Refreshing memory

By Gerard Mullins

Significant witnesses are rarely called to give evidence in trials without the preparation of a statement or a 'proof of evidence'. In most personal injury trials, particularly those involving complicated issues of liability and causation, carefully prepared statements can help plaintiffs to assemble their evidence. They can also help lawyers to tease out the critical factual issues to be addressed in evidence-in-chief and to identify the issues likely to be the subject of cross-examination. In these circumstances, it is common and proper for a witness, while the statement is being prepared, to be referred to all relevant contemporary documents, including those made by others.[1]

In the case of a professional witness, the compilation of a statement or report will largely depend upon reference to the contemporaneous notes taken at the time of one or many consultations. For example, doctors asked to give evidence of symptoms described at consultations will usually need to refer to their notes or to previously prepared statements to refresh their memories as to the symptoms described by plaintiffs at a particular time.

Witnesses regularly refer to prepared statements and contemporaneous notes to refresh their memory during trials. In civil trials, they are often referred to without objection. But certain conditions to the admissibility of evidence based upon 'refreshed memory' must be fulfilled before evidence based on the notes can be given.

A witness is entitled to refer to a document made out of court to refresh their memory about certain events, provided certain conditions are fulfilled and the court's leave is sought.[2] The document in question must have been made substantially at the same time as the occurrence of the events to which the witness is required to depose. The witness must have read over the document and accepted it as accurate while the facts were still fresh in their memory. It must be produced to the court or opposite party on demand. Witnesses who seek to refer to notes do not have to exhaust memory as to the whole of their narrative: they may refer to notes each time they reach a point where there is a gap in their memory.[3]

But special caution needs to be exercised where plaintiffs or witnesses refresh their memory from documents outside of court when genuine recollection is not revived. In *King v Bryant (No. 2)*,[4] the plaintiff sued the defendant for damages arising out of a collision between two motor vehicles. A police constable who had inspected the scene shortly after the accident was called as a witness for the defendant. The constable had, in the course of his duty, made a report to his superior containing details of the incident. He stated that he could not produce the report without the consent of the Commissioner of Police. In evidence, he stated that he had read a copy of the report upon receiving the subpoena to give evidence in order to refresh his memory on date and times: when he looked at the report, he remembered from his own memory and observations much of the incident. Any evidence he gave other than on times and dates would be from his own knowledge, memory and observations made at the time of the incident.

The Full Court of the Queensland Supreme Court held that if a witness purports to have refreshed his memory outside court from a document and swears that his evidence is to be his actual memory of the events and not a mere repetition by learning the contents of the document, his evidence is admissible whether the document is produced or not. The facts can be proved by oral evidence if the memory exists independently of the document, even though looking at the document has revived the memory of the facts.

However, where witnesses have no actual memory of events or 'no independent recollection' of the facts, the situation is different. If they use that document in order to enable them to swear to a fact contained in it, the document should be produced to the court.[5]

The principle is an important one. In a complicated case, a professional witness may have no independent recollection of events other than what can be cobbled together by way of contemporaneous documents. A statement prepared for the purposes of giving evidence and refreshing memory prior to trial may be required to be produced when called for. In those circumstances, it is essential to ensure that the statement is accurate, signed and well prepared. ■

Notes: **1** *Lindsay-Owen v Lake* [2000] NSWSC 1046 per Hodgson CJ in Eq at [3]. Note that it is inappropriate for witnesses to be given copies of each other's statements or proofs of evidence in circumstances where they can compare what each other had said: *R v Richardson* [1971] 2 QB 484 at 490; *R v Momodou* [2005] 2 All ER 571. **2** Cross on Evidence, para [17,180]. **3** Cross on Evidence, supra; Note also s34 of the *Commonwealth Evidence Act*; and the corresponding provisions of the New South Wales *Evidence Act* 1995 and Tasmanian *Evidence Act* 2001. **4** [1956] St R Qd 570. **5** For the application of the principles in more recent times, see *R v Alexander and Taylor* [1975] VR 741; *Woods v Rogers* [1983] 2 Qd R 212; *Sorrenson v McNamara* [2004] 1 Qd R 82.

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