Controlling adverse and hostile witnesses

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In a perfect world, all witnesses would be truthful, co-operative, and helpful to the side that called them. But most witnesses are not perfect. Some are unreliable, adverse to your client, and hostile to the entire courtroom process.

We know that "the reality of litigation is that sometimes a witness will be called to prove or corroborate a matter of evidence where it is known or suspected that the witness will also give damaging testimony on another point."[1] In the appropriate case, asking the trial judge for a declaration that the witness is adverse or hostile can help you get the evidence you need from an unfriendly witness and limit the damage they can cause.

It is "trite law" that a party cannot impeach or cross-examine its own witness. But with virtually all evidence rules, there are exceptions – as when a witness is being especially forgetful, difficult, adverse, or hostile. Justice Paciocco has described "a ladder of increasingly aggressive but nonetheless limited techniques that [counsel] can attempt to climb in an effort to exert control over the information their witnesses have given."[2] At the lowest rungs, counsel may try using "trigger" questions or refreshing the witness's memory. If the witness remains difficult, provisions of the *Evidence Act* can permit limited cross-examination. In the case of a totally intransigent witness, the trial judge can grant a declaration of hostility and permit cross-examination at large.

These techniques, while not frequently used in any context, will likely be much more familiar to the criminal defence practitioner than to those of us in the civil bar. Yet civil litigators should be prepared for potentially difficult witnesses. You may have to call the opposing party's co-conspirator, or a family member, or an employee in order to prove your case. An important witness could be frightened, or have changed their mind about which side to support. This article sets out the different scenarios that can arise to help you plan for and deal with problem witnesses.

Calling adverse parties as witnesses

Cross-examination by right is available if you call a witness who is an opposing party or, in the case of a corporate party, an officer, director, employee, or sole proprietor of the entity.[3] You can also cross-examine any partner of a partnership that is an adverse party. As long as the witness was in the role at the time of the events in question, their subsequent retirement does not excuse them from cross-examination under this rule.[4]

There are some conditions: you can call an adverse party only if the adverse party has not yet testified and opposing counsel will not undertake to call that person as a witness. As a practical matter, if the person you wish to call does not appear on the other side's witness list, the first step is to ask whether opposing counsel will undertake to call the desired witness themselves. If they refuse, then Rule 53.07 requires you to issue a summons to the witness at least 10 days before the commencement of the hearing, unless you know for certain that the person will be in attendance at trial.[5]

The order in which an adverse party is examined differs from the order for a regular witness. Instead of beginning with examination-in-chief, the party calling the adverse witness gets to start with cross-examination. Afterward, other parties who are adverse to the witness get a chance at further cross-examination. Re-examination by counsel for the adverse witness's party, and any other parties aligned in interest, takes place at the end.

Geoff Hall, a partner at McCarthy Tétrault in Toronto, had this issue arise in a recent trial. When opposing counsel asked for an undertaking to call 10 current or former employees of his client, he refused. "The trial judge permitted all 10 witnesses to be cross-examined, and we only had a right to re-examine within the scope of proper re-examination – and the trial judge policed the bounds of proper re-exam vigorously."

Some of the witnesses were cross-examined only perfunctorily, seriously limiting what could be accomplished through re-examination. Hall and his team then recalled three of the witnesses in their own case. The trial judge allowed him to examine these witnesses in chief and gave the other side a second chance at cross-examination.

While Hall admits that it was "awkward" to have these witnesses testify twice and out of order, he was ultimately successful at trial (although the scope of Rule 53.07 has been raised as an issue on appeal).

The strategic considerations when faced with a request by the other side to undertake to call a witness are complex – and, as the trial judge noted, there is the potential for abuse on both sides:

> A Plaintiff could request an undertaking from the Defendant to call a witness. If the Defendant refused to give the undertaking, the Plaintiff could summons the witness, ask one question, and then "ice" the witness and seek to prevent the witness from giving their full story.
>
> On the other hand, the Defendant could refuse to give the undertaking, wait and see what the witness has to say, and then seek to call the witness and duplicate the witness's entire evidence.

It's also important to be aware that there can be severe consequences for an adverse party who refuses to attend for examination or fails to co-operate. The court has a broad discretion to grant judgment in favour of the party calling the witness, adjourn the trial, or make such other order as is just.[6]

Cross-examining your own witness

While you can never discredit your own witness, there are two exceptions to the rule prohibiting impeachment and cross-examination: adversity and hostility.

There are at least two good reasons for this restriction. First, witnesses are presumed to favour the party calling them; and second, it's generally considered unfair to witnesses to call them to testify only to then undermine their credibility before the court.[7] In rare cases, however, leave of the court will be granted to cross-examine your own witness.

Rebecca Jones, a partner at Lenczner Slaght, cautions counsel who suspect a witness might become adverse or hostile to be well prepared to argue the motion for adversity on the spot. "The court will need your assistance with the process because declarations of adversity or hostility are really complicated and unfamiliar to most civil judges. Bring a cheat sheet along to trial if there is any possibility at all of a witness going rogue. Know all the different tests and different outcomes cold."

The adverse witness

The statutory exception to the rule against cross-examination for adverse witnesses is set out in the various Evidence Acts. Subsection 9(2) of the *Canada Evidence Act* permits cross-examination about recorded prior inconsistent statements without any required declaration of adversity. Subsection 9(1) expands this power to permit cross-examination on any prior inconsistent statement if the witness is declared adverse. In the Ontario *Evidence Act*, parties cannot discredit their own witnesses, but they can "contradict the witness by other evidence" or, if the witness is declared adverse, prove that they made a prior inconsistent statement. Similar provisions exist in the other common law provinces.[8]

Adversity is a prerequisite for cross-examination under the Ontario *Evidence Act*. But how can you prove a witness is adverse? The trial judge must find that the witness is "unfavourable in the sense of assuming by their testimony a position opposite to that of the party calling them."[9] Giving evidence that is inconsistent with a previous statement may be enough to establish adversity on its own.

It is important to keep in mind that a witness can be adverse without being unfair or wishing to harm the party that called them. Adversity is about the content of their evidence, not the manner of their testimony.

Refreshing a witness's memory

Before you jump to the conclusion that a witness is adverse in interest, Brian Gover, a partner at Stockwoods, recommends that you first attempt other, more gentle strategies to get the best evidence. "Before you get to adversity, consider whether you really have to go there. Can you cure the unhelpful evidence through refreshing a witness's memory? Maybe they just don't accurately recall. Don't just jump right to the conclusion they are adverse in interest."

A witness who gives evidence inconsistent with a previous statement is not necessarily adverse or hostile – they might just be forgetful or confused. Ask whether reference to a statement might refresh their memory. If it would, then you can produce the statement for the witness to review.[10]

Gover notes that it's not unusual for a witness to say something starkly inconsistent with previous statements, but when prodded admit they don't recall and would benefit from having their memory refreshed. That witness can then give a different version of events – the helpful version – and explain the discrepancy. The refreshed memory, or "past recollection recorded" (if the witness's memory is not refreshed but the witness agrees that the recorded statement is an accurate reflection of what they knew at the time they made it), is admissible evidence at trial.

Using a prior inconsistent statement

If the witness persists with their unhelpful evidence and tries to explain away the previous statement, then the prior inconsistent statement can be proved and used as the basis for limited cross-examination – with leave of the court. The process for obtaining a declaration of adversity and proving a prior inconsistent statement is exacting and must be carefully followed:

1. Establish the witness's testimony – ideally you want to phrase the question identically to the prior statement, if you have a transcript.
2. Request permission to put the inconsistent statement to the witness by tendering the prior statement to the trial judge. The trial judge must determine whether (a) the statement is inconsistent; and (b) the witness is adverse.
3. Prove that the inconsistent statement was made by the witness – first ask the witness about the circumstances of making the statement, whether the witness was being truthful at the time, and so on. Opposing counsel may cross-examine on issues relating to the proof of the statement.
4. If the witness denies making the statement or telling the truth at the time the statement was made, you can call other evidence to prove the prior statement. Opposing counsel will also have the right to cross-examine any other witness called to prove the statement.
5. Once the statement is proven and made an exhibit, request permission from the trial judge to cross-examine the witness on any inconsistencies.

In Ontario and Alberta, cross-examination under the *Evidence Act* is limited to the

inconsistent statement and the issues on which the witness is adverse to the party calling them.[11] To cross-examine the witness at large requires a declaration of hostility.

Admitting the prior statement for the truth of its contents

A truly adverse witness may deny the prior statement under even the most vigorous and skilled cross-examination, leaving you with only the unhelpful evidence – unless you can get the prior statement admitted for the truth of its contents under the *KGB* rule.

The *KGB* rule originates in criminal proceedings, but it applies equally (and more flexibly) in civil hearings.[12] To get a prior inconsistent statement admitted for the truth of its contents, the trial judge must be satisfied that the evidence in the prior statement is necessary and reliable.

The necessity requirement asks whether there is any other source for this evidence. In the classic case, the witness is unavailable, deceased, or incapacitated. In the case of an adverse or hostile witness, necessity can be met by the witness refusing to adopt the prior statement and failing to provide a suitable explanation for the changing story.[13]

The reliability requirement asks whether there are some indications that the prior statement is likely to be true – but only on a "threshold reliability" basis. Jones notes that "ultimate reliability is a question of weight decided at a later date – the trial judge should be reassured that this is just a threshold reliability determination. They don't need to determine which version to believe at the *KGB* stage."

Particularly in the civil context, the criteria for what makes a statement reliable are not set in stone. In some circumstances, unsworn statements might bear sufficient markers of reliability. Consider statements made to an insurer or authority figure, or look to analogies with the traditional and modern exceptions to hearsay.[14]

With the *KGB* statement admitted, you now have conflicting evidence on the record. Which should the trial judge accept: the previous statement, now denied by your witness, or their evidence at trial? Recall, you have not yet been able to cross-examine the witness at large – but there is one other strategy left that could help to establish that the prior statement (even if not sworn) is more reliable than the testimony given at trial.

The hostile witness

The highest rung of the ladder when it comes to controlling your own witness requires a declaration of hostility. This is a very high standard under the common law – a hostile witness is not merely adverse or unhelpful to the party calling them; they are adverse and unhelpful to the very truth-seeking function of the trial process. Hostile witnesses are "prepared to resort to falsehoods" and show "a disregard for the trial process and for truth telling as a whole." They will typically have a "hostile animus" toward the party calling them.[15]

Traditionally, demeanour was considered an important element of hostility. A bad attitude and an unwillingness to co-operate were more likely to result in a hostile witness declaration than testimony that was polite, but disingenuous. More recently, courts have been willing to look beyond demeanour at the substance of the testimony – it should not be the case that "a witness who lies politely cannot be cross-examined, but one who bristles can be."[16]

Motive is also an important consideration. A hostile witness will usually be someone who wishes to harm the party calling them, or protect the opposing party, or both. The trial judge should also consider the substance of their testimony and where there was a prior inconsistent statement by the witness.

The purpose of the hostile witness designation is to permit the examiner to treat their own witness as if called by the opposing party; that is, to permit cross-examination at large. Consider carefully whether this is a necessary strategy. It may have the result of discrediting the witness so completely that the trier of fact is unable to rely upon whatever helpful evidence you are able to elicit. Jones advises counsel always to "think about the outcome – does it even matter if the witness is declared hostile, or are you just trying to get a prior statement in as evidence?" "While it can be satisfying to cross-examine a witness who is trying to harm your case," says Gover, "be practical and gauge against the purpose of advancing your case."

Conclusion

May all your witnesses be truthful and helpful. But if they are not, having these strategies in your advocate's toolbox can assist you in controlling an adverse, inconsistent, conveniently forgetful, or downright hostile witness.

Notes

1. *Anderson v Flying Saucer Drive-In Ltd*, 2009 CanLII 45321 (Ont Sup Ct) at para 26.
2. David M Paciocco, "Confronting Disappointing, Hostile and Adverse Witnesses in Criminal Cases" (2012) 59: Issues 2 & 3 Crim LQ 301 at 312.
3. *Rules of Civil Procedure*, RRO 1990, Reg 194 at Rule 53.07; *Court of Queen's Bench Rule*, Man Reg 553/88 at Rule 53.07; *Rules of Court*, NB Reg 82-73 at Rule 55.05; *Supreme Court Civil Rules*, BC Reg 168/2009 at 12-5 (19–26).
4. *Toronto Dominion Bank v Leigh Instruments Ltd. (Trustee of)* (1997), 14 CPC (4th). 353 (Ont Gen Div); *Livent Inc v Deloitte & Touche LLP*, 2013 ONSC 621.
5. *Rules of Civil Procedure*, RRO 1990, Reg 194 at Rule 53.07.
6. *Ibid* at Rule 53.07(7).
7. Peter Sankoff, *The Law of Evidence and Witnesses in Canada* (Toronto: Thomson Reuters, November 15, 2021) at §11.25.
8. *Canada Evidence Act*, RSC 1985, c C-5 at s 9; *Evidence Act*, RSO 1990, c E.23, s 23; *Evidence Act*, RSNL 1990, c E-16, s 10; *Evidence Act*, RSPEI 1988, c E-11, s 15; *Evidence Act*, RSNS 1989, c 154, s 55; *Evidence Act*, RSNB 1973, c E-11, s 17; *The Manitoba Evidence Act*, CCSM c E150, s 19; *Evidence Act*, SS 2006, c E-11.2, s 19(7); *Alberta Evidence Act*, RSA 2000, c A-18, s 25; *Evidence Act*, RSBC 1996, c 124, s 16; Art. 280 CCP; *Evidence Act*, RSY 2002, c 78, s 29; *Evidence Act*, RSNWT 1988, c E-8, s 30.
9. *Hanes Mutual Insurance Co v Hanes*, [1961] OR 495.
10. Sidney N Lederman, Alan W Bryant, and Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (5th ed) (Markham, ON: LexisNexis Canada, 2018) at §16.101.
11. *Evidence Act*, RSO 1990, c E.23, s 23; *Alberta Evidence Act*, RSA 2000, c A-18, s 25.
12. *R v B(KG)*, [1993] 1 SCR 740; *Jung v Lee Estate*, 2006 BCCA 549.
13. *Sopinka, Lederman & Bryant*, *supra* note 10 at §16.89.
14. *Fawley et al v Moslenko*, 2017 MBCA 47 at paras 92–120.
15. Sankoff, *supra* note 7 at §11.25.
16. David M. Paciocco and Lee Stuesser, *The Law of Evidence* (6th ed), (Toronto: Irwin Law, 2011) at 509.