# Re-examination

By Gerard Mullins

Many advocates have sat and listened to an honest witness turn into 'humpty dumpty' and 'have a great fall' on a particular topic during the course of cross-examination. After the close of cross-examination, the advocate tries to marshal 'all the king's horses and all the king's men' to try to 'put humpty dumpty together again'.

The purpose of re-examination is to elicit from a witness facts that explain away or qualify facts that have been drawn from them during cross-examination and which are in themselves prejudicial to the party's case or the witness's credit, or from which prejudicial inferences could be drawn.[1]

The rule marches in tandem with the related principle that when a witness has been cross-examined as to part of their written or oral statement, examining counsel becomes entitled to prove in re-examination such other parts of the statement as are necessary to explain or qualify it.[2]

Re-examination must therefore be confined to matters arising out of cross-examination. A party cannot embark upon the process of eliciting fresh evidence that should have been asked before cross-examination. Ordinarily, questions will not be permitted on any new matter that could have been asked in examination-in-chief. To introduce a new matter, the permission of the court must be sought, and the adverse party is usually given the opportunity to cross-examine in respect of the new material.[3]

But although re-examination is limited by the conduct of the cross-examination, matters opened up in cross-examination that may otherwise be inadmissible because of their relevance or the form of their evidence, may be the subject of re-examination.[4] For example, where a witness is asked about a topic that might only have been admissible through expert evidence, the re-examiner is entitled to question the witness on the matter to remove ambiguities, supplement or explain the facts. If a matter came into evidence during cross-examination through a non-responsive answer, the cross-examiner is entitled to have the answer struck out. But if the cross-examiner does not do so, and the non-responsive answer remains as part of the evidence, re-examination on the topic can take place.[5]

Importantly, the same rules on the form of questioning that apply in examination-in-chief apply in re-examination. There can be no leading questions and a witness cannot be cross-examined by his or her own counsel.

Re-examination should generally be approached with caution. The author of the *ABC of Evidence* writes:

> 'Re-examination should not be carried out simply for the sake of doing it. Many a time things are left well enough alone. Re-examination should not be lengthy, as advocates who spend too much time in this regard soon become unpopular with judges and juries. It is useless to call for an explanation from the witness when there is no room for explanation at all.'

Keith Evans, the author of *Advocacy in Court (A Beginner's Guide)*, puts the point more firmly:

> 'Unless there is some real advantage to be gained or some real point to be made, resist re-examining altogether. If you get up, stand there and pick through your papers, asking two or three feeble or apparently unimportant questions – and one sees it done all the time – you visibly lose your impetus, your authority and your status. You must, when your witness has finished being cross-examined, re-possess yourself at once of the running of the show.'

Despite these comments, re-examination is a valuable tool that can be used to considerable advantage. When a door is opened on a topic the re-examiner is entitled to march through and lead evidence on an issue that may have been excluded in evidence-in-chief because of its inadmissibility. It can be useful to clear up an uncertainty in a topic where an advocate knows that the witness has simply become confused during the course of cross-examination. It can be vital where the advocate has available a fact or a statement that might be put into evidence and can effectively massacre the cross-examination.

But a word of warning. Be sure you know what the answer is going to be. If a witness has given a series of unfavourable answers in cross-examination, a re-examination can extract responses that simply underline the concessions already made, with catastrophic results. ■

**Notes:** **1** *Wogcic v Incorporated Nominal Defendant* [1969] VR 323 at 326. **2** *Wentworth v Rogers* (No. 10) (1987) 8 NSWLR 398 at 409 per Glass JA. **3** *ABC of Evidence*, Butterworths, (online edition), [44,001]. **4** *Cross on Evidence*, Lexus Nexus, (online edition), [17,615]. **5** *Cross* (supra) at [17,615].

**Gerard Mullins** *is a barrister at Ronan Chambers, Brisbane.*
**PHONE** *(07) 3236 1882.* **EMAIL** *gerrymullins@ozemail.com.au*