THE ART AND SCIENCE OF ADVOCACY

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The common law provisions are still operative. In addition to the statutory provisions governing the hostile witness, you still have the common law right to call evidence that contradicts the witness. In other words, you can advance other evidence to show that the witness has erred and to make out your case.[12]

Two contentious issues arose in the interpretation of the statutory provisions:

1. What meaning is to be given to the term "adverse"?
2. What use can be made of a prior statement?

(i) *The Meaning of "Adverse"*

In Ontario, the law is settled. Prior to the *Wawanesa* case, the term "adverse" was held to mean that a witness had to show a hostile demeanour. Now, both under section 24 of the Ontario Evidence Act and under section 9(1) of the Canada Evidence Act, the the examiner is no longer obliged to show that the witness is hostile in his attitude to the party calling him. If the witness is unfavourable, that is, if he assumes a position unfavourable to the party calling him, he may be declared a hostile witness.[13]

(ii) *The Use of a Prior Inconsistent Statement*

The *Wawanesa* case clearly establishes in Ontario that a prior inconsistent statement may be used to determine if the witness is adverse.[14] This does not appear to be the current view in England.[15]

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whether or not he did make the statement.

(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

[12] *R. v. Precourt* (1976), 39 C.C.C. (2d) 311 at 325 (Ont. C.A.), leave to appeal to S.C.C. refused (1976), 39 C.C.C. (2d) 311n (S.C.C.); McWilliams, *Criminal Evidence*, §36:40200; 3A Wigmore, *Evidence*, Chad. Rev., §907.

[13] *Hanes v. Wawanesa Mutual Insurance Co.*, [1961] O.R. 495 at 507 (C.A.); *R. v. Williams* (1985), 18 C.C.C. (3d) 356 (Ont. C.A.), leave to appeal to S.C.C. (1985), 18 C.C.C. (3d) 356n (S.C.C.); *Boland v. Globe & Mail (The)*, [1961] O.R. 712 at 720 (C.A.). This is the test under section 9(1) of the Canada Evidence Act: in Ontario, see *R. v. Cassibo* (1982), 70 C.C.C. (2d) 498 at 519 (Ont. C.A.). It is unclear whether the old, narrow case law will be applied in other provinces in view of the decision in the *Cassibo* case. See also Sopinka, Lederman & Bryant, *Evidence*, at 838-847; 3 Wigmore, *Evidence*, Chad. Rev., §774, and 3A Wigmore, *Evidence*, Chad. Rev., §896; McWilliams, *Criminal Evidence*, §36:40320.

[14] *Hanes v. Wawanesa Mutual Insurance Co.*, [1961] O.R. 495 (C.A.).

[15] Cross & Tapper, *Cross*, at 271; as to the varied American positions, see 3A Wigmore, *Evidence*, Chad. Rev., §§904-905; Cleary, *McCormick*, §38 at 84, points out that the rule is being abandoned in many American jurisdictions.

Prior to the introduction of section 9(2) of the Canada Evidence Act, a strict interpretation was given to section 9. The examiner had to demonstrate that the witness was hostile. The fact that the witness had made a previous inconsistent statement could not be considered in the determination of hostility.[16] Section 9(2) was enacted to overcome the narrow construction given to this provision by the courts.

Section 9(2) has been interpreted to provide an independent procedure under which the trial judge may permit a party to cross-examine on a prior statement without the necessity that the witness be declared hostile.[17] Section 9(2) is restricted to statements in writing or reduced to writing. Such a cross-examination may then be considered by the trial judge in a determination whether the witness is hostile under section 9(1). An oral statement may be used under section 9(1) in an application to have the witness declared hostile.[18]

(b) The Procedure

What is the proper procedure to have the witness declared hostile? The steps under the provincial legislation and under section 9(1) of the Canada Evidence Act are as follows:[19]

1. Advise the court that you wish to have the witness declared hostile under the relevant statute.
2. If there is a jury, then the jurors should be excused.
3. The trial judge should then conduct a *voir dire* and hear all the relevant evidence on the issue. Any previous contradictory statements made by the witness are relevant to the issue. Any such statement may alone

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[16] *R. v. Brennan*, [1963] 3 C.C.C. 30 (P.E.I. S.C.); *R. v. McIntyre*, [1963] 2 C.C.C. 380 at 389-390 (N.S. C.A.); but see *R. v. Cronshaw* (1976), 33 C.C.C. (2d) 183 (Ont. Prov. Ct.), wherein the *Wawanesa* approach was adopted; and also *R. v. Collerman*, [1964] 3 C.C.C. 195 (B.C. C.A.).

[17] *R. v. Cassibo* (1982), 70 C.C.C. (2d) 498 at 520 (Ont. C.A.); *R. v. Higgins* (1979), 28 N.B.R. (2d) 20 (N.B. C.A.), leave to appeal to S.C.C. refused (1979), 29 N.B.R. (2d) 450n (S.C.C.). The prior inconsistent statement, of course, does not constitute substantive evidence, and, consequently, if the cross-examination is for the purpose of putting the statement before the jury, or if it would have minimum probative value but would result in undue prejudice to the accused, the trial judge should prevent the cross-examiner from adducing the contents of the statement during the cross-examination: *R. v. Fraser* (1990), 55 C.C.C. (3d) 551 at 558-559 (B.C. C.A.). This rule must now be read subject to the recent decision of the Supreme Court of Canada in *R. v. B. (K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.), where the court held that in certain narrow circumstances a prior inconsistent statement may be admitted for the truth of its contents. For a more comprehensive discussion of this new principle, see §10.2(e).

[18] *R. v. Cassibo* (1982), 70 C.C.C. (2d) 498 at 521 (Ont. C.A.).

[19] See the remarks of MacKay J.A. at p. 534-535 for some observations as to the procedure to have a witness declared adverse in *Hanes v. Wawanesa Mutual Insurance Co.*, [1961] O.R. 495 (C.A.).