Foundational Approach (acts as filter at each stage)

1. Materiality (Purpose)
    a. Is the evidence material to a live issue in the case? (s 7) (What is the live issue?)
        i. 'Material' = it will help us get towards the truth, prove an element of the offence, answer the question at issue in some way.
        ii. If evidence is directed at a live issue, it is material.
        iii. S 7(3): Anything that is of consequence to determination of the proceeding:
            1. What part of the test is this evidence going to be used for? What needs to be proved?
            2. Materiality = factual question = what is the legally material fact.
2. Relevance
    a. Does the evidence have a tendency to prove or disprove a matter of consequence to the determination of the proceeding? (s 7(3)) (Does the evidence tend to prove the live issue?)
        i. PROVISION EXPANDED
        ii. S 7(1): Presumption: All relevant evidence is admissible except if it is inadmissible under this or any other Act or is excluded under this or any other Act. (*Rebuttable presumption)*
        iii. S 7(2): Evidence that is not relevant is not admissible.
        iv. Tendency to prove or disprove:
            1. First ask: What are you trying to prove or know? Then can ask: Is this evidence relevant to what you are trying to prove or know?
            2. This is a YES or NO question to whether the evidence has any probative tendency. It is NOT an issue of weight or reliability or credibility.
        v. Anything that is of consequence to determination of the proceeding:
            1. Go up to materiality.
            2. Relevance is a logic question e.g. logic of the inference getting from this piece of evidence to that material element. What is the logical connection between evidence x and material issue y?
        vi. TEST/CONDITION
        vii. Relevance is a NECESSARY but not a SUFFICIENT condition for admissibility. Evidence has to be relevant for it to be admissible but it is possible for evidence to be relevant and still not admissible.
        viii. *Wi v R* - s 7(3) is not an exacting test. "The question is whether the evidence has some, that is any, probative tendency, not whether it has sufficient probative tendency. Evidence either has the necessary tendency or it does not."
        ix. *R v A*: relevance means evidence has some tendency in logic and common sense to advance the proposition in issue. Evidence is excluded when fails relevance test.
            1. *R v Bain:* COA = acknowledged different interpretations of the 111 call. SC = transcript can't include these disputed interpretations, only muffled sounds, the evidence had no probative tendency.
        x. TYPES
        xi. Direct evidence = evidence which, if true/believed, will resolve a material issue.
        xii. Circumstantial evidence = evidence which requires an inference to get to a material issue.
            1. Propensity evidence = if someone has been violent before, might have propensity to be violent again.

xiii. LOGIC

xiv. **Deductive reasoning** - This can help us separate questions about whether the premise is true (a weight question) and whether the connections between the premises make logical sense (a relevance question).

xv. Major premise + minor premise = conclusion/deduction

1. Major Premise = Background assumption or inference likely to be accepted by a reasonable person.
2. Minor Premise = evidence you want to admit.
3. Conclusion or deduction = material legal elements we want to prove or disprove.
    a. Minor premise/major premise idea: encourages us to spell out the background assumptions needed to make the logical link from the piece of evidence to the material fact looking to prove.

xvi. *Validity* = This argument has validity if all premises lead from one to another in a logical way. But if we don't know the truth of the premises, we are less sure that the conclusion is true.

1. Example: All men are human (MAJ P) + Socrates is a man (MIN P) = Socrates is human. But what if Socrates was a cat, not a man. Then the minor premise is not true and the conclusion is incorrect.
2. If an argument has validity, it will be relevant.

xvii. *Soundness* = A valid argument with all true premises (and therefore a true conclusion).

1. A valid argument structure is only as good as the truth it inputs.
2. If an argument is sound, this means it is not only relevant but also admissible / passes the weight test.

xviii. There is a distinction between having a logical tendency to disprove or prove a fact (relevance) and the evidence being considered being true (weight).

1. Note: Remember that evidence is still relevant if it could prove or disprove an issue in the proceeding, even if the evidence is not very credible/not true. IF IT IS TRUE, WOULD IT HELP US SOLVE THE ISSUE? Is the question for relevance.
2. Ultimate goal = have soundness e.g. logic + true premises for a strong argument.

xix. *R v Alletson (2009) (CA)* - example of evidence that is not relevant.

1. Facts
    a. Sexual assault of young girls by Anglican minister.
    b. Evidence question: Can they admit evidence of the minister's good character evidence of his religiosity and the respect the authorities have for him.
2. Held
    a. Is the evidence material to a live issue in the case?
        i. Could argue that the good character evidence suggests he is less likely to assault young girls or that this is a false or mistaken complaint.
        ii. But using logic, this is a dubious assumption or premise.

1. People who are pious don't sexually assault children. (Background assumption)
2. Anglican man is a pious man.
3. Therefore, Anglican man did not sexually assault children.

iii. Firstly, it is well known that pious people with good character, particularly in the church, can sexually assault children. But, using logic, if we look at this on the flip side - this background assumption makes even less sense.

xx. Inductive reasoning - Use information we have to make a prediction based on generalisations or probability. Allows for the possibility that the conclusion could be false even if the premises are all true. E.g. Because the sun has risen everyday of my life, tomorrow it will rise.

1. Can use inductive reasoning in a similar way to spell out how a background assumption is required to link a piece of evidence to a material fact we are trying to prove logically.
2. Alleston example: No one has met a religious person who has sexually assaulted a child (background assumption), this person is religious, so unlikely that they have sexually assaulted a child. = Weak background assumption.

3. Does an exclusionary rule apply?

a. Opinion Evidence

i. **Trigger step:** Is this evidence opinion evidence? (Section 4)

1. Opinion = a statement of opinion that tends to prove or disprove a fact.
    a. A view or judgment formed in the mind but not necessarily based on fact or knowledge. Less than truth or knowledge. More than a hunch or impression. That either proves or disproves a fact.

ii. **PRESUMPTION** = Section 23: A statement of an opinion is not admissible in a proceeding, except as provided by ss 24 and 25.

1. We have this presumption due to relative roles of the witness and the fact finder. Witness = present facts based on immediate senses/provide raw data. Fact finder = hear raw information and draw inferences based on it/process it.
2. If witnesses give their opinion they are going beyond their role, impinging on the role of the fact finder by drawing their own inferences from the raw data.

iii. **Exception:** Section 24 - General admissibility of opinion evidence

1. (1) A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.
2. Purpose: *In practice, a lot of evidence will have elements of opinion because it is necessary to make sense of the information that we consume/apply heuristics so that the information has some meaning. It would not be useful to always force witnesses to separate facts completely from opinion.*
3. Goal: *get necessary and useful information before the jury without undermining the jury's fact finding role.*
4. **TEST**

5. Step One: Opinion must be necessary to effectively communicate the information to the fact finder/Can the fact finder infer the information without the opinion?
    a. *J v R:* rape charge, complainant said she thought the defendant had understood initially that she didn't want to have sex but then he thought she changed her mind. Issue: should this evidence be excluded on the basis that it was opinion evidence?
        i. It should be included because the complainant's opinion evidence is the only way of getting the information that the defendant had believed in her consent to the fact finder. If she described the shape of his various facial expressions, that wouldn't have fully explained this evidence. Need some of her perception/interpretation of the situation to understand the fact.
    b. Is the witness doing the fact finder's role of drawing conclusions or is it a human inference that makes meaning out of what we observe?
6. Step Two: The witness must be giving an opinion based on something they personally perceived/witness must describe the factual basis for their opinion as far as possible.
    a. *R v Bain:* police officers opinion re defendants emotional state after the murders was that the defendant didn't seem very distressed.
        i. This opinion evidence is okay because the police officer was basing that observation on direct observations e.g. he could see and describe how the defendant was behaving and from this behaviour holds the opinion that the defendant was not distressed.
        ii. We can see the logical flow from raw data the witness observed and the opinion formed. Not a massive jump.
7. Examples of evidence that needs opinion to make sense of the facts.
    a. Identity: I saw these features/outfit and drew inference that it was this person vs I saw this feature and this outfit (Visual identification evidence rules below).
    b. Speed: It looked like the car was going over the speed limit vs. the car took x time to get from this spot to this spot. It got from x to x faster than other cars.
    c. Emotional state: She looked like she was upset vs. there were tears coming from her eyes, her face was scrunched, she sat curled up.
    d. Age: she looked about 25-30 years old vs. she has some fine lines, dressed in x clothing, had short bob hair.
    e. Weather: it was bad weather vs. on this day 25 mm of rain fell.

iv. **Exception:** Section 25: Admissibility of expert opinion evidence

1. (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
2. (2) An opinion by an expert is not inadmissible simply because it is about—

a. (a) an ultimate issue to be determined in a proceeding; or
b. (b) a matter of common knowledge.

3. (3) If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.
4. (4) If expert evidence about the sanity of a person is based in whole or in part on a statement that the person made to the expert about the person's state of mind, then—
5. (a) the statement of the person is admissible to establish the facts on which the expert's opinion is based; and
6. (b) neither the hearsay rule nor the previous consistent statements rule applies to evidence of the statement made by the person.
7. (5) Subsection (3) is subject to subsection (4).
8. **TEST**
9. <u>Identify general pros and cons of evidence</u>
    a. Pros: Sometimes it is helpful to hear from an expert so that the fact finder can make sense of the evidence. For example, if there is forensic/DNA evidence, if there is special identification technology e.g. fingerprint analysis or if there is risk of counter-intuitive evidence e.g. rape myths, domestic/family violence myths, syndromes).
    b. Cons: But we do not want the jury to put too much weight on the expert opinion because they are an expert/we value scientific expertise so view their opinion as objective, rather than working through all the evidence before them.
        i. This is dangerous if the expert is dodgy e.g. convictions of parents whose children die from SIDS.
        ii. Also dangerous generally because scientific studies are never neutral e.g. questions asked will depend on culture, values, questions that occur to you. This will frame the focus of the study. But it is hard for lawyers/judges to assess the quality of scientific evidence.
10. <u>Step one:</u> Is the evidence being offered by a relevantly qualified expert? 25(1)
    a. <u>[Note: s 25 only relates to expert opinion evidence, not evidence expert gives that relates to fact].</u>
    b. Is the person an expert/have an area of expertise?
        i. Section 4: Expert = a person with specialised knowledge or skill based on training, study or experience.
        ii. Formal qualification; OR
        iii. Area of expertise due to on-the-job experience.
            1. *Holtham:* police officer who worked undercover for many years has expertise in street names and codes for drugs = specialised knowledge, expertise.
    c. Is the evidence on a matter within the area of expertise?

11. Step two: Is the opinion based on facts within the general body of expertise of the expert or will the fact be proved or judicially noticed in the proceeding? S 25(3).
    a. Section 4: Expert evidence = evidence that comes from an expert, is based on specialised knowledge or skill of that expert and includes evidence given in the form of an opinion.
        i. *Platt:* expert gave evidence on fetal alcohol syndrome but she was an expert in sexual assault examinations. Evidence was outside her area of expertise.
        ii. Expert does not need to have specific knowledge about the exact area the facts relate to, but have to be in general body of expertise.
    b. Section 25(4) - Expert opinion re sanity: Provides for admissibility of person's statement about state of mind in order to provide basis for expert to give opinion on sanity (ie not inadmissible under hearsay or previous consistent statement rules).
12. Step three: Judicial Gatekeeper - Expert opinion must be substantially helpful in understanding other evidence or ascertaining any fact in issue to be admissible (s 25(1))
    a. Does evidence have relevance AND substantial weight?
    b. Substantially helpful?
        i. Explain how to understand certain types of scientific evidence, make connections between evidence that require special skills or explain counter-intuitive evidence?
    c. If the evidence is not ***reliable*** it will not meet this test. More robust science = more reliable. But this does not mean novel science is necessarily bad, should be able to access cutting edge new science.
        i. **Daubert Factors (US)** endorsed in *Lundy* (PC-2014)
            1. Has theory/technique been tested?
                a. Has the expert witness actually met the complainant/defendant if they are stating opinions about them?
            2. Has the theory/technique been subjected to peer review and publication ("good" science)?
                a. Has the research been peer reviewed/subject to scrutiny/cross-checking? Or is it untested/junk science?
                b. Where do they publish? Reputable journals?
            3. The known or potential rate of error or the existence of standards?
            4. Whether the theory or technique used has been generally accepted?
                a. Where does the expert sit within their expert field? Are they an outlier or is there substantial disagreement with their view? Some disagreement is fine if it is rational.

ii. Evidence that is relating to a syndrome, especially a new syndrome, will probably be novel science because the way you define a syndrome is a grouping of symptoms that could be a lot of things and we call it a syndrome because we don't understand it.

iii. Are there any concerns of conscious or unconscious bias? E.g. if a witness has regularly acted for the prosecution will they be independent?

1. Expert witness has an overriding duty to assist the court impartially on relevant material within their expertise. Not an advocate for the party that engages the witness - High Court Rules.

13. Ultimate issue?

a. Purpose of Section 25(2)(a): Previously, experts could not give their opinion on the ultimate issue of the case e.g. defendant is guilty or not because of the risk of usurping the fact finders role. Now - this is not a hard and fast rule. Expert opinions on the ultimate issue are not automatically excluded but it is rare that courts will allow expert opinions on the ultimate issue to be given.

i. *Pora:* Professor Gudjonsson formed the opinion that Pora's confessions were false confessions. This was the ultimate issue of the case (if confession was false, might not be guilty because conviction relied heavily on confession). This part of the evidence should not have been admissible. Other expert witnesses were fine because they gave expert opinions on false confessions generally, but did not an expert opinion on whether Pora's confession was false or not.

14. JUDICIAL DIRECTIONS/WARNINGS

15. Scale of evidence

a. Judges can give directions that limit the time spent on the expert witness.

i. *D v H:* Dr Blackwell's evidence was too lengthy. It should be kept as brief as possible (consistently with the need to ensure accuracy) to avoid any concern that a jury will treat it as having greater significance than it warrants.

b. Avoid evidence being given in a way that makes the expert evidence seem more weighty.

16. Counter-intuitive evidence

a. Judges can give warnings or explanations on the purpose of counter-intuitive evidence.

b. *D v H:* trial judge directed jury that Blackwell had no met the complainant and that she is referring to statistics of how victims of child sexual abuse tend to behave. Evidence is designed to educate, correct misunderstandings and remove false preconceptions.

b. Visual Identification Evidence

i. Purpose

1. Pros: It can be probative evidence if it puts the defendant in the right place at the right time. Tangible evidence that can help prove elements of the offence are made out. Eye-witness can be reliable evidence.
2. Cons: Identifying someone is a form of opinion evidence, there is mental processing to say that the person you saw was X. People can make mistakes when identifying someone they saw. Risks are:
    a. A person has face blindness = syndrome where people cannot process visual features. They could not give visual identification evidence.
    b. Race issues = pakeha people are better at differentiating other pakeha people from Māori or asian people. More likely to falsely identify someone of a different race. Not neutral in practice because certain groups who are more likely to be stereotyped will be targeted.
    c. Genuine mistakes = we can make mistakes about thinking someone is someone we know well. High risk if someone makes this mistake because:
        i. If the witness knows the person they have identified well, their testimony will seem very credible given the close relationship.
        ii. The witness will be certain they are correct. Cross examination is not effective because often people aren't lying, they just make a genuine mistake in identifying the person.

ii. **(1) Is this visual identification evidence?** (Section 4)

1. Section 4: Visual ID evidence = (a) an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done; or (b) an account (whether oral or in writing) of an assertion of the kind described in paragraph (a)
    a. Is assertion based on witnesses' own sensory perceptions?
    b. Is the visual ID of the defendant?
    c. The visual ID evidence can be:
        i. Direct evidence = an account from a witness that they saw the defendant doing AR = solves material question of identity; OR
        ii. Circumstantial evidence = seeing the defendant being near where the AR was committed at the time the AR was committed.
    d. Types of visual ID evidence (*Turaki*)
        i. Positive ID evidence = draws conclusion that the person who the witness saw was the defendant. Further step from just describing features but doing mental processing to identify that person as the defendant.
        ii. Recognition evidence = a form of positive ID evidence, when the witness knew the defendant before and describes recognising a person they know.
    e. Other identification evidence that is NOT visual ID evidence (*Turaki)*:

i. Resemblance evidence = a witness describes a person with various characteristics but leaves it to the fact finder to draw final inference that it is the defendant.
ii. Observation evidence = if purpose of evidence is not to identify the defendant but to describe something else e.g. to prove the defendant did an action.
    1. What is the materiality and relevance of this evidence?
    2. Is the presence of the defendant at the scene a contentious issue or is not disputed?
        a. If identification of the person seen as defendant is not the contentious issue on the facts e.g. because we know that the defendant was there, but the evidence will provide some other useful observations about what the defendant was doing ≠ visual ID evidence.
        b. This is just describing sensory observations, not opinion evidence.

iii. **(2) Has the formal procedure set out in s 45(3) been met?**

1. **If yes,** Visual ID evidence is prima facie admissible (s 45(1)). Go to step 4.
2. **If no,** (s 45(2)), go to step 3.
3. (3) For the purposes of this section, a **formal procedure** is a procedure for obtaining visual identification evidence—
    a. (a) that is observed as soon as practicable after the alleged offence is reported to an officer of an enforcement agency; and
    b. (b) in which the suspect is compared to no fewer than 7 other persons who are similar in appearance to the suspect; and
        i. This could be through photographs, video recording or real people.
        ii. *Ahomiro:* it was not similar enough to the appearance of the defendant if other people in the photo montage do not have the same coverage or style of tattoo as the defendant.
    c. (c) in which no indication is given to the person making the identification as to who among the persons in the procedure is the suspect; and
        i. You can't give any hints to the person making the identification that might make them choose the defendant, they must truly form identification themselves.
    d. (d) in which the person making the identification is informed that the suspect may or may not be among the persons in the procedure; and
        i. This protects against false positives
    e. (e) that is the subject of a written record of the procedure actually followed that is sworn to be true and complete by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and
    f. (f) that is the subject of a pictorial record of what the witness looked at that is prepared and certified to be true and complete by the officer

who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and

g. (g) that complies with any further requirements provided for in regulations made under section 201.

iv. (3) Was there a good reason for not following the formal procedure under s 45(4)?

1. **If yes,** the Visual ID evidence is prima facie admissible (s 45(1)). Go to step 4.
2. **If no,** (s 45(2)), the Visual ID evidence is prima facie inadmissible. Go to step 5.
3. (4) The circumstances referred to in the following paragraphs are **good reasons** for not following a formal procedure:
    a. (a) a refusal of the suspect to take part in the procedure (that is, by refusing to take part in a parade or other procedure, or to permit a photograph or video record to be taken, where the enforcement agency does not already have a photo or a video record that shows a true likeness of that person):
        i. This includes if they make themselves stick out or don't comply with the rules of the parade.
    b. (b) the singular appearance of the suspect (being of a nature that cannot be disguised so that the person is similar in appearance to those with whom the person is to be compared):
        i. Probably a relatively high bar. Police need to make a genuine and reasonable effort to find people that match, only if it's really impossible
            1. *Fraser:* said police could have photoshopped lion suits on to find people of similar appearance if that was necessary.
            2. *Ahomiro:* Can find at least 7 other people in NZ who have face tattoos that are similar to Ahomiro's e.g. not covering the forehead. Police did not do a thorough enough job.
    c. (c) a substantial change in the appearance of the suspect after the alleged offence occurred and before it was practical to hold a formal procedure:
    d. (d) no officer involved in the investigation or the prosecution of the alleged offence could reasonably anticipate that identification would be an issue at the trial of the defendant:
    e. (e) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency soon after the offence occurred and in the course of that officer's initial investigation:
        i. If it is so close after the time of offending there is less likely to be a mistake of identity problem and in the heat of the moment it doesn't work to go through the formal assessment.
    f. (f) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency after a chance

meeting between the person who made the identification and the person alleged to have committed the offence.

i. This has to be an actual fluke, it can't be set up on purpose.

v. **(4) When ID evidence is prima facie admissible, the burden shifts to the defence to prove on the balance of probabilities that the ID evidence is unreliable. Has defence discharged the burden? (s 45(1))**

1. **If yes,** presumption of admissibility rebutted, evidence is inadmissible.
2. **If no,** evidence is admissible.
    a. *Harney:* there is not a necessary correlation between witness confidence and reliability of witness evidence. Though it is not entirely irrelevant e.g. uncertainty can suggest unreliability but certainty does not mean reliability.

vi. **(5) When ID evidence is prima facie inadmissible, burden shifts to prosecution to prove BRD that the circumstances in which the identification was made have produced a reliable identification. Has prosecution discharged this burden? (s 45(2))**

1. **If yes,** presumption of inadmissibility is rebutted, evidence is admissible.
2. I**f no,** evidence is inadmissible.
    a. *Harney:* if the evidence is recognition evidence they don't need to do full formal procedure for identification to be reliable, they definitely know who they are. E.g. you knew a person from school and caught up with them or you were in a close personal relationship.
    b. *Harney:* there is not a necessary correlation between witness confidence and reliability of witness evidence. Though it is not entirely irrelevant e.g. uncertainty can suggest unreliability but certainty does not mean reliability.
    c. *Fraser:* Dock ID is not a reliable form of identification.
    d. *Ahomiro:* if the defendant has any distinctive feature from the other people in the line up e.g. a blank forehead, then the circumstances of identification cannot effectively prove reliability.
    e. *D v R:* There was reliable identification found BRD when a witness who was held at gunpoint by 4 men in her home identified them in a photo montage 4 months after the offending because the witness got a good look at all the men up close, her description of the men was very detailed so she had a good memory of them, in general the witnesses memory was confident and compelling so identification was still reliable despite delay.
    f. *R v Edmonds:* you can find identification was reliable when at least some of the requirements of s 45(3) are satisfied but there is some small change or difference that means it does not follow the process e.g. delay. Unlikely to find identification was reliable if a totally new process is used, process departs majorly from s 45(3) procedure.

vii. **Section 126 - Judicial warnings: Is it appropriate for the Judge to give the jury guidance about what weight they should give visual ID evidence or guidance of inferences they are entitled to draw from this evidence?**

1. (1) In a criminal proceeding tried with a jury in which the case against the defendant depends wholly or substantially on the correctness of 1 or more visual or voice identifications of the defendant or any other person, the Judge must warn the jury of the special need for caution before finding the defendant guilty in reliance on the correctness of any such identification.
    a. *If it is just a side issue/tangential it will not trigger this.*
2. (2) The warning need not be in any particular words but must—
    a. (a) warn the jury that a mistaken identification can result in a serious miscarriage of justice; and
        i. *And because of this they should pay extra attention to whether they believe this identification is accurate.*
    b. (b) alert the jury to the possibility that a mistaken witness may be convincing; and
        i. *Idea from Harney.*
    c. (c) where there is more than 1 identification witness, refer to the possibility that all of them may be mistaken.
3. WARNING can also be made:
    a. To take into account factors like the time, lighting, different race/ethnicity, what they were wearing, weighting bias.
    b. Time delay might be something to warn about, even if we found the pros can prove BRD that the identification is reliable.
    c. Intervening events e.g. photo published in paper that mean their memory might be shaped by events after the actual identification and not on what they originally saw.
    d. Any other issues that came up in discussing whether evidence should be admissible or not could make up a warning by a Judge if it is passed to test on a fine balance.

c. Hearsay

i. Dangers of Hearsay

1. If we admit it
    a. The hearsay witness may have misunderstood what they saw/heard from the declarant. We can't talk to the declarant to unpick the mistakes the hearsay witness made.
    b. The hearsay witness may have forgotten important details in describing what she saw/heard from the declarant. We can't talk to the declarant to unpick the mistakes the hearsay witness made.
    c. If the declarant was being deliberately untruthful or misleading, we cannot test the truthfulness of the declarant's statement by questioning them.
2. If we do not admit it
    a. We could be excluding relevant and probative evidence.
    b. Hearsay may be the only evidence we have that will prove or disprove a case.
    c. Should it be excluded if the HS witness has been quite critical and obtained a lot about the truthfulness of the statement from the declarant.

3. Major truth seeking principle = hear from witnesses in court, get their own perceptions and cross-examine them to test veracity of their evidence. Declarant is insulated from these processes.

ii. **Trigger step:** Is the evidence hearsay?

1. Section 4: Hearsay = A statement made by a person other than the witness that is offered in evidence for the truth of its contents.
2. Is the evidence a statement by a non-witness?
    a. Is this statement from a non-witness?
        i. Witness = a person who gives evidence and is able to be cross-examined in a proceeding.
        ii. Has to be a statement made out of court by someone who is insulated from giving evidence and being cross-examined.
        iii. If the statement is made by a witness out of court = previous consistent/inconsistent statement, not hearsay.
    b. Is this a statement?
        i. Must be spoken, written or non-verbal conduct
        ii. Must be asserting something/intended to have meaning
        iii. <u>Unintended implied assertions</u>
            1. Is the use that we are offering the statement for the same as what the declarant intended the statement to mean/assert?
                a. If yes = Hearsay
                b. If no - the declarant intended the statement to assert something different = Not hearsay.
            2. *R v Holtham:* Text messages sent to the defendant were offered for the purpose of demonstrating that the accused was supplying drugs. The senders of the texts were not trying to assert that the person receiving these messages is a drug dealer, they are saying that they want drugs. It is an unintended implied inference that by sending messages asking for drugs, the person who received the messages is a drug dealer. Thus, the messages are not a statement asserting something that we want to know the truth value of - we don't need to know if it is true that the senders wanted drugs, we just need to know there were texts received of people wanting drugs by the defendant. The texts are not hearsay.
            3. *Manase:* The drawing by the child was offered for the purpose of implying that the child had seen her uncle's erect penis. We would want to know if this is true, because if it is, this makes it significantly more likely the uncle sexually abused the girl. Court said = hearsay. But today this would not be hearsay. This is because the girl did not make the drawing to assert that she had seen her uncle's erect penis, she was just expressing

what her uncle had told her was a lollipop. There is an unintended implied inference by the adults that she had seen her uncle's erect penis. Thus, the drawing is not a statement asserting something that we want to know the truth value of - we don't need to know if it is true that the uncle told the girl that this penis-like image was a lollipop, we just need to know the girl thought that and the fact-finder can infer from this that the girl had seen her uncle's erect penis.

3. Is the statement by a non-witness offered for the truth of its content?
    a. What is the materiality and relevance of this evidence?
        i. Materiality: What is the legal question or legal element that this evidence is working towards?
        ii. Relevance: Explain how this piece of evidence helps to logically establish that legal issue?
    b. Is the purpose of hearing the declarant's statement to ascertain whether the declarant's statement is true?
        i. Or is it some other purpose?
            1. To tell us something about the witness's reliability.
            2. To tell us something about the witness's/defendant's state of mind because of hearing the declarant's statement.
            3. To tell us that the declarant was present to make that statement or was alive at a certain time.
            4. To show that certain words were said that have legal consequences (legally operative facts).
            5. If we need to know that it is true whether the statement was said or not, but not whether the statement was true for the value of its contents, can just cross the witness.
        ii. *Hunt:* Hunt published a book against court orders. The statement that the lawyer told me it was okay to publish the book was not hearsay because it doesn't matter if the lawyers statement was true, it just matters to demonstrate that Hunt thought that it was okay to publish the book. We can cross-Hunt to work out whether he believed it and relied on it to publish the book.
    c. Sankoff's test: Who is the real witness? Or who is the most important character?
        i. If the declarant is the real witness, or the most important character, the truth of what they are saying probably matters = hearsay.
    d. Elisabeth McDonald's test: Does it make sense to add "and so it's true" after the statement to answer our material issue/main question?
        i. If yes = hearsay. If no = not hearsay.
    e. Explain how if it is a hearsay statement, the fact that we need to know the truth of its contents is because of hearsay dangers…

4. Note: double hearsay = where the witness talks about a hearsay statement of someone talking about another hearsay statement.

iii. PRESUMPTION: Section 17 - Hearsay statement is not admissible.

iv. EXCEPTION: Section 18 - General admissibility of hearsay

1. (1) A hearsay statement is admissible in any proceeding if—
    a. (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
    b. (b) either—
        i. (i) the maker of the statement is unavailable as a witness; or
        ii. (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
2. (2) This section is subject to sections 20 and 22.
3. **TEST**
4. Is it necessary for this evidence to be admitted as hearsay? (s 18(1)(b))
    a. Is the maker of the statement unavailable as a witness?
        i. Death
        ii. Outside NZ and not reasonably practical for them to be a witness e.g. alternative methods.
        iii. Young child
        iv. Can't find them and reasonable efforts have not turned them up.
        v. Person is not compellable
        vi. Person excused from testifying under the Criminal Procedure Act
        vii. Unable to give evidence because of disability or health issues
    b. Judge considers it would cause undue expense and delay to call that person as a witness
        i. For example, if it would cause expense or delay to locate the declarant or to get them in NZ to be a witness.
5. Do the circumstances relating to the statement provide reasonable assurance that the statement is reliable?(s 18(1)(a)) [Do they overcome hearsay concerns?]
    a. Circumstances to consider that may provide assurance that the statement is reliable.
        i. The nature of the statement
        ii. Contents of statement
        iii. Circumstances re making that statement
        iv. Circumstances re the veracity of the declarant
        v. Circumstances re the accuracy of observation of the declarant.
    b. Factors that increase reliability
        i. Is the statement written or recorded?
        ii. Very detailed statement

iii. Internally consistent e.g. *Preston:* it fits within the whole picture of all the evidence, so statement does not seem left field.
iv. Against self-interest = can't see any ulterior motives the declarant might have had for making the statement, this will bolster reliability.
v. Statement made in spontaneous or immediate way
vi. Statement close to time of the offence.
1. *Preston:* Did someone else witness the hearsay statement being said, especially if it was the defendant? Suggests it could have been tested for accuracy at the time.

c. Factors that decrease reliability
i. If it was overheard, not in writing.
ii. If it is a self-serving statement e.g. declarant had reason to lie or the declarant had some other motive to make the statement.
iii. It was made later in time
iv. It was promoted to be made e.g. via leading questions
v. Is declarant known to be unreliable or lie often.
vi. Do we have reasons to doubt the declarants accuracy about what their statement refers to e.g. if they describe seeing something but they have poor eyesight.
1. Preston: Is it very unclear what the declarant meant by that statement? Really necessary to hear what they think?

d. Weigh up all these factors/circumstances and decide on balance whether evidence is reliable or not.
e. Note: remember to not factor in reliability of the witness, we can test the veracity of the witness through cross-examination, focus on hearsay dangers that arise from declarant being insulated.

6. If it is necessary and reliable, go on to s 8 exclusion to see if it should be excluded because of its prejudicial effect or risk of needlessly prolonging proceedings.
a. Check Preston case files for any ideas on s 8 analysis in relation to hearsay.

v. EXCEPTION: Section 19
1. Business records are generally admitted because we view them as reliable.
2. This is a broad section. It includes statements made to the police and various types of medical records.
3. Any kind of professional keeping a written record will likely fall under this heading.
4. Emphasis is solely on necessity, rather than reliability. It is assumed business records are reliable.
a. (a) Hearsay is admissible if the person that supplied the information is unavailable to a witness. Necessary via business record.

b. (b) Person is available but there is no useful reason to get them to tell us in person. Time consuming and they might not tell us anything extra than what is already captured in the medical chart.
c. (c) efficiency - is it going to be unduly expensive or take too long to require someone to turn up in person.

5. Remember, can still consider any issues with reliability under s 8 if that creates prejudicial risk.

vi. EXCEPTION: Section 21
1. If you are a criminal defendant, and you decide not to be a witness, you have to stick by that. You can't use hearsay to have a statement you made out of court be admitted as evidence and avoid cross-examination on this issue.
2. If a defendant is a witness, previous out of court statements are not hearsay.

vii. EXCEPTION: Section 22
1. You have to provide notice to the otherside if you want to admit hearsay evidence without a reasonable time. This will encourage hearsay admissions to be made pre-trial so the defendant/prosecution can prepare a response or defence or rebuttal evidence.

viii. Section 122: Judicial directions about evidence that may be unreliable
1. If there are any possible concerns about reliability or undue weight being given to hearsay evidence, the judge can direct the jury on how to make sense of the evidence e.g. what legitimate and illegitimate inferences can be drawn from this.
a. *Preston* 2016 - Para 76.
2. Note: even if not here, may still later find that the judge should give direction to outweigh prejudicial risk under s 8.

4. S 8 Exclusion (General Exclusion)
a. The final filter where evidence that is material and relevant may be found to not be admissible.
b. S 8 (1) = Probative value > prejudicial effect. Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding.
i. Probative value = weight.
ii. Prejudicial effect = risk of prejudicing the fact finder in some way so to give the evidence more weight than it deserves.
iii. Needlessly prolong proceeding = The evidence does fulfill it's goal as evidence as outlined in s 6.
1. Section 6: Purpose
2. S 6(1)(a) - Provide for facts to be established by application of logical rules = TRUTH INTEREST.
a. Other interests are often at tension with this interest.
3. S 6(1)(b) - provide rules of evidence that recognise the importance of NZBORA rights.
a. Even if evidence is weighty, if it was unfairly obtained it cannot be used e.g. illegal searches.
4. S 6(1)(c) - promote fairness to parties and witnesses.

        a. Particularly fairness of defendants in criminal trials because of the power imbalance. Prosecution has to prove evidence BRD.
    5. S 6(1)(d) - protect rights of confidentiality and other important public interests.
        a. Don't want to brutalise witness because they have to give evidence in front of their attacker. Tweak requirements for humane and policy reasons.
    6. S 6(1)(e) - avoid unjustifiable expense and delay.
        a. Even if evidence is relevant if it is tricky to obtain because it is time consuming to put together or expensive then the evidence may not be worth it. Pragmatic consideration.
    7. S 6(1)(f) - Enhance access to the law of evidence.
        a. Makes these rules easy to understand and access.
c. S 8(2) = In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.
    i. This ensures that the crown is sticking to the rule of s 1, they will be particularly careful with crown evidence because of the imbalance of power / BORA rights etc.
d. <u>Approach</u>
    i. QUESTION 1: How useful is the evidence? Does probative value outweigh prejudicial effect or outweigh how it prolongs the proceeding?
        1. Factors to work out probative value
            a. Go to witness credibility. Trustworthy? Young? Old? Ill health?
            b. Proximity defence - Are there any external factors that might make this evidence incorrect? E.g. if there is an eye witness, how clearly could they see because of distance, lighting, things obstructing their view.
            c. Body language or the way they speak. Confident? Emotional?
            d. How good is expert evidence?
            e. Type of evidence - how relevant is this evidence to the overall issue e.g. blood splatter
            f. Admissions and confessions have high probative value but are not indisputable (under pressure, someone who is susceptible might make a false confession)
            g. What is the logical inference from the evidence to the material fact we are trying to prove? Is it very uncontroversial or clearly true or is it weaker? (Deductive/inductive reasoning)
                i. Heuristics (enabling someone to learn or discover something themselves) is useful but human's make mistakes and can be biased. Problem if heuristic is used from one context in a different context.
            h. Is the evidence directly relevant or circumstantially relevant?
            i. Is this evidence the only way to get this information before the fact finder or is it duplicating this?
            j. How reliable or credible is the witness?
        2. Examples of prejudicial effect
            a. Most evidence will have a prejudicial effect. The question is not - Is it prejudicial? BUT - Is it prejudicial so that it will be illegitimate?

i. Will the jury have a moral prejudice against the defendant because of the evidence = more likely to convict.
ii. Will the jury have reasoning prejudice against the defendant because of the evidence e.g. misuse, misunderstand or be distracted by evidence = more likely to convict.

b. Factors that indicate prejudicial risk in case law
    i. Previous convictions - generally are prejudicial because it undermines the presumption of innocence. Don't want to essentially retry people for the past offences just because it is relevant to the offence. Using logic, we also don't want to use the background assumption that just because you have offended before you will offend again because on the flip side that suggests that because someone hasn't offended before they didn't offend in this scenario (which is often not true).
    ii. Violence and aggression
    iii. Willingness to engage in criminal behaviour
    iv. Gang affiliation
    v. Gruesome photographs

c. Weatherston
    i. Facts
        1. Photographs showed stab wounds over 200 times. Argued that if the jury was shown these photos they would be unfairly biased against the defendant because they are so disturbed by the photos.
    ii. Held
        1. Judge said the photos would incite an emotional reaction in the jury because they are so distressing. So there could be an issue that the jury would gloss over the details of the case.
        2. But depends on <u>the argument the defence is running.</u> The defence is arguing that the defendant was out of control, acting frenzied. This photo evidence relates to or is part of the defendants arguments, so introducing it isn't prejudicial on the defence since they indicate this to the jury themselves.
        3. Judge held the evidence was admissible because while there is some prejudicial effect in admitting the evidence it is not illegitimate because it is in the defences argument and the judge could manage to use of the evidence by presenting it to the jury in a way that didn't give the photos too much weight.

3. Examples of needlessly prolonging proceedings.
    a. Partial exception: If the exclusionary rule you looked at under step 3 already had a similar balancing exercise to the one under s 8.
        i. Example: *Mohammed* - they had already discussed whether they should evidence of early conduct (death of a child) to

show propensity to cause this kind of harm under a propensity section under step 3.

b. Efficiency consideration - do not want to waste court time.
    i. Duplication of evidence heard
    ii. Low probative effectiveness for amount of time and effort.
    iii. Child is too young to string together useful ideas?
    iv. Propensity evidence by the defence e.g. good character evidence - how many do you need before it becomes time wasting.

ii. QUESTION 2: Take account of the defendant's right to offer an effective defence.
    1. In practice, more lenient on defence than on crown.

iii. QUESTION 3: Judge's role: If there is a risk of prejudicial effect, this can be overcome by the Judge giving the jury a warning or direction on how to look at evidence.
    1. *R v R*
        a. Facts
            i. Domestic violence case. Being tried for physical/sexual violence but there is also evidence of coercive control.
        b. Issue
            i. Should the evidence of coercive control have been admitted at trial? Does it have probative value?
        c. Held
            i. The evidence of his coercive control was not relevant to whether he had done the charged offences. It painted him as a monster, inhumane - so quite intense.
            ii. COA finds that the fact finder at trial did a good job of balancing the evidence. There were some convictions but also some acquittals on the charges. This suggests that the evidence of coercive control did not make them blindly prejudice the defendant so the evidence was fine to be admitted.