Objectionable questions

In determining whether an objection is to be taken to a question, it is necessary for counsel to clearly understand what may be the subject of legitimate objection and what may not. As has been observed in earlier articles, the making of unnecessary objections is likely to have a negative impact upon a jury and possibly upon a judge or magistrate. Objections that are readily overruled may be seen as having been unnecessary in the first place.

There are many bases for objecting to questions asked or evidence sought to be led. Objections commonly taken include that counsel is asking a leading question in examination in chief, that a question is directed to irrelevant matters, and that a question invites a hearsay answer or the expression of an opinion where relevant expertise has not been established. These are familiar examples.

There are some areas in which objection may legitimately be taken to questions asked in cross-examination which are less frequently recognised. One such area is where counsel is cross-examining as to collateral matters, for example the credit of the particular witness, rather than in relation to the issues in the case.

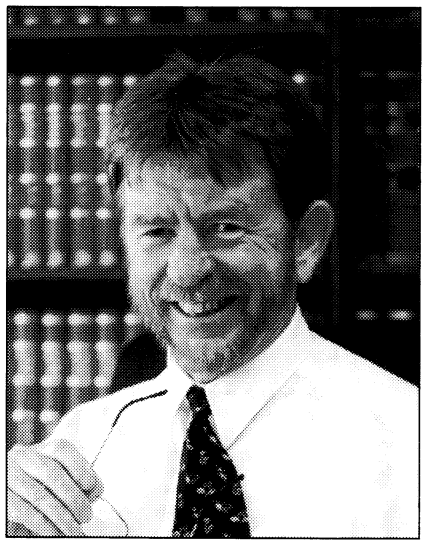
Where there is cross-examination directed solely to the credit of the witness or to some other collateral matter, and not directed to eliciting evidence relevant to the issues in the case, the cross-examiner is bound by the answers of the witness. The answer is to be treated as final and "the cross-examiner must take them for better or worse and cannot contradict them by other evidence."[1] It may be necessary for opposing counsel to put an end to a line of questioning that proceeds too far down such a track.

Similarly, if any question is put to a witness in cross-examination that relates to a matter not relevant to the proceeding except insofar as it affects the credit of the witness by injuring his character, then the court is to decide whether the witness shall be compelled to answer[2]. The court may, if it thinks fit, inform the witness that he or she is not obliged to answer the question. The considerations to which the court shall have regard in determining whether such a question shall be answered are set out in s 15 of the Evidence Act (NT). The court must have regard to whether the question may elicit an answer which would seriously affect the opinion of the court as to the credibility of the witness on the matter in relation to which he or she testifies.

The question will be disallowed if the imputation which it conveys relates to matters so remote in time or of such a character that the truth of the imputation would not affect, or would affect only in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he or she testifies. The question may also be disallowed if there is a "great disproportion" between the importance of the imputation made against the character of the witness and the importance of the evidence.

There is another form of question that is not only objectionable but also contains what WAN Wells[3] calls "hidden dangers". It is the question which starts: "You know, do you not, that...?" followed by an assertion of fact. As the learned author points out, the flaw in the question is that the witness may have gained his knowledge in all sorts of ways that are sufficient to satisfy him but, when analysed, reveal sources that are unacceptable in law. For example, the knowledge of the witness may come from a hearsay source or from a "best guess" on the part of the witness or reflect some other unsatisfactory basis for reaching the conclusion identified. There are dangers for counsel asking the question and there are dangers for counsel on the other side.

The danger for the person asking the question is that, if the incompetence of the witness is subsequently revealed, the evidence loses its impact and cannot be relied upon. On the other hand, if opposing counsel does not take objection, the evidence will be in and later may be difficult to undermine.



Hon Justice Riley

A further form of objectionable questioning occurs where the cross-examiner seeks to challenge a witness by reference to the evidence given by another identified witness. Generally speaking it is inappropriate to suggest to witness A that witness X said something quite different and invite the witness to comment. To do so is to invite witness A to give answers influenced by reference to the status of the witness X. The thrust of the question is to invite the witness, not to provide evidence of what he or she recollects but, rather, to alter or modify that evidence by reference to the evidence of another. There is no reason why the challenge to the witness should not proceed by putting the alternative scenario to him or her, but this should not occur by reference to the evidence of another identified witness. Of course this will not be the case where the witnesses are both experts and giving expert testimony on the same issue.

One form of question likely to require early intervention is that which contains editorial content or puts an unacceptable gloss on evidence that the witness has already given. Such questions are often of the kind: "After you had recklessly cut across oncoming traffic..." or "When you had finished attacking Mr Smith..." where the evidence does not support the description provided by counsel. In many cases the use of the description "victim" in relation to a person the subject of an alleged assault may itself be objectionable especially if issues of consent or who was the aggressor are

continued next page

New online law course at CDU

Charles Darwin University (formerly the Northern Territory University) has officially launched its external, fully interactive online Bachelor of Laws degree.

The first of its kind in Australia, this new course format allows for more flexible delivery and recognises the needs of students who live in remote locations or are juggling study around work or family commitments.

CDU law lecturer Ken Parish has been the driving force behind the degree becoming interactive.

"We know there are a couple of other universities that have external online law degrees but this is the first really interactive degree in Australia where the students get to experience aspects of the course like student and lecturer discussions and debates," Mr Parish said.

"We thought that there was a real need for a degree that wasn't just external, where students completed their studies pretty much alone, but a degree that gave the students the experience of live debate, conversation, discussion about the course, where students can ask a question and get an answer straight away from a voice and not just a text response."

The unique aspect of the degree is in the audio technology. Tutorials are scheduled for the external students; they log in to the tutorial on their computers and they can hear the lecturer present the subject in a 'chatroom' environment.

Students can also follow what the lecturer is talking about on screen and can interject with questions and comments at anytime by signalling the lecturer and other students on their computers. They can also hold a text conversation on screen while the lecture is taking place.

Ken Parish showing NT Minister for Education, the Hon Syd Stirling, the features on the new online course.

The course started operating in the middle of this year and has already attracted students from Perth, the Kimberley and other remote parts of Western Australia, the Northern Territory, Sydney, Brisbane, and even a student from Dunedin in New Zealand.

Objectionable questions cont...

alive.

The examples of questions that may be objectionable in form or content are innumerable. Many more examples will be found in the leading texts on evidence.

(Endnotes)

[1] *Cross on Evidence* (Butterworths Looseleaf edition at para 17580 et eq.)

[2] Evidence Act s 14.

[3] WAN Wells: *Evidence and Advocacy* (Butterworths 1988)

Obituary: Bill Herd

On Thursday 9 October, Williamson Mitchell Herd sadly passed away.

Bill Herd graduated from the University of Queensland with a B. Com. and LL.B(Hons) in 1975. He was admitted to practise as a Solicitor of the Supreme Court of Queensland in 1976.

There followed a period of practice and part-time teaching in law at the University of Queensland and the, then, Queensland Institute of Technology. He took up a full-time academic appointment in the Faculty of Law at the University of Queensland in 1977.

He moved to the University College of the Northern Territory in 1988 with the establishment of the School of Law and was admitted to the Supreme Court of the NT. He completed his LL.M(Qld) in 1989.

Most recently, Bill held the position of Senior Lecturer in Law in the Faculty of Law of the Northern Territory University. His teaching interests were Equity, Trusts, Succession, Military Law, Legal Process and Legal Research and Writing.

Bill was extremely popular with students. He was a brilliant lecturer and had a quick wit. His lectures were both informative and entertaining. In 1992, he won the inaugural Northern Territory University Excellence in Teaching award.

Bill was a well-known and valued member of the Northern Territory legal profession. He was an institution in Law at NTU, a Lecturer extraordinaire and a much-loved mentor to many in the Territory legal profession. He will be greatly missed and always remembered.