in dispute so as to dispense with proof of that fact.
>
> (3) In a criminal proceeding, the prosecution may admit any fact that is not in dispute so as to dispense with proof of that fact.

Vulnerable Witnesses
There are specific provisions in the *Evidence Act* to assist with the taking of evidence from vulnerable witnesses. Section 41 lists some of the categories of vulnerable witnesses and allows the court to make orders in respect of them:

> **Arrangements for vulnerable witnesses**
>
> **41.** (1) Where a court considers that the capacity of a witness to give evidence satisfactorily may be limited and that limitation may be lessened by making special arrangements for the taking of that person's evidence, the court may make such special arrangements that it sees fit in the interest of justice.
>
> (2) Without limiting the generality of subsection (1), special arrangements may be requested by –
>
> (a) victims of a crime against morality;

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[28] For example, section 199 addresses evidence in reply in the following terms:
> If the accused person adduces evidence in his defence introducing new matter which the prosecutor could not have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut the said matter.

(b) victims or witnesses in domestic violence proceedings;

(c) persons under the age of 18 years; and

(d) persons with a mental or physical disability, illness or impairment.

(3) The court must have regard to the following matters in determining what orders to make –

(a) the desirability of minimising distress or trauma for the witness;

(b) the witness must be treated with dignity, respect and compassion;

(c) the possibility of the witness being intimidated when giving evidence;

(d) the proceeding should be resolved as quickly as possible.

(4) Special arrangements that the court may make include the following –

(a) closing of the court;

(b) restriction on publication of evidence;

(c) obscuring the witness from the view of the accused in a criminal trial;

(d) remote audio visual taking of evidence;

(e) allowing a support person to accompany the witness;

(f) making an order under section 42.

Section 42 of the *Evidence Act* allows the court to intervene where a vulnerable witness is being cross-examined by an accused. It provides for the court to appoint a person to cross-examine the witness, which may be particularly useful in sexual assault cases or where children are being cross-examined. Section 42 states:

Vulnerable witness cross-examined by accused

42. (1) A court may intervene where a witness's ability to testify under cross-examination may be adversely affected if the accused conducts the cross-examination.

(2) If the court considers it necessary in the interest of justice, it may appoint a person to ask the witness any questions that the accused requests the person to ask the witness.

(3) A person appointed under this section, when acting in the course of such appointment, must not give the accused or witness legal or other advice.

(4) A witness may consent to be cross-examined by the accused.

In cases involving allegations of sexual assault or other offences against morality, the practitioner should also bear in mind the provisions of section 58 of the *Evidence Act*, which restricts questioning of witnesses about their prior sexual experience. The section is designed to allow for focus to be placed on the alleged offending without diversion into issues related to general sexual activity. It states:

58. (1) In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the accused, except with the permission of the court.

(2) In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with the accused unless the evidence or question –

(a) relates directly to the acts, events, or circumstances which constitute the offence for which the accused is being tried; or

(b) is of such direct relevance to facts in issue in the proceeding or the issue of the appropriate sentence that it would be contrary to the interest of justice to exclude it.

(3) In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters –

(a) for the purpose of supporting or challenging the truthfulness of the complainant; or

(b) for the purpose of establishing the complainant's consent; or

(c) for any other purpose except with the permission of the court.

Charts and Summaries

Section 48 of the *Evidence Act* allows for the use of charts and summaries. It states:

48. Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would

be likely to aid its comprehension of other evidence that has been given or is to be given.

Section 94 of the *Evidence Act* which is referred to in Chapter 12 is also relevant when such charts and summaries are going to be used in evidence.

Section 60 allows for the recalling of a witness. This is especially useful where a advocate has failed to properly put relevant issues such as required in a *Browne v Dunn* situation. It states:

Parties Recalling Witnesses
Section 60 allows for the recalling of a witness, this is especially useful where an advocate has failed for properly put relevant issues such as required in a *Browne v Dunn* situation. It states:

60. (1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if –

(a) the evidence concerned has been admitted; and

(b) it contradicts evidence about the matter given by the witness in examination-in-chief; and

(c) the witness could have given evidence about the matter in examination-in-chief.

(2) A reference in this section to a matter raised by evidence adduced by another party includes reference to an inference drawn from, or that the party intends to draw from, that evidence.

Court Recalling Witnesses
Section 61 allows the court to recall a witness. It states:

61. (1) The court may recall a witness who has given evidence in a proceeding if the court considers that it is in the interest of justice to do so.

(2) The court may recall a witness under this section at any time until judgment is delivered in the proceeding.

Witness Called in Error
Section 65 deals with situations where a witness is called in error. It states:

65. A party is not to cross-examine a witness who has been called in error by another party and has not been questioned by that other party about a matter relevant to a question to be determined in the proceeding.

Communication Assistance to Accused
Section 68 allows for communication assistance to be provided to an accused. It states:

> **68.** (1) A court may order communication assistance be provided to an accused in a criminal proceeding if needed to enable that accused to understand the proceeding and to give evidence if the accused elects to do so.
>
> (2) Communication assistance may be provided to an accused in a criminal proceeding on the application of the accused in the proceeding or on the initiative of the court.
>
> (3) A person who, whilst providing communication assistance to an accused, wilfully makes any false or misleading statement to the accused or to the court commits an offence and is liable on conviction to a fine not exceeding 10,000 penalty units or to imprisonment for a term not exceeding twelve months.

Communication Assistance to Witnesses
Section 69 allows for communication assistance to witnesses. It states:

> **69.** (1) A court may order communication assistance be provided to a witness in a civil or criminal proceeding if needed to enable that witness to give evidence.
>
> (2) Communication assistance may be provided to a witness on the application of the witness or any party to the proceeding or on the initiative of the court.
>
> (3) A person who, whilst providing communication assistance to a witness, wilfully makes any false or misleading statement to the witness or to the court commits an offence and is liable on conviction to a fine not exceeding 2000 penalty units or to imprisonment for a term not exceeding twelve months.

Hearing and Speech Impaired Witnesses
Section 70 deals with hearing and speech impaired witnesses. It states:

> **70.** (1) A witness who cannot hear adequately may be questioned in any appropriate way.
>
> (2) A witness who cannot speak adequately may give evidence by any appropriate means.
>
> (3) This section does not affect the right of a witness to whom this section applies to give evidence about a fact through an interpreter.

The Voir Dire
The *voir dire* is a tool for testing evidence, usually to determine whether evidence is admissible. It is of equal use in civil and criminal proceedings.

The phrase derives from the Norman French, meaning literally 'to look, to speak'. This refers to the judge opening an inquiry into the evidence to make a preliminary assessment separate from the substantive trial.

In most cases, issues to be canvassed on a *voir dire* should be dealt with prior to the commencement of the trial proper. This makes sense particularly if the evidence challenged is of great importance to the party relying upon it. Once the ruling has been obtained, the party will then know whether the evidence can be properly referred to in opening, without the risk of aborting the hearing by referring to material which ultimately will not be before the court.

The separate nature of a *voir dire* hearing to the trial proper is well established at common law and nothing contained in the Solomon Islands *Evidence Act* alters this fact.

Section 181 of the *Evidence Act* states:

> **181.** (1) If the determination of a question whether –
>
> (a) evidence should be admitted (whether in the exercise of a discretion or not); or
>
> (b) evidence can be used against a person; or
>
> (c) a witness is competent or compellable;
>
> depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.
>
> (2) In the hearing of a preliminary question about whether an accused's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the accused.
>
> (3) In a hearing to determine a preliminary question of fact, the facts in issue are taken to include the fact to which the hearing relates.

The forensic utility of conducting a *voir dire* prior to the trial proper, be it civil or criminal, is clear. Where crucial evidence is excluded in a criminal matter, an adjournment may then be sought to make the appropriate representations to the Director of Public Prosecutions. In a civil matter the result may lead to the parties reaching a settlement. In either case the result is a saving of court time, costs and resources.

A *voir dire* is a two step process: determining the factual basis upon which the objection to admissibility rests, and applying the law to determine admissibility.

In criminal trials the application for a *voir dire* is made by the defence when challenging the admissibility of a witness' evidence. Probably the most common *voir dire* hearings are held to test the admissibility of confessional evidence contained in a record of interview,[29] but there are many other examples of circumstances in which it is appropriate to hold a *voir dire*.

A *voir dire* may be held to determine whether a witness is competent to give evidence.[30] It may be conducted to ascertain whether a particular witness can give expert evidence either on the basis of a challenge as to whether the witness has specialised knowledge or whether the field of knowledge is a recognised area for expert evidence.[31] The challenge may be on the basis of admissibility of identification evidence,[32] or hearsay evidence of an allegedly unavailable witness.[33] The categories are not closed.

A hearing might also be conducted to allow the court to decide whether to exercise its discretion to limit the use of or exclude evidence.[34] More particularly it would need to be conducted where the provisions of section 170(1) of the *Evidence Act* are sought to be relied upon:

> **170.** (1) Evidence that was obtained –
>
> (a) improperly or in contravention of any law; or
>
> (b) in consequence of an impropriety or of a contravention of any law;
>
> is not to be admitted unless the desirability of admitting the evidence that has been obtained outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.[35]

Indeed, it is accepted law that any evidence that depends on the existence of factual matters to determine admissibility should occur on the *voir dire*.[36]

The prosecution will call its contested evidence first, unless the determination of admissibility is being done on the papers. The contested evidence is given through prosecution witnesses. The usual trial procedures are followed when examining witnesses on the *voir dire*. After a prosecution witness has given evidence-in-chief, the defence can cross-

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29 See *Evidence Act* s 169. Section 170(2) sets out a raft of matters for the court to take into consideration in deciding whether to exclude confessional material.

30 *Evidence Act* s 30.

31 *Evidence Act* s 133

32 *Evidence Act* Part 7 (ss 81–86).

33 *Evidence Act* s 118(5)

34 *Evidence Act* Part 10 (ss 136–139).

35 Section 170(3) sets out a further raft of matters to be taken into account in determining whether to exclude illegally or improperly obtained evidence.

36 See *Cornelius v R* [1936] HCA 25; (1936) 55 CLR 235, 248–249.

examine and then re-examination can occur. The defence should put its case to the prosecution witnesses.[37]

Evidence of the Accused

The accused does not have to give evidence; however, if for example the question to be determined is whether a confession was induced it would probably be necessary to call the accused to give evidence of the alleged inducement in order to make out the challenge. Where an accused does give evidence on the *voir dire* he or she may be cross-examined; but not about the truth of the confession.[38] Furthermore, if the accused gives evidence at trial he or she can only be cross-examined about evidence given on his or her *voir dire* if it is inconsistent. If the evidence given during the *voir dire* is not inconsistent with the evidence given at trial then an accused cannot be cross-examined about the evidence given by the accused during the *voir dire*.

The defence can call other witnesses on the *voir dire*. When all evidence is heard, because it is a challenge by the defence, the defence addresses the court first followed by the prosecution.

In most circumstances, the testimony of a witness on the *voir dire* is not admissible in the trial proper. If the disputed evidence is ruled admissible it should be given again in the trial proper. There are many reasons for this approach including:

1. The defence may have limited its cross-examination of prosecution witnesses to matters relevant for consideration of admissibility only.

2. The prosecution may wish to elicit more evidence from its witnesses than that given during the *voir dire*.

3. Consideration of admissibility does not include evaluation of the weight that might be given to the evidence.

4. As a matter of fairness to all parties admissibility of evidence should be determined at the earliest opportunity.[39]

It is essential that the counsel requesting the *voir dire* specify the issue(s) to be determined and any matters beyond those specified may not be relevant and therefore not admissible on the *voir dire*.[40]

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37 See *R v Davis* [1990] Crim LR 860.

38 *Wong Kam-Ming v R* [1980] AC 247.

39 *Grbic v Pitkethly* (1992) 65 A Crim R 12, 26–7.

40 See *R v Lars, Da Silva & Kalanderian* (1994) 73 A Crim R 91, 115. Judges can also sit with Assessors in the Solomon Islands. The *Criminal Procedure Code* covers such situations.

Judges Sitting Alone

It is appropriate for a judicial officer sitting alone, as is the case for judges and magistrates in the Solomon Islands, to determine admissibility of evidence and then separately, as the tribunal of fact, the weight to be given to the evidence.

Judges and magistrates sitting alone face the difficult task of excluding from their consideration any evidence that they have ruled inadmissible when determining whether the prosecution has proved its case beyond reasonable doubt. In order to assist with this process, matters which are not relevant to determination on the *voir dire* are inadmissible during the *voir dire*. For example, the whole of a record of interview may not need to be read for a judge or magistrate to determine if it was voluntarily given. The burden is also lessened, and therefore the chance of a miscarriage of justice reduced, if judges and magistrates do not have available the prosecution brief of evidence that invariably contains accounts of events that may never make it into evidence.

The risk of contamination of the judge's impartiality by exposure to evidence that will not ultimately be admitted may be avoided in another way.

A judge or magistrate should take considerable care when determining what evidence they need to hear on a *voir dire*. This principle is stated by Andrew J in *Uda Lili Gasika v The State*, in which the Papua New Guinea Supreme Court considered whether a trial judge should read a record of interview or have it read to the Court prior to determining its admissibility.[41] Justice Andrew stated:

> In my view, the better practice in most cases is for the trial judge to hear the evidence of both sides on the voir dire and then to consider whether there might be some assistance from looking at the document. He should invite submissions from counsel as to whether he should exercise that discretion or not.
>
> …
>
> In my view however, it was incorrect for the trial judge to have ordered the record of interview to be read aloud to the court prior to deciding the question of its admissibility. It had not then become evidence and should only have been read by the trial judge in order to assist on the question of admissibility.[42]

A very clear example of a judge making an error by not separately considering what evidence is admissible is provided by the Court of Appeal in *Pitakaka v Regina*.[43] In this case there were a number of co-accused and the judge was required to consider the evidence against each co-accused

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41 [1983] PGSC 10; (1983) PNGLR 58, 62.
42 Ibid.
43 [2007] SBCA 16.

separately. Although not a case involving consideration of the application of evidence heard on the *voir dire*, it is a very good example of the difficulties confronted by a judge sitting alone attempting to apply evidence appropriately when determining whether the prosecution has proved its case beyond reasonable doubt. In this case, the relevant facts were set out as follows:

The brief facts of the prosecution case may be taken from the introductory summary in the judgment:

> It is alleged that these five, acting in concert, beat Brother Sado to death at a village known as Pite on the Weathercoast of Guadalcanal after he had been imprisoned for some time in a hole made about the roots of an abololo tree. Pite was a Guadalcanal Liberation Front (GLF) controlled village at the time of the insurrection by the GLF. The Crown case was that Ronnie Cawa, the second in command to Harold Keke, the leader of the Front, had the Brother kept against his will as prisoner whilst he was interrogating him. It is alleged that these five accused on a particular morning inflicted such a beating on him that he died.
>
> The Crown case then is that these five acted together by common purpose or agreement to kill or alternatively aided and abetted each other in beating him well knowing he would die.
>
> The motive for murder was that the GLF suspected Brother Sado had traveled to the Weathercoast as a spy seeking information about the activities of the GLF about Pite village, for they were the suspicions which drove the interrogation by Cawa and which after beatings, caused Cawa to imprison the brother. The truth or otherwise of the GLF suspicions which gave rise to the beatings is not on point although the prosecution does say those suspicions were false.
>
> After the killing, Brother Sado's body was buried at the beach at Pite village and was ultimately exhumed on October 2003. A post mortem examination was carried out in Honiara.

The Court of Appeal referred to the relevant law that requires separate consideration of statements made by co-accused, stating:

> [T]he fundamental rule that statements made by one accused are not evidence against his co-accused unless the maker of the statements either expressly or by implication adopts them and makes them part of his own evidence; *R v Rudd* [1948] 32 Cr App R 138.

The Court then went on to describe how the judge mixed the evidence applying wrongly the evidence of one accused against another, and concluded that:

> In a trial involving a number of accused, the judge must be careful to consider the case against each accused separately. Much of the evidence may be admissible against all or some of the accused but it is essential that the judge does not allow evidence to be considered in the case of an

> accused against whom it is inadmissible. The judge's approach in the present case fell into the error.

The need for caution and careful consideration of what evidence is admissible provided in the *Pitakaka* case gives strong support for the laws and procedures that should be applied when considering *voir dire* evidence.

The separate nature of the *voir dire* does not mean that in all circumstances the evidence given cannot be used in the trial proper. In civil trials without a jury it has been held by two judges of the Federal Court of Australia that *voir dire* testimony may be admitted in the trial proper, if relevant to the fact in issue and not subject to any exclusionary rule.[44] There may be good reasons in a civil trial for parties to agree to shortening a case by consenting to having evidence given on the *voir dire* simply accepted for the trial proper. Acceptable examples of such practices in serious criminal trials would be rare.

In *Ben Tofolo v R* the Court of Appeal outlined the procedures that were appropriate when evidence was being taken on the *voir dire*, and referred to the fact that prosecution evidence could be used in the trial proper if agreed by the defence and accept by the judge.[45] This decision does not conflict with the established law and procedure, and should not be used to suggest the prosecution does not have to produce witnesses for cross-examination during the trial proper. The case is also authority for the proposition that the magistrate or judge is required to rule on the admissibility of the disputed statement before proceeding with the trial. The obvious reason for this is that the accused is entitled to know the case that is being brought. The Court commented about general procedures in the following way:

> We think it will be helpful if we set out courses that may be acceptably followed when there is a challenge to the admissibility of an accused's statement. The challenge may be either on the grounds of non-voluntariness or that in its discretion the Court should refuse to admit the statement as having been unfairly obtained or that its use would in some other way be unfair. …
>
> It may be that before the trial commences defence counsel advises the prosecution that a statement's admissibility is to be challenged, or it may not be disclosed until the Police officer who is to produce the statement gives evidence. In the former case Counsel may agree that the judge be asked to rule before the Crown makes the opening address the judge holds the voir dire and rules upon whether the statement is to be admitted or not. In the latter case, and this is probably the more usual case, once counsel indicates that the admissibility of the statement is challenged evidence in chief stops, and evidence on the voir dire is taken. In either case the judge should require defence counsel, in the absence of the Police Officer concerned, to specify the grounds on which the statement is challenged.

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44 *Brown v Commissioner of Taxation* (2002) 119 FCR 269; [2002] FCA 318 at [95] per Sackville and Finn JJ.

45 [1993] SBCA 4.

> Counsel should then call the Police Officer and lead his evidence in relation to the statement and the grounds upon which it is challenged, which of course is subject to cross – examination.
>
> Crown Counsel may then call such other witnesses as he thinks proper on the issues raised in the challenge of admissibility. When the crown has given its evidence the defence may call such witnesses as it thinks proper, including the accused, on the issues raised on the challenge to admissibility, which may very well not cover all the matters arising upon the charge the accused faces. Counsel then address and the court rules on whether the statement is admissible. After the ruling, the Police officer who was giving evidence when the admissibility of the statement was challenged resumes giving evidence at the point where the challenge was made.
>
> … It is our view that the appropriate course to follow is to treat the prosecution evidence on the voir dire as evidence on the trial, unless counsel object and obtain a ruling from the judge that it should not be so treated; and that the defence evidence be not so treated unless Defence Counsel agree that it should be so treated and also that the defence call the witness or witnesses concerned. The reason why the witness must also give evidence is that cross – examination on the voir dire is limited to matters relevant to the issues raised on the question of admissibility but if an accused or his witnesses give evidence as a part of the defence case they are open to be cross – examined on all issues. The accused should not be able to gain an advantage by calling evidence on a voir dire, use it as a part of the defence and yet avoid cross examination on all the issues.
>
> At the conclusion of the Crown case the normal procedure is followed. Defence counsel opens his case knowing exactly what the evidence is against his client. The accused may or may not give evidence; if he does then Counsel and the judge may accept that the evidence he gave on the voir dire be treated as part of his evidence for the defence and he may add to it and be subject to cross – examination in the usual way. On the other hand if he does not give evidence then what he said on the voir dire should not be referred to by counsel and the judge should put it out of his consideration of the case. The same approach should apply to any other defence witnesses who gave evidence on the voir dire.[46]

Other procedural matters relating to when a judge could make a decision to release an accused can be found in *R v Keaviri*, Muria CJ held:

> If Mr Talasasa's contention is accepted it would mean that the fifth accused would continue to sit in court throughout the rest of the trial even though there was no evidence against him. I do not think any reasonable-minded tribunal would accept such a course of action. … The only sensible course of action to take was to give him back his liberty and set him free. In other words, at the end of the prosecution evidence there was no evidence against the accused so the court, after hearing counsel for the prosecution and accused, dismissed the charges against the fifth accused

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[46] Ibid.

> and acquitted him, That in our view is in accordance with section 268(1) of Criminal Procedure Code .
>
> In Solomon Islands, a criminal trial is conducted by a judge sitting alone. He deals with a voir dire hearing as a trial within a trial. The prosecution adduced all the evidence at the one and same trial. It is therefore well within the power of the court to consider the question of the guilt of the accused after the prosecution concluded its evidence but before the conclusion of the voir dire if at that stage there was no evidence against that accused. There is the added constitutional right consideration here. The accused is 'presumed innocent until he is proved guilty or has pleaded guilty': Section 10(2) Constitution. This right to presumption of innocence cannot be overridden by a mere procedural technique [referring to s 268(1) of the Criminal Procedure Code (Ch 7)] which adds nothing against the accused person who stands trial without any evidence against him.[47]

There is a competing argument that, in the event of a joint trial, even if there was found to be no case against an accused after the *voir dire*, the judge could not acquit the accused until the Crown had formally closed its case against all accused. This may be an overly technical approach. In any event, good practice and the interests of justice demand that if called upon the Crown ought make the appropriate concession where there is no other evidence that could secure a conviction and the Court could then acquit the accused.

The use of *voir dire* examinations where appropriate can thus be seen to assist in the narrowing of issues, the promotion of extra curial (out of court) resolution of cases and the protection of the rights of the accused. There is a resultant greater efficiency of time and resources in running the ultimate trial. There is also the removal of the risk of obfuscation of the real issues by matters which ultimately ought not to be in evidence.

Assessors

The *Criminal Procedure Code* allows for trials to be conducted with Assessors.[48] The use of assessors has been limited as are their functions. Section 275 of the *Code* gives the assessors a limited advisory role. It states:

> **275.** (1) When, in a case tried with assessors, the case on both sides is closed, the Judge may in his discretion sum up the evidence for the prosecution and the defence, and shall require each of the assessors to state his opinion orally on all matters on which such opinion is asked, and shall record such opinion.
>
> (2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors and the decision on all matters on which the opinion of the assessors has been asked shall be vested exclusively in the Judge.

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47 Criminal Case No 20 of 1995 (Unreported *voir dire* ruling).

48 Reference should be made to the relevant sections of the Code for the procedures.

(3) If the accused person is convicted, the Judge shall pass sentence on him according to law.

(4) Nothing in this section shall be read as prohibiting the assessors, or any of them, from retiring to consider their opinions if they so wish, or, during any such retirement or at any time during the trial, from consultation with one another.

Kapi J in *Loumia v Director of Public Prosecutions* described the role of assessors in the following way:

> In relation to the second ground of appeal, agree, with Connolly, J.A. that this ground should be dismissed. Function of assessors in Solomon Islands is different from the function of juries in other countries. Assessors are only required to express an opinion on matters referred to them by the judge. . . . The judge is not bound to conform to the opinion of assessors . The final decision is vested exclusive in the judge.[49]

Unfavourable Witnesses

Until the introduction of the *Evidence Act* a party calling a witness could not cross-examine the witness without the court declaring the witness hostile. The *Evidence Act* now allows for cross-examination on the basis that the witness is unfavourable. It is much easier to make out the bases upon which a witness can be declared unfavourable than to have a witness declared to be hostile.

Part 13 of the *Evidence Act* (sections 162 to 166) deals with unfavourable witnesses, how they may be cross-examined, the weight to be given to their evidence, and how documents can be used.

Section 162 describes unfavourable witnesses. It states:

162. (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about –

(a) evidence given by the witness that is unfavourable to the party; or

(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination-in-chief, making a genuine attempt to give evidence; or

(c) whether the witness has, at any time, made a prior inconsistent statement; or

(d) matters relating to the credit of the witness.

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[49] [1986] SBCA 1; [1985-1986] SILR 158.

> (2) Questioning a witness under this section is taken to be cross-examination.
>
> (3) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

Section 162(1)(a) allows for cross-examination about unfavourable evidence generally. In Australia 'unfavourable' has been found by courts to simply mean not favourable.[50] It can include the situation where a witness cannot remember the events in question. This is a very significant change from the previous position, when judges were required to find a witness to be hostile before they could be cross-examined while they were still in examination-in-chief.

In *Adam v The Queen* a majority in the High Court in Australia stated:

> There appears much to be said, however, for the view that to give evidence which, at best, is unhelpful to the party calling it, and to do so without 'making a genuine attempt to give evidence', is to give evidence 'unfavourable' to that party.[51]

The section refers to 'evidence . . . that is unfavourable' rather than to an 'unfavourable witness', therefore an order could be made permitting cross-examination about part of a witness' testimony which is unfavourable, even though the rest of the witness' evidence is favourable: this has been found to be the case in Australia.[52]

Section 162(1)(b) is a similar test as existed under the hostile witness rules. Section 162(1)(c) allows for cross-examination of prior inconsistent statements. It is necessary to be able to prove the prior inconsistent statement.[53] Section 162(1)(d) allows for cross-examination about credit in order to attack a witness' credibility about the unfavourable evidence.[54]

Section 164 provides guidance about how the court should go about estimating the weight given to a statement admitted under the sections relating to prior inconsistent statements and unfavourable witnesses. It states:

> **164.** In estimating the weight (if any) to be attached to a statement rendered admissible as evidence under this Part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including –

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50 *Souleyman* (1996) 40 NSWLR 712 at 715; *Lozano* (New South Wales Court of Criminal Appeal, Unreported, 10 June 1997) .

51 [2001] HCA 57 at [27]; (2001) 207 CLR 96.

52 *Pantoja* [1998] NSWSC 565.

53 In a case where the witness has been interviewed with an interpreter, it has been held in Australia, that there must be proof that the interview was correctly interpreted: *Yi* [1998] NSWSC 39.

54 *Le* (2002) 54 NSWLR 474.

(a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and

(b) the question whether or not the maker of the statement or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts.

In all cases it is important to remember that the unnecessary adjournments and the unnecessary calling and questioning of irrelevant witnesses does nothing to assist either the prosecution or defence case. The efficient management of hearings undoubtedly assists with ensuring a fair trial.

The next chapter covers confessions and their admissibility