

## PRESENTERS



**Scott Optican, Associate Professor and Associate Dean for Alumni and Advancement, Faculty of Law, The University of Auckland**

Scott holds a BA degree in Rhetoric (University of California at Berkeley), a Masters Degree in Criminology (Cambridge), and a JD degree (Harvard). He interned at the Crime Prevention and Criminal Justice Branch of the United Nations in Vienna, clerked for the US Federal District Court Southern District of New York and served as a prosecutor in the New York County District Attorney's Office. Scott specialises in evidence, criminal procedure, and comparative criminal procedure. He is the author of numerous articles and a co-author of Rishworth, Huscroft, Optican & Mahoney, *The New Zealand Bill of Rights* (2003) and Mahoney, McDonald, Optican and Tinsley, *The Evidence Act 2006: Act and Analysis* (2007).



**Peter Sankoff, Senior Lecturer, Faculty of Law, The University of Auckland**

Peter Sankoff B.A. (Concordia), J.D. (Toronto), LL.M. (Osgoode Hall) is a Senior Lecturer at the University of Auckland (New Zealand), Faculty of Law, teaching in the areas of criminal law, evidence and animal law since 2001. Peter previously worked as a law clerk for Madame Justice Claire L'Heureux-Dubé at the Supreme Court of Canada, and between 1999 and 2001, for the Canadian Federal Government as an adviser on human rights matters involving criminal justice. Peter is the co-author of *Witnesses*, a treatise on the substantive, evidentiary and procedural laws relating to witnesses, and *Mewett, Manning and Sankoff on Criminal Law*, 4th ed., a treatise on the Canadian criminal law. He is also the sole author of the *Portable Guide to Witnesses*, and numerous articles on human rights, criminal procedure, animal law and evidence.

*The statements and conclusions contained in this booklet are those of the author(s) only and not those of the New Zealand Law Society. This booklet has been prepared for the purpose of a Continuing Legal Education course. It is not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such. If advice on the law is required, it should be sought on a formal, professional basis.*

# CONTENTS

INTRODUCTION .....	1
<b>I – RELEVANCE &amp; PREJUDICE.....</b>	<b>3</b>
(A) RELEVANCE (S 7).....	3
(B) GENERAL EXCLUSION: BALANCING PROBATIVE VALUE V UNFAIR PREJUDICE/ NEEDLESSLY PROLONGING THE PROCEEDING (S 8) — OVERVIEW .....	4
(i) <i>Probative/prejudice test (s 8(1)(a))</i> .....	5
(ii) <i>Needlessly prolonging the proceeding (s 8(1)(b))</i> .....	8
(iii) <i>Right to an effective defence (s 8(2))</i> .....	9
(C) PROPENSITY EVIDENCE — OVERVIEW (SS 40-43) .....	10
(i) <i>The definition of propensity evidence (s 40(1)(a))</i> .....	11
(ii) <i>The scope of propensity evidence (s 40(1)(a))</i> .....	17
(iii) <i>Propensity evidence about defendants (s 41)</i> .....	19
(D) ABSENCE OF PRIOR CONVICTIONS.....	19
(E) GOOD CHARACTER EVIDENCE/REBUTTING GOOD CHARACTER EVIDENCE UNDER S 41(2) .....	21
(i) <i>Propensity evidence offered by defendants about co-defendants (s 42)</i> .....	24
(F) <i>R v MOFFAT</i> [2009] NZCA 437: FACTS & DECISION .....	24
(G) <i>R v MOFFAT</i> [2009] NZCA 437: ANALYSIS & DISCUSSION.....	26
(i) <i>Propensity evidence offered about defendants by the prosecution (s 43)</i> .....	28
(H) FACTORS RELEVANT TO PROBATIVE VALUE (S 43(3)) .....	31
(I) FACTORS RELEVANT TO UNFAIRLY PREJUDICIAL EFFECT (S 43(3)) .....	33
(J) MODEL JURY DIRECTIONS UNDER S 43.....	34
<b>II – ELIGIBILITY &amp; COMPELLABILITY.....</b>	<b>37</b>
(A) OVERVIEW .....	37
(B) ADMISSION BY CONSENT — EXPRESS OR IMPLIED (S 9) .....	37
(C) THE REQUIREMENT OF OATH OR AFFIRMATION (S 77) .....	40
<b>III – HEARSAY .....</b>	<b>45</b>
(A) OVERVIEW .....	45
(B) HEARSAY VS NON-HEARSAY .....	45
(i) <i>Statements of a witness</i> .....	45
(ii) <i>The meaning of “assertion”</i> .....	46
(iii) <i>Non-hearsay evidence after witness takes the stand</i> .....	48
(C) RELIABILITY – GENERALLY .....	49
(i) <i>Factors to consider</i> .....	49
(ii) <i>Double hearsay</i> .....	51
(iii) <i>Reliability and other forms of prejudice: The interaction between ss 8 &amp; 18</i> .....	52
(D) THE “NECESSITY” CRITERION (S 18(1)(B)).....	54
(i) <i>Unavailable as a witness</i> .....	54
(ii) <i>Avoiding undue expense and delay (s 18(1)(b)(ii))</i> .....	56
(E) THE CO-CONSPIRATORS EXCEPTION.....	57
(F) THE BUSINESS RECORDS EXCEPTION .....	58
(i) <i>Scope of the business records definition</i> .....	58
(ii) <i>The necessity criterion s 19(1)</i> .....	59
(iii) <i>Residual consideration of reliability</i> .....	59
(G) NOTICE.....	60
<b>IV — EXAMINATION-IN-CHIEF .....</b>	<b>63</b>
(A) OVERVIEW .....	63
(B) SECTION 27 (DEFENDANT’S STATEMENTS OFFERED BY PROSECUTION) .....	63
(i) <i>The scope of s 27</i> .....	63
(ii) <i>Editing a defendant’s statement under s 91</i> .....	64
(iii) <i>The relationship between s 27 and the ss 37-38 veracity rules</i> .....	65
(iv) <i>The relationship between ss 27 and 35 (previous consistent statements rule)</i> .....	65
(C) SECTION 35 (PREVIOUS CONSISTENT STATEMENT RULE).....	65

(i)	<i>The scope of s 35(2) / s 35(2) and re-examination under s 97</i> .....	66
(ii)	<i>Section 35(2) and the recent complaint rule/ defendant’s statements admitted under s 27</i> .....	67
(iii)	<i>The use of the previous consistent statement under s 35(2)</i> .....	71
(iv)	<i>Previous consistent statements offered to rebut a claim of recent invention: triggering the s 35(2) exception</i> .....	72
(v)	<i>Previous consistent statements offered to rebut a claim of recent invention: The pre-motive requirement</i> .....	72
(vi)	<i>Prior identification (s 45) and s 35</i> .....	75
(D)	SECTION 90 (USE OF DOCUMENTS IN QUESTIONING WITNESS OR REFRESHING MEMORY) .....	76
(E)	SECTIONS 103-107 (ALTERNATIVE WAYS OF GIVING EVIDENCE).....	80
(i)	<i>Overview</i> .....	80
(ii)	<i>Reasons and threshold for resorting to s 105</i> .....	81
(iii)	<i>Video record evidence (s 106)</i> .....	83
<b>V – CROSS-EXAMINATION</b> .....		<b>85</b>
(A)	VERACITY – OVERVIEW (SS 37-39).....	85
(B)	SCOPE OF THE VERACITY RULE (SS 37-39).....	85
(i)	<i>Prior inconsistent statements</i> .....	85
(ii)	<i>Lies</i> .....	86
(iii)	<i>The absence of prior convictions</i> .....	88
(iv)	<i>Cross-examination</i> .....	88
(C)	VERACITY: MEANING OF “SUBSTANTIALLY HELPFUL” .....	89
(D)	REPUTATION EVIDENCE RELATING TO VERACITY .....	91
(E)	DEFENDANT’S VERACITY (S 38).....	92
(F)	CHALLENGING A CO-DEFENDANT’S VERACITY (S 39) .....	93
(G)	SEXUAL EXPERIENCE OF COMPLAINANTS IN SEXUAL CASES (S 44).....	94
(i)	<i>“False” complaints: Veracity evidence or sexual experience?</i> .....	94
(ii)	<i>Direct relevance to facts in issue</i> .....	95
(H)	HOSTILE WITNESSES (SS 4, 37(4), 94).....	96
(i)	<i>Definition of hostile</i> .....	96
(ii)	<i>Deliberately calling a hostile witness</i> .....	97
(iii)	<i>Offering evidence regarding facts in issue</i> .....	98
(iv)	<i>The failure to cross-examine (s 92)</i> .....	98
<b>VI – OPINION EVIDENCE</b> .....		<b>101</b>
(A)	GENERAL (NON-EXPERT) OPINION EVIDENCE (S 24).....	101
(B)	EXPERT OPINION EVIDENCE (S 25) .....	104
(i)	<i>Substantial helpfulness (s 25(1))</i> .....	104
(ii)	<i>Section 25(1) &amp; s 127 (delayed complaints or failure to complain in sexual cases)</i> .....	107
(iii)	<i>Judicial instructions on expert evidence/the conduct of experts</i> .....	108
(iv)	<i>Experiments, demonstrations and reconstructions</i> .....	110
(v)	<i>Expert evidence based on defendant’s statements (ss 21 &amp; 25(4))</i> .....	111
<b>VII – IDENTIFICATION EVIDENCE</b> .....		<b>113</b>
(A)	ADMISSIBILITY OF VISUAL IDENTIFICATION EVIDENCE (S 45) .....	113
(i)	<i>Overview</i> .....	113
(ii)	<i>Definition of identification evidence (s 4)</i> .....	115
(iii)	<i>Formal procedure (s 45(3))</i> .....	118
(iv)	<i>Good reasons (s 45(4))</i> .....	119
(v)	<i>The threshold for admission (s 45(1) &amp; (2))</i> .....	123
(B)	ADMISSIBILITY OF VOICE IDENTIFICATION EVIDENCE (S 46) .....	124
(C)	WARNINGS ABOUT IDENTIFICATION EVIDENCE (S 126).....	125
<b>VIII – JUDICIAL WARNINGS</b> .....		<b>127</b>
<b>IX – PRIVILEGE</b> .....		<b>131</b>
(A)	OVERVIEW.....	131
(B)	LEGAL PROFESSIONAL PRIVILEGE (S 54).....	131
(C)	LITIGATION PRIVILEGE (S 56) .....	133
(D)	SETTLEMENT PRIVILEGE/WITHOUT PREJUDICE COMMUNICATIONS (S 57).....	134
(E)	PRIVILEGE AGAINST SELF-INCRIMINATION (S 60) .....	135

(F)	EXCEPTIONS TO CLASS PRIVILEGES (SS 65, 67)	136
(i)	<i>Waiver</i>	136
(ii)	<i>The power to disallow privilege</i>	138
(G)	CONFIDENTIAL INFORMATION	139
(i)	<i>Journalist-source (s 68)</i>	139
(ii)	<i>Confidential communications and information (s 69)</i>	140
(H)	PUBLIC INTEREST IMMUNITY (S 70)	143
<b>X – RELIABILITY/ OPPRESSION/ IMPROPERLY OBTAINED EVIDENCE</b>		<b>145</b>
(A)	EXCLUSION OF UNRELIABLE STATEMENTS (S 28)	145
(B)	EXCLUSION OF STATEMENT INFLUENCED BY OPPRESSION (S 29)	147
(C)	IMPROPERLY OBTAINED EVIDENCE (S 30)	149
(i)	<i>Section 30 applications under ss 344A &amp; 379 Crimes Act 1961</i>	150
(ii)	<i>Standing</i>	151
(iii)	<i>Interpretation &amp; application of the s 30(2)(b) proportionality-balancing test/s 30(3) balancing factors</i>	152
(iv)	<i>Interpretation &amp; application of the s 30(6) practice note</i>	155
(D)	INTERPRETATION & APPLICATION OF PARAS 1-5	156
(i)	<i>Para 1</i>	156
(ii)	<i>Para 2</i>	157
(iii)	<i>Para 3</i>	158
(iv)	<i>Para 4</i>	158
(v)	<i>Para 5</i>	160
(E)	MULTIPLE POLICE INTERVIEWS	161
(F)	THE S 30(6) PRACTICE NOTE & THE POLICE RIGHTS FORM IN BREATH/BLOOD ALCOHOL CASES	162