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Hostile Witnesses

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The best introduction to this topic is in *Cross on Evidence* -

A party calling a witness to prove certain facts may be disappointed by the failure of the witness to do so. The difficulties of the party may be increased by the witness's manifest antipathy to the party's cause. This lies at the root of the distinction between unfavourable and hostile witnesses. An unfavourable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves an opposite fact. A hostile witness is one who is not desirous of telling the truth at the instance of the party calling the witness.

An unfavourable witness might be contradicted by other evidence tendered in the case, but their credit cannot be attacked by the party who called the witness.

Some Pacific countries have legislation dealing with this topic, and it is largely consistent with the provisions of the *Evidence Act 1977 Queensland*. So far as I know, some do not. In that case, I presume the common law applies.

It is said that the difference the legislation made is that it allows a party to prove a prior inconsistent statement of the hostile witness. But I am jumping ahead.

I will cover the topic in these steps: some history; the state of the common law and some statutes; what is an adverse/hostile witness; and how does it work in practice?

History[1]

The common law has long held that a party calling a witness could not ask questions designed only to discredit the witness, or to call other testimony to the same effect.[2] This position at common law has been given statutory effect on a number of occasions in a number of jurisdictions.[3] But there has also existed, since at least the early nineteenth century and probably earlier, a discretion to permit cross-

[1] I acknowledge my colleague, Judge Glen Cash, of the District Court of Queensland, from whose paper delivered in 2021 this paper is substantially taken.
[2] *Wright v Beckett* (1834) 1 M & Rob 414 per Denman CJ at 425; 'You shall not prove that man to be infamous, who you endeavoured to pass off to the jury as respectable.'
[3] For example, see *Common Law Procedure Act* 1954 (Eng.), section 22, *Criminal Procedure Act* 1865 (Eng.), section 3, *Evidence and Discovery Act* 1867 (Qld), section 16 and *Evidence Act* 1977 (Qld), section 17.

examination by a party of its own witness, if that witness is considered adverse.[4] In *Clarke v Saffrey* (1824) Ry & Mood 126; 171 ER 966, Best CJ (CP) said:

> [T]here is no fixed rule which binds the counsel calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shews himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination.

Nine years later in *Wright v Beckett* (1834) 1 M & Rob 414 the Lord Chief Justice, Thomas Denman, cemented this proposition and went further. Where a witness 'unexpectedly turns' against the party who called them, that party may cross-examine the witness as to a prior inconsistent statement and, if necessary, prove the statement. That is what occurred in *Wright v Beckett*.

The claim was for trespass in which the plaintiff asserted 'exclusive right to a piece of marshy land'. The trial was in August 1833. The plaintiff called four witnesses who all testified that the plaintiff had 'immemorially exercised acts of ownership' over the land. A fifth witness, Warrener, was called by the plaintiff and contradicted the testimony of the first four witnesses. The plaintiff's counsel proceeded to put to the witness that he had given a different account to the plaintiff's attorney two days earlier. An objection was taken by opposing counsel but overruled by Lord Denman. The witness gave an evasive answer. The plaintiff's counsel called his instructing attorney to prove what the witness had said and a further objection by was similarly overruled. Denman put the evidence to the jury in his summing up but directed them not to treat it as 'evidence of the facts therein stated: they were only to receive [it] by way of neutralizing the effect of the evidence which [the witness] had unexpectedly given in Court'.

The jury found for the plaintiff and the next morning the defendant obtained a rule *nisi* on the ground the evidence had been improperly received. The attempt to make the rule absolute was heard and decided early in 1834 - by Denman and Baron Bolland. Ultimately, these two disagreed, so the rule *nisi* was discharged and the decision at first instance upheld. Denman argued persuasively why, as a matter of justice, it was proper to allow a party to prove a prior inconsistent statement of a witness who unexpectedly turns.

Bolland reached the conclusion that a party can tender evidence that tends directly to prove the cause, even if it has the effect of contradicting and collaterally discrediting another witness called by the party. But Bolland disagreed that a prior inconsistent statement could be established for the mere purpose of discrediting a witness. There being only two judges who (openly) participated in the decision, and those judges disagreeing, the value of the decision as a precedent was questionable.

Over two decades some propositions became settled. It was clear that if a witness disappointed the party calling them, another witness might be called to give a different account of the transaction. It

[4] *Clarke v Saffrey* (1824) Ry & Mood 126; 171 ER 966; *R v Hunter* [1956] VLR 31; *R v Lawrie* [1986] 2 Qd R 502 at 515.

was also settled that it was permissible for a party calling a witness to ask questions about prior inconsistent statements. However, doubt remained about the probity of attempting to prove a prior inconsistent statement of an adverse witness.

In my respectful opinion if the judge has found the witness to be adverse and the witness does not distinctly admit making the statement, depending on all the circumstances of the case, it would be open to the judge to permit the prosecutor to prove it.

In any case, soon the debate would be rendered moot.

Statutory reform in England

Legislation which became the model – sometimes it was simply copied verbatim – for the law concerning adverse or hostile witnesses was enacted in the *Common Law Procedure Act* 1854 (UK). This Act applied only to civil proceedings, but the same provisions were reproduced in the *Criminal Procedure Act* 1865 (UK)

These important provisions reinforced the common law prohibition on a party impeaching the credit of their own witness in a general way, but allowed for proof of prior inconsistent statements. It is here that can be found the first statutory use of the word 'adverse' in relation to witnesses. The Queensland version is in the Queensland *Evidence Act* 1977 s. 17:

17 How far a party may discredit the party's own witness

(1) A party producing a witness shall not be allowed to impeach the credit of the witness by general evidence of bad character but may contradict the witness by other evidence, or (in case the witness in the opinion of the court proves adverse) may by leave of the court prove that the witness has made at other times a statement inconsistent with the present testimony of the witness.

(2) However, before such last mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether or not the witness has made such statement.

The differences in some Pacific jurisdictions are interesting:

Kiribati

7. Adverse witness may be contradicted by party calling witness

(1) A party producing a witness shall not be allowed to impeach the witness's credit by general evidence of bad character but may contradict him/her by other evidence, or may *by leave of the court* prove that witness has made at other times a statement inconsistent with the present testimony. But before such proof can be given and cross examination thereon be permitted, the circumstances of the

supposed statement sufficient to designate the particular occasion must be mentioned to the witness; and the witness must be asked whether or not the witness has made such statement.
(2) In considering the leave necessary under subsection (1) the Court, may, among other things, consider:
(a) whether the witness is an adverse or hostile witness *to the party or the party's interest*;
(b) *whether the inconsistency* sought to be exposed *relates to a matter material* to the issues for determination.

Samoa

s 79. Hostile witness

In any proceeding, the party who calls a witness may, if the Judge determines that the witness is hostile and gives permission, *cross-examine* the witness *to the extent authorised by the Judge*. ("at large")

Tonga

147. Hostile witness: leave of Court.

(1) A witness may neither be cross-examined nor his credit impeached by the party calling him except by permission of the Court which permission shall only be granted when in the opinion of the Court the witness has shown himself to be a hostile witness.
(2) A hostile witness for the purpose of this and the following section shall mean a witness who from the manner in which he gives his evidence, shows that he is *not desirous of telling the truth to the Court*.

Section 17, and I would suggest, other provisions in the Pacific, did not supplant the common law.[5] Instead they supplemented the existing law by permitting proof of a prior inconsistent statement in addition to the discretion to permit cross-examination afforded by the common law. The provision was nevertheless important because of the doubt that had existed as to whether or not proof of the inconsistent statement was permissible.[6]

I mention this point in case you have a similar provision - Section 17 must be read in conjunction with sections 101 and 102 of the Queensland *Evidence Act*. Section 101 provides that upon proof of a prior inconsistent statement the contents of the statement are admissible as proof of any matter of which direct oral evidence would be admissible. This important provision settled another long-standing debate: was the prior inconsistent statement admissible only to undermine the credit of the witness or could it be regarded as proof of the facts asserted in the statement?[7] In the case of a statement proved pursuant to section 17, the jury will be directed in accordance with s. 101 and [and this is section 102] to have regard to matters that might bear upon the weight they attach to the evidence.

[5] *R v Hunter* [1956] VLR 31.
[6] *Greenough v Eccles* (1859) 5 CBNS 786 at 802; 141 ER 315 at 322
[7] *R v Vella* (2006) 14 VR 592; [2006] VSCA 248 at [33] and the cases cited therein; *Walker v Walker* (1937) 57 CLR 630; *Barnes v Allied Interstate (Qld) Pty Ltd, ex parte Barnes* [1969] Qd R 244 and subsequently in the High Court at (1968) 118 CLR 581.

Of course, there always remains a discretion to exclude evidence the admission of which would be unfair to a defendant.[8]

When is a witness adverse? As discussed above it is insufficient that the witness be merely unfavourable. There must also be hostility to the cause of the party calling the witness. In *R v Hayden & Slattery* [1959] VR 102 at 103, Scholl J, conducting a trial for robbery, said this upon an application by the Crown Prosecutor to cross-examine a witness on the basis they were hostile:

> … 'adverse' must mean, in this field, unwilling, if called by a party who cannot ask him leading questions, to tell the truth and the whole truth in answer to non-leading questions — to tell the truth for the advancement of justice.

This formulation by Scholl J has been endorsed in the Hight Court in *McLellan v Bowyer* (1961) 106 CLR 95 and in Queensland in *R v Baira* [2009] QCA 332 at [30].

While inconsistency in material evidence may be sufficient to treat a witness as adverse, it does not follow that every witness who is inconsistent will be so treated. In *McLellan v Bowyer* (1961) 106 CLR 95 at 103 it was said:

> … not every witness who testifies inconsistently with an earlier statement can properly be regarded as hostile.

The question of hostility or adversity is to be determined by the trial judge as an "objective question of fact".[9] You may do so having regard not only to inconsistencies in the evidence but also to the demeanour of the witness.[10] It is possible, though unusual, for a witness to be considered adverse even in the absence of a *voir dire* and without there being an opportunity for the witness to explain the inconsistency.[11] However, evidence on a *voir dire* is usually desirable. Both parties ought to be permitted to cross-examine on the *voir dire* and 'if the witness satisfies the court that he or she is willing to tell the truth for the advancement of justice no declaration as hostile or adverse will be made notwithstanding the prior inconsistent statement'.[12]

A determination that a witness is adverse will, at common law, allow a judge to permit cross-examination, either limited or at large, by the party who called the witness with a view to discrediting the witness.[13] It will also, depending on your exercise of discretion and your legislation, permit proof

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[8] Section 130 *Evidence Act 1977 (Qld)*; *R v Hall* [1986] 1 Qd R 462.
[9] *McLellan v Bowyer* (1961) 106 CLR 95 at 102.
[10] *McLellan v Bowyer* (1961) 106 CLR 95 103; *R v Hadlow* [1992] 2 Qd R 440 at 443; *R v Lawrie* [1986] 2 Qd R 502 at 514.
[11] *R v Hadlow* [1992] 2 Qd R 440; *R v Huy Tran Le* [2009] QCA 343; *cf. R v Ashton* (1999) 108 A Crim R 200 at 202 [5].
[12] *R v Hadlow* [1990] 2 Qd R 440 at 449, 18; *R v Ashton* (1999) 108 A Crim R 200 at 202 [4]-[5].
[13] *R v Hadlow* [1990] 2 Qd R 440 at 449, 33.

of prior inconsistent statements.[14] Also depending on your legislation, such statements can be treated by the jury as proof of any facts contained therein. However, if the only evidence implicating the defendant is that proved pursuant to [your equivalent of] Queensland section 17 (and section 101) a conviction would almost inevitably be regarded as unreasonable and set aside. As Macrossan CJ said in *R v Parkinson* [1990] 1 Qd R 382 at 384:

> It will almost inevitably be the case (I find it hard to visualise an exception) that a conviction cannot safely be entered when the only real evidence to support it consists of a prior statement of a prosecution witness which is steadfastly contradicted and declared to be false by that witness on oath at the trial.

The 'hostile' witness in practice

What follows is an example of how an application to treat a witness as adverse might unfold. As every case is different it should not be regarded as a prescriptive formula but may serve as a useful 'checklist'.

The party who is calling the witness will lead evidence-in-chief. They should establish all of the relevant evidence and resist the temptation be to make an application as soon as the first major inconsistency emerges. This will allow the trial judge more material upon which to consider the application and, if the application is successful, it will allow the tribunal of fact a better understanding of the true evidence, especially where counsel intends to invite the tribunal to consider the witness dishonest or unreliable.

Counsel should indicate they have a matter to raise (in the absence of the jury if there is one) and then indicate they seek a ruling that the witness is adverse. As noted above, this will almost always be followed by a *voir dire*. Counsel should seek leave to cross-examine on the *voir dire*, identifying if necessary the areas they wish to cover. Cross-examination on the *voir dire* is ultimately discretionary, but it is almost always permitted. In *R v Hadlow* [1992] 2 Qd R 440 at 449, Cooper J stated:

> If the Crown seeks to prove the witness hostile in this way it will be necessary that the witness be cross-examined on the alleged prior inconsistent statement on a voir dire in the absence of the jury. The purpose of the cross-examination is to establish as an objective question of fact whether the witness is hostile (McLellan v. Bowyer at 103). As part of the process to ascertain that fact a trial judge will allow cross-examination by the opposing party in order to establish that the evidence given before the court is truthful and to explain away or repudiate the prior inconsistent statement.

[14] *R v Lawrie* [1986] 2 Qd R 502 at 515.

Cross-examination at this point is not intended to attack the credit of the witness. It is to establish, or ameliorate, such manifest inconsistency as might demonstrate the witness is adverse in the sense discussed above.

The party seeking to have the witness regarded as adverse would put to the witness the earlier statement. Assuming it is in writing, it would be advisable for counsel to give them a copy of the document and have them agree that they made relevant assertions that are inconsistent with their present testimony. A degree of flexibility is necessary. Sometimes the witness will claim illiteracy or poor eyesight. Less commonly they will deny their signature or claim coercion by the police or someone else. In such cases it might also be necessary to call the statement taker to establish the statement is indeed that of the witness. There is no obligation to offer the witness an opportunity to explain the inconsistencies.

Once the witness has given evidence on the *voir dire* the parties will make their submissions (in the absence of the witness). Whether a witness is adverse or not is a matter for the judge to decide in the exercise of judicial discretion. It is important that the party seeking to prove the prior inconsistent statement/s identify precisely what is to be put to the witness. Sometimes Counsel will ask to cross-examine the witness "at large". Whatever this means, it is for the judge to set the parameters of the cross-examination of the witness. A sensible lawyer would simply put the prior inconsistent statement and cross-examine on matters that might tend to demonstrate it is the true account. It is not usually in the interest of counsel cross-examining their own witness to wholly destroy that witness's credibility because, after all, they want the tribunal of fact to accept that, at an earlier moment at least, the witness told the reliable truth.