

ADVOCACY

Re-examination (1)

“Re-examination – the putting Humpty Dumpty together again”

Sir Frank Lockwood

The decision whether or not to re-examine will often involve you in a very delicate balancing act. In reaching your conclusion you will need to consider the impact of the cross-examination in the context of your case strategy. Even though there may have been damage to your witness in the course of cross-examination, if that damage does not have a negative impact upon your case strategy, you should not re-examine. If damage has occurred then you will need to determine how serious that damage is and whether it can be rectified. If the witness has been shown to be totally unreliable or irretrievably mistaken then you may be better advised to walk away from the wreckage. Any attempt to retrieve the position will highlight the deficiencies and may worsen the situation. However, if it is possible to explain apparent flaws in significant parts of the evidence of the witness revealed in cross-examination then you may wish to embark upon re-examination.

The scope of re-examination is not as limited as is sometimes thought by advocates appearing in the courts. The learned authors of *Cross on Evidence* have this to say (Looseleaf edition par17605):

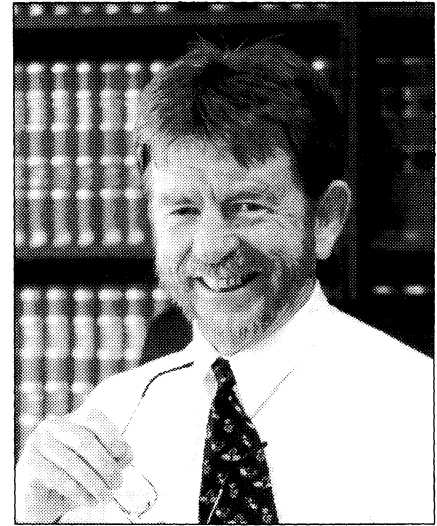
“The purpose of re-examination is not merely to remove ambiguities and uncertainties, but is allowed wherever an answer in cross-examination would, unless supplemented or explained, leave the court with an impression of the facts, whether facts in issue or facts relating to credibility, which is capable of being construed unfavourably to the party calling the witness and which represents a distortion or incomplete account of the truth as the witness is able to present it.”

In considering whether a topic can be addressed in re-examination it is open to the court to look beyond the particular question and to consider the information conveyed by the witness in the context of the whole of the proceedings. The purpose of re-examination is to avoid the prospect of misunderstanding, misinterpretation or the giving of a wrong impression.

It is also worthy of note that, whilst re-examination is limited to matters arising out of the cross-examination, new matters may be introduced into evidence with the leave of the court. Whether or not to allow the introduction of fresh material will be a matter within the discretion of the court. When such leave is given it will be usual for the court to provide the other party with the opportunity to cross-examine upon the new material.

In determining whether to re-examine you should consider the importance of any successful attack in cross-examination upon the credit of your witness. If the credit of the witness has been shaken but only in relation to minor or peripheral matters you may think that it is better to leave re-examination alone. Any attempt to shore up the credit of the witness in those peripheral areas is likely to serve to highlight the issues you raise and to do so to the detriment of the overall case. However if there has been an unfair attack upon your witness in an area that is important to your case then providing the witness with the opportunity to explain can lead to a restoration of the credit and/or reliability of the witness and, depending upon the circumstances, may lead to the evidence of the witness being accorded heightened importance. If you are able to demonstrate that the attack was unfair, this may also have a negative impact upon the case presented by your opponent. In such a case re-examination can be a potent weapon.

Having determined that the damage done to your case in cross-examination



Hon Justice Riley

is sufficiently important to call for a response you then need to consider whether you have the necessary information to provide that response. Obviously it would be unwise to endeavour to repair damage caused to your case without knowing the basis upon which you can proceed to do so. If you have no idea why the witness has said a certain thing it would be imprudent to blindly pursue the matter. You would bear the substantial risk that things will go from terrible to devastating. To re-examine by asking questions to which you do not know the answer or, at the very least, do not have a confident expectation of what the answer will be, is to undertake a dangerous exercise.

I recommend a very cautious approach to re-examination. Generally speaking the issue of whether to re-examine only arises in the course of cross-examination and is difficult to anticipate. It is therefore unusual for counsel to be adequately prepared for the eventuality. This necessitates the making of your decision on short notice and in pressured circumstances. A thorough knowledge of the case, an understanding of the nature of your witness and a carefully developed case strategy will assist you to make the hurried decision that circumstances will force upon you. However, if you are in doubt then do not re-examine. In most cases it will not be possible to successfully put Humpty Dumpty together again.