Section 32(1), 32(3), 33 and 38 of the Evidence Act 1995 (NSW)

An analysis, explanation and guide

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INTRODUCTION

The purpose of this paper is to analyse and discuss the following sections of the *Evidence Act 1995 (NSW):*

- Section 32
- Section 33
- Section 38

My hope is to provide a useful and practical analysis of the above provisions that all lawyers, students or interested readers can use.

Please feel free to contact me if you would like to make any suggestions or have a discussion about this paper. I can be contacted at tomas.gooley@alsnswact.org.au.

Enjoy,

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PART 1:

SECTION 32 OF THE EVIDENCE ACT 1995 (NSW) ATTEMPTS TO REVIVE MEMORY IN COURT

Section 32 of the Evidence Act 1995 (herein section 32)

(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.

PURPOSE

The purpose of this provision is to facilitate a witness giving evidence who, without access to a document of the kind referred to in the section, would be unable to give complete evidence about an incident or some aspect of an incident. In my experience you are most likely to encounter this provision where a prosecution witness, who has previously given a formal written statement, forgets to mention certain evidence during evidence-in-chief.

I will examine section 32 in three broad sections:

A. Section 32(1)
B. Section 32(3)

C. Section 32(2) and Section 192 of the Evidence Act 1995

In practice, the effect of *section 32* is:

- First, it may allow a witness to use a document to revive their memory while giving evidence;[1] and
- Secondly, it may allow a witness who has used a document to revive their memory, to read the relevant portion of that document into evidence.[2]

SECTION A: SECTION 32(1)

As mentioned above the most common use of section 32 is the power for a witness to use a document to revive their memory while giving evidence. In my experience this would most commonly arise when a prosecutor seeks leave to revive a witness' memory by having them read a document, generally their statement, to themselves during their evidence in chief. As a practitioner it is important to be aware of this provision to avoid being caught off guard and allowing a prosecution witness to be reminded of a fact or opinion when they are not entitled to.

In practice an application in accordance with section 32(1) would involve the following steps:

- The applicant/prosecutor seeks leave for the witness to refresh their memory from a document
- If leave is granted (see below), then the witness will be given the document, asked to identify it, and then read the relevant portion to themselves
- The witness will then be asked, having read the document, if that refreshes their memory
- The witness will then be allowed to continue giving their evidence after having had their memory refreshed.

SECTION B: SECTION 32(3)

Section 32 also contains an ancillary power which may allow a witness who has already attempted to revive their memory in accordance with section 32(1) to read the relevant portion of that document into evidence. This is concerning because it may allow evidence to be given despite a witness having no recollection at the hearing/trial. In certain circumstances if not most this could cause extreme

[1] *Section 32(1) of the Evidence Act 1995*
[2] *Section 32(3) of the Evidence Act 1995*

unfairness to an accused person who as a result of the witness' poor memory is unable to question or challenge the evidence that has been read.[3]

SECTION C: SECTION 32(2) AND SECTION 192 OF THE EVIDENCE ACT 1995

Before a party can utilise a power in accordance with either sections 32(1) or (3) they must be granted leave to do so. Both provisions require the same considerations to be applied before leave is granted. Those considerations are set out in sections 32(2) and 192(2):

Section 32(2), says:

- If while giving evidence a witness is unable to recall a fact or opinion adequately without the use of a document,[4] and
- There exists a document that would assist the witness in reviving their memory (implied), and
- The document is an original or copy of a document,[5] and
- The document was written or made by the witness,[6] and
- At the time the document was written or made by the witness the events recorded in the document were fresh in the memory of the witness,[7] and
- At the time the document was written or made by the witness, the witness found that document to be accurate.[8]

The witness may be permitted to use the powers set out in section 32. However, before granting leave the consideration of section 192 must also be taken into account which are:

- The extent to which granting leave in accordance with the application would be likely to add unduly to, or to shorten the length of the hearing,[9] and
- The extent to which granting leave in accordance with the application would be unfair to a witness,[10] and

[3] *R v Jenkins (No 5) [2018] NSWSC 730 at 39*
[4] *Section 32(2)(a) of the Evidence Act 1995*
[5] *Section 32(2)(b) of the Evidence Act 1995*
[6] *Section 32(2)(b)(i) of the Evidence Act 1995*
[7] *Section 32(2)(b)(i) of the Evidence Act 1995*
[8] *Section 32(2)(b)(ii) of the Evidence Act 1995*
[9] *Section 192(2)(a) of the Evidence Act 1995*
[10] *Section 192(2)(b) of the Evidence Act 1995*

- The importance of the evidence in relation to which the application for leave is sought,[11] and
- The nature and importance of the proceeding to which the application relates,[12] and
- The power of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.[13]

The above considerations are mandatory and while each consideration need not be satisfied, they must nevertheless be considered before the court exercises its discretion.[14]

While, both section 32(1) and (3) require the same test to be applied it is clear from the authorities (discussed below) that applications in accordance with section 32(3) are significantly more difficult to obtain.[15]

The section 32(2) considerations are explored below:

WHAT IS A DOCUMENT?

A document is any record of information, and includes:[16]

(a) Anything on which there is writing,

(b) Anything on which there are marks, figures, symbols, or perforations having a meaning for persons qualified to interpret them,

(c) Anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or

(d) A map, plan, drawing or photograph.

Further:[17]

(a) Any part of the document, or

(b) Any copy, reproduction or duplicate of the document or of any part of the document, or

(c) Any part of such a copy, reproduction or duplicate.

WHAT IS MEANT BY FRESH IN THE MEMORY?

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[11] *Section 192(2)(c) of the Evidence Act 1995*

[12] *Section 192(2)(d) of the Evidence Act 1995*

[13] *Section 192(2)(e) of the Evidence Act 1995*

[14] *R v Jenkins (No 5) [2018] NSWSC 730*

[15] *R v Jenkins (No 5) [2018] NSWSC 730 at 32*

[16] *Dictionary, Evidence Act 1995*

[17] *Clause 8 part 2 of the Dictionary, Evidence Act 1995*

This is probably the most controversial aspect of section 32 and as Bellew J said in *R v Rogerson; R v McNamara (no 24)* [2016] NSWSC 105 at 8 (Rogerson)

> *"There is a dearth of authority as to the meaning of the term "fresh in his or her memory" as it appears in s 32"*.[18]

Although Bellew J's remarks are accurate there are a few cases that provide some guidance as to the meaning of fresh in his or her memory.

A good starting point is *R v Van Beelen* (1972) 6 SASR 534 at 537 per Sangster J

> *"In my opinion the real test is freshness of memory as a question of fact and not the relationship in time, except that shortness of time makes it easier to accept the witness' assertion that the facts were fresh and length of time more difficult – and a great length of time would undoubtedly lead any court to reject the evidence claiming that the events were fresh in the memory of the witness at the time of making the memorandum."*

Returning to *Rogerson,* we are assisted by Bellew J's analysis. In summary *Rogerson* dealt with the following:

- There was an application for a crown witness, Mr McLannen, to use his statement to revive his memory during evidence in chief.
- Mr McLannen was called by the Crown to give rebuttal evidence of character that was raised by the accused at trial.
- The proposed statement was made to Police in January 2015 and contained the witness' recollection of events that had occurred in early 2014, some 12 months before the making of the statement.
- The primary issue in this application was, what is meant by the words fresh in the memory?
- Ultimately leave was not granted for the witness to revive his memory.

The judgement as mentioned is both helpful and digestible specifically at paragraphs 12 – 20: However, the key point are:

- A liberal approach should be taken in determining what is meant by fresh in the mind for the purposes of section 32.[19]

[18] *R v Rogerson; R v McNamara (no 24) [2016] NSWSC 105 at 8*

[19] *R v Rogerson; R v McNamara (no 24) [2016] NSWSC 105 at 17*

- 12 months is considered a significant time period and not a period which would fall within the ambit of section 32 generally.[20]
- Notwithstanding the use of the word "or" as the conjunctive term in section 32(2) as opposed to "and" all of the consideration in section 32(2) are mandatory in determining whether or not leave should be granted.[21]
- In determining whether to grant leave in accordance with section 32 the test is one which compiles the considerations of both section 32(2) and section 192.[22]

R v Al Batat & Ors (No 15) [2020] NSWSC 1227, is a more recent and equally helpful decision by Hamill J. Factually:

- During a murder trial, whilst giving evidence, the witness Ms Li was unable to remember the contents of some messages sent between her and one of the accused people using an electronic messaging platform named WeChat.
- The message exchange occurred on 2 February 2017.
- The Crown sought leave for Ms Li to revive her memory by referring to a document.
- The proposed document was not the original WeChat messages but rather a statement made by her to Police on 1 May 2019. Importantly, the messages occurred more than two years prior to the making of Ms Li's statement.

Hamill J found that the WeChat message exchanged were not fresh in Ms Li's memory at the time of making her statement, saying:

> *"It was far from it… There is simply no way that her memory at that time allows for a perfect reproduction of the words actually used 27 months earlier on 2 February 2017."*[23]

The case also provides a summary and interpretation of the relevant authorities relating to section 32 and what is meant by the term 'fresh in the memory'. It provides a literal albeit liberal view, the seminal point being the factual finding that Ms Li's memory was unable to reproduce the words used perfectly and on that basis it could not be fresh in her memory.

[20] *R v Rogerson; R v McNamara (no 24) [2016] NSWSC 105 at 16*
[21] *R v Rogerson; R v McNamara (no 24) [2016] NSWSC 105 at 13*
[22] *R v Rogerson; R v McNamara (no 24) [2016] NSWSC 105 at 18-19*
[23] *R v Al Batat & Ors (No 15) [2020] NSWSC 1227, at 16 and 19*

For completeness, but not very helpfully, the Victorian Court of Appeal in *Roth (a pseudonym) v R* [2014] VSCA 242 also considered the issue of what is meant by fresh in the mind.

- During a trial the victim was unable to recall events which formed the basis of two offences. This resulted in the prosecutor seeking leave to have the victim revive her memory in accordance with section 32.
- The application was opposed by the defence but ultimately granted.[24]
- The statement used to revive the victim's memory was made some 5 years after the occurrence of the events which lead to the offences.
- On the application for leave the appellant submitted that the requirement of being fresh in the memory in accordance with section 32 of the act is analogous to the requirement of being fresh in the memory in accordance with section 66 of the act and further if that is the case in the absence of s66(2A) which legislates matters to be taken into account when considering what is fresh in the memory in accordance with section 66 of the act, the court was bound by the decision in *R v Graham* (1998) 195 CLR 606 at 608.

Neave and Priest JJA disagreed stating:

> *"Although it is unnecessary to decide the question we would have difficulty in accepting the argument that "fresh in the memory" for the purposes of s 32 of the Act should be read in the same manner as it was interpreted in Graham for the purposes of s 66… Moreover the discussion between counsel and the judge, prior to the judge ruling on the application in relation to the first complainant, makes it clear that her Honour was well aware of the need to take account of whether the events recorded in the statement were fresh in the memory of the witnesses, in exercising her discretion. Thus we are not persuaded that there is any merit in the argument…"*[25]

The above decision is an important one because as in *Rogerson* it is clear that notwithstanding the similarities in the two provisions being section 66 and section 32 the two tests are not synonymous. This has the flow on effect of meaning that the restrictive approach by the High Court in *Graham* does not apply. Neave and Priest JJA further stated:

> *"It is unnecessary for the purposes of this application to decide whether s 32 of the Act replaces the common law principles governing the use of documents to refresh memory. But*

[24] Roth (a pseudonym) v R [2014] VSCA 242 at 28
[25] *Roth (a pseudonym) v R [2014] VSCA 242 at 40*

even if s 32 comprehensively states the principles governing the discretion to permit use of documents to revive memory, and the judge misapplied those principles, no substantial miscarriage occurred as a consequence of the judge's rulings.[26]"

In my view, Roth turned on its own particular facts. It is not authority for the proposition that five years will amount to fresh in the memory.

In *R v Jenkins (No 5)* [2018] NSWSC 730, Hamill J again dealt with an application for leave in accordance with section 32(1).

- During evidence in chief a crown witness AR was unable to recall certain aspects of his evidence.
- AR had previously participated in an interview with Police, the crown sought that leave for AR to revive his memory by reading the transcript of that interview.
- The interview was conducted on 17 July 2015 and related to incidents that were said to have occurred some 3 months earlier in March/April 2015.
- During the application AR gave evidence, that evidence largely focused on the need for AR to refer to the transcript and his inability to recall that evidence without assistance of that transcript, a short excerpt of his evidence is as follows:

  A. *Fuck, I can't remember what I said.*

  Q. *Sorry?*

  A. *I can't remember what I said.*

  Q. *Did reading the statement you made to the Police refresh your memory?*

  A. *Well it did when I read it. You know what I mean? I don't have a very good memory because I used heaps of drugs.*

There was limited evidence to suggest that the witness' drug affected memory was any better or worse in 2015 at the time of the events and the interview or that the witness found that document to be accurate.

His Honour found:

[26] *Roth (a pseudonym) v R [2014] VSCA 242 at 42*

> *In the present case, the events of which the witness was giving evidence occurred around three months before his statement. The witness' evidence and his insightful self-assessment of the quality of his memory, suggested that he had difficulty remembering things that had happened yesterday, let alone things that had happened months earlier…*[27]

And:

> *There was no evidence that AR's memory was better in 2015 than it is today. In view of the quality of AR's memory generally, the nature of the events he was being called upon to remember and the delay between the subject events and his police interview, I was not satisfied that the interview was recorded when the events therein records "where fresh in AR's memory"*[28]

In summary what is meant by fresh in the memory?

The following key points emerge from the five cases discussed:

- It is a question of fact that is not solely determined by how soon or long after an event occurs that the document is made.[29]
- Notwithstanding the above how soon or long after an event occurs the document is made is a relevant and important consideration: the shorter the time between the event and the making of a document the more likely the event was fresh in the memory of the witness.[30]
- A liberal approach should be applied in determining if a matter is fresh in the witness' memory.[31]
- The fact that a witness would have been unable to provide a *"perfect reproduction"* of the events led to the finding that the events were not fresh in the memory.[32]
- The quality of a witness' memory both generally and specifically in relation to the events in the document is an important factor.[33]

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[27] *R v Jenkins (No 5) [2018] NSWSC 730 at 11*
[28] *R v Jenkins (No 5) [2018] NSWSC 730 at 12*
[29] *R v Van Beelen (1972) 6 SASR 534 at 537*
[30] *R v Van Beelen (1972) 6 SASR 534 at 537*
[31] *R v Rogerson; R v McNamara (no 24) [2016] NSWSC 105 at 17*
[32] *R v Al Batat & Ors (No 15) [2020] NSWSC 1227 19*
[33] *R v Jenkins (No 5) [2018] NSWSC 730 at 11 and Director of Public Prosecutions v Curran (no2) [2011] VSC 280*

ACCURACY?

What is meant by accuracy? In *Rogerson,* it was found that the fact the statement had been signed by the witness at the time of making the statement was sufficient to prove that Mr McLannen had found the document to be accurate at the time of making it.[34]

This view was confirmed in *Al Batat & Ors* where the prosecution relied on the fact that Ms Li had signed her statement true and correct. However, Hamil J at 17 said:

> *"That is a relevant consideration but it is not one of very much weight in all of the circumstances of this case. The jurat in paragraph 1 of the statement is part of every statement taken by New South Wales Police. It is also to be noted that this was an induced statement, given upon a promise made to Ms Li that its contents would not be used against her."*

However, in *Jenkins* at 11, Hamill J found that there was no evidence in the transcript of the witness AR that he had found the document to be accurate, there was no accompanying document adopting and confirming the accuracy of that document at the time of making it and on that basis his Honour was not satisfied that the document was, at such a time, found by the witness to be accurate.

In practice it is therefore more likely that a signed Police statement containing a jurat would satisfy this requirement, but one should keep in mind Hamill J's remarks in *Al Batat & Ors*. Nevertheless, as practitioners we should be careful to not allow unsigned documents to be relied on in the absence of some other form of evidence satisfying this consideration.

<u>SECTION 32(2) VS SECTION 192(2)</u>

After exploring and examining the above provisions in isolation, now we must look at their application in practice.

As an opening statement it seems clear that the considerations in section 32(2) as explored above seem to be ancillary to the considerations of section 192.

In *Jenkins* as outlined above, in relation to an application under 32(1), Hamill J, found that the transcript of the witness was not made while the events were fresh in his memory and did not accept that the transcript was found the be accurate by the witness at the time of making it.

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[34] R v Rogerson; R v McNamara (no 24) [2016] NSWSC 105 at 17

Notwithstanding, his Honour granted leave for the witness to revive his memory by reading the transcript. After considering section 192, his Honour stated:

- Granting leave would not unduly lengthen the trial.[35]
- The fact that the witness was using the aid was patent to the tribunal of fact and would accordingly not cause any unfairness to the accused man.[36]
- The evidence of the conversation the witness had with the accused was potentially important.[37]
- The nature of the proceedings being a murder trial would suggest there should be some attempt to allow the witness to revive his memory.[38]

While it may seem strange, the decision in *Jenkins* is not an anomaly. Similarly as discussed above Neave and Priest JJA in *Roth* found no error when a witness was granted leave to revive her memory from a statement made some 5 years after the event because there was no *substantial* miscarriage of justice.[39]

Both *Jenkins* and *Roth* relate to applications in accordance with section 32(1). Interestingly as mentioned above the way in which the considerations are applied change significantly when determining an application in accordance with section 32(3).

In support of the above we look at the Hamill J's remarks in *Jenkins* stating that his Honour was only dealing with an application under section 32(1). If his Honour had been dealing with an application in accordance with section 32(3), it would likely have been refused.[40]

This is further explored in *Director of Public Prosecutions v Curran (no2) [2011] VSC 280.* Kaye J considered an application made by the Crown to have a witness, in a murder trial, read portions of her statement to the jury in accordance with section 32(3) of the Victorian Evidence Act.

- During evidence-in-chief, a witness, Ms Anagnostopulos, was having issues recalling portions of her statement.
- The Crown initially sought leave under section 38(1)(b) of that Act to cross examine Ms Anagnostopulos on the basis that she was not making a genuine attempt at giving evidence.

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[35] *Section 192(2)(a) of the Evidence Act 1995*
[36] *Section 192(2)(b) of the Evidence Act 1995*
[37] *Section 192(2)(c) of the Evidence Act 1995*
[38] *Section 192(2)(d) of the Evidence Act 1995*
[39] *Roth (a pseudonym) v R [2014] VSCA 242 at 42*
[40] *R v Jenkins (No 5) [2018] NSWSC 730 at 32*

- During the application it became clear that the witness was making a genuine attempt but was having sincere issues with recalling the evidence on the basis that she suffered from issues with her memory, panic attacks and had been in receipt of psychological assistance.[41]
- The Crown therefore abandoned the application in accordance with section 38 and instead sought that Ms Anagnostopulos read her statement to the jury in accordance with section 32(3).
- His Honour stated that, strictly speaking, the Ms Anagnostopulos would first have to seek leave to use a document to attempt to revive her memory and then further seek leave in accordance with section 32(3).
- The application was opposed by the defence and it was submitted that given Ms Anagnostopulos had no recall of the evidence, if her statement was read to the jury it would be unduly unfair to the accused because he would be unable to challenge that evidence.

His Honour noted:

> *In the end, it would seem to me that, if I permitted the evidence to be given, the defence will have enormous difficulty in being able to test, firstly, the truthfulness of the part of the statement that is read, secondly, how it came to be in the statement, and, thirdly, the accuracy of it in the sense as to whether Ms Anagnostopoulos was in a position to accurately hear what was said and how it was said.*[42]

And further:

> *The difficulty, with permitting the prosecution in those circumstances to take the course for which Mr Tinney contends, is that it would be very difficult, if not impossible, for me to offset the unfairness occasioned to the defence, by an appropriate direction to the jury.*[43]

Ultimately for the above reasons the application was not granted.

It is on that basis that it can be said that while the considerations for both an application in accordance with section 32(1) and 32(3) are identical in their terms, the application of those considerations and the ultimate determination are distinct. It is also clear that the two tests are separate it is not a foregone conclusion that a witness who is given permission to revive their memory is permitted to read that document on to the record.[44]

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[41] *Director of Public Prosecutions v Curran (no2) [2011] VSC 280 at 4*
[42] *Director of Public Prosecutions v Curran (no2) [2011] VSC 280 at 15*
[43] *Director of Public Prosecutions v Curran (no2) [2011] VSC 280 at 17*
[44] *R v Jenkins (No 5) [2018] NSWSC 730 at 32*

A final interesting point is even if a witness is permitted to read their evidence there may be some relief by way of submissions following the hearing. Justice Hamill left this open and intimated there may be issues with the accuracy and reliability of the evidence given, the fact that the witness' use of the document saying *"was patent to the tribunal of fact and would accordingly not cause any unfairness to the accused man."*[45]

SUMMARY

The key points of this part of the paper are:

1. There are two separate and distinct powers created by section 32:
    - The power for a witness to revive their memory by the use of a document.
    - The power for a witness who has used a document to revive their memory to then read that portion of the document relied on into evidence.
2. The court must have regard to a combined set of considerations which are contained in section 32(2) and 192(2).
3. Whilst the considerations are identical for both section 32(1) and 32(3) the application of those considerations is not.
4. Leave must be sought in relation to both an application in accordance with section 32(1) and 32(3). It is not a foregone conclusion that a witness who is given permission to revive their memory is automatically permitted to read that document on to the record.
5. "Fresh in the memory" is a question of fact that takes into consideration the length of time between an event and the making of a statement.
6. Even if a document was not made while it was fresh in the memory of a witness and the document was not found to be accurate, the court may still grant leave in accordance with section 32(1) providing the court is satisfied it should do so after considering section 192(2).
7. The same is unlikely to occur in an application in accordance with section 32(3) because of, amongst other things, the potential unfairness it could cause.

[45] *R v Jenkins (No 5) [2018] NSWSC 730 at 14*

PART 2:

SECTION 33 OF THE EVIDENCE ACT 1995 (NSW) EVIDENCE GIVEN BY POLICE OFFICERS

Section 33 of the Evidence Act 1995

(1) Despite section 32, in any criminal proceeding, a police officer may give evidence in chief for the prosecution 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 to his or her Australian legal practitioner or legal counsel a reasonable time before the hearing of the evidence for the prosecution.

(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.*

PURPOSE

Section 33 of the Evidence Act 1995 goes further than the preceding provision, it allows Police officers to give evidence-in-chief by reading or being lead through a written statement.

The purpose of this provision is explained by Grove J in *Chisari v Regina (no 2)* [2006] NSWCCA 325 at 28*:*

> *"It is apparent that the provision exists to recognize the reality that police officers frequently are required to testify long after events have occurred and that in the intervening period they may be likely to have been involved in a multiplicity of incidents about which they may also be required at some future time to testify. A practice of reciting statements which have been learned by heart – a recognized past practice – represented more a test of recall of the recitation than a recall of events and s 33 provides a transparent practice of evidencing matters which would be fresh in the memory at the time of making the statement."*

In other words, it avoids the need for Police officers to cram for their day in court and recognises that a contemporaneously prepared statement is likely more accurate than a Police officer's memory.[46]

IN PRACTICE

In practice this means that notwithstanding section 37 of the Evidence Act, Police officers can be lead through their statements and in certain circumstances even read their statements onto the record. Thankfully there are safeguards written into section 33 that must be satisfied before a Police officer is permitted to give their evidence in this form, I will refer to this as the test.

THE TEST

Before an officer is permitted to either be led through or read from their statement, the prosecution must satisfy the following:

1. Is the statement that is sought to be read a written statement? If so,
2. Was it previously made by the Police officer who seeks to read it? If so,
3. Was the statement signed when it was made? If so,
4. Was it made at the time of or soon after the occurrence of the events to which it refers? If so,
5. Has a copy of the statement been served on the defence within a reasonable time before the hearing of the evidence?

If the answer to the above five questions is yes then in most cases a Police officer will be permitted to give their evidence by way of being led through or reading from a previously made statement.

THE ISSUE

What is meant by "At the time of or soon after", and "The occurrence of events to which it refers"?

Well similar to Bellew J's comments in *Rogerson* in relation to section 32, Button J in *R v Briggs (no 4)* [2014] NSWSC 853 notes:

"There is a paucity of authority on the point."

[46] *Orchard v Spooner (1992) 28 NSWLR 114 at 116*

While again that is correct, there a few cases that provide guidance. Before we look at what is meant by the words at the time of or soon after, we should first look into what is meant by the occurrence of events to which it refers.

THE OCCURRENCE OF EVENTS TO WHICH IT REFERS

The Court of Criminal Appeal in *Dodds v The Queen* (2009) 194 A Crim R 408; [2009] NSWCCA 78 dealt directly with this issue. In this case:

- The Crown sought to have Detective Murray give evidence- in-chief by reading his statement in accordance with section 33.
- The statement in questions contained two important pieces of evidence:
    - First, Detective Murray's purported translations of the appellant's conversations with his co-offender's, which were had in Pig Latin.
    - And, secondly Detective Murray's purported identification of the appellant's voice.
- The statement was made about 18 months after the investigation and the consequential telephone intercepts to which Detective Murray's statement was based on.
- However, the statement was made shortly after or at the time that Detective Murray heard the telephone intercepts which formed the basis for his ad hoc expert translations and purported identification.

The Court held:

> *"Although of course the statement was not made at the time that the interception was effected it was made when the officer reviewed the material for the purpose of giving evidence at the trial. The statement includes the conclusion that it was the voice of the appellant which could be identified as one of the speakers in the telephone call. Accordingly in the relevant sense the statement was in relation to matters which were contemporaneous to its making. The interception of the relevant calls and the making of the transcript was established by other evidence at the trial. In these circumstances there was no error in her Honour permitting the officer to read from his statement in the course of giving evidence."*[47]

Detective Murray was therefore permitted to read from his statement as the events to which the evidence referred was the opinion which was formed by Detective Murray after listening to the material gathered by the investigation and telephone intercepts. On that basis statement was said to have occurred at the time of or soon after the events.

[47] *Dodds v The Queen (2009) 194 A Crim R 408; [2009] NSWCCA 78* At 67

Dodds highlights the importance of identifying the events that are relevant for the purpose of section 33 because the events as mentioned is the anchor to which at the time of or soon after is gauged.

AT THE TIME OF OR SOON AFTER

The question of what is meant by "at the time of or soon after" has been considered in several cases. The leading authority is *Orchard v Spooner (1992) 28 NSWLR 114* (Newman J at 119):

> *"While as I have said ultimately it is a question of fact for the tribunal to determine it seems to me that the subsection contemplates days rather than weeks as being the permissible time which is allowed to elapsed in order to allow a statement to be read in accordance with the section."*

The NSW Supreme Court in *Orchard v Spooner* (1992) 28 NSWLR 114 adopted the view of Sangster J, applying the principles stated *in R v Van Beelen* (1972) 6 SASR 537*:*

> *"In my opinion the real test is freshness of memory as a question of fact and not the relationship in time, except that shortness of time makes it easier to accept the witness' assertion that the facts were fresh and length of time more difficult – and a great length of time would undoubtedly lead any court to reject the evidence claiming that the events were fresh in the memory of the witness at the time of making the memorandum."*

Newman J, held at 119:

> *"It is a question of fact for the court hearing a matter to determine whether a witness's statement falls within indefinite time restrains referred to in the subsection."*

It is therefore clear from the above that the question of what is meant by at the time of or soon after is not a matter which is dealt with by solely considering how many hours, days, weeks or months the statement was written after the events occurred. It is a question of fact taking into consideration the freshness of mind but it should not be overlooked that how close or long after the events occurred is a very important consideration in accepting as a matter of fact that the statement was made at the time of or soon after.

In *Orchard v Spooner,* Newman J stated at 119:

> *"The statement of Sergeant Spooner being made that day after the events would plainly enough fall within the ambit of the section. The statement of Constable George being made*

six weeks after the events in my view if I were determining the matter as a question of fact would not."

In *Salmon v R* [2012] NSWCCA 119 the court considered the decision to allow three Police officers to give evidence in chief by reading their statements. Again, questions about what is meant by at the time of or soon after was discussed when considering whether three statements were said to have been made at the time of or soon after the events. These statements were:

- Senior Constable Murphy, made 31 days after the occurrence of the events to which it refers,
- Constable Eastham, made 13 after the occurrence of the events to which it refers, and
- Senior Constable Fitzpatrick, made 15 days after the occurrence of the events to which it refers.

His Honour Hoeben JA found at 108:

"For my part, I would not regard any of the three statements mentioned as made as s33 requires. 'At the time of or soon after the occurrence of the events to which it refers.

And at 114:

"While I regard the reading of their statements by these police officers as an error in the trial, it was an error having little or no significance."

Consideration was given and mention made to the following factors in coming to his decision:

- The statement of Senior Constable Murphy was very short,
- The statement of Senior Constable Eastham was not short but, in terms of the appellant's guilt, innocuous, and
- The statement of Senior Constable Fitzpatrick was not short and contained evidence of an inculpatory nature, however, a deal of it, particularly the incriminating parts, accorded with evidence that the accused himself gave. [48]

This decision seems to be consistent with *Orchard v Spooner* in that it seems that the subsection contemplates days rather than weeks as being the permissible time has been endorsed by the CCA.

Finally, and likely most simply, Button J's decision in *R v Briggs (no 4) [2014] NSWSC 853* which dealt with an interlocutory application by a Crown prosecutor who sought to have a Police officer,

[48] *Salmon v R [2012] NSWCCA 119 at 109 – 112*

Constable Hill give evidence in chief in accordance with section 33 by reading a statement made two days and nine hours after the occurrence of the events to which it refers. Button J referred to the above cases and adopted their reasoning. Ultimately it was held that 2 days and 9 hours was within the ambit at the time of or soon after the occurrence of the events to which it refers.

Note: Even if a Police officer is permitted to read their statement in evidence, that evidence is still subject to the rules of admissibility in the Evidence Act.[49]

TO READ OR TO LEAD

If the prosecution have successfully established that the proposed statement was both made at the time of or soon after, and the occurrence of events to which it refers they will be granted permission to either be led through that statement or read that statement onto the record. However, who determines whether the officer can read their statement or whether they should be led through their statement?

In *Chisari v Regina (No 2)* [2006] NSWCCA 325*,* a slightly different and perhaps not unique set of circumstances arose. The case dealt with a conviction appeal of a charge of maliciously inflicting grievous bodily harm with intent. Constable Harder who is the Police officer that sought to give evidence in accordance with section 33 was the victim in the matter. By way of factual background:

- Constable Harder was issuing a fine for a car illegally parked a tow truck arrived and began towing the illegally parked car away.
- The appellant who was the owner of the car arrived as the car was in the process of being loaded on to the tow truck, he got in the car and in the process of driving away ran over Constable Harder causing grievous bodily harm.

Constable Harder wrote his statement some 8 days after the offence. The Crown sought to have Constable Harder read his statement in accordance with section 33. The Court found that the application in accordance with section 33 should be granted as it was satisfied that the statement complied with the above stated test; however, the Court chose to exercise their discretion in refusing to allow Constable Harder to read his statement and rather sought that he be lead through the statement. Grove J said at 30

[49] *R v Dean (No 2) (unreported, NSWSC, Dunford J, 12 March 1997)*

> *"The provision vests a discretion and his Honour exercised it by declining to permit the reading of the statement. He indicated a preference that the constable be led through the statement."*

It may be the case that an important consideration in determining when a court should consider using that discretion may be in situations when the Police officer themselves are a victim or somehow personally affected by the offences in which they intend to give evidence.

CONVENIENCE

It should also be remembered and the court be reminded that when considering whether or not to grant an application in accordance with section 33, convenience does not play a factor as Newman J stated in *Orchard v Spooner:*

> *"In considering the matter, considerations such as convenience and practicality should not in my view play any part in determining whether or not a witness' statement complies with the section…"*[50]

SUMMARY

7 points can be extracted:

1. Section 33 creates an avenue for Police officers in certain circumstances to give evidence in chief by way of either being led through a statement or reading directly from that statement.
2. The decision of whether to permit the officer to read or be led through the statement is a discretionary one that is determined by the court.
3. In determining whether or not an application in accordance with section 33 should be granted considerations of convenience are not to be taken into account.
4. Whether a statement was made at the time of or soon after the occurrence of the events is a question of fact that is determined by taking into account a number of factors including the length of time between the occurrence of the event and the statement being made.
5. Some of the considerations raised in part 1 of this paper relating to the term "fresh in the memory" may be relevant in the assessment of "at the time of or soon after", particularly those issues raised in *Jenkins* and *Curran,* being the quality of a witness' memory both generally and specifically in relation to the events in the document.[51]

[50] *Orchard v Spooner (1992) 28 NSWLR 114 at 119*
[51] *R v Jenkins (No 5) [2018] NSWSC 730 at 11 and Director of Public Prosecutions v Curran (no2) [2011] VSC 280*

6. Importantly as stated in *Orchard v Spooner*, and confirmed in *Salmon,* the subsection contemplates days rather than weeks as being the permissible time which is allowed to elapsed in order to allow a statement to be read in accordance with the section.
7. Finally, even if the application is granted the evidence is still subject to the rules of admissibility in the Evidence Act.[52]

[52] *R v Dean (No 2) (unreported, NSWSC, Dunford J, 12 March 1997)*

PART 3:

SECTION 38 OF THE EVIDENCE ACT 1995 (NSW) UNFAVOURABLE WITNESSES

Section 38 of the Evidence Act 1995 Unfavourable witnesses

(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.

(2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).

(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

(4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

(5) If the court so directs, the order in which the parties question the witness is to be as the court directs.

(6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account—

a. whether the party gave notice at the earliest opportunity of his or her intention to seek leave, and

b. the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

(7) A party is subject to the same liability to be cross-examined under this section as any other witness if—

a. a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person, and

b. *The party is a witness in the proceeding.*

PURPOSE

The purpose of section 38 was stated most accurately by Refshauge J in *R v SH* (2011) 6 ACTLR 1; [2011] ACTSC 198 at 21 *(*herein *R v SH*) referring to McClellan CJ in *Burrel v R* (2007) 190 A Crim R 148 at 232 – 235:

> *"A helpful exegesis of the rationale for the provision is… on occasions, because of the forensic risks a material witness would not be called by either side. Section 38 was intended to*

ameliorate the common law and make it easier for a party to test the evidence of their of witnesses"

Further at 35:

"…The crown having laid certain charges should be able to test the evidence that is inconsistent with those charges in the interests of truth."

It is important to keep the purpose of this provision in mind when dealing with applications of this nature as it useful to come back to the purpose to identify the parameters and considerations of the provision in practise.

For criminal defence practitioners this provision will most commonly arise in the following circumstances:

- In a matter, where a complainant or witness no longer wishes to give evidence or at least give evidence of an inculpatory nature against the accused person and strays from the initial Police complaint. The prosecution may in some circumstances then be permitted to cross-examine the complainant or witness on the prior complaint/version and seek to discredit the evidence given in court.
- Where a witness or complainant forgets to give crucial evidence during their evidence in chief, a prosecutor may then have the ability to seek to lead that omitted evidence by way of cross examining it in

Both of the above scenarios can be quite inconvenient and unhelpful for defence practitioners particularly in the second scenario discussed above.

An important case to remember when considering the practical effect of section 38 is *R v Pantoja* [1998] NSWSC 565. *Pantoja,* was an appeal against a conviction for murder in which several grounds of appeal were raised by the appellant. One of the grounds of appeal (ground 8) related to the decision to grant leave for the prosecution to cross-examine their witness Mr Rosales in accordance with section 38. A short summary of the facts of the case is as follows:

- Mr Pantoja was convicted of murdering his wife.
- During the trial the Crown alleged that the appellant on the night of the murder had left his work as a cleaner and returned home to murder his wife.

- An important piece of evidence in the trial was that the appellant was responsible for the key and letting himself and co-workers into the premises they cleaned.
- The Crown alleged that on the night of the murder the appellant gave the key to a co-worker and left. Mr Rosales was a crucial crown witness who gave largely favourable evidence.
- Mr Rosales had made a statement to Police during the investigation saying that he could not remember whether the appellant let him in to the premises that night and that it may have been a co-worker. However, in evidence in chief Mr Rosales said that he had let himself in to the premises that night.
- In cross-examination Mr Rosales strayed from that evidence, offering a third version saying that he had not been using the electronic key lately but rather had been let in by the appellant.

Following this evidence the Crown sought leave to cross-examine Mr Rosales. The trial judge gave a considered judgement in which it was concluded that leave should be granted for the Crown to cross-examine Mr Rosales. His Honour noted that section 38(1)(a) and (c) unlike Section 38(1)(b) do not have a requirement that the unfavourable evidence occur in evidence in chief and on that basis leave should be granted to the Crown notwithstanding the evidence occurs in cross-examination. His Honour referred to section 192 in coming to his decision.

During the appeal, counsel for the appellant submitted that Mr Rosales was not unfavourable because the majority of his evidence was favourable to the prosecution:

> *"Although the heading of s38… is "unfavourable witnesses", the section itself refers to evidence given by a witness and in my view leave can be granted to cross-examine a witness on part only of his evidence if it is unfavourable to the party calling him or inconsistent with a prior statement made by the witness, even though the rest or most of the rest of the witness' evidence is favourable to the party calling him"*[53]

Further:

> *"I agree with the trial judge that leave can be granted pursuant to para(a) or para(c) of s38(1), even though the evidence on which the application is based was given by the witness in cross-examination. That the evidence was given in cross-examination is, of course an important consideration in deciding whether the trial judge's discretion should be exercised in favour of granting leave. In the present case, it is clear from his Honour's judgement that*

[53] James J, R v Pantoja [1998] NSWSC 565 51

his Honour was very conscious that the evidence about which leave to cross-examine was sought had been given in cross-examination and that that was a matter which was material to the exercise of his discretion." [54]

James J continued to consider section 192 saying that the evidence which was unfavourable had the potential to provide the appellant with an alibi and on that basis the considerations erred on the side of allow the Crown to cross-examine. The ground of appeal was rejected.

The importance of this case is twofold and is discussed below:

WHEN CAN AN APPLICATION TO CROSS EXAMINE BE MADE

As *Pantoja* clearly shows there is potential for an application to be made in accordance with Section 38(1)(a) and/or (c) at any time during a witness' evidence (other than when the witness is being questioned by the other party). It is also clear though that the time in which an application is made is a material factor in determining whether or not to grant leave. In *Pantoja* the importance of the matter and the particular evidence obviously outweighed the considerations of timing, however, this may not always be the case.

An application in accordance with section 38 can be made during evidence in chief or in re-examination. However, *when* the application is made is a material factor in determining whether to grant leave.

Sections 38(4), (5) and (6)(a) are relevant in that regard. It is clear that section 38 is intended to create fairness and promote truthfulness in trials, that factor along with the above cases and sections would indicate that it was envisioned that in practice:

- A party who is seeking to cross-examine a witness (usually but not always the prosecution/crown) would give the other party (usually but not always the defence) notice at the earliest opportunity of the unfavourable witness,
- Make the application as soon as the unfavourable evidence is given by the witness, and
- Consequently, would seek to cross-examine that witness prior to the other party cross-examining.

However, it is accepted and reflected in the above cases and sections that this is not always the case.

[54] James J, R v Pantoja [1998] NSWSC 565 51

If this occurs in practice it is important to consider the judgements in *R v Parkes* [2003] NSWCCA 12 and *Burrell v R* [2007] NSWCCA 65 which, in agreeing with *Pantoja,* disapproved the use of section 38 as a tactical or forensic device by the party calling the witness to cross-examine the witness last.[55]

The default position is therefore that the cross-examination of an unfavourable witness should occur before the other opposing party begins cross-examination.

WHAT CAN THE PARTY SEEKING TO CROSS EXAMINE, CROSS-EXAMINE ON?

Once leave has been granted in accordance with section 38(1) there remains parameters on what the witness may be cross-examined on. The existence of parameters is universally accepted; however, the extent of those parameters is contentious.

It is accepted that cross examination is only permitted in relation to the matters which are determined to be unfavourable for the reasons set out in section 38(1) and consequently cross-examination of a general nature is not permitted.

This view is highlighted in *R v Hogan* [2001] NSWCCA. James J held that:

> *"…the leave would by no means have permitted the unfettered and wide-ranging questioning which was undertaken, apparently because all of the trial judge, the Crown Prosecutor and counsel for the appellant considered that there were no restrictions on what Rachel Golby could be questioned about and in particular that her credit could be attacked."*[56]

Further at 55:

> *"When one examines his Honours' reasons, there was no advertence to those matters and particularly those which s.192 of the Evidence Act 1995 provides nor was there any limitation such as is suggested by s.38 on the ambit of cross-examination…"*

And 76 and 77:

> *"The cross-examination was general in nature. It included cross-examination about what the witness had had to drink, whether or not she had taken heroin, whether she was on drugs and what drugs, including heroin, speed and "pills" such as Serapax and Valium and marijuana she had taken. It developed into a wholesale attack on credit as well as dealing with those matters in relation to issues that were at least peripherally relevant at the trial or*

[55] R v Parkes [2003] NSWCCA 12 at 240
[56] *R v Hogan [2001] NSWCCA 292 at 4*

might have been relevant to the witness' opportunities and capacity to observe what had occurred. She was specifically cross-examined on a number of occasions by the proposition being put to her that she was lying to protect the accused. The questioning asserted the content of prior inconsistent statements whether relevant to issues or on credit. Much of the cross-examination was prejudicial to the appellant.

There was cross-examination which ranged so widely as to question her about whether the complainant and Rebecca Jones had been sleeping together which had caused a rift in her friendship with Rebecca Jones. There were questions put as to whether she had caught the two sleeping together and as to the nature of the house in which this had occurred. This was entirely collateral and far from the issue."

Ultimately at 84 his Honour said:

"Even if leave would almost certainly have been granted, it could not be successfully argued that would necessarily have permitted as wide an ambit of cross-examination as occurred. I conclude there was a miscarriage."

James J's critical remarks make it clear that cross-examination should be specific and limited to the issues which are raised on the section 38(1) application. In a practical sense if we consider *Pantoja*, the decision in *Hogan* would have the effect of meaning the crown was limited to crossing the witness Mr Rosales on the discreet issue of who let him in the building with reference to the previous statement.

It should be remembered that this approach does not restrict the prosecution from making further applications to extend the parameters if need be.

However, consider the approach by Heydon JA in *R v Le* (2002) 54 NSWLR 474; 130 A Crim R 44; [2002] NSWCCA 186 at 66 and 67, where it was said:

"One purpose of a s 38 examination must be to enable counsel calling the witness to demonstrate that the evidence in chief which led to the s 38 order is false. Another must be to enable counsel to demonstrate that any prior statement inconsistent with it is true. That latter purpose is assisted by s 60, which permits a prior inconsistent statement to be considered as evidence of what is represented, not merely as a matter affecting credibility… The purposes described can be assisted by obtaining concessions from the witness about matters tending to indicate the falsity of the impugned evidence. One of these is the lateness with which the impugned story is advanced. Another is the inherent improbability of the

impugned story. These purposes must also be capable of being assisted by the eliciting of evidence tending to show the truthfulness of prior statements inconsistent with the impugned evidence, such as the fact that they were made under conditions conducive to accurate recollection and expression and conducive to sincerity.

In my opinion, on the true construction of s 38, leave may be granted under s 38 to conduct questioning not only if the questioning is specifically directed to one of the three subjects described in s 38(1), but also if it is directed to establishing the probability of the factual state of affairs in relation to those subjects contended for by the party conducting the questioning or the improbability of the witness's evidence on those subjects. In establishing the probability or improbability of one or other state of affairs, the questioner is entitled to ask questions about matters going only to credibility with a view to shaking the witness's credibility on the s 38(1) subjects."

Heydon JA took a slightly broader approach to that of James J in *Hogan.* What is clear though is the fact that no matter what approach is adopted, section 38 does not permit the opportunity for the unfettered cross-examination of a witness.

<u>WHAT DOES UNFAVOURABLE MEAN?</u>

The Macquarie Dictionary defines the term as meaning not favourable, not propitious, disadvantageous or adverse.[57]

In *R v Le [2001] NSWSC 174*, McClellan J, discussed the history of section 38 and the preceding provisions both in Australia and England. McClellan J, helpfully said:

> *"The word unfavourable should be given a board meaning thereby ensuring that in the course of any criminal trial the court would not be denied evidence as to any relevant issue and would not be denied the opportunity for that evidence to be appropriately tested."*[58]

In *Director of Public Prosecutions v Garret (a pseudonym)* 1 [2016] VSCA 31 the Court considered an interlocutory appeal from the Victorian County Court on an application for leave in accordance with section 38. Factually:

- CG was a Police officer who was charged with intentionally causing injury after an arrest.

[57] Odgers 203
[58] *R v Le [2001] NSWSC 174 at 15*

- For interest sake only, the crown case was that following a short police pursuit the victim was arrested by Police, shortly after their arrest more Police attended the scene being CG and KB.
- Police officers CG and KB picked up the victim walked him away from the others and assaulted him by pushing the victim to the ground face down and striking him numerous times with an object to both sides of his face.
- The prosecution sought an advance ruling in accordance with s192A of the Evidence Act 1995 (herein section 192A) to cross examine Crown witness KB in accordance with section 38 in anticipation that the witness' evidence would be unfavourable.
- The trial Judge rejected the application which gave rise to the appeal.

On appeal Maxwell P, Redlich and Beach JJA allowed the appeal and set aside the trial judge's refusal, saying:

> *"The word "unfavourable" is not defined in the Act. It is an ordinary English word and, on accepted principles of interpretation, should be given its ordinary meaning. Perhaps unsurprisingly, the principal dictionary definition of unfavourable is not "not favourable" other meanings given include disadvantageous, adverse and ill-disposed. In turn the word favourable is defined to mean affording aid, advantage or convenience…*[59]
>
> *Axiomatically, it is the words of the statute themselves which must govern the interpretation. As the authorities have made clear unfavourable means simply not favourable.*[60]
>
> *…Whether evidence is unfavourable to the case that the party is seeking to prove will depend upon the circumstances of each case.*[61]
>
> *The party's case may be discerned from its opening, its pleadings and/or the evidence which the court has already heard or which is proposed to be called. If the evidence of the witness called by the party is inconsistent with or likely to be contradictory of that identified case it will ordinarily satisfy the description of unfavourable."*[62]

Recently, Rothman J considered what is meant by unfavourable in *R v Tangi (No 4)* [2020] NSWSC 539. In essence, his Honour agreed that a broad view is to be taken in determining whether or not evidence is unfavourable. His Honour went as far as to say that if a witness fails to remember a

[59] *Director of Public Prosecutions v Garret (a pseudonym) 1 [2016] VSCA 31at 64*
[60] *Director of Public Prosecutions v Garret (a pseudonym) 1 [2016] VSCA 31at 66*
[61] *Director of Public Prosecutions v Garret (a pseudonym) 1 [2016] VSCA 31at 67*
[62] *Director of Public Prosecutions v Garret (a pseudonym) 1 [2016] VSCA 31at 68*

probative piece of evidence and is unable to be reminded of that evidence by the use of section 32 of the Evidence Act, then even in circumstances where there is another witness capable of giving that very same evidence a witness may be seen as unfavourable and on that basis leave would be granted in accordance with section 38 and 192.[63]

An interesting final addition is the decision in *Klewer v Walton* [2003] NSWCA 308. Unlike the other cases discussed this is not a criminal matter. *Klewer v Walton* dealt with an appeal to the New South Wales Court of Appeal regarding a civil decision in the Local Court. The facts of this matter are not overly important for this part of the paper but what can be taken from this matter is the principle that evidence that is neutral is not necessarily unfavourable.[64]

In summary it must be said that unfavourable means:

- Not favourable[65]
- Must be something more than neutral[66]
- Must be determined with reference to the individual circumstances of each case[67]
- A broad approach must be taken in determining what is unfavourable [68]
- Evidence can be unfavourable even in circumstances where the witness themselves are generally favourable[69]
- The fact that a witness may not be making a genuine attempt to give evidence and/or has made a prior inconsistent statement that they will not adopt may be unfavourable[70]

<u>MAY REASONABLY BE SUPPOSED TO HAVE KNOWLEDGE AND MAKING A GENUINE ATTEMPT TO GIVE EVIDENCE</u>

Section 38(1)(b) is significantly less complicated then the above, in practice this most commonly arises in tandem with section 38(1)(c), that in circumstances where a witness has made a prior statement and during evidence does not accord with that statement.

Interestingly sections 38(1)(b) and (c) have significant interplay with section 32(2) of the Evidence Act 1995 as discussed earlier in this paper with reference to *Director of Public Prosecutions v Curran*

[63] *R v Tangi (No 4) [2020] NSWSC 539 at 4*
[64] *Klewer v Walton [2003] NSWCA 308 at 20*
[65] *Director of Public Prosecutions v Garret (a pseudonym) 1 [2016] VSCA 31at 66*
[66] *Klewer v Walton [2003] NSWCA 308 at 20*
[67] *Director of Public Prosecutions v Garret (a pseudonym) 1 [2016] VSCA 31at 67*
[68] *R v Le [2001] NSWSC 174 at 15*
[69] R v Pantoja [1998] NSWSC 565 at 51
[70] Adam v R [2001] HCA 57 at 27

(no2) [2011] VSC 280. *Adam v R* [2001] HCA 57 deals largely with some of the considerations in sections 38(1)(b) and (c). In *Adam,* the High Court considered an appeal from the Supreme Court. The appeal related to a conviction following a trial for the murder of an off-duty Police officer. At the trial:

- The Crown called the brother of the appellant Mr Sako as a witness.
- Mr Sako had previously made a statement to Police in which he provided inculpatory evidence against the appellant. However, prior to Mr Sako giving evidence it was clear that he may have been unfavourable to the prosecution.
- The Court thought it appropriate for Mr Sako to give his evidence in a Basha style inquiry, hence, Mr Sako was questioned by the prosecution on a voir dire and an application in accordance with section 38 was made and granted on the voir dire.
- The evidence given by Mr Sako on the voir dire was in essence that he did not see anything of any great moment.[71]
- The Crown who still sought to call Mr Sako made an application for an advanced ruling in accordance with section 192A and sections 38(1) and (3).
- That application was granted and Mr Sako gave evidence.
- On appeal it was asked whether the trial judged had erred in granting leave to the prosecution to cross-examine Mr Sako.

Ultimately the appeal was dismissed by Gleeson CJ, McHugh, Kirby and Hayne JJ.[72] In particular at 27, it was said:

> *"The judge formed the view, on the voir dire, that he was not making a genuine attempt to give evidence and went so far as to find that the version he had given in the interviews "more probably than not reflected his observations on the night" it may be doubted that it was necessary for the judge to form a view about where the truth probably lay. The finding which his Honour made was, however, a finding which clearly bore upon the question presented by s38(1)(b): was the witness, in examination in chief, making a genuine attempt to give evidence? Given that the witness had made prior inconsistent statements, there is no doubt, then, that para(b) and para(c) of s38(1) were satisfied. It is not necessary in those circumstances to consider whether para(a) was also met. There appears much to be said, however, for the view that to give evidence which, at best, is unhelpful to the party calling it,*

[71] Adam v R [2001] HCA 57 at 12
[72] Adam v R [2001] HCA 57 at 39

and to do so without "making a genuine attempt to give evidence", is to give evidence "unfavourable" to that party."

PRIOR INCONSISTENT STATEMENT

We return to *Klewer v Walton* which as discussed briefly above dealt with amongst other things an appeal to the New South Wales Court of Appeal from the Local Court arising from a private prosecution brought by Ms Klewer against Mr Walton for assault but was ultimately dismissed. Ms Klewer who was self-represented during her prosecution called a witness, Sergeant Levey. Sergeant Levey made a police statement regarding the incident subject to these proceedings. In short Sergeant Levey wrote in his statement that:

"…I made inquiries with Mr Walton in relation to the incident involving the young person Robert Klewer. Mr Walton also informed me of an incident between staff at the college and Mrs Lucy Klewer. (That she has to be physically removed from the office area due to her yelling abuse at staff and using foul language which could be heard all around the school)."

Sergeant Levey gave evidence in court that:

"A. I phoned Mr Walton in relation to the matter of the boys, and there was also a conversation about the behaviour of Mrs Klewer in the office, and that she had to be ejected from the office due to her swearing and her yelling out, which could be heard right across the school

…..

Q. Can you describe "eject" the way you described what you now say "ejection", those words you used – that Mr Walton used at the time, what were the actual words?

A. The words – at no time did Mr Walton say that he touched you or used any force on you."

Ms Klewer sought leave to cross-examine Sergeant Levey in accordance with section 38(1)(c) on the basis of that he had made a prior inconsistent statement. The magistrate disagreed and refused leave. On appeal Hodgson JA said at 21 and 22:

"In relation to paragraph (c), there is no explicit or logical inconsistency between Sergeant Levey's oral evidence and his prior statement…

> *The question then is whether there is any implicit or what might be called substantial inconsistency, falling short though of logical or explicit inconsistency. In my opinion, inconsistency of that latter kind may be sufficient to enliven s.38(1)(c). However, in circumstances where the prior statement did not purport to set out exact words and where the present statement was to the effect that Mr Walton said the claimant had to be "ejected", I think the better view is that there was not such inconsistency as to engage s.38(1)(c), or to require consideration of the discretionary factors set out in s.192. In my opinion, there is no difference of substance between "ejected" and "physically removed"…"*

This is a useful analysis and, in my view, reflects in the approach adopted in *Pantoja* but referable to section38(1)(c).

MATTERS RELEVANT ONLY TO THE WITNESS' CREDIBILITY

Section 38(3) provides a discreet power allowing an applicant to question an unfavourable witness about issues relating to their credibility. In practice this may arise in a situation where a witness who has provided unfavourable evidence and has been cross-examined in accordance with section 38(1) regarding the unfavourable evidence (factually) may then be questioned about their motive to provide the unfavourable evidence, ie, whether there is a motive to lie.

It must be remembered that an application in accordance with section 38(3) requires its own separate grant of leave.

Already stated above the most concise explanation of the purpose and practical effect of section 38(3) is what Heydon JA said in *R v Le* at 67:

> *"In my opinion, on the true construction of s 38, leave may be granted under s 38 to conduct questioning not only if the questioning is specifically directed to one of the three subjects described in s 38(1), but also if it is directed to establishing the probability of the factual state of affairs in relation to those subjects contended for by the party conducting the questioning or the improbability of the witness's evidence on those subjects. In establishing the probability or improbability of one or other state of affairs, the questioner is entitled to ask questions about matters going only to credibility with a view to shaking the witness's credibility on the s 38(1) subjects."*

SECTION 42 OF THE EVIDENCE ACT 1995

It is important to note the effect that *section 42 of the Evidence Act 1995* may have. Section 42 gives the court discretion to limit and control a party's ability to ask leading questions. Relevantly, section

42(2) allows the court to limit a party's ability to cross-examine a witness after that witness has been considered unfavourable and has been already cross-examined on unfavourable evidence by the party who has called them as a witness.

Section 42 of the Evidence Act 1995

(1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.

(2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:

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

(3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not us

(4) This section does not limit the court's power to control leading questions.

The specifics of section 42 are not further explored in this paper.

THE TEST

The appropriate test that should be applied before leave is granted in accordance with section 38 was set out in *R v Parkes* [2003] NSWCCA 12 at 73:

> *"Section 38… Its exercise is, however, subject to a number of discretionary considerations, so as to prevent its abuse, and is a section that needs to be applied with some care in criminal trials. So it is that before leave is granted, the trial judge must give consideration to the matter specified in s 38(6), s 135, s 137 and s 192 of the Act".*

In practice that would mean:

- The first point of call would be determining whether the evidence given by the witness was unfavourable in accordance with section 38(1)(a),(b) or (c).
    - If it is determined that the evidence is unfavourable,
    - then the second consideration is whether leave should be granted. In determining whether to grant leave the court must consider:
        - Section 38(6), and Section 192
- If after considering the above sections the court is of the view that the party should be granted leave to cross-examine the witness the final test is whether there is any existing evidentiary issues preventing the cross-examination of that witness, with particular reference to section 135 and 137 of the Evidence Act.
- If after considering all of the above the Court is satisfied that leave should be granted than the party may cross-examine the witness in accordance with section 38(1) and/or (3).

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