Advocacy – Evidence in Chief

Most lawyers who win a case advise their clients "we have won," and when justice has frowned upon their cause ... "you have lost."

Louis Nizer

It is easy to overlook the importance of the presentation of the evidence in chief of your client and your client's witnesses. Whilst the cross-examination of your opponent's witnesses may be the most exhilarating or frustrating part of a case and whilst, on some occasions, you may achieve a telling result through that process, more often than not your case will be won or lost on the basis of the evidence presented in chief. It is obviously vital that the presentation of that evidence occurs in a thoughtful and effective manner.

The quality of the witnesses who will present the evidence on behalf of your client is something largely beyond your control. Generally speaking you must take your witnesses as you find them. Important parts of the case that you are to present will be in the hands of individuals who may be nervous, prone to exaggeration, prone to underestimation, argumentative, taciturn, garrulous, shifty in appearance, evasive in manner and possessing any one or more of a whole range of other unhelpful characteristics.

In an earlier article in this series I recommended that you interview each of your witnesses in order to assess their qualities and frailties and to determine how best to present your evidence through them. Having undertaken that process you should be in a position to assess what you can expect of the witness in the witness box and how best to lead the evidence from that witness.

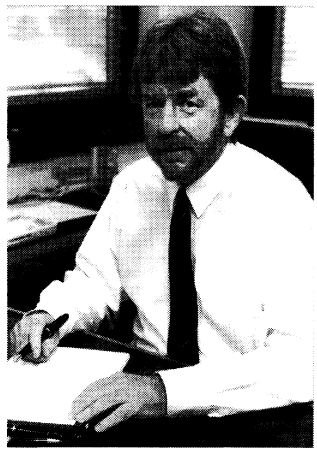
In most cases it will be desirable to allow the witness to present his or her own story in his or her own words. You will be able to lead the witness through the evidence by asking questions such as: "What happened next?", "What did you do then?" and the like. If your witness is capable of recounting the history in intelligible terms questions of that kind may be all that is required of you. On the other hand it may be necessary for you to exercise a greater degree of control over your witness or, alternatively, for you to prise the evidence from the witness.

If you have a garrulous or excitable witness it would be prudent to diplomatically alert the witness to that part of their nature and to invite him or her to present the evidence in a calm and concise manner. When the witness is in the witness box and strays into emotional, lengthy or irrelevant responses to your guiding questions, a reminder that the answers should be limited to responding to the questions asked is likely to remind the witness of the warning previously given. If this fails you may have to resort to questions of a narrow focus and take the witness through the evidence in a controlled way.

If your witness is reticent or, for whatever reason, not forthcoming with information then it will be necessary for you to structure your examination in order to lead the evidence bit by bit. Short questions building one upon the other and in a logical progression through the story is likely to be the most productive approach to adopt.

However, in most cases your role will be to direct the delivery of evidence by asking appropriate broadly based questions. Those questions will generally be short and simple and will commence with words such as "what", "when", "where", "how" and the like. Insofar as is possible you should let the witness tell the story rather than conducting a question and answer session.

In order to ensure that the witness remains on track, or to emphasise some aspect of the evidence, you may wish, on occasions, to summarise the earlier evidence. For example you may say: "You have told us that you attended at the hotel, that you had four beers, that you entered a conversation with Joe Bloggs where he mentioned your mother in law, now please tell us what happened next".



The Hon. Justice Riley

You may also wish to control the direction of the evidence by identifying the areas into which you intend to take the witness. For example you may introduce a topic by saying: "I now wish to ask you some questions about what happened at the hospital". You then proceed to ask questions with regard to that topic. When the topic has been exhausted you will open the next topic in the same manner.

These techniques should not be used continuously in the course of examination in chief because, to do so, reduces their impact and will become a source of irritation to the tribunal. Rather they should be used at intervals in the course of the taking of the evidence.

It is of assistance to most, if not all, witnesses that you proceed in a logical order of presentation. The logical order will almost always be that which appeals to your witness and this will generally involve dealing with the matter on a chronological basis. If, in the course of giving evidence, the witness is recounting events and omits to mention a matter of importance do not interrupt the witness. Rather allow him or her to complete their account of the matter under discussion and then, when that has occurred, come back to the matter which has been overlooked. Similarly, if the witness has a mental block or is unable to appreciate what it is that you are endeavouring to extract from them, leave the area and address a fresh topic. To press the witness at that time is likely to increase the pressure on the witness and lead to confusion. You should return to the

Continued page 20

Advocacy – Evidence in Chief

problem area at a later time and, if possible, from a different direction.

It is important that you listen to the answers given by your witness and that you show interest in what is being said. If you do not do this you will contribute to any discomfort that your witness may be feeling. Put yourself in the position of the witness who is asked a question by a person who seems to have no interest in the answer. What does the witness do? Who does he or she respond to? Further, you may miss a vital answer that is inconsistent with what was to be expected from the proof of evidence you have before you. In the event that your witness does provide you with an answer that is inconsistent with your instructions you should not demonstrate surprise or exasperation or any kind of displeasure. To do so emphasises to all in court the fact that you have received a "wrong answer". It will also contribute to any concern the witness may be feeling. If the matter is sufficiently important you may wish to come back to it in another way at a later time, but you will have to be wary of an objection based upon you endeavouring to cross-examine your witness. If the "wrong answer" is not of overwhelming importance to your case you may be better advised to leave it alone. This will be a matter for the exercise of your judgment at the time.

You can assist your witness in the presentation of evidence by yourself being calm, confident, concise and seeking information in a logical order.
It will help your witnesses if you refer to them by name. It must be off-putting, dehumanising and aggravating for a person in the witness box to be addressed as "witness" rather than by name. Further, you should use any title to which that person is entitled, eg Constable Smith, Doctor Jones, Professor Adams. This is a matter of simple courtesy.

On an earlier occasion I recommended that you endeavour to ensure that each of your witnesses is both familiar and comfortable with the process which they are about to undertake and that they understand what is expected of them. I will not repeat what I said on that occasion.

Whilst it is necessary to avoid asking leading questions in evidence in chief, commonsense requires that you be permitted to do so in some areas and on some occasions. The Court is likely to become frustrated if non-leading questions are asked in relation to peripheral and non-contentious matters. It should be possible for you to agree with your opponent that you will lead the witness in areas that are not controversial but that you will apply the rules when appropriate.

Your strategy in leading your evidence in chief is likely to be to obtain the necessary information from your witness in an orderly fashion, a comprehensible manner and in a way that is most likely to lead to that testimony being accepted. In order to achieve this end careful preparation is required.

CASE NOTE - HIGH COURT *from pg18*

Callinen J noted that the very fact of bizarre out-of-court *assertions* by an accused may constitute bizarre *conduct* for the purpose of a psychiatric or psychological diagnosis and on this basis alone may be admissible as original evidence.

Appearances
Appellant
Counsel - Odgers and Cox
Solicitors - NT Legal Aid Commission
Respondent
Counsel - Grace QC and Fraser
Solicitors - DPP(NT)

Commentary

Character directions have for years been a rich source of appeals from trial judges in Australia. In some jurisdictions the wording of an uncontroversial character direction is now contained in judges' benchbooks, the precise terms of which is known to many prosecution and defence counsel.

The High Court and the Court of Criminal Appeal reached the same result but used quite different reasoning. The High Court, unlike the Court of Criminal Appeal, seems to have had no difficulty *per se* with the proposition that evidence of good character may be used to support the credibility of out-of-court statements placed before the jury and made by an accused who has chosen not to give evidence himself.

The Court of Criminal Appeal had been referred to *Gillard* (unreported NSWCCA 13/7/91 per Gleeson CJ) which some years earlier had approved the application of the character direction to out-of-court statements by an accused. That appeal also concerned an attack on the credibility of an accused, through his medical experts, who claimed diminished responsibility.

The Court of Criminal Appeal considered the question of the accuracy of the history given by the appellant to his medical experts to be 'extraneous' to his state of mind at the time of the killing. None of the High Court judgments expressly agrees with this reasoning.

In this commentator's opinion the regime of discretionary character directions, as reaffirmed by the High Court in *Melbourne*, can lead to curious if not anomalous results, particularly where the good character of the accused is not contested by the Crown.

If an accused gives his version of events to interviewing Police and declares, "...I've never been in trouble with the Police", he will be only entitled to the propensity element of the character direction in the absence of 'more probative' evidence as to his good character.

On the other hand, if in the same context he states "...I'm an honest man", the jury should be directed that they may also consider the accused's good character when deciding if in general they accept him as a truthful interviewee.

The waters may, however, easily muddy. Consider, for example, the scenario in which a suspect, in the course of making an exculpatory statement to Police declares, "...I'm an *honourable* man...". Would defence counsel, on this statement being before the jury, be able to count on a <u>full</u> character direction from the trial judge ? After *Melbourne* it seems that in this example the extent of the character direction required by law from the trial judge will be governed by whether he or she thinks the accused had staked a claim to being moral - or only reputable.