Rebutting allegations of invention

By Gerard Mullins

Often a party seeks to undermine the credibility of an opponent's key witness by cross-examining them about inconsistencies in their evidence. Prior inconsistent statements are essential tools in deconstructing the story of a witness. But sometimes the cross-examining counsel goes further and suggests that the evidence is not only unreliable, but that it has been fabricated or invented.

In limited circumstances, a prior consistent statement is admissible to rebut such an allegation. The rule was expressed by Dixon CJ in *Nominal Defendant v Clements*:[1]

> 'If the credit of a witness is impugned as to some material fact to which he deposes upon the ground that his account is a late invention or has been lately devised or reconstructed, even though not with conscious dishonesty, that makes admissible a statement to the same effect as the account he gave as a witness if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or a reconstruction.'

In *Clements*, the plaintiff was a seven-year-old boy injured in a motor vehicle collision. He gave evidence that he walked to a monument near a road to watch other children playing. He stated that although a beach ball came towards him, he did not run on to the road. He was cross-examined to show that he had no memory of the accident. It was suggested that his evidence was the result of coaching by his father. To rebut that suggestion, the plaintiff's counsel tendered a statement from a police officer obtained from the boy two months after the accident which gave a consistent account. The High Court confirmed that the statement was admissible for the purpose of rebutting the suggestion of late invention.

Whether a prior consistent statement is admissible will depend on the challenge offered in the course of cross-examination. The cross-examination must be able to be interpreted as containing the direct question, 'When did you first invent this story?' Windeyer J in *Clements* wrote:

> 'It is not enough that a witness has been cross-examined as to credit, however much his credibility may appear to have been shaken ... there must be an imputation, clearly made and not unequivocally disclaimed, that the witness is not speaking from his own recollection of events, but is recounting a story subsequently made up by him or for him. Furthermore, the statement which it is sought to use to dispel this imputation must be made in such circumstances that it logically does so. For if evidence be attacked as a recent fabrication, the attack is not repulsed by proving another statement, itself the product of pressure or of a motive to falsify.'

When a statement is made under the rule, it is admitted not as evidence of the truth of its content but tending to disprove a concoction. Moreover, as Glass JA noted in *Wentworth v Rogers (No. 10)*,[2] the alleged fabrication need not be 'recent'. In that case, the questions in cross-examination might have suggested fabrication at any time during a period of 7 years, 10 months prior to trial. His Honour noted that the adjective 'recent' is a misnomer and that the doctrine was concerned with any fabrication subsequent to the events in question, but before the trial.

A recent example is a decision of the SA Court of Appeal in *Campbell v Burrows Engineering*.[3] The plaintiff was injured when he fell through scaffolding at a worksite, which he alleged had been inadequately secured. The trial judge dismissed the claim and rejected the plaintiff's evidence of the circumstances of the accident. The trial judge found that, after the accident, the plaintiff did not inform his night-shift foreman, Mr West, that loose scaffolding was a cause of his fall. The plaintiff asserted he had advised West. West denied the assertion.

Ronald Burrows, a director of the defendant, stated to an investigator that when he arrived at work the morning after the incident, he saw that some details of the incident had been recorded on a whiteboard in the main office, likely by West. Burrows made further enquiries, asking 'why the plank was loose, more so to make sure that there were no other planks in the same situation'. The court held that the evidence was admissible on a number of grounds, including the ground of rebutting recent invention. Gray J wrote:

> 'That suggestion [as to recent invention] was made by counsel for Burrows Engineering, adopted by counsel for Lucon and appears to have been accepted by the trial judge. The statement was secondary evidence of what had been written on and later removed from the whiteboard. It led to the clear inference that a report at least in those terms had been made to West at the end of the shift. ...
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> 'The Burrows statement was relevant and probative. It confirmed the report was made by Campbell at the end of the shift or the morning of the incident. It was directly relevant to refute the suggestion of recent invention. It negated the trial judge's conclusion that Mr Campbell did not report a problem with the scaffolding...'

The rule that permits prior consistent statements to be tendered following the suggestion of invention is an important practical tool. A practitioner must always be alert to the allegation and respond in defence of a witness when the opportunity presents itself. Equally, a good cross-examination that has demonstrated several inconsistencies in a witness's testimony may be unravelled if cross-examining counsel over-reaches and suggests recent invention in circumstances where an earlier statement might be enough to restore the credibility of the witness. ■

Notes: **1** (1960) 104 CLR 476. **2** (1987) 8 NSWLR 398 at 401. **3** [2002] SASC 96.

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