

# The sensitive question

In many trials, both civil and criminal, it is necessary to ask a witness questions relating to matters which the witness will consider distasteful, offensive, discomfiting and, possibly, quite distressing. Such questions may arise because they go to the heart of the case to be presented or they may relate to matters required to be addressed in order to comply with the rule in *Browne v Dunn*.

If an issue to be raised with a witness is likely to be a sensitive one in the sense I have suggested then, obviously, forethought as to how it is to be approached is required. Your concern will be for the impact of the questions upon the witness and also for their impact upon the tribunal. The causing of distress to a witness is likely to have an impact not just upon the witness but also upon all who hear and observe the responses. Judges and Magistrates are human and, even though they may understand the need for a sensitive issue to be raised and may expect that to occur, the causing of distress, and especially unnecessary distress, to the witness is likely to have an adverse effect. It may create an atmosphere of sympathy around the witness. If poorly executed, it may cause the tribunal to query the motives of counsel or of the client. The presence of a jury will make the position even more difficult.

Your approach to such matters will depend upon the nature of the particular issue, the nature of the case being heard, the nature of the tribunal and whether you are raising the issue in evidence in chief or in cross-examination.

If the evidence is to come from a witness called by you then the witness should be forewarned that it will be necessary to address the sensitive issue. The need to address the issue should be explained and the understanding of the witness as to that need should be obtained. The witness should be given some idea of how you propose to address the issue in the course of evidence. The witness can then prepare for the raising of the issue and can have time to consider the manner in which he or she wishes to deal with it.

The situation is more difficult when the sensitive issue is to be raised for the first time in cross-examination. The

witness may or may not be prepared for what is about to come. In those circumstances your approach will depend upon the nature of the witness and the nature of the material to be explored, considered in the context of the case.

Hard decisions will have to be made as to how you proceed. Is it necessary to brutally confront the witness with a direct allegation or is it sufficient that you simply raise the issues with the witness for comment and then move on? If other witnesses are to give evidence on the issue then you may not need to dwell on it with the witness most directly affected. If you need to obtain admissions from such a witness then you may have to be more insistent and direct.

As a general proposition you may think that in many cases it is preferable to adopt a "softly, softly" approach. You may wish to forewarn the witness that you are about to venture into matters that he or she may find upsetting. You may wish to explain to the witness that it is not your intention to cause distress or embarrassment but that it is necessary for the proper presentation of the case to raise the matters. The observations you make in this regard will, of course, be intended to provide some comfort and understanding to the witness but, in addition, will forewarn the tribunal of what is to come and why the raising of such an issue is unavoidable.

If you adopt this approach you should remain courteous and, where appropriate, sympathetic throughout. You should allow the witness ample time to deal with the matters you raise and you should avoid the temptation to interrupt unless absolutely necessary. The tone of your questions and the language you use should be appropriate to the circumstances. However you should bear in mind the need to use clear language and you



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should avoid the use of euphemisms so that there can be no later suggestion that the responses of the witness were ambiguous or otherwise unclear.

In some cases it will be more appropriate to bluntly confront the issue. If your intention is to catch the witness off guard or to undermine the image the witness has been seeking to create, a series of short, sharp and direct questions may be preferable. Courtesy need not be abandoned but the questions should be firm and to the point.

Venturing into such fields is both dangerous and unpleasant. However if the evidence is material to the case of your client you must do your duty. How you perform that duty should be the subject of careful and sensitive preparation. ①

## Editor's Note:

This will be the last of Justice Trevor Riley's advocacy columns in *Balance*. After almost five years of regular monthly articles, Judge Riley has decided to rest his pen.

The current and previous editors of *Balance* would like to sincerely thank Judge Riley for his invaluable contribution. His articles were always informative, interesting, accurate and timely.

Judge Riley's advocacy columns from 1999 to 2002 (inclusive) have been published - 'The Little Red Book of Advocacy'. Copies are available from the LSNT, call 8981-5104. ①