True though this is, a warning is required. Confidence can be over-cultivated and over-valued. True confidence comes of sound preparation, a belief in one's self — combined with experience — and it is of enormous assistance. Munkman says:

> [T]he ideal state to start a case is one of alert relaxation. There is however nothing worse than over confidence and its handmaiden pomposity and nothing more rapidly alienates the jury. No advocate should be apologetic certainly. An awareness of one's position and a readiness to stand up for one's rights as an advocate and for the client's rights is at the forefront of the traditions of the Bar. This does not however involve talking down to juries or condescension to judges. Confidence should always be accompanied by courtesy and unpretentiousness. Confidence should not be easily abandoned. (Munkman, *Techniques of Advocacy*.)

Persistence

1.24 Like confidence, persistence is a virtue in moderation. Again, let me cite Munkman: 'Persistence is a marked characteristic of the average successful junior; it enables him to fight cases to the end in spite of unexpected difficulties and is a most valuable asset in cross-examining'. It is certainly true that persistence is essential. Cases may be lost but they should not be abandoned, and the courage to persist in a difficult cause is important. But again, a note of warning must be sounded — persistence must be distinguished from doggedness. Endless repetition brings no reward but loss of interest and then loss of temper in the hearer. The function of persistence is to fight your case until the end but not to prolong it needlessly only to delay an inevitable defeat.

Mileage

1.25 To become a really effective advocate you will need to exercise both practical judgment and technique. Both of these come only with experience, practice and application. Nothing can take the place of experience in running cases, but the difficulties involved in gaining that experience can be mitigated by sound preparation of the whole case — witnesses, law, tactics and overall strategy.

2 PREPARATION AND CASE ANALYSIS

When I went to the Bar as a very young man
said I to myself, said I
I'll work to a new and original plan
said I to myself, said I
...
Ere I go into court I will read my brief through
said I to myself, said I
and I'll never take work I'm unable to do
said I to myself, said I

INTRODUCTION

2.1 Every advocate is familiar with the sinking feeling that accompanies the receipt of a brief or file which is either in an unfamiliar area of practice or of an unforgiving size. Adequate techniques of preparation and analysis provide the cure for those problems. If you wish to be successful there is no alternative to the hard grind of simply sitting and reading the whole of the material. What the advocacy manuals emphasise are the glamorous jobs. Yet every successful examination, cross-examination or trial speech is based on the underlying lonely task of extensive preparation. Your reading of the material must be structured, thoughtful, and above all done with a mind free from bias or prejudgment of the outcome.

Whenever a brief is received, the advocate's immediate inquiry is invariably, 'For whom do I act?'. The answer to that apparently neutral question in truth does much to condition the attitude, manner and frame of mind with which the advocate commences and undertakes the task of preparing the case. This must be guarded against, by careful analysis and preparation.

Human nature and advocates being what they are, preparing the case from the narrow perspective of the party represented is both inhibiting and dangerous. If the first step in preparation is undertaken from the perspective of the party for whom the lawyer acts, this confines the width of analysis and scope for independent and free-ranging assessment of the case.

A common fault of the adversary system and the mindset it engenders is too close an identification between the advocate and the cause of the party represented. The first step is to recognise this fundamental fact. All too often an overconfidence in our own case, and too little attention to the opposing case, leads to a kind of pre-trial psychosis, which can be fatal in an adversary system.

One of the most important and difficult attributes to acquire is the ability to see the case in proper perspective, or as it is sometimes said, 'to see the big picture'. An integral part of correcting the imbalance described above involves paying due regard to the weaknesses of the client's case. This is for two fundamental reasons. The first is that the recognition of the weaknesses of the case will lead to adequate planning to deal with them. The second is that the weaknesses of your own case may mirror the strengths of your opponent's case.

One means of achieving this end derives from a critical reading of the whole of the material. Omit nothing. Reading should include correspondence, particulars, original and amended pleadings and so on. One should read with two aims: to assimilate and consider what is there and to identify what is missing, or should be there.

That reading should, however, always take place in the legal context of the matter. If the brief is delivered 'on hearing', begin by identifying the cause(s) of action and elaborate the elements of each, whether you are for the plaintiff or the defendant, the Crown or the accused. If you are to advise on whether a cause of action exists, establish in a summary way the essential facts about which the advice is to be given, and then proceed in the same way. The point is your reading must be intelligent and focused to be of value to you or to the client.

Until this process is automatic, advocates should begin the preparation by preparing not their own case, but their opponent's.

This, of course, assumes a case beyond the advising stage. The earlier task is to review the facts to identify and deal with likely defences to your position. This may involve conference or requests for further material to complete the brief. It is not always safe to assume that the material is complete when it is received, and it is better to take a little extra time than to provide a flawed advice or one that is completely wrong.

It will always remain essential to prepare the opponent's case at the early stage in one's own preparation: a most important step in the process of preparation is to consciously deal with the case from the opponent's point of view.

As John Stuart Mill wrote in *On Liberty*, p 46:

> The greatest orator, save one, of antiquity, has left it on record that he always studied his adversary's case with as great, if not with still greater intensity than even his own. What Cicero practised as the means of forensic success, requires to be imitated by all who study any subject in order to arrive at the truth. He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion.

THE MECHANICS OF PREPARATION

2.2 All useful preparation requires a methodical system which is essentially a mechanical process. The most experienced advocates all employ a systematic means of organising the case materials. This begins with a method of recording the issues; of relating the evidence and the witnesses to those issues; of establishing a chronology of relevant events; and of relating the issues to the law applicable to the case.

A first step in any good preparation is in my opinion a good chronology. In all but the very simplest of cases it may be said that there is no case which is not improved by a chronology, as long as it is intelligently directed. Many courts require one as part of the practice, but in any event knowing the order of events and their interrelationship is central to their understanding. (See section on Chronologies below.)

Analytical, intelligent preparation involves more than just reading the brief or file. At the same time, the advocate will be isolating the issues and organising the materials into a logical sequence. While the methodology of this is subjective, any successful system will have at least the following common attributes.

The tools of preparation

2.3 The physical organisation of the case is a conscious and deliberative task, but one too often the result of accident or habit rather than design. At some point the advocate must, as a separate step in the preparation process, determine how

the brief is to be organised to ensure maximum ease of access in court. There are a number of tools readily available to assist in this purpose.

Organisation of the brief

2.4 The brief may be organised in the following ways:

- alphabetical (witness or subject matter);
- chronological;
- exhibits/advices/memos;
- court documents (critical documents);
- expert reports; or
- a combination of the above.

However it is resolved to organise the brief, convenient access to each section suggests the sections should be clearly separated, either in different folders (in the case of a large brief) or by dividers (coloured or numbered), indexed at the front and conveniently labelled. Sometimes the categories might overlap or the relevant material may be recorded in more than one place when reorganised. Multiple copies of such material to ensure the desired ease of access is a useful way of avoiding extensive and clumsy cross-referencing. A fresh index to the brief must be arranged once this process of reorganisation is completed.

Marking the brief

2.5 Marking the brief is very subjective. For central material, highlighting key references (by colour, underlining or removable flags) ensures easy accessibility. Colour coding to identify subject matter, important or 'dangerous' material or exhibits is easily done and effective; for example, flagging admissions of the opposing party, critical documents to be tendered (although these should be separately listed to ensure they are not overlooked), or highlighting a central passage in the expert's opinion, or a prior inconsistent statement which is to be relied on or cross-examined on.

Trial notebooks

2.6 Conscious organisation is as important once in court as it is beforehand. It is necessary to devise a system which enables both accurate note-taking and keeping a close eye on the witness. The precise method is individual, but must be deliberate, whether it involves a notebook, a looseleaf pad, a laptop computer or tablet. It must be something that achieves accuracy while allowing for your own preferences and style.

Notes are best confined to the relevant. Not all that is said by any witness is relevant. Much of what is said by most witnesses can be disregarded. The notes you take should accurately and completely record only two things — that which you wish to rely on and that which you wish to attack or have rejected.

Properly kept notes are essential. An accurate note is necessary for cross-examination and for address, especially in cases where there is no running transcript. Additionally, most people will keep a note with the aim of stimulus to the memory. If, for example, you keep the note taken in conjunction with a witness summary or checklist (see below), to know not only what has been said, but what has not yet been said or is omitted altogether, you can turn the note into a tactical weapon that is of far more use than the transcript can ever be.

Methods of keeping notes vary greatly and there is probably little to choose between thorough systems. If you use a book, it is a good idea to use the back for quick notes of important passages of evidence that can later form the basis of the final address. The brevity or otherwise of your notes of evidence will depend on the quality of your memory, the complexity of the case and the need of the moment. But in all cases you should take notes for one reason only — certainly not to occupy yourself at the bar table — with the aim of making them useful. There is no use simply duplicating what will be provided by the court reporter or the sound recording system; too much attention to recording unimportant details will distract your attention from the non-verbal dynamics of the courtroom.

Moreover, a useful technique is to identify the passages of interest as you go. Often a word, a phrase or a piece of evidence in tension, or even in conflict, with the general tenor of the witness' evidence will strike you as it is given. It must be noted then — it will be nigh on impossible to find otherwise. Similarly, noting the timing of the introduction of exhibits and MFIs is usefully tied to the time of the giving of the relevant evidence. I have used a system of three columns to achieve this result, organised in this way:

Witness/Exhibit/MFI number	Summary of relevant evidence	Note of XX issue, or nature of striking evidence
X B	*I picked up a copy of the ...*	*XX re incons with statement — cp par 7*

The law and authorities

2.7 In every case, it will be necessary to relate the factual issues to legal principle, and in most to argue some law. This will involve identifying the principal authorities to be relied upon and dealing with those which do not support the case. In the first place, it is necessary to organise the authorities systematically. This may be done alphabetically; according to subject matter (for example, liability, damages, causation etc); or by hierarchy (by level of court, in reverse chronological order (most recent case first)). The cases must be read, noted, and allocated to the subject matter(s) to which they belong. It is an essential part of preparation in the common law system which depends so heavily upon the doctrines of precedent and *stare decisis* that the authorities be cross-referenced. It is important to identify those cases which have been followed, applied, distinguished, or overruled. Obviously, it is necessary to check recent unreported decisions of the higher courts.

At the hearing, it will be necessary to separate the cases from which it is proposed to read from those for reference only; most rules of court now require the

provision of lists of authorities divided in that manner to be filed in advance. It will also be necessary to have crystallised, in succinct form, the legal propositions to be advanced. This should be typewritten, if possible, for submission to the court as a summary of argument at the tactically appropriate moment. By crystallising the legal principles involved you will ensure that you understand precisely what the cases you have selected stand for, and avoid reciting long passages or quotations from those cases when the time comes to make submissions as to the law. The latter is never good advocacy.

The checklist, or 'ready reckoner'

2.8 As an aid to coordinating the above material, many advocates, as a matter of standard practice, maintain a précis or summary of the salient features of the case, on no more than a page or two, always ready at hand. This checklist of the entire brief is organised so it can be used as an index or 'ready reckoner'. Usually included are the essential matters of proof so as not to be forgotten or overlooked. Many a case has been won for the defendant by the inadvertent failure of counsel for the plaintiff to prove one essential element before closing a case; for example, in a culpable driving trial, otherwise fought on the single issue of excessive speed, the Crown failing to prove that there was no mechanical defect in the accused's motor vehicle. Notes should be made relating the essential facts of the case, not only in some kind of accessible chronological sequence, but which are issue based and which also contain cross-references to the witnesses or modes of proof to be employed. Such a document is invaluable when the presiding judge asks, 'Where is the evidence for that?' or 'Where can I find that statement?'.

This proposition also applies to the preparation of argument of law, to avoid questions like 'Where in the authorities is the passage which supports that proposition?'.

IDENTIFYING THE ISSUES

2.9 In the first place, to identify the issues it will probably be desirable to go to the formal court documents: in a civil case, the pleadings; in a criminal proceeding, the summons or indictment. These, however narrowly, identify the basic elements of the crime or cause of action. Next, in a civil case, usually the formal particulars and interrogatories or discovery contain vital references to key issues. In a criminal case, the deposition or police brief and/or records of interview will provide the core material in the case. From there it is useful to proceed to witness statements or proofs, expert reports for both sides, and the exhibits.

In the process of reading (and noting) these materials, the advocate ought to be identifying, separating and distilling the issues and cross-noting the evidence/witnesses/exhibits which bear upon them. At the conclusion of this preparatory stage, the trial lawyer will have an organised summary of the case broken down into the constituent elements or the issues. This is a continuing process during the reading phase. The advocate will be constantly revising and re-defining the

issues. Some will become apparent later rather than sooner, while others which appeared to be matters in issue at the outset will disappear or assume only minor significance.

CHRONOLOGIES

2.10 A central function of preparation is to record the sequence of events in a clear and concise way. This is best achieved by compiling, as an integral part of the preparation process, a chronology of events. However, there are chronologies and chronologies. In order to be valuable, a chronology needs to contain the precise date(s) (and perhaps the precise time) of key events and usually of other subsidiary or secondary events likely to be material to the case. Yet, a chronology containing every date is often too long and overbearing and the relevant or more important events are lost in the mass, or the morass. Equally, a too abbreviated chronology is usually so cryptic as to be of little value.

By the end of the reading phase, the trial lawyer will have an exhaustive chronology of all the events, including references to the witnesses, documents, or other proved or admitted facts which relate to the events in issue. This will be ideal for forensic purposes but too unwieldy to present to the trial court. At this stage, it is helpful to have the chronology in table form, containing columns for date, event, evidence and comment.

For trial purposes, the advocate will need to edit out matters which are irrelevant or 'for one's eyes only' and marginal events, and prepare a concise chronology in brief but informative terms. This should be confined to a plain English version of material events. Such a chronology might be submitted during the opening as an *aide memoire* and can be revised for tender at the conclusion of the trial by including references to transcript pages and exhibits vouching its content.

It is often useful to prepare, in addition, a separate short chronology of key or critical events in the case. Another alternative is to present an agreed chronology of central events. Additionally, in personal injury cases, a separate chronology of medical treatment is often more appropriate than a general chronology of dates upon which key witnesses were first interviewed about the facts.

WITNESS AND EXHIBIT SUMMARIES

2.11 In addition to all of the above, it is more than useful (desirable in almost every case, and essential in long cases) to prepare a separate document which contains, in alphabetical order by witness name, a short summary of the principal aspects of the evidence of each witness on both sides, so far as they are known. This should identify both favourable and unfavourable aspects of the evidence. This document provides a quick overview of the real means of proof. It is especially useful for cross-examination and in preparing the outlines for opening and closing addresses. A document index duly cross-referenced can also be used to the same effect. Prepare charts or spread-sheets if necessary to best summarise, collate or marshal the brief.

- over-helpful witnesses;
- difficult witnesses;
- interruptive objections;
- difficult judges;
- witnesses needing to refresh memory;
- adverse witnesses;
- subpoenas to produce;
- character witnesses.

5 CROSS-EXAMINATION

Or assume that the witnesses summon'd in force
In Exchequer, Queen's Bench, Common Pleas, or Divorce
Have perjured themselves as a matter of course
said I to myself, said I.

INTRODUCTION

5.1 Chapter 4, on examination-in-chief, should have demonstrated that it is a misconception to think cases will be solely won or lost on the basis of a successful or effective cross-examination. It is certain that cases can be and have been lost by unnecessary, unplanned or undisciplined cross-examination. In fact, where examination-in-chief affords the best opportunity to win the case, cross-examination provides an unequalled opportunity to lose it.

As a general rule, there must be a very good reason for asking each and every question. The way to decide whether to cross-examine at all is to isolate the reasons for asking each question, and weigh the likely gain against the risk. If there is any substantial risk, the better course is, almost always, don't. Where there is any risk at all, be as brief as possible.

The reason to challenge the evidence or the witness will have been demonstrated and exposed by the case analysis. The necessity of cross-examination will be revealed by testing that reason against the aims of cross-examination. The risk must then be weighed against the aim sought and the probable gain to be achieved.

AIMS OF CROSS-EXAMINATION

5.2 The aim of cross-examination is not the discovery of new facts or of truth. Neither is it for testing a rope of evidence inch by inch and strand by strand. Harris, in *Hints on Advocacy*, said:

> It should be borne in mind that the objects of cross-examination are three, the first positive, and the other two negative. They are to obtain evidence favourable to the client, to weaken evidence that has been given against your client, and finally, if nothing of value which is favourable can be obtained, to weaken or destroy the value of the evidence by attacking the credibility of the witness.

Morris, in *The Technique of Litigation*, describes the objectives of cross-examination:

> Your objectives in cross-examination should be:
>
> (i) To elicit facts favourable to your case.
> (ii) To elicit facts which may be used to cross-examine other witnesses.
> (iii) To show that adverse evidence is unacceptable.
> (iv) To show that the witness himself is not worthy of credence.
> (v) To put your case to the witness so that it may be known and commented upon.

Munkman, in *Techniques of Advocacy*, refers to four specific aims:

> In greater detail, the aims of cross-examination are these:
>
> (i) To destroy the material parts of the evidence-in-chief;
> (ii) To weaken the evidence, where it cannot be destroyed;
> (iii) To elicit new evidence, helpful to the party cross-examining; and
> (iv) To undermine the witness (or shake his credit, as it is commonly expressed) by showing that he cannot be trusted to speak the truth, or that he is deposing (however honestly) to matters of which he has no real knowledge.

Wrottesley, in *Principles of Advocacy*, says this:

> The objects of cross-examination are three in number. The first is to elicit something in your favour; the second is to weaken the force of what the witness has said against you; and the third is to show that from his present demeanour or from his past life he is unworthy of belief, and thus weaken or destroy the force of his testimony.

Ultimately, you will find that all the versions come down to this: first, so far as the witness being cross-examined is concerned, there are two principal aims only — extract any benefit you can and destroy, undermine or explain everything else; second, if you are defending, it is the first opportunity you have of getting the case for the defence before the tribunal — use it.

No cross-examination

5.3 In practical terms, the above considerations mean that before cross-examining, the advocate needs to be satisfied that the questions below can be answered positively.

Cross-examination is inherently risky. You are dealing with an adverse witness. Such a witness is not only likely to be unhelpful, but also resistant to suggestion. Despite these obstacles, advocates almost invariably feel compelled, at the end of evidence-in-chief, to embrace the risk. Often, this is because one is reluctant to let the evidence of an opposing witness stand unchallenged. However, this view is often wrong. To ignore evidence minimises its impact. Cross-examination of a non-important witness calls attention to the evidence and is likely to lead to damaging repetition, and elevate the importance of the evidence in the eyes of the tribunal. Conversely, to respond to the witness with a dismissive 'I have no questions for this witness' can often have the effect of diminishing the importance of the evidence in the proceedings, by conveying the impression that it is either irrelevant or of no value.

Wells, in *Evidence and Advocacy*, p 167, draws attention to the danger inherent in the myth of the case-winning cross-examination:

> Many, even most lawyers, think that unless a cross-examination leads to dramatic denunciation of a witness, or to comprehensive destruction of his credibility, it is practically worthless. Inexperienced practitioners are sometimes allowed — even encouraged — to share that view, and biographers of famous counsel who cite, exclusively, spectacularly successful cross-examinations conducted by their subjects tend to reinforce it.

As noted at the outset, many more cases are lost by such an attack, sometimes even if made good, than are ever won by it. The decision to cross-examine thus involves no mere determination that the witness is vulnerable to a credit attack, or to proof of prior inconsistency, or other weakness — it requires weighing the gain against any possible negative result.

To determine whether or not to cross-examine, you must be thoroughly prepared, not only for the particular witness, but in relation to every other witness, fact or document that may bear on that witness' evidence.

Because of the risks, the question must always be: 'Is my cross-examination really necessary?'. Before that question is answered 'yes', there must be matters, gaps or omissions that must be covered; the witness must have given some evidence which needs to be dealt with (see **[5.4]**); or there must be some realisable gain to be had.

Even then, before proceeding to cross-examine, a further level of analysis is required along the following lines:

(1) Are there other ways of proving the facts?

(2) Can the information sought be obtained only by cross-examination of this witness?

(3) Will the evidence to be elicited be credible or sufficiently probative to warrant the exercise?

(4) How certain am I that I can compel the witness to agree?

Younger, in *The Advocate's Deskbook*, p 290, advised an even more rigorous approach:

> It seems to be part of the young lawyer's personality that he is afraid to say, 'No questions on cross-examination'. He thinks that his client will feel that he is not earning his fee, or that the judge will look down at him and say, 'You are afraid. You can't be a trial lawyer if you are afraid. You've got to do something'. Not at all. The mark of the master is to do as little as possible. The courage to stand up and say 'No questions', when there is nothing to be gained by cross-examination is the mark of supreme mastery.

To sum up, the first rule of cross-examination is: do not without very good reason. I repeat, many more cases are lost by cross-examination, particularly aggressive cross-examination, than are won by it. If you must cross-examine, be brief and, most importantly of all, be careful. In cross-examination as in much of trial advocacy, the defining principle is 'less is more'.

Constructive cross-examination

5.4 The second rule is to build before destroying:

(1) Did the witness give evidence favourable to your case which needs to be repeated, reinforced or elaborated?

(2) Is there some evidence favourable to your case which the witness can give additional to the evidence-in-chief?

(3) Is there some document, material or evidence this witness can give which will reflect adversely on another witness for the opposing party?

Again, the application of this rule must be attended by caution — do not cross-examine in the hope or expectation of positive material. Do so only if you are certain of its existence and equally sure of your ability to compel the witness to reveal it. Again, only ask for what you are sure of getting, and once you possess it do not try to improve on it.

Destructive cross-examination

5.5 Before embarking upon what is intended to be a destructive cross-examination, you should consider the following questions:

(1) Can the evidence be explained, qualified, repaired or minimised without cross-examination?

(2) Can circumstances be demonstrated that undermine the evidence without cross-examination?

(3) Can the evidence be doubted or discredited without cross-examination?

  (a) Are there inconsistencies between witnesses in the opponent's case that can be exploited?

  (b) Are there internal inconsistencies within a single witness' evidence?

  (c) Are there other objective facts or circumstances which cast doubt on the evidence?

  (d) Does the evidence have weight?

    (i) Is the witness credible?

    (ii) Is the witness' veracity or demeanour such that the evidence will carry conviction?

  (e) Is the evidence reliable?

    (i) Was there opportunity to see or hear, etc?

    (ii) Recollection, reconstruction or recent invention.

  (f) Are there other reasons to doubt the witness?

    (i) prior inconsistent statements;

    (ii) prior convictions or discreditable conduct; and/or

    (iii) interest, partiality or bias.

CASE ANALYSIS AND THEORY

5.6 When dealing with preparation and case analysis, it was suggested that case theory not only provides a 'road map' for the conduct of the entire proceedings; it also identifies the subject matter for cross-examination.

The case analysis provides the content for the questions it has been decided to ask. It is counter-productive to cross-examine to destroy the credit of a witness if, later, one will do no more than suggest the evidence was mistaken, or where, on balance, the evidence is more helpful than not. The cross-examination should be thoughtful and structured. When you are on your feet and tempted to ask a question, the safest course is to adhere to the line of questioning which is prepared and flows from the case analysis. This is the technique which Lubet (*Modern Trial Advocacy*, pp 57–9) calls the 'risk averse' method of preparation, although it is really no more than a label for the application of the case theory to cross-examination:

> Risk averse preparation for cross-examination begins with consideration of your anticipated final argument. What do you want to be able to say about this particular witness when you address the jury at the end of the case? How much of that information do you expect to be included in the direct examination? The balance is what you will need to cover on cross.
>
> Next, write out the portion of a final argument that you would devote to discussing the facts presented by this particular witness. This will at most serve as a draft for your actual closing, and you should limit this text to the facts contained in the witness' testimony. You need not include the characterisations, inferences, arguments, comments and thematic references that will also be part of your real final argument. Depending upon the importance of the witness, the length of this argument segment can range from a short paragraph to a full page or more.
>
> An effective paragraph will include the facts that underlie your theory of the case. It should now be a simple matter to convert the text into a cross-examination plan. You merely need to take each sentence and rephrase it into a second-person question …
>
> This technique is useful for developing the content of your cross-examination. The organisation of the examination and the structure of your individual questions will depend upon additional analysis.

AFFIRMATIVE CROSS-EXAMINATION

5.7 It has always been said in the texts on advocacy (as the selections above indicate) that one of the main purposes of cross-examination is to elicit material favourable to your case, yet advocates continue to perceive cross-examination as exclusively attacking or confrontational. In truth, affirmative technique, while less spectacular than attack, is more readily achievable and much more frequently successful.

It is necessary to closely examine whether a witness can be turned to advantage without the need to resort to destructive techniques. There are a number of alternatives which can be explored to implement this often effective method, whether or not the witness is later to be attacked.

Repetition

5.8 Having counselled against repetition which reinforces rather than diminishes the evidence, an exception is where the evidence is to be deliberately reinforced by cross-examination because it significantly advances your case. Just as the examiner-in-chief might strengthen the force of evidence by repetition, so can the cross-examiner. It is therefore legitimate and permissible to ask a witness to confirm the critical passages of evidence. However, this is not done by rising and asking, 'Would you please repeat what you said about X'. To do so invites disaster. The advocate must still control the witness and here especially ask only short, leading questions.

Such a cross-examination might run (counsel being careful to use the precise words of the witness-in-chief):

Q — You said, in your evidence-in-chief, 'X'.
A — Yes.
Q — You also said 'Y'.
A — Yes.

Q — That was true and correct?
A — Yes.

In a trial heard many years ago before Justice Roma Mitchell (as she then was), a witness on the other side gave a surprisingly helpful and unexpected answer in evidence-in-chief. The cross-examination was as follows:

Counsel: Mr Jones, did I understand you to say 'X'?
Her Honour: Mr Waye, you know perfectly well that is what the witness said.
Counsel: Yes, your Honour, I just wanted to hear it again.

There was no further cross-examination, but no one in the case, for a moment after, ever forgot what 'X' was.

Omitted topic

5.9 Often a witness does not give evidence about a certain subject matter or event. This may be either for deliberate tactical reasons or because the witness was in trouble for one of a number of the reasons discussed above.

The advocate must determine whether to cross-examine on the omitted material. Where the omission was anticipated, the case theory will have already made that determination. Where the omission is unexpected, a choice must be made, often quickly and in pressing circumstances. Generally, prudence would dictate that it be left alone on the sound basis that it is best to 'let sleeping dogs lie'. But sometimes, other information available to the advocate, whether from evidence given, or expected from documents and/or instructions, may dictate a different course.

The material must be sufficiently important to the case theory, and the answer likely to be favourable.

For example, the charge is larceny of a purse belonging to the defendant's secretary. She gave evidence that the defendant said to her shortly afterwards, 'Good luck, I hope that you find the $300'. The Crown case was that this indicated a guilty mind, because the defendant's statement relating to the stolen purse could only have come from the actual thief, since he knew the amount of money in the purse. It showed 'esoteric knowledge' of the precise amount taken. When interviewed by the police shortly afterwards, the secretary in fact told them (and a contemporaneous note was made) that the defendant said, 'Good luck and I hope you find the money'. She was asked:

Q — You spoke to the police within half an hour of your purse being stolen?
A — I thought it was less than that.
Q — They made a note in their notebook which you signed.
A — Correct.
Q — In fact, you said then that the defendant said to you, 'Good luck, I hope you find the money'.
(Adapted from the case example of *R v Canning*, with the kind permission of the Australian Advocacy Institute.)

The answer does not matter because either it will be admitted, in which case you have achieved your purpose, or it will be denied, in which case you can

prove the statement by calling the police officer. This example of the omission of a very important piece of evidence illustrates a method of putting an alternative explanation.

Misleading context

5.10 The cross-examiner is entitled to explain ambiguities and to put evidence in its proper and complete context in much the same way as may be done in re-examination. Where evidence has been led of a fact, circumstance or event which is incomplete or which may mislead the tribunal of fact, effective cross-examination may involve completing the picture favourably to the cross-examiner's case. This is better done by short, courteous propositions without challenging the witness, than by confrontation.

A brief example illustrates the concept. In a domestic violence order case of alleged harassment, the witness has alleged that your client telephoned her on four occasions after the relationship broke down, despite her repeated requests that he not do so, and despite a solicitor's letter directing him to stop on 6 June:

Q — He in fact called you on four occasions only after 6 June?
A — Yes.
Q — The first of these was in relation to obtaining some toys belonging to his six-year-old son, which had been left at the house?
A — Yes.
Q — You arranged their return?
A — Yes.
Q — Nothing else was spoken of?
A — No.
Q — The second time was to return your telephone call on [date].
A — Yes.
Q — That related to your having lost your purse?
A — Yes.
Q — He called to tell you it was safe?
A — Yes.
Q — The third was to tell you after his aunt had died, the date and time of the funeral?
A — Yes.
Q — She had been a close friend of yours?
A — Yes.
Q — You thanked him for that call?
A — Yes.
[and so on]

Alternative explanations

5.11 There are occasions when a witness called by your opponent will give evidence as expected which is adverse, but who can, by affirmative questioning, be encouraged to give an entirely new emphasis or meaning. This will require a carefully structured series of short leading questions which gradually bring the witness to the desired point.

6 RE-EXAMINATION, REBUTTAL AND REPLY

You may seek it with thimbles — and seek it with care —
You may hunt it with forks and hope;
You may threaten its life with a railway-share;
You may charm with smiles and soap —
But oh, beamish nephew, beware of the day,
If your Snark be a Boojum! For then
You will softly and suddenly vanish away
And never be met with again!

(Lewis Carroll, *The Hunting of the Snark*)

RE-EXAMINATION DEFINED

6.1 At the conclusion of the cross-examination of a witness, the party who has called him or her is permitted to re-examine to explain any part of the cross-examination which has proved unfavourable. According to Buzzard and Howard, *Phipson on Evidence* [1615], this 'explanation' extends to explaining motives for a prior inconsistent statement and to re-examination on inadmissible matter which was introduced in cross-examination, but where there are conflicting authorities cited.

RIGHT TO RE-EXAMINE AND ITS LIMITS

6.2 Re-examination is one of the most useful tools of the trial advocate. It is also one of the least understood and least well conducted. Properly done it can, in a rare case, undo a whole cross-examination, but often can reconfirm evidence made questionable.

The right to re-examine exists only when there has been cross-examination, and must be confined to explanation of matters which properly arise from that cross-examination, unless the judge gives leave to the contrary: see *The Queen's Case* (1820) 2 Brod & B 284; and Uniform Evidence Acts s 39.

It should be noted that, at common law, the rule does not forbid re-examination on parts of a statement necessary to explain other parts elicited in cross-examination, so as to put them in proper context, or to elicit the whole statement on the relevant subject, as was said in *The Queen's Case* at 298 per Abbott CJ:

> ... not only so much as may explain or qualify the matter introduced by the previous examination, but, even matter not properly connected with the part introduced upon the previous examination, provided only, that it relate to the subject matter of the suit: because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion.

The rule in *The Queen's Case* can make a whole document admissible, although it was not admissible in chief. In this way, re-examination can become the vehicle for the introduction of new and important evidence. The advantage is attended by a concomitant disadvantage — that re-examination is subject to the same rules as examination-in-chief, including the prohibition on leading questions. The task is made doubly hard because it comes at a time when the witness has been unsettled by cross-examination.

OBJECT OF RE-EXAMINATION

6.3 The object of re-examination goes beyond explanation. The aim of the re-examiner is to explain, to complete any matter left incomplete, and to countervail the damaging effect of the cross-examination. In the picturesque passage from Sir Frank Lockwood, which appears in almost every book on advocacy:

> Re-examination — the putting Humpty-Dumpty together again — was by no means an unimportant portion of an advocate's duty. Once, in the Court of Chancery, a

witness was asked in cross-examination by an eminent Chancery leader, whether it was true that he had been convicted of perjury. The witness owned the soft impeachment, and the cross-examining counsel very properly sat down. Then it became the duty of an equally eminent Chancery QC to re-examine: 'Yes,' said he, 'it is true you have been convicted of perjury. But tell me: have you not on many other occasions been accused of perjury and been acquitted?' He recommended that as an example of the way in which it ought not to be done.

Not only that, but, with all due respect to the great nineteenth century law officer, 're-assembling Humpty-Dumpty' is not a realistic aim for the re-examiner. The great reason for re-examination is to prevent the garbling of the evidence that can always be ingeniously done by a skilful cross-examination. The scope for real restoration is very narrow, not least because re-examining counsel cannot lead. This means you must be able to frame non-leading questions which take you to the point quickly, simply and effectively; at the same time, you must frame them in a way that does not further confuse the witness. For this reason many questions in re-examination are long-winded, or introduced by a lengthy preamble. To attempt, in addition, to re-establish a witness' credit, is unrealistic.

W A Wells, former Justice of the South Australian Supreme Court and writer of one of the leading judgments on re-examination, notes that 'some of the most effective — even dramatic — work in advocacy is done in re-examination'. He said in *Evidence and Advocacy*, p 196:

> Re-examination in practice is exciting; it calls for rapid and precise thought, and a careful choice of language. A well-entrenched rule of practice forbids the use of leading questions in re-examination; but re-examination will prove abortive unless the witness's mind is clearly directed, not only to a specific topic, but also to the facet of the topic under scrutiny upon which, in the judgment of re-examining counsel further testimony should, in justice, be given by the witness. In short, the questions must show the witness what the purpose of the re-examination is, without improperly leading him to the answer sought.
>
> Some junior counsel, in their anxiety to avoid an injustice, or indignant at the possible misuse of the witness's answer, stumble into asking a leading question, to which the opposing counsel immediately and vociferously objects. It is imperative that re-examination proceed smoothly; the last thing you want to happen is for the witness to be rattled by a dispute between counsel.

The leading judgment referred to above was in *R v Szach* (1980) 23 SASR 504 at 511–19. It clearly sets out the law, which remains unaffected by the Uniform Evidence Acts, and has been applied throughout Australia. While the following passage is long, it is very important and is an area much misunderstood:

> Before turning to the question objected to, it may be useful to discuss certain misconceptions of the purpose and limits of re-examination that appear, in some quarters, to be virtually ineradicable.
>
> There is no doubt that re-examination must, in general, arise out of cross-examination. If, in the judgment of the trial judge, this condition precedent is not satisfied, the question sought to be asked can be asked only by leave. Re-examination is, within its proper limits, a right, although the limits of that right and the occasion of its exercise is subject to the close scrutiny of the trial judge, who carries a heavy responsibility. What Dixon CJ said of the trial judge's duty in *The Nominal Defendant v Clements* (1960) 104 CLR 476 at 479 with respect to re-examination designed to rebut the suggestion of recent invention or reconstruction, applies generally, in my opinion, to re-examination of all kinds.
>
> But to say that re-examination must arise out of cross-examination is not the same as saying that all that the trial judge can look at in order to determine the limits of re-examination, is a passage in cross-examination, considered alone and artificially disengaged from the context of the witness's evidence as a whole. The trial judge is entitled and, indeed, bound to look, not only at the passage in cross-examination that lies at the heart of the application to re-examine, but also at the evidence of the witness as a whole, for the purpose of discerning what are, or may be, the implications of that passage. (Compare Dixon CJ (*supra*) at 479.)
>
> The matter does not, however, rest there. An answer given in cross-examination may, read in isolation, be clear and unequivocal, and yet it may, having regard to the use that will or may be made of it by cross-examining counsel, justify extensive re-examination, in order to explain, or to place in true and fair perspective, the answer given in cross-examination. The leading case of *Prince v Samo* (1838) 7 A & E 627; 112 ER 606, for example, provides authority for the proposition that where a witness acknowledges in cross-examination that he made a statement with respect to a specified subject matter, counsel calling him may elicit from him the whole of the conversation relative to that subject matter.
>
> A particularly illuminating ruling was made by the great Parke B in the trial of St George for feloniously attempting to discharge loaded arms: *R v St George* (1840) 9 C & P 483 at 488; 173 ER 921 at 924. The victim of the alleged felony, one B E A Durant, had given evidence of the assault upon him, whereupon in cross-examination, he gave the following answers:
>
> 'I had been on ill terms with my father, and I did say that my father was a hoary old villain; I told him my mother said she died a murdered woman, and he was starving all her children, and that he ought to be tied to a cart's tail and flogged through the village.'
>
> In re-examination, counsel for the prosecution proposed to ask the witness how Mr Durant, senior, had acted towards the witness before he made use of expressions that he conceded he had made. Serjeant Ludlow, for the prisoner, objected, saying, 'I apprehend that the conduct of Mr Durant, senior, is not evidence in the case'. The report proceeds:
>
> Parke B: 'You have made it so by your cross-examination. To discredit the witness you ask him, whether he did not use violent language towards his father, and he admits that he did; and his counsel, to explain that evidence, may ask him how his father acted towards him, with a view of shewing that the language was not without provocation.'
>
> The evidence was given, and the witness stated that his father had locked him up for five or six days, in a room at the top of Tonge Castle, saying that he was deranged, and after that put him to live at a small farm where he was boarded, lodged, and clothed at 10s a week.
>
> The foregoing principle is, however, found in operation even earlier than *The St George* case. In *The Queen's Case* (1820) 2 Brod & Bing 284 at 295, 297: 129 ER 976 at 980, 981, Abbott CJ gave the answer of several Judges to the following question (asked by the House of Lords):
>
> 'First, if upon the trial of an action brought by A (Plaintiff) against B (Defendant), a witness examined on the part of the Plaintiff, upon cross-examination by the Defendant's counsel, had stated, in answer to a question addressed to him by such counsel, that, at a time specified in his answer, he had told a person named CD that

he was one of the witnesses against the Defendant, and, being re-examined by the Plaintiff's counsel, had stated what induced him to mention to CD what he had so told him, and the counsel of the Plaintiff should propose further to re-examine him as to the conversation between him and CD which passed at the time specified in his former answer, as far only as such conversation related to his being one of the witnesses; would such counsel, according to the rules and practice observed in the courts below, with respect to cross-examination and re-examination, be entitled so further to re-examine such witness; and, if so, would he be entitled so further to re-examine, as well with respect to such conversation relating to his being one of the witnesses against B as passed between him and CD at the time specified after he had told him that he was to be one of the witnesses, as with respect to such conversation as passed before he had so told him?'

The material portion of his answer reads:

'I think the 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 to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.'

I would emphasise the part of that answer that authorises re-examination for the purpose of drawing forth an explanation of the motive for using the expressions deposed to in cross-examination. The decision of our own Full Court in *R v Pullman* [1942] SASR 262 exemplifies another application of the same broad principle. In that case, the appellant had been charged with using an instrument with intent to procure a miscarriage. A witness, to whose house the recently pregnant girl had been handed over for what may be called post-operational care, deposed that the accused had given her money, but she was not sure whether the amount was £4 or £5. Defence counsel cross-examined the witness for the purpose of stressing the uncertainty evinced by her about the amount of money. In re-examination, the witness was asked, 'Why are you not sure that it was £4 or £5 that Mrs Pullman gave you?' and the answer was received, 'Because sometimes she gave me £4, and sometimes she gave me £5'. On appeal, the Court of Criminal Appeal said of this evidence [at 265–6]:

'If this is taken as a complaint of error in law, it is difficult to see any objection to the action of the Judge in allowing the question to be put. As the evidence stood, it was apparently intended to ask the jury whether they could believe the witness, in view of this uncertainty in her testimony. If she was able to give any explanation, the Prosecutor was *prima facie* entitled to elicit it, and it is for the appellant to shew that the answer — as given — was incompatible with a trial in due form of law, or alternatively that it was such as to prejudice a fair trial.'

Later, the court added [at 266]:

'We think that evidence of this kind is admissible when, without it, the transaction — which is the proper subject of the enquiry — would be made to appear unreal or improbable. The jury are entitled to see the transaction as it was, and not as a mere skeleton. In the present case it was impossible to exclude the evidence of the accomplices, which — if it was believed — must almost necessarily have suggested to the jury that 'this was not the only trip and not the only girl'. We adhere to the practice that evidence of this kind ought not to be tendered except — as it were — under compulsion, but it seems to us that, when the defence had shewn its hand, by stressing the uncertainty in Mrs Fitzgerald's statement, the Prosecutor was entitled to call upon her for her explanation, and that the answer was admissible,

notwithstanding its tendency to disclose other offences (*R v Chambers* (1848) 3 Cox CC 92; *R v Briggs* (1839) 2 M & Rob 199).'

The Full Court again considered the propriety of questions asked in re-examination in *R v Nation* [1954] SASR 189. Nation was charged with attempting to procure an act of gross indecency. The main evidence for the prosecution was given by a police officer who deposed that, using an assumed name, he became acquainted with Nation, who subsequently invited him to his business premises, where, after some conversation of a homosexual character, Nation made the attempt alleged. The police officer was strongly attacked in cross-examination. The Full Court summarised the effect of it as follows [at 193] (Aldridge was the name of the police officer):

'By his cross-examination of Aldridge, Mr Pickering elicited that he had in London had cases dealing with homosexuality, but those cases were in the normal course of duties. There is no special branch of the Metropolitan Police Force assigned to such offences. Aldridge admitted that he had deliberately lied to the appellant and had done so time and again, and that he had knowingly and consciously told him untruths. Counsel administered a number of questions suggesting that Aldridge had "set himself out from the outset to trap the appellant", had set himself out "to lead him on to committing some offence"; that "he was there for the purpose of trapping him, with a view to trying to make an arrest"; that he was "out from the very beginning to see if he could induce the appellant to commit an offence"; that "his purpose in remaining in the appellant's shop was to try to get the appellant to commit some offence so that he could arrest him"; that he was "deceiving him for the purpose of leading him on into commission of an offence"; that when with the appellant in his shop "he wanted to arrest him"; that he had "led the appellant on in the hope that he would commit some crime of a homosexual character"; and that he had invited the appellant to take his pants off.

To all these suggestions made by way of cross-examination, Aldridge gave a denial, but as he admitted having lied to the appellant, and as his evidence about the appellant substantially related principally to homosexual conversation and homosexual conduct it was clearly open to the appellant's counsel to suggest to the jury that Aldridge's denials were merely further instances of his willingness and ability to lie, and that he had deliberately and consciously from the beginning set himself out to trap the appellant into the commission of some homosexual offence in order that he might make an arrest.

A perusal of the transcript discloses that Aldridge's answers in cross-examination were, in themselves, pellucidly clear and unequivocal.

The Full Court judgment continues [at 194–5]:

'At the close of the cross-examination, the Crown Prosecutor put certain questions to the witness Aldridge in re-examination, with a view to rebutting the suggestions referred to. The passage in the transcript of the evidence relating to the re-examination by the Crown Prosecutor is as follows:

"From my information and instructions I believed that there was a real person named James Miller. I believed that he was associated with a negro. I believed he had been in Sydney towards the end of February of this year. I believed that he had been aboard the American ship *Sonoma*.

"Q. What was the purpose of your contacting, meeting and talking with accused?

"A. (Mr Pickering objects.)

"Q. By his Honour: Was there anything in particular that you were investigating and looking for? (Mr Pickering objects to this line of questioning.)

"A. Yes.

"Q. Can you put it in a word?

The transcript shows the following questions to and answers from the witness, and a colloquy between counsel and me:

'Witness H W Short, re-examination by Mr Martin.

'Q. You agreed with Mr Borick yesterday after refreshing your memory that in the Magistrates Court you looked at the accused and said: "The person in the box there could be the person but the hair is different." What did you mean when you said in the Magistrates Court he could be the person?

'Objection: Objection by Mr Borick.

'Mr Borick: I object. There is nothing equivocal about what he said there or here.

'His Honour: That is only one infinitesimal portion of an area where re-examination is permissible. If you look at the general principles in the books you can see there is a much wider principle than that, and, in my view, that statement which you elicited from him is evidence here combined with the references to the slides that make this plainly permissible re-examination. I so rule.

'Re-examination:

'Q. What did you mean by the expression "could be the person"?

'A. I meant that was the person.

'Q. Why did you use the expression "could be"?

'A. At that time I was being cautious.

'No further questions.

'Witness released.'

The reasoning that lay behind my brief observation to counsel was this. At the trial, the jury were first presented with the unqualified identification of the prisoner by Mr Short. They next heard evidence of Mr Short's selection of slide 7 on 7 August 1979; the twelve slides were, of course, to be viewed by them and were in fact viewed in due course. They then heard Mr Short's answers about what had happened in the lower court.

Having regard to the whole of Mr Short's testimony, it seemed to me that his answers in cross-examination about the lower court identification formed (to use the language of Halsbury, 4th ed, para 280, p 195) 'part of his evidence given during cross-examination which [was] capable of being construed unfavourably to his own side', and that it was, accordingly, open to the Crown Prosecutor to re-examine him 'for the purpose of explaining' that part. Mr Borick objected to the re-examination upon the ground that there was nothing equivocal about what the witness said at the trial or in the committal proceedings; but he invoked no express principle and referred to no authority. It seemed to me at the trial, and still seems to me, however, that the aim of the re-examination fell fairly within the foregoing principles. I therefore allowed the re-examination.

SCOPE OF RE-EXAMINATION

6.4 The real scope of re-examination is this: where only part of the available material as to a relevant event has emerged from the cross-examination, you may re-examine to put the whole into perspective; where damaging evidence has been elicited or insinuated in cross-examination and there are facts which explain or amplify, re-examination is useful. It is absolutely necessary, in many cases, to give a witness an opportunity, after cross-examination, of explaining any statements inadvertently made during cross-examination. In order to determine whether to re-examine, you need first of all to know the case — you must be able to recognise the damage or potential damage caused to your case by cross-examination.

The other precondition is that you must have the material to repair the damage. If you have that material, you may re-examine; if you do not, you must not. A good re-examination will not only repair and restore, but will secure a repetition of the most important points of evidence and so imprint it more firmly.

Some counsel are very conservative about re-examination and will only attempt it when certain the witness has the right answers. There are others who are more adventurous, and will re-examine on the basis that they believe (from pre-trial preparation and analysis) that the witness will produce the right explanation.

HOW TO RE-EXAMINE

6.5 There are three steps involved in performing a good re-examination. The first involves giving a clear, direct signpost to the witness about to be re-examined, in a non-contentious way. To do this, you may announce your intention and alert the witness to your purpose by using directional or transitional (and even leading questions): see **[4.37]**. You are entitled to direct the witness to a particular topic.

For example, the witness was the mother of a daughter burned badly by a stove explosion in their home the day before. Her case of damages was based on the stove being in a dangerous condition, to the knowledge of the owner. The defence case was that the child was playing with matches, a case of accident. During cross-examination, counsel put to the mother a statement she had supposedly given to a reporter from a Sunday newspaper the following day, which was to the effect that she believed the child was playing with matches. She was re-examined along the following lines:

> Q — You were asked in cross-examination about speaking to the reporter from the *Sunday Mail*.
> A — Yes, I remember that.
> Q — In answer to the questions you were asked by my learned friend yesterday, you said …

Alternatively:

> Q — In your evidence you said …

may be used to do this. Be accurate, in order to avoid objection.

In the example above the following took place:

> Q — It was suggested during the questions that you told the reporter that your daughter was playing with matches?
> A — Look … honestly, I don't remember what I said to the reporter … I could have said nearly anything.

Finally, you bring the witness to the critical point. You must carefully frame non-leading questions which will obtain the explanation, or omitted feature:

> Q — What time was it when you spoke to the reporter?
> A — About 10 am.
> Q — Where had you been beforehand?
> A — At the hospital. I hadn't slept for about twenty hours.
> Q — Where did you speak with him?

A — Outside the operating theatre.
Q — What operating theatre?
A — My daughter was having an operation for the burns, she had been in there for over six hours.
Q — How were you feeling when you spoke to the reporter?
A — I hardly remember the event, I had just been told that my daughter would probably die.

REBUTTAL AND REPLY

Civil cases

6.6 After the conclusion of the case for the plaintiff, it having revealed a *prima facie* case, and at the conclusion of any evidence called for the defendant, there arises the possibility of the plaintiff introducing evidence in reply, or rebuttal. This may be to call new evidence rebutting the other party's case, or the production of supplementary or confirmatory evidence in reply. One must be extremely careful, in calling a case in reply, not to infringe the rule against splitting.

This rule may be expressed in a simple way: a plaintiff ordinarily is required to lead in chief the whole of the evidence on which he or she intends to rely. A plaintiff is not entitled to split the case by holding back some part of the evidence in order to obtain a tactical advantage. A complete analysis of the authorities which determine the exercise of the discretion to permit re-opening or evidence in rebuttal in civil cases is to be found in the judgment of Muirhead J in *Murray v Figge* (1974) 4 ALR 612. Essentially, three matters are required in civil cases for a judge to permit re-opening in order to make good a defect in the case. They are, in order of importance:

(1) that the doctrines of fairness and the interests of justice require the evidence to be admitted;
(2) that the evidence is important to the result; and
(3) that the evidence could not by reasonable diligence have been discovered earlier.

Where counsel makes an application on the ground of inadvertence, his Honour was of the view that a fourth ground, namely, that the other party is not prejudiced by reason of delayed introduction of the evidence, must also be established.

Criminal cases

6.7 The position is much clearer in criminal trials, and much more rigid. In *Killick v R* (1981) 147 CLR 565, reaffirming *Shaw v R* (1952) 85 CLR 365, the High Court held that 'the prosecution must present its case completely before the prisoner's answer is made … the prosecution therefore may not split its case on any issue'. Indeed, before the prosecution will be allowed to supplement its evidence, the matter that arises must be 'one which no human ingenuity can foresee' (*R v Frost* (1839) 4 St Tr (NS) 86 at 386), and is exercised only in exceptional circumstances: *R v Chin* (1985) 157 CLR 671.

It is to be noted that discretion is usually, although not invariably, exercised against the Crown and in favour of the accused. It will certainly not be exercised in favour of the Crown to permit re-opening of the Crown case to prove some matter which has been omitted during the case in chief. Wells J in *R v Killick* (1980) 24 SASR 137 at 152–3 (in the Full Court in South Australia) set out seven propositions relating to rebuttal evidence which may be summarised as follows:

(1) As a general principle, the prosecution must present the whole of its case in chief.
(2) There are particular exceptions; for example, where the onus of proof is on the defence.
(3) In exceptional circumstances, there is a discretion to allow rebuttal evidence.
(4) Any matter raised prior to the trial or foreshadowed in the Crown case should be refuted by the Crown in chief; for example, character, alibi, and so on.
(5) Rebuttal evidence will be permitted for the purpose of permitting a witness to deal directly with a breach of the rule in *Browne v Dunn* (1894) 6 R (HL) 67.
(6) The weakening of a defence case arising out of cross-examination of the accused cannot be the occasion of the Crown calling further evidence.
(7) Evidence may be permitted in rebuttal where evidence which was initially of doubtful or minimal relevance becomes evidence of clear probative force as a result of the defence which is presented.

Note that it is impermissible to call rebuttal evidence to refute collateral matters raised in cross-examination: see *Ready v Brown* (1967) 118 CLR 165.

RECENT INVENTION

6.8 Where there has been a charge of recent invention made by the examining counsel, evidence in rebuttal of that charge is admissible in re-examination. The question whether such an allegation has been made is one for the trial judge and not for the jury: see *Transport and General Insurance Co Ltd v Edmondson* (1961) 106 CLR 23. At common law, a previous consistent statement by a witness is admissible to rehabilitate his or her credit by rebutting the suggestion that his or her testimony is a recent fabrication. In the words of Dixon CJ in *Nominal Defendant v Clements* (1960) 104 CLR 476 at 479:

> If the credit of a witness is impugned as to some material fact to which he deposes on the ground that his account is a late invention or has been lately devised or reconstructed, even though not with conscious dishonesty, that makes admissible a statement to the same effect as the account he gave as a witness if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or reconstruction.

In *Fox v General Medical Council* [1960] 3 All ER 225 at 230, Lord Radcliffe held that the doctrine of recent fabrication:

> … cannot be formulated with any great precision, since its application will depend on the nature of the challenge offered by the course of cross-examination and the relative cogency of the evidence tendered to repel it. Its application must be, within