Advocacy – The Hostile Witness

That's not a lie, it's a terminological inexactitude.

Alexander Haig

The Hon. Justice Riley

What do you if, in the course of presenting your evidence in chief, you are confronted by a witness who does not give evidence in accordance with his or her proof? Sometimes that will occur because the witness has had a change of mind or now recollects matters differently. However in some cases it will occur because the witness is hostile to your client's cause.

A witness who is hostile is obviously a very dangerous witness for your case and such a witness will have to be treated with extreme care. If the witness is identified as being hostile prior to the commencement of the hearing then, of course, you will explore every avenue to avoid calling that witness and subjecting your client's case to the danger posed by the witness. However in some cases you may determine that you have no choice other than to call the witness, for example, because it is only through that witness that something can be established.

More often the hostility of the witness will come as a surprise to you and whilst you are on your feet. The hostility may be demonstrated by overt conduct on his or her part. The very demeanour of the witness may make the position of the witness quite clear. On the other hand the hostility of the witness may be subtle and therefore more dangerous and care will be required in demonstrating the fact that the witness is hostile.

It is necessary to distinguish a hostile witness from a witness who is merely unfavourable. The authors of Cross on Evidence (Australian Ed.) draw the distinction in this way:

"An unfavourable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves an opposite fact. A hostile witness is one who is not desirous of telling the truth at the instance of the party calling the witness, ie one "unwilling if called by a party who cannot ask him leading questions, to tell the truth and the whole truth in answer to non-leading questions"."

As is pointed out by the authors a witness is not hostile merely because his or her testimony is against the party calling the witness. Rather the correct test focuses "on the incapacity of the party calling the witness to elicit the truth by non-leading questions since the witness is deliberately withholding material evidence by reason of an unwillingness to tell the truth".

Section 18 of the *Evidence Act* (NT) deals with the circumstances in which a party may discredit his or her own witness. That section prohibits a party who produces a witness from impeaching the credit of that witness by general evidence as to bad character. However it provides that, if the Court is of the opinion that the witness is adverse, the party may contradict the witness by other evidence or, by leave of the Court, prove that the witness has made an inconsistent statement at another time. Importantly, from the point of view of the advocate, before such proof is given of an inconsistent statement the circumstances of the statement, sufficient to designate the particular occasion, shall be mentioned to the witness and the witness shall be asked whether or not he or she made the statement.

Once you have determined that a witness can and should be characterised as being hostile then you should make an application for a declaration to that effect. You would only make such an application if you considered it necessary in order to properly present the case for your client. If the matter is before a jury any such application should be made in the absence of the jury.

In order to prove a prior inconsistent statement you will need to present the statement to the witness. You may do this by showing the witness the document and asking him or her to confirm that the signature (if there be one) is that of the witness. The witness may then be asked to read the document silently. Once that has occurred, the witness should be asked whether it is a statement he or she made. This will be so whether the document has been signed or not signed. If the statement is adopted then it will be necessary for you to point out to the Court the matters upon which you rely in order to have the witness declared hostile.

If the witness adopts the statement but provides a credible explanation as to why it was made (eg "I was forced to make the statement" or "I was misled" etc) and the witness maintains that the evidence now being given before the Court is the truth, then you will need to carefully consider whether your application is worthy of pursuit.

In the event that the witness denies having made the statement then it will be necessary for you to establish that it was the case that he or she did so. In those circumstances you should ask that the witness be stood down whilst you call such evidence as is available to you in order to prove the making of the prior inconsistent statement.

Once the witness is declared hostile it is advisable to seek leave to cross-examine generally in relation to the evidence of the witness rather than just in relation to the prior inconsistent statement. The extent to which you are permitted to

Continued page 21

been made of s.41 in cases where the defendant has raised *payback* as the *justification* (that word not here used as in the self-defence provisions of the Code - ss.27 & 28)? That is, an attempt has been made to argue compliance with Aboriginal customary law as a defence? It would appear that again the section has been overlooked and courts have relied on inadequate provisions such as duress and provocation to address the situation where homicide occurs as a result of a compelling customary law.

It was suggested by the trial judge in ***R v Warren Coombes and Tucker*** (3) that the defence of duress was unavailable due to the effect of Mason CJ's comments in ***Walker v NSW*** (4). The trial judge referred to the passage: *Australian criminal law does not accommodate an alternative body of law operating alongside it.* The South Australian Court of Criminal Appeal rejected this argument and held that while in this case the evidence to support the defence was not available, nevertheless *the trial judge was wrong in saying that the decision in* ***Walker*** *precludes acceptance of the defence.* The judges accepted the argument that if the evidence demonstrated that the applicants believed that they would be severely beaten or killed if they did not punish the victim, then they had acted under duress for the purpose of the general criminal law. Section 40 of the ***NT Criminal Code*** would not support such a defence because of sub-section (2)'s limitation of the duress defence to comparatively minor assaults.

The defence of duress will only cover a limited number of scenarios where death has occurred as a result of the application of customary law. It is not available for example where the accused carries out the act because she/he believes in the legitimacy of the law. Section 41 will more aptly apply as it allows the court to comprehensively consider the context in which the killing is committed – taking into account the mind of the accused further than simply posing whether or not threats of physical harm had overborne his/her will. Operating only as a partial excuse, it prevents the situation where an Aboriginal person may be completely exonerated for carrying out payback killings which are sanctioned by Aboriginal law. (An extreme example of this may be illustrated by a man who kills his wife when imposing traditionally accepted *discipline* for *marital misconduct* (5).

A detailed examination of the complex issues which arise when Aboriginal law collides with the accepted Australian law was conducted in 1986 by the Australian Law Reform Commission. The use of coercion (as provided for in s.41) as a defence, although not apparently raised in Territory Courts, would seem to achieve the recommendation of the ALRC's report (No 31, 1986). Paragraph 453 states:

It should be provided that, where the accused is found to have done an act that caused the death of the victim in the well-founded belief that the customary laws of an Aboriginal community to which the accused belong required that he do the act, the accused should be liable to be convicted for manslaughter rather than murder.

Rex Wild, Director of Public Prosecutions.

We would be interested to hear the views of other readers of ***Balance*** in respect of these, to us, interesting concepts.

(1) Beth Wild is a final year Arts/Law student at NTU and the part-time librarian at N.T.L.A.C. Rex Wild is a local lawyer.
(2) R v Secretary (1996) 5 NTLR 96.
(3) Unreported decision of County Criminal Appeal of South Australia, SCCRM 95/529 judgment no. 5543, 19 February 1996.
(4) (1994) 69 ALJR 11.
(5) McRae H, Nettheim G & Beacroft L. Aboriginal Legal Issues. 1991 Law Book Company. NSW p.269.

Cross-vesting - no worries?

There is no doubt that the decision in Re Wakim striking down the Cross-vesting scheme in relation to corporations law (but of more general import) also prevents the NT from conferring jurisdiction on a federal court. But does it matter? The Solicitor General Tom Pauling QC is trying to find out if there is a real (rather than theoretical) problem to fix.

Would any practitioner having difficulty because of the Re Wakim decision inform Jenni Daniel-Yee on: 8999 5391.

Advocacy – The Hostile Witness

Continued from page 19

cross-examine will be a matter for the Court. That decision will depend upon what the Court considers is necessary for the purpose of doing justice.

It should be noted that there is no prohibition at common law or under the *Evidence Act* on the calling of evidence from subsequent witnesses that contradicts in part testimony given by an earlier witness for the party. This will occur in many cases where witnesses have different recollections of the order of events or the precise nature of what occurred. To do so is not to discredit the earlier witness in the relevant sense, *R v M.* (1980) 2 NSWLR 195 at 210.

The Advocacy articles are written by the Hon. Justice Trevor Riley of the Supreme Court of the Northern Territory.