The leading question

By Gerard Mullins

Most advocates have at some time, while extracting evidence-in-chief from a witness, hit that uncomfortable hurdle when the witness either misunderstands the question or gives an incorrect answer to the question.

The advocate knows what the witness's answer should be and that the witness truly knows that answer. So the advocate 'focuses' the question and takes it one step further to 'lead' the witness to the correct answer. Soon after completing the question, the advocate hears the rustling of papers as their opponent rises to their feet for the inevitable objection to leading the witness.

A 'leading question' is defined in the dictionary to the *Evidence Act* 1995 (NSW) as a question asked of a witness that:

- directly or indirectly suggests a particular answer to the question; or
- assumes the existence of a fact, the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked.

The reason that leading questions are objectionable is explained in *Cross on Evidence*: 'Leading questions are objectionable because of the danger of collusion between the person asking them and the witness, or because of the impropriety of suggesting the existence of facts which are not in evidence. Account must also be taken of human laziness – it is easy to say "yes" or "no" on demand, and most leading questions can be answered in this way, even if the same is true of some questions that are not leading. Questions assuming the existence of disputed facts are often put unintentionally by a cross-examiner so certain of his facts that he has not noticed that the witness has not admitted them … an affirmative and a negative answer may be almost equally damaging, and a perfectly honest one may give a bad impression because he cannot answer directly, but has to enter on an explanation.'[1]

EXCEPTIONS

There are some exceptions to the prohibition on asking leading questions in examination-in-chief. A witness may always be led on the formal introductory part of their testimony. Matters that are not in dispute remain in the same category. The third exception relates to matters which may be described as the purely introductory aspects of the witness's evidence.

Caution should be exercised in everything other than the personal particulars. Justice John Phillips states further: 'Apart from the matter of the personal particulars of the witness, it is a wise course, however, to have a clear understanding with your opponent as to the precise extent of the other matters which can be dealt with by leading questions. It must be borne in mind that the taking of an objection can often be upsetting to a witness and is not infrequently assumed by the witness as some sort of personal reflection upon him or her.'[2]

A fourth exception is referring a witness to a document or object. A fifth is where evidence-in-chief is led to specifically contradict the evidence of another witness. A witness may be referred to that evidence with particularity.

CLEAR LINES

In practical terms, a problem with a leading question can generally be traced back to a communication problem between the advocate and the witness. The well-prepared advocate will know the witness's version of events. This will generally come from a well-prepared statement and a conference with the witness before the witness gives evidence. The difficulty is extracting the evidence from the witness in an admissible form. The problem for the witness is that they cannot understand, given the question, the answer being sought from them. So there is a communication problem between the advocate and the witness. Unfortunately, it often happens that the moment passes without the evidence being given clearly and persuasively.

Problems with leading questions can generally be overcome by good preparation.

First, establish with clarity what the evidence from the witness will be on a particular point.

Second, explain that court procedures do not allow you to ask a question that suggests an answer or that assumes the existence of a fact. That is, explain that you are not allowed to ask leading questions *before* the witness steps into the witness box. The witness needs to understand the limitation on questions that can be asked.

Third, formulate (in writing) the questions you intend to ask on the key issues before you arrive at court so that you are not left to prepare or formulate those questions on your feet.

Careful preparation will clear the lines of communication between the advocate and the witness to ensure that the evidence-in-chief can be given in a coherent and uninterrupted fashion and maximise its persuasive quality. ■

Notes: **1** J D Heydon, *Cross on Evidence* (Australia), LexisNexis publications, online version, 1 August 2004, at para [17150]. **2** 'Practical Advocacy' (1988) 62 *ALJ* 807.

Gerard Mullins *is ALA's Queensland President and a barrister at Ronan Chambers, Brisbane.* **PHONE** *(07) 3236 1882.* **EMAIL** *gerrymullins@ozemail.com.au*