Hostile Witnesses

A judge has a common law power to declare a witness hostile (or "adverse"[1]) and to allow cross-examination by the party who called him. In addition, s 17 of the *Evidence Act* 1977 enables the party calling the witness whom the court considers hostile to seek leave to prove any prior inconsistent statement[2] by the witness.

The judge may form an opinion that a witness is hostile without any inquiry on the voir dire,[3] but the more usual course of events is as follows:

- Counsel who called the witness seeks leave, in the absence of the jury, to cross-examine the witness on the voir dire. The purpose of doing so is to demonstrate hostility, providing a basis for applications for leave to cross-examine the witness in the presence of the jury and leave to prove any inconsistent statement. The extent of the explanation needed to warrant a grant of leave to cross-examine on the voir dire will vary. Sometimes the difficulties the witness is presenting will already be obvious from his demeanour and responses; more often, counsel will raise areas of apparent inconsistency with earlier statements.
- If granted leave to proceed on the voir dire, counsel will cross-examine in order to establish the witness' hostility. He will identify any prior inconsistent statement to the witness, and seek to obtain admissions of authorship and of the truth of its contents.[4] Usually the witness will admit the statement is his; if not, counsel will seek leave to call evidence on the point, for example from the police officer who took the statement. The opposing party will also cross-examine, with a view to establishing that the witness is not hostile and providing him an opportunity to explain any inconsistencies. After cross-examination, both counsel will make submissions as to why the declaration should or should not be made and whether leave to cross-examine and/or prove earlier statements should be given.
- The judge must rule as to whether the witness is hostile. A hostile, or adverse, witness is one who demonstrates an unwillingness to tell the truth, in relation to matters important in the trial, "for the advancement of justice".[5] Mere forgetfulness, lack of enthusiasm for the role of witness or dislike for the party calling him are not sufficient. If previous inconsistent statements are relied on, it will be necessary, firstly, to consider whether any discrepancies are significant as to extent and subject matter and, secondly, to assess whether they are explained by genuine loss of memory or stupidity, or should be regarded as the product of reluctance to tell the truth. The fact that the witness' present evidence is inconsistent with an earlier account is material but not necessarily conclusive.[6]
- If the declaration of hostility is made, there remain separate discretions to be exercised as to whether to allow cross-examination of the witness before the jury and whether to give leave to prove previous inconsistent statements (although the first would usually follow from the conclusion of hostility, and the second from that conclusion and the

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1 The terms "hostile" and "adverse" may be regarded as synonymous.

2 "Statement" is defined in the *Evidence Act* 1977 as including "any representation of fact", however made.

3 *R v Hadlow* [1992] 2 Qd R 440 at 448.

4 Quite often, the witness on being shown his statement begins to respond in a way more satisfactory to the party calling him and the application is abandoned.

5 *R v Hayden and Slattery* [1959] VR 102 at 103; see also *R v Lawrie* [1986] 2 Qd R 502 at 514 and *R v Hadlow* [1992] 2 Qd R 440 at 448.

6 *McLellan v Bowyer* (1961) 106 CLR 95 at 103.

demonstration of inconsistency). The declaration of hostility and each grant of leave should be distinct so as to reflect the different exercises involved.[7]

- Leave may be granted to cross-examine the witness at large (as is usually the case) or to a more limited extent. Counsel granted such leave retains the right of re-examination after the opposing party has also cross-examined.
- Where leave is given to prove an earlier statement, s 17 requires, before the statement is proved, that details of the circumstances of the statement's making sufficient to identify it be put to the witness and he be asked whether he made it. That process will usually have taken place on the voir dire, but counsel will ask similar questions before the jury. If the witness admits to making the previous statement, counsel will have succeeded in proving it.[8] (If its content has already been put clearly before the court in the course of questioning, there may be no need to adduce any further evidence of it in written form.) If the witness does not admit making it, counsel is entitled to call evidence to prove that he did. Leave under s 17(1) allows proof of the actual statement which is inconsistent with the witness' evidence, not the tender of the entirety of any document containing it.[9] Section 101 of the *Evidence Act* makes the statement thus proved evidence of the facts stated in it where they would have been admissible had the witness given the same evidence orally.[10]
- If the statement is admitted, a direction should be given as to the weight to be attached to the statement: see 46.1. For possible circumstances relevant to the evaluation see *Bradley* [2013] QCA 163.
- An application for a declaration of hostility and for leave to cross-examine and/or prove a previous statement which has been refused may be renewed as the evidence progresses.

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7 *Lawrie* at 513.

8 It is unnecessary to have recourse to s 18 of the *Evidence Act* for proof of an inconsistent statement where leave has been given under s 17: *R v Baira* [2009] QCA 332 at [29].

9 *R v Baira* at [32].

10 See direction at 44.1 for Previous Inconsistent Statements