feature

Lost in Re-examination

By David Lewis and Anne Barnett*

The art of re-examination is both important and exacting. A comprehensive approach to this part of the evidence in criminal and civil matters may both rectify damage or doubt cast by cross-examination, as well as strengthening a case by the tender of documents used or referred to in cross-examination. Some of the limitations which have been placed on re-examination are becoming more relaxed – particularly those relating to the exhibiting of documents which show general consistency in the face of prior inconsistent statements. The Canadian courts have developed much broader principles concerning the tender of documents in re-examination. While the Canadian authorities have not yet been tested or applied in the Australian courts there appears to be no reason why the Canadian approach would not be accepted - providing some potent strategies for use in the re-examination of witnesses.

In a world where time seems to be shrinking, where amenity is grasped in fleeting moments between busy schedules, lawyers might be forgiven for drawing an unfavourable comparison between the time it takes for a matter to come before the court to receive final determination and the slow plod of the bakers cart delivering much needed sustenance to the unhurried citizens of the 1930's. That is not to say that the courts and court administration should be criticised in any way – case management and better resources have speeded things up considerably – however by its very nature the legal process will always be slow and witnesses will have forgotten or adjusted much of the detail of their evidence by the time they finally get into the witness box.

The complexities and intricacies of life have increased ten-fold. The pace of existence, the movement of individuals and families from one place to another, the need to deal with trauma, and the modern potential for rapid changes in relationships and loyalties – all take their toll in enabling individuals to remember details of what they saw or heard or did at a particular time in the past. When finally giving their evidence – sometimes for the second or third time over a period of 12 months or more – witnesses invariably provide accounts which range in inconsistency with previous accounts. These inconsistencies are most often concerned with small details but they frequently relate to critical facts which have been adjusted and re-coloured by subsequent events.

In these circumstances, considerable damage can be done to a criminal or civil case by the cross-examiner taking the witness to earlier inconsistent statements or to other documents which cast doubt on the memory or credit of the witness. It might be the colour of a car or clothes, the order of events, or simply the failure to have previously revealed a fact which is now asserted.

"*You never mentioned this anywhere in your statement to the police – did you?*" is the type of question which can gain considerable mileage for the cross-examiner attempting to cast doubt over the reliability of the evidence.

The remedy is in re-examination. An assertion of recent invention by reference to the failure of a witness to have mentioned something in a previous statement may well allow the entire statement to be tendered. This might be necessary to show either general consistency, or to enable a proper assessment of the context of the document. Similarly, documents referred to in cross-examination to establish prior inconsistency may be tendered either in their entirety or in part to demonstrate consistency elsewhere in the document or in the context of what was said. This can be a powerful tool in the hands of the re-examiner to re-establish and fortify the evidence.

The Australian position

In *The Queen's Case*[1] the House of Lords pronounced the basic common law rule for cross-examination on documents: a witness cannot be asked questions as to the contents of a document without the witness identifying it as their document, and, where that is admitted, the whole of the document is made evidence. The rationale for the principle is that if only part of the document was put before the Court it may have a very different meaning than when read as an entire document.[2] The Court made further pronouncements as to the law regarding re-examination stating "counsel, has a right, upon re-examination, to ask all questions, which may be proper to draw forth an explanation of the sense and meaning of the expression used by the witness on cross-examination, if they be in themselves doubtful, and, also, of the motive, by which the witness was induced to use those expressions."[3]

These rules were applied by the NSW Supreme Court in the case of *Meredith v Innes.*[4] Street CJ observed that when cross-examining counsel placed a document in the witness' hand and asked the witness to swear to its accuracy, counsel, in re-examination, could call for the document and request the tender of such parts of the document as are necessary to explain or qualify it.[5]

continued next page...

* David Lewis and Anne Barnett are Crown Prosecutors with the ODPP in the Northern Teritory.

Lost in Re-examination cont...

In *Wojcic v Incorporated Nominal Defendant*[6] the Full Court of Victoria rendered prior written statements, in the form of an employee report, admissible following an attack on the witness' credit in cross-examination relating to conversations between the witness and the plaintiff about the circumstances of a motor vehicle accident. It was suggested to the witness, an insurance investigator, he had failed to complete a claim form on behalf of the plaintiff resulting in a breach of duty to his employer. Proof of the form of the reports, compiled shortly after each conversation with the plaintiff, was capable of explaining away facts elicited in cross-examination. Winneke CJ, delivering the judgment of the Court, stated the law in the following words:

> "A party, however, is entitled in re-examination to elicit from witness facts which explain away or qualify facts which have been elicited from the witness in cross-examination and which are themselves prejudicial to the party's case or the witness' credit or from which prejudicial inferences could be drawn."[7]

Further application of the principle is demonstrated in *Wentworth v Rogers*[8] where cross-examining counsel sought to attack the credit of a witness on the basis that she had attempted to influence the rulings of the trial Judge by forwarding the transcript of a witness' testimony, various written statements (of the witness and herself) and the Judge's ruling as to admissibility of those documents to the Attorney General, claiming the witness had perjured himself and requesting the Attorney-General intervene and direct the trial Judge to admit the documents. In re-examination, counsel unsuccessfully sought to have the documents tendered. While expressing the view that the cross-examination was impermissible: not going to credit, the Court of Appeal, applying the principles in *Meredith v Innes* and *Wojcic*, held that the documents should have gone to the jury to enable them to assess the basis for which the claim of alleged discreditable conduct was being made by the witness.

See also *R v Phair* (1986) 1Qd R 136; *R v Singleton* [1986] 2 Qd R 535.

Developments in Canada

The Canadian Court of Appeal has applied the principles more broadly permitting the tendering of prior statements in re-examination in circumstances where there has been extensive cross-examination on documents,[9] where cross-examining counsel suggested that matters raised in direct evidence have not previously been disclosed to authorities or that witness' prior statements are a product of police coercion[10] and to show general consistency.[11]

In *Gerow v The Queen* the Court of Appeal held that it was a proper exercise of the trial Judge's discretion to have the transcript of a taped conversation between a Crown witness and two police officers marked following extensive cross-examination of the witness on it.

This argument was developed further in the case of *R v Smith* in which the Court held permissible the Crown's tender of a police officer's report upon which there had been extensive cross-examination and an acknowledgement by the witness of inconsistencies between it and his oral testimony. The Court considered the document should be marked in order "to establish that the writing generally was consistent, or, at least, not totally inconsistent, with his testimony."[12] The Court acknowledged that the trier of fact could only use the document for a limited purpose: to assess the weight to be attached to the testimony of the witness.

Most recently, in the case of *R v Newall* the Court upheld the Trial Judge's discretion to mark three prior statements of an indemnified Crown witness. The first two statements comprised transcripts of interviews conducted between the witness and police, while the third was a more concise (and more incriminating) statement of the first interview. Cross-examination was extensive, highlighting inconsistencies and aimed at developing the Defence theory that the witness was a puppet of the authorities. In one instance, during the course of cross-examination, Counsel suggested that the witness had not mentioned matters she disclosed in direct evidence in any of the previous statements provided to police. The Court held that the course adopted in cross-examination rendered it "essential that substantially the whole of the statement be tendered."[13] In particular, the court commented

continued page 23...

Change of details

As of 1 January 2005 Lyn McDade is moving from Edmund Barton Chambers to work from home.

Her new contact details are:
Postal Address: GPO Box 2281 DARWIN NT 0801
Telephone (wk): 8942-0436
Telephone (mb): 0401 110 411
Email: lynmcdade@optusnet.com.au

Dear Stork...

It seems that Santa isn't the only one receiving special requests this December...

Danny and Nicole Wauchope are expecting a visit from the stork next year. Danny is hoping for a boy in order to restore gender balance (or democracy) in a home currently dominated by females (Nicole and daughter).

Movement in Alice Springs

Sam Salmon and Ted Sinoch (both formerly of Collier and Deane) are setting up their own practice in Alice Springs. Ted and Sam will be staying on in Collier and Deane's current premises as C&D moves to its new offices.

Newly admitted

Congratulations to Caroline Heske from the Office of the Director of Public Prosecutions who was admitted on 7 December.

Admissions overload

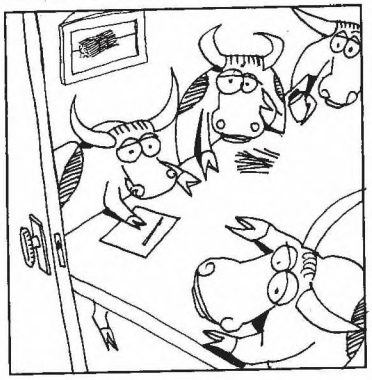
On 17 December 14 students from Charles Darwin University's Graduate Diploma in Legal Practice (GDLP) will be admitted to the Supreme Court.

Congratulations to Janine Carroll, Niny Borges, Helen Roberts, Jennifer Bagshaw, John Whitington, Vaughan Casey, Paul Rojas, Christopher McGorey, Richard Bryson, Karen Friscich, Tanya Vogt, Alana LaPorte, Peter Pohlner, Kirsten Donlevy, Bethany Lohmeyer and Michaela Milner.

Nuptials at Withnall Maley

Congratulations to newly weds Peter Maley and Vanessa Farmer (now going under the name Mrs Vanessa Maley).

The Muster Room



Here at last?

The Nicols Place office space is apparently almost finished, after many months of anticipation. By all accounts William Forster Chambers are expecting to move-in early in the new year. Some members have been heard to mention that all the waiting for the project to be finished has led them to develop a killer thirst for the welcome drinks.

Lost in Re-examination cont...

"the fact that no reference was made by the witness could not, by itself, be fairly taken as reflecting on her credibility. It could do so only if the questions asked, or the scope of the discussion recorded in the statement made it appropriate for her to refer to those matters. That is a question upon which the jury could fairly form a judgment only with the whole of the statements available to it."[14]

Although most jurisdictions[15] have enacted legislation setting out the procedure for cross-examination as to previous written statements, the legislation has not significantly altered the basic common law rule pronounced in *Queen's Case.* Rather, the legislation was enacted to circumvent problems with procedure[16].

Interestingly, the Judge in *Newall* marked the statements of his own motion pursuant to his discretion under a provision of the Canadian Evidence Act in identical terms to Section 20 of *Evidence Act NT.* This appears never to have occurred in the Australian jurisdictions[17].

The logic and rationale of the Canadian authorities are entirely consistent with the Australian position to date, and it could be expected that Australian courts would apply the same principles as a natural progression. We may need to re-think our approach to both cross-examination and re-examination to take advantage of the available strategies.

ENDNOTES

1 (1820) Brod & Bing 284
2 ibid at p287
3 ibid at p297
4 (1930) 31 SR (NSW) 104
5 ibid at p111
6 [1969] VR 323
7 ibid at p326
8 (1987) 8 NSWLR 398
9 Gerow v The Queen (1981) 22 CR (3d) 167
10 R v Newall 5 DLR 352
11 *R v Smith* (1983) 35 CR (3d) 86
12 ibid at p94
13 op cit 11 at 362
14 ibid
15 See Evidence Act NT sections 19 & 20
16 Queens Case called for a long-winded requirement that the entire document be read out to the witness
17 See Cross-Examination on Documents, M H McHugh QC (1985) 1 ABR 51 at 55.