On Trial

Advocacy Skills Law and Practice

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CHAPTER 28

RE-EXAMINATION: THE ABUSED ART

28.01 THE BOUNDARIES OF RE-EXAMINATION

Re-examination is intended to allow counsel calling the witness an opportunity to ask questions of the witness in order to have the witness explain, clarify or place in context, evidence given by the witness in cross-examination.

Abbott C.J. put the matter this way in what is still considered to be the modern rule governing re-examination:

> I think counsel has a right upon re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also, of the motive by which the witness was induced to use those expressions; but, I think he has no right to go further, and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.[1]

Re-examination, it is to be noted, is only considered proper if it meets a two-fold test. The questions must arise out of the cross-examination.[2] New material is not permitted in re-examination.[3] If any particular topic has not been touched upon by the cross-examiner there can be no re-examination on the point as there are no answers to clarify or explain. Re-examination must also be directed toward clarifying, explaining or placing in context the evidence given in cross-examination. Questioning in re-examination that invites the witness to repeat the evidence given in chief is improper.[4]

Re-examining counsel may ask questions relating either to new material raised for the first time in cross-examination or to material originally touched upon in examination-in-chief. In the latter case, however, the re-

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1 *Queen Caroline's Case* (1820), 2 Brod. & Bing. 284 at 297; see adoption of this rule in cases such as *Prince v. Samo* (1838), 7 Ad. & El. 627; *R. v. St. George* (1840), 9 C. & P. 483; *Wetmore v. Bell* (1890), 30 N.B.R. 83. *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell 1, 1990), para. 12-28.

2 *R. v. Moore* (1984), 15 C.C.C. (3d) 541 at 568 (Ont. C.A.); leave to appeal to S.C.C. refused (1985), 15 C.C.C. (3d) 541n; *R. v. Evans*, [1993] 2 S.C.R. 629, *per* Cory J. at 643.

3 *R. v. Evans*, *ibid.*, *per* Cory J. at 643.

4 *R. v. Royer*, [1995] O.J. No. 153 (Ont. C.A.); affd [1996] 2 S.C.R. 169.

examination will be limited to legitimate efforts to explain answers that can be said to reasonably require explanation. Counsel re-examining on new material raised for the first time in cross-examination will be allowed considerably more leeway in developing the facts surrounding the new material first touched upon in cross-examination in order to clarify, explain or place in context the answers adduced on cross-examination. The entire issue of the right to re-examine was put "very well"[5] by one learned author in the following words:

> Questions permitted as of right on re-examination must relate to matters arising out of the cross-examination which deal with new matters, or with matters raised in examination-in-chief which require explanation as to questions put and answers given in cross-examination.[6]

Re-examination in practice today is subject to much abuse. All too frequently, upon objection being made to re-examination, the presiding judge will ask counsel whether the subject matter of the re-examination "arises out of" or was "touched upon" in cross-examination. If satisfied that it does, the re-examination is allowed to proceed. This is not the measure by which the admissibility of re-examination ought to be determined. It tends in modern practice to lead to re-examination that is nothing more than an unfair repetition of some of the major points made during examination-in-chief.

A return to the principles laid down by Chief Justice Abbott will help restore equilibrium to the trial process.

28.02 LEADING QUESTIONS ON RE-EXAMINATION

Leading questions are no more permitted in re-examination than they are in chief.[7]

28.03 THE OBJECTIVES OF RE-EXAMINATION

Legitimate re-examination has as its objective one or more of the following goals:

(i) *To resolve outright confusion on the part of the witness.* Where the witness has given obviously confusing or contradictory testimony it is clearly appropriate for counsel in re-examination to

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5 *R. v. Evans, supra,* note 3.

6 Ewaschuk, *Criminal Pleadings & Practice in Canada,* 2nd ed. p.16.29, para. 16:2510.

7 *R. v. Moore* (1984), 15 C.C.C. (3d) 541 at 568 (Ont. C.A.); leave to appeal to S.C.C. refused (1985), 15 C.C.C. (3d) 541n.