PROVING THE PLAINTIFF'S OR PROSECUTION'S CASE PERSUASIVELY

Cairns Judiciary 2016/17 CPD Series, 15 March 2017 – Henry J

Introduction

The plaintiff's lawyer and the prosecutor share the same role at trial – proving their case persuasively. The legal issues vary. The standard of proof varies. But when it comes to proving a case persuasively, the core principles to be followed and skills to be deployed as between the civil and criminal jurisdictions are not materially different. Our focus this evening is upon those principles and skills.

We will discuss them in two parts. In part A we will canvass three overlapping rules to guide your mindset and approach to the persuasive proof of your case. They are: (1) be sure of your case's foundations; (2) exercise control of your case; and (3) remember your audience. In discussing those rules we will traverse various advice about the preparation and presentation of your case. In part B I will discuss some remaining advice about the presentation of evidence in your case in court.

Our interest will be on improving the persuasiveness with which the advocate appearing for the plaintiff or prosecution, whether barrister or solicitor advocate, proves the case. The stage of the trial with which we are concerned is the proof stage of the case for the plaintiff or prosecution. That is, the phase of the trial after the opening and up to the closing of the case for the plaintiff or the prosecution when the case is being proved by evidence. This focus is not to suggest opportunities to improve the persuasiveness of the plaintiff's or prosecution's case do not sometimes arise in cross-examination during the defence case. They do, and you should not overlook such opportunities, but they are not our focus tonight.

Laypersons might find the proof stage a curious target for a session dealing with persuasion. They might think the speech-making part of the case - the opening and more particularly the closing - is when the lawyer seeking to prove the case engages in the art of persuasion. This overlooks the reality that the entire trial, not just the speeches, provides a platform for persuading the decision-maker of the merits of the case for the plaintiff or prosecution.

Part A: The three rules

The presentation of the plaintiff's or prosecution's case has many elements in common with the staging of a play. It is a major production calculated at pleasing its audience. Who is its audience? It is not the public gallery; it is the judge or jury. Like a play, the presentation of the plaintiff's or prosecution's case requires preparation. Like a play, it requires you to remember you and your cast are performing for an audience and to prepare your entire cast for that audience. Like a play it has a plot involving some key elements upon which its potential success is founded.

This heralds the first of the three rules I will emphasise tonight: be sure of your case's foundations.

Be sure of your case's foundations

One of the greatest threats to the persuasive proof of the plaintiff's or prosecution's case is that it has been built on weak legal or factual foundations or if those foundations do not align.

Legal and factual symmetry

Knowing what evidence you need to gather for trial turns upon what case you intend to try to prove at trial. However, the case you intend to try to prove at trial turns upon what evidence you will be in a position to adduce at trial. This cyclical connection between the legal and the factual foundations of your case requires that symmetry be maintained between the two of them in order for your case to succeed. There is little point in having highly persuasive evidence if the case it proves is not the case which has been pleaded or charged.

If the facts are not apt to support the pleaded or charged case, then you need to gather more facts or face reality and alter the nature of your pleaded or charged case.

Build on the facts beyond doubt

In settling the pleaded claim or the charge – the legal foundation of your case – you should obviously have regard to the available evidence, such as it is. In so doing, try to identify from that evidence the facts which appear to be beyond doubt. Where there are facts beyond doubt which are favourable to your cause, then ideally it is those facts around which you should build your case. They are the facts which will provide a solid foundation for your case.

Amend the claim or charge if needs be

The dilemma of course is that when pleadings or charges are first placed before a court, the evidence-gathering process is seldom complete. After that point in time, as more witness statements or addendum statements are gathered and more potential exhibits are located, some of the earlier identified facts beyond doubt may no longer look so unassailable and other facts beyond doubt may emerge. In short, it may become apparent that your claim and or the pleadings, or the charges and or their particulars need to be substituted or amended. If so, it is better that you take prompt steps to do so. The longer you delay and the closer the trial gets the more your prospects of being given leave to do so without sanction or at all will diminish.

Be conscious of foundation during presentation

The importance of being conscious of your case's foundations continues into the presentation of your case. Once the trial is underway it is very difficult to amend your pleaded case or charge. Even if you succeed in doing so the fact the change was needed may undermine the persuasive momentum of your case in the eyes of your audience.

At trial you must prove the facts which prove the elements of your pleaded or charged case. This is fundamental. Remember though that the object is not just to prove those facts. It is to do so persuasively. There was something about those facts which caused you to perceive them as the facts beyond doubt when you prepared for trial. Make sure in presenting the evidence at trial that you adduce the evidentiary detail which gave them that perceived quality.

It is inherent in much of what I have already said that as the advocate for the plaintiff or prosecution you enjoy an advantage which the defence advocate does not have. You fix the parameters for the contest in court. You control the selection of the foundations upon which the case will be fought. That power of control confers an enormous advantage, if exercised.

Exercise control of your case

This brings us to the second rule guiding the persuasive proof of your case: exercise control of your case.

Value adding

The advocate's role is not just to prove the case and hence survive a no-case submission. It is to prove the case persuasively and hence give that case its best prospect of success. The advocate cannot fulfil that role just by turning up to trial and "rolling the arm over", mindlessly presenting whatever evidence has come to hand. Such an approach assumes, wrongly, that the advocate has no contribution to make in improving the state of the case to be presented.

If you are the advocate in the case the premise of your engagement is that you will value add. Your obligation is to apply your expertise and learning so that you will have done your professional best to improve your case's prospects of success. That obligation derives not merely from your role as a professional. It derives from your oath or affirmation on the occasion of your admission as a legal practitioner of our court. That promise is that you will conduct yourself as a lawyer of this court to the "best" of your knowledge and ability.

You are the lawyer who will be presenting the case in court. It is your professional reputation at stake. It is you who will and should feel professional opprobrium if you do not see to it that your case is given its best prospect of succeeding. Ultimately, whether you are briefed by another lawyer or acting as a solicitor advocate, the fact that you will advocate the case dictates you must exercise control over the presentation of your case. To do so it is unavoidable that you must also exercise control, even if it is shared control, of your case's preparation.

Control preparation

We will touch upon your control of the presentation of your case shortly.

The extent to which the advocate can contribute to the preparation phase of the case is obviously influenced by variables, such as how long before the listed trial the advocate becomes involved and whether or not the advocate has been briefed by a solicitor who already has carriage of the case. However, it will be rare that the advocate is briefed so late as to be unable to make any meaningful contribution to the preparation phase of the case. Furthermore, the fact that a lawyer with pre-existing carriage of the case has briefed you provides no excuse for you not value adding to the preparation process once you are briefed.

How might you control the preparation of the case you are to present, shaping it into a case which will present persuasively?

Ensure you have signed witness statements

It is essential to the proper preparation of the case to be proved in court that the evidence which may be adduced from your witnesses should be reduced to a written statement which is signed. This elementary requirement needs to be emphasised because, remarkably, some lawyers fail to meet it.

Witness statements may take the form of statutory declarations or affidavits or documents styled as statements bearing an *Oaths Act* endorsement at their conclusion. Whatever the precise form, it should not just be someone else's note of what the witness says. To be a statement you can rely upon it is important that the statement be identifiable on its face as the statement of the witness. Thus, it should be signed by the witness and have some form of endorsement at its conclusion so that, in signing it, the witness is representing the contents of the statement are true and correct.

This is necessary for a variety of reasons. It will hopefully provide you with reasonably reliable information about what the witness will say in court. The process of signing the witness statement is a moment of some gravity. It generally promotes care on the part of the witness in ensuring the statement is indeed truthful and accurate. Further, a signed statement provides a measure of protection for the lawyers taking and acting on the statement. It is a safeguard in the event the witness later turns hostile. It also provides you with evidence which you may be able to tender. For example, in civil cases, under s 92 of the *Evidence Act* 1977 (Qld), a witness statement will generally be admissible if the witness dies, disappears or becomes unfit to testify.

A witness statement, particularly if taken in a timely way, will also aid the witness in refreshing the witness's memory before giving evidence. It follows you should ensure that a witness you intend to call actually has possession of a copy of the witness's statement to refresh memory from. Have spare copies available – witnesses often misplace or forget their copy of their statement.

Recorded witness interviews

An exception can arise to the need to take written and signed statements when, because of a witness's young age or other disability, it is more practicable to take the statement as a recorded interview. Where that occurs it is vital, at the interview's conclusion, that the witness is asked to confirm he or she has told the truth in the interview or recorded statement. Where a statement is taken in this fashion it ought be transcribed so as to provide a written record of equal convenience to a written statement in your brief for you to use in preparing your case. I will, for convenience, refer to such recorded and transcribed records as witness statements as well.

Request addendums and requisition statements from extra witnesses

Do not assume when you come into a matter that the existing witness statements are adequate. Take control and decide whether they are adequate. You may decide an addendum statement from an existing witness is needed. You may decide a new witness needs to be located and asked to provide a statement. Where such shortcomings are identified, it is imperative that they are addressed promptly. Delay cedes time for the witness's memory to dim and for evidentiary leads, which the witness might provide, to run cold.

Record the statement in the words of the witness

The person taking the witness statement should ensure relevant matters are addressed properly. However, that aspect of the statement-taker's role should not infect the witness's choice of words. The words used in the statement should be the words the witness uses in recounting the information which the witness recalls. This will minimise any suggestion the content of the witness's statement is really the work of the person who took the statement. More importantly, it will result in a more believable statement, which can be advantageous in the event your opponent or the court have cause to consider the reliability of the statement's content. Further, a statement in the witness's own words will be more helpful when it is used by the witness as a tool to refresh memory before entering court.

Time does not permit a more extensive analysis of how to draft an effective witness statement or affidavit. Those of you who are interested in learning more may find it useful to refer to a previous paper delivered by me in the 2014/2015 Cairns Judiciary

CPD Series, *The affidavit as a tool of persuasion: drafting an effective affidavit and using an affidavit effectively*. It is accessible in the Judicial Papers on the court's website.

Pre-trial conferences

Perhaps the most important task in the advocate's exercise of control over preparation of the case to be proved is the holding of pre-trial conferences.

I know there exist advocates, particularly some barristers, who profess that they should not or do not need to participate in pre-trial conferences with witnesses. I know they lay claim to all sorts of reasons for not doing so. Let me call those reasons for what they are: lame excuses to avoid work which should be done.

Let's review some of the more common excuses. "I won't have time" – rubbish, consult your diary well in advance and make the time. "The witness is too far away to travel to a conference in advance of trial" – so what, have you not heard of telephones, skype or facetime? "I better not talk to the witness in case there is an issue about what was said in conference" – so ensure you have your instructor with you and if you are a solicitor advocate without another staff member present then record the conference. "Pre-trial conferences breach the ethical rule against coaching" – nonsense, that rule precludes attempts to influence or alter the substance of the witness's testimony. It prevents advising witnesses what answers they should give. It does not preclude asking questions about what the witness recalls.

A copy of the like forms of the rule against coaching in our profession's *Conduct Rules* is attached to this paper. In *Professional Responsibility and Legal Ethics in Queensland* (at 12.60), Corones, Stobbs and Thomas explain the rule against coaching does not prevent the advocate from preparing the witness by simulating the giving of evidence or cross-examination. They observe, quite correctly, that a barrister "would be derelict in his or her duty to the client" not to exercise the advantageous opportunity given by the pre-trial conference of gauging "how a witness will respond in court, and to identify aspects of the evidence which require clarification".

The notion that such a public and pivotal interaction as occurs between advocate and witness in evidence in chief might occur without the two players having conferred meaningfully beforehand is anathema to the persuasive proof of the case. To draw again upon the analogy with the production of a play, how can you, the director and one of the

lead actors on the court stage, possibly hope to exercise control over the production you will present without meeting properly with your fellow cast members beforehand?

It may well be an advocate has the support of an instructing lawyer who has conferenced or can conference with a witness to be called. However, that does not remove the need for the advocate to also confer with the witness. It is after all the advocate who will be performing in tandem with the witness in court. Further, it cannot be assumed the instructing lawyer will ask the same questions which an advocate might in pre-trial conference and in turn at trial. Nor can it be assumed an instructing lawyer will perceive and record all the behaviour and responses of the witness in pre-trial conference in a way which can be accurately conveyed to the advocate. If an advocate is to exercise control over the plaintiff's or prosecution's case it is inescapable that the advocate should conduct pre-trial conferences with each witness who may be called in proof of that case.

Having earlier alerted you to the more typical phoney excuses for avoiding pre-trial conferences it is as well to identify three other ruses of the lazy or unprepared advocate in respect of pre-trial conferences. One is to agree to hold a pre-trial conference but only on the morning of trial when there is inadequate time to confer thoroughly, inadequate time for the witness to absorb what has occurred in conference and inadequate time to make further inquiry prompted by new information given in the conference. Pre-trial conferences, particularly with significant witnesses, should be held well before the day of trial.

A second ruse is to agree to a pre-trial conference in advance of trial but to then confer at a pointlessly superficial level. The lazy advocates who engage in this ruse, perhaps because they are yet to read the brief properly, only take a few minutes to confer, doing no more than meeting, checking the witness has read the statement and that it is all correct and leaving it at that. That superficial exercise is not a pre-trial conference. The pre-trial conference should actually involve the exercise of you asking and your witness answering questions about the facts; questions of a kind you would ask in court. That gets the witness used to the question answer format and informs you about the strengths and weaknesses of the witness and the witness's account. The pre-trial conference should also involve some reassuring explanation of the logistics and court process relevant to witnesses attending court and giving evidence. This all takes time.

A third ruse is to avoid or only hold a cursory pre-trial conference on the basis the witness's evidence in chief will be by tendered affidavit or expert report, as sometimes occurs in civil cases and most family law cases, or tendered recorded interview, as occurs for child witnesses in sex cases in the criminal jurisdiction. Such witnesses are as deserving as any other of being told about the logistics and court process of giving evidence. Moreover, even though the witness will not be giving evidence in chief you should conduct a pre-trial conference as if the witness will be. In that way you will ensure you learn of any additional relevant information which is not but should be in the affidavit or report. You will also aid the readiness of the witness for court, including cross-examination, because answering your questions about the facts will bring the witness's memory of relevant events back to the forefront of their mind.

The topic of conferring with child witnesses in sex cases is deserving of more time than is available for this session. However, two points should be made before I move on. Firstly, it ought not be assumed that methods used in a standard pre-trial conference are appropriate for a child. For example, the suggestibility of children demands that particular caution be exercised against the use of potentially suggestive questioning. Secondly, it is prudent to record the conference with the child. This will ensure that if the witness does reveal new incriminating information you preserve a first-hand record of its emergence, protecting yourself, the witness and the integrity of your case against suspicion of coaching.

Time also precludes special attention being given to conferences with experts. If you want to learn more about that topic I deal with it to some extent in my paper to the Australian Lawyers Alliance National conference on 22 October 2016, *Expert Evidence – A View From The Bench*, which can also be accessed on the court's website.

Returning now to the benefits of conventional pre-trial conferences, they allow the advocate to:

> confirm the witness has his or her statement, is literate and has refreshed his or her memory from it;
>
> confirm and clarify the evidence the witness will give, using questions of a kind likely to be asked in evidence in chief;
>
> confirm the witness's recollection accords with his or her statement(s) and or previous evidence;

assess the reliability of the witness;

confirm the witness's understanding of exhibits to be shown to the witness;

check if the witness has special needs;

gather information about the witness which might not be relevant to lead in chief but may assist in building a rapport with the witness and might even prove useful in re-examination.

From the point of view of the witness, the pre-trial conference allows the witness:

to be informed about the process of giving evidence;

to get used to recalling their evidence;

to get used to answering questions of a kind asked in court;

to provide further information not included in the witness's statement;

to be forewarned about court process;

to have the witness's questions and concerns about giving evidence addressed.

It may assist to give the witness a document about the process, assuming your witness is literate, to reinforce and further explain what you tell the witness about the process of giving evidence. A two-page example of such a document, headed *Giving Evidence*, is annexed to this paper by way of illustration.

Plan the evidence-in chief

If the advocate is to exercise control over the case then evidence-in-chief cannot be led by asking questions mindlessly following the witness's statement. The witness's statement is merely a guide to the content which you might lead in chief, but it will not have been drafted with your informed view of the broader context of the case. Consider the purpose behind calling the witness and plan your question content and sequence so as to best fulfil that purpose.

Make notes about that plan rather than just formulating it in your mind. Your notes might include key prompt questions. However, the most helpful method is to note the essential pieces of evidence you wish to elicit rather than the questions you wish to ask. So for example, in a dangerous driving or vehicular personal injuries case your notes would not read: "What was the weather like?", "What was the speed limit in that area?", "What colour was the oncoming car?", and so on. Rather they would read, "Weather fine", "Speed limit 60km per hour", "Oncoming car red" and so on. Once you have identified the evidence you are after in this way, the questions necessary to elicit that evidence will come naturally.

Plan what and how exhibits will be shown to the witness

Plan in advance what exhibits should be tendered through or shown to the witness. Consider at what point they should best be shown to the witness. Consider how your audience, the judge or jury, will view them concurrently with the witness. Will the detail of the exhibit be visible to your audience on a screen? Do you need copies of documentary exhibits for the judge or jury?

Have sketches done in advance

Consider whether the witness should prepare explanatory charts or maps to better explain the evidence they give. Too often witnesses are asked to sketch a plan of a particular scene or physical location without warning during evidence in chief, as if the idea has come upon the advocate like a thought bubble. The witness will be in a better position to draft a well-considered sketch or plan if called upon to do it in advance, in the witness's own time, away from the constrained and stressed circumstances of the witness box.

Plan your witness sequence

In exercising control over your case you should plan the ideal sequence in which to call your witnesses. Experience suggests such plans do not always survive the encounter of the logistical reality and challenges of trial. However, that is no excuse not to try and call your witnesses in the sequence which will have the most persuasive impression upon the judge or jury.

That sequence will generally be the sequence which provides the most comprehensible succession of information for your audience to absorb and understand. Most often it will be chronological, telling a coherent story by progressing the evidence before court as it

progressed in real life. However, in some cases, particularly those involving physical events, it may be much more important to your audience's understanding of the evidence for you to first lead evidence of photographs and plans of the scene.

There may be other cases where a piece of evidence arising or discovered late in the chronological sequence of events, such as a taped admission or an incriminating financial transaction, makes the case very strong. It may blunt attacks you know will be made on other aspects of your case if you lead such damning evidence from the jump. This highlights the additional point that the persuasiveness of your case can be influenced by how and at what point you lead the weaker parts of your case.

Use certificates, averments, admissions

In exercising control over your case you should turn your mind to the potential use of laws which deem a fact be proved without the need to call a witness to prove it, such as certificates, admissions and averments.

Logistics matter

Some of the above illustrations of exercising control over the case you will present highlight the importance of logistical matters. Identifying evidence to be gathered, booking witness conferences, procuring illustrative exhibits, requesting certificates, requesting sufficient photocopies of documents, timetabling witness sequence, are all tasks of a logistical kind. However, they are vitally important in making sure the final production comes together well in court.

Proving a case in court is a major logistical undertaking. Some of the best advocates for the plaintiff or prosecution are those who ensure matters of organisation are given the attention they deserve. Your audience may never realise how hard it was for you to orchestrate a seamless production in front of them but if it runs without logistical hiccups there is a better chance your audience will find it persuasive. If there are hiccups, such as documentary exhibits not being available for the jury or constant adjournments because witnesses are not available, they will irritate your audience and thus detract from the persuasiveness of your case. It is imperative that you do not frustrate or annoy the very audience you are setting out to persuade.

Remember your audience

This brings us to the third rule: remember your audience.

There are two equally important aspects to the rule that you must remember your audience. The first is that your audience needs to properly comprehend the evidence you present. The second is that your audience will be watching you and your cast. The rule that you must remember your audience therefore requires both that you remember the needs of your audience and remember that your audience is watching.

As mentioned earlier your audience is not the public gallery. It is the decision-maker, the judge or jury, as the case may be.

Your audience needs to comprehend your evidence

There is no magic to the first aspect of the rule. Your audience needs to comprehend the evidence you present if you are to have any hope of persuading it to accept that evidence. It is a point which will be further illustrated in part B with some specific advice about the in court presentation of your case.

Your audience is watching

As to the second aspect of the rule, remember that your audience is watching, its application is broader than you may think. It applies to you and your cast and it applies whenever you and your cast may be under observation by your audience, not just when you are asking questions. We will come to your cast momentarily. Let us deal firstly with you.

Everything you do or say at court should be calculated at pleasing your audience. When at court you should always assume your audience may be watching you. How you look, how you speak, how you conduct yourself towards witnesses, how you behave while your opponent has the floor, all have the capacity to influence your audience's opinion of you. For as long as decision makers are human beings rather than robots their opinion of you will have the potential to influence their opinion of your case, even if only subconsciously. In a close contest that influence might be the difference between winning and losing.

Imagine in such a contest two theoretical advocates for the plaintiff or prosecution. Let's assume they are barristers and it is a jury trial. Let's call them Barack and Donald. Barack presents in properly fitting attire. Donald presents with a bar jacket that no longer

covers his middle-aged spread and an incorrectly fitted jabot. When Barack has an objection, he stands and then states it. When Donald has an objection, he utters most of it before bothering to stand up. When the jury are brought into court by the bailiff at the appointed time for court's resumption after the morning tea break Barack is robed, sitting up straight, quietly waiting at the bar table. An embarrassing and silent two minutes goes by before Donald finally wanders into court, yabbers loudly to his instructing solicitor about his expensive home renovations while putting his robes back on and slumps down at the bar table. While Barack questions his main witness, Donald makes theatrical facial expressions and keeps muttering half audible asides to his instructing solicitor at the bar table. While Donald cross-examines Barack's witness, Barack is silent, exchanges a single written note with his solicitor and keeps a poker face. When Barack asks questions of the witness he does so in a polite tone, looking at the witness, standing up still behind the lectern. When Donald asks questions of the witness he takes an aggressive tone from the outset, moves, leans and slouches over the lectern and spends more time looking theatrically at the jury and his notes than at the witness.

Nothing in that scenario went to the substance of the evidence being advanced in proof of Barack's case but it cannot be doubted the jury, having watched most if not all of Donald's unprofessional, discourteous behaviour would thereby have been rendered more receptive to Barack's case.

Your cast is also being watched

As I mentioned earlier, the need to remember the jury is watching does not apply only to you. It also applies to your cast.

Who is your cast? It is you the advocate, it is any lawyers or clerks attending court with you, it is your client, it is your complainant, it is your arresting officer, it is the witnesses you call and it may on occasion even include friends or family of your cast attending court in support of them. In short it is anyone who your audience may identify as connected with the advancing of the plaintiff's or prosecution's case.

If any of your cast are seen by your audience to dress or behave in a disrespectful or discourteous manner then, because they may be perceived by your audience as part of your team, it may make the audience less receptive to the merit of your case. Your witnesses and their attending supporters should be made to understand this.

Behaviour

You should discuss with each of your witnesses in pre-trial conference the topic of how they should behave at court and what they will actually wear to court. As to behaviour, remember your witnesses will not be as familiar with court etiquette and process as you. Tell them they are supposed to stand up when the judge comes in or leaves. Tell them the judge is called "Your Honour". Explain the process is a question and answer format. Explain they should just answer the question truthfully and then stop speaking. Counsel them against speech-making or arguing. Explain you will do the objecting, not them. Explain that if something needs further explanation or clarification you will tend to that in re-examination.

Dress

As to attire, you cannot know what prejudices your audience might have about how others present so it is safer to urge a broadly conservative approach to dress standards. A witness who turns up wearing a T-shirt, board shorts and a pair of thongs is unlikely to be as well received by your audience as one who turns up wearing casual business attire. The latter attire in the case of a male witness, would hopefully include leather shoes, a pair of trousers and a business shirt. Be alive to the risk that over-dressing can sometimes backfire. Witnesses who are unused to wearing suit coats and ties but who acquire them for the specific purpose of wearing them to court often look so uncomfortable in such attire and the attire is so ill-fitting that it is obvious they are trying to present as something they not.

Depending on the significance or unpredictability of the witness it may also assist to discuss the colour and patterns of the clothing your witness intends wearing. Muted colours and plain or only mildly patterned fabric are uncontroversial. Patterns and slogans of a kind found on clothing worn to parties or nightclubs may irritate your audience.

If your witness is giving evidence in a professional capacity and ordinarily wears a presentable work uniform in public, as uniformed police officers and ambulance officers generally do, encourage them to wear it to court. Their appearance in a uniform, will likely give them heightened credibility in the eyes of your audience.

Tattoos, jewellery, caps

Despite their modern-day ubiquity, tattoos can invoke misconceived adverse judgment, as can facial jewellery. It may be prudent to discuss that reality where relevant with significant witnesses.

It is also preferable those witnesses with a penchant for wearing caps or leaving sunglasses on top of their head remove them before entering court – it is a bad start for you or worse the judge to have to tell them to remove them when they are in the witness box.

The entourage

You should enquire of your witness, particularly a significant witness such as a complainant or a plaintiff, whether they will have an entourage present with them at court. If so, you might suggest the witness should inform the entourage to dress to a similar standard as discussed with the witness.

You should also explain to your significant cast members that they may by chance be seen arriving at or leaving court by your audience and it is therefore important they behave with dignity and decorum when near the precinct of the court.

Part B: Presentation phase

In canvassing the three rules guiding the persuasive proof of the plaintiff's or prosecution's case we have already canvassed some advice about the presentation of that case. In part B of this session I will provide some further advice about how to present the evidence in your case persuasively.

Spoken evidence-in-chief is better than evidence-in-chief by affidavit

The substitution of normal evidence in chief by the tender of an affidavit may sometimes be unavoidable. In those situations where there is a choice about it, there exists a school of thought that it is safer to tender the document. This ensures the evidence is before the court. It avoids the risk that the witness will not come up to proof in oral evidence in chief. However, this risk warrants little weight if there has been a pre-trial conference with the witness and it has given no cause for such concern. If so the risk is unlikely to outweigh the persuasive value which oral evidence in chief ordinarily brings to your case.

Oral evidence in chief will be more readily understood than evidence in chief by affidavit. It will be understood at the time the trial is occurring and not rely upon your audience's subsequent perusal of the affidavit. It will allow your audience to get a "feel" for the witness who is giving evidence. It will hopefully promote a favourable attitude by your audience towards the witness well before your opponent cross-examines the witness. It will also allow your witness to settle into giving evidence in a less challenging environment than under cross-examination.

Be wary of admissions robbing your case of its reality and cogency

Defence advocates will sometimes engage in the making of wholesale admissions of fact. They may have mixed motives in doing so. A pure motive may be to save cost and inconvenience to the parties and the court. A more cynical motive may be to rob your case of the reality and cogency it will have if presented conventionally in evidence in chief.

Merely because a fact has been admitted does not automatically mean you should not adduce evidence of that fact. It may for example be a fact integral to other unadmitted facts to be adduced in the plaintiff's or prosecution's case. If so, it may be simpler or even necessary to lead evidence of the admitted fact because it is so integral to the topic about which evidence is being given.

There will be occasions when an admission on a topic does not provide all the information you would like to adduce on the topic so that regardless of the admission you will still have to lead evidence about the topic. In such a situation, your opponent may be prepared to broaden the admission on your request. Do not walk blindly into making such a request. If you perceive it is to your forensic advantage to present oral evidence in chief about the topic there will be little forensic advantage in you requesting your opponent to expand upon the proposed admission.

None of this is to suggest that you ought deliberately waste court time by leading unnecessary evidence. Rather, it is to illustrate that pursuing the making of admissions in preference to the leading of evidence will not always be to the persuasive advantage of the plaintiff's or prosecution's case.

Do not lead just because your opponent permits you to

Continuing with the theme of the forensic advantage inherent in evidence in chief, there will be occasions when your opponent indicates you may lead much or even all of a witness's evidence in chief. Again, there lurks in this offering the temptation of a "sure thing", without realisation of what may be lost. As already mentioned, the adducing of oral evidence in chief allows the witness to settle into the witness box prior to cross-examination and gives the judge or jury a chance to develop some affinity for the witness. This advantage will likely be lost if you do all the talking and the witness simply says "yes".

Evidence in chief is laden with factual information which you want the jury to comprehend and remember. It will be easier for the judge or jury to comprehend and remember that information if it falls from the mouth of the witness as the witness tells his or her story in evidence in chief. The information will barely register with the judge or jury and will certainly have no persuasive clout if it all comes from the mouth of the advocate.

Let the witness settle in

Give your witness the opportunity to ease into the process of giving evidence. Let your witness make a good first impression. Most witnesses will be nervous. Use your introductory questions about name, occupation and contextual background as a means of getting the witness used to answering questions in the daunting environment of court. Do not waste the beneficial effect of these easy questions on the witness's confidence by putting them in leading form.

Let the narrative flow

The teaching of advocacy in the modern era involves considerable emphasis on the advocate maintaining control of the witness, whether in chief or cross-examination. This emphasis may have resulted in an increasing tendency for advocates adducing evidence in chief to be so constrictive and controlling in their questioning that no narrative flow develops from the witness.

If you have conducted an effective pre-trial conference with your witness the prospect of your witness wandering into irrelevant or otherwise inadmissible areas in the absence of highly controlled questioning will be reduced. If your witness is on track, relevantly narrating what happened, do not interrupt the witness's flow. Let the witness tell his or

her story until a logical break in the narrative is reached. Earlier interruption of the narrative reduces the cogency and thus the impact of the evidence on the jury and tends to disrupt the recollection of the witness. Do not worry if the witness misses something or says something that requires clarification. Note such matters and return to them when a natural pause in the narrative is reached.

Adopting this course of doubling back to seek additional testimony is also the simplest way to elicit evidence the witness has missed without asking leading questions. It gives you a broader body of evidence to refer to in the hope of jogging the witness's memory by referring to it.

Finally, resist the temptation in mid-narrative to interrupt and show an exhibit to the witness. If you consider it helpful that the witness explain an exhibit, such as a photograph or plan, then do it at the outset or or during a relevant pause in the relevant part of the witness's testimony, whichever point will make the explanation more comprehensible.

Use props such as plans and photographs

As with the presentation of a play, so too in your presentation of your case the use of props will make the process more interesting and understandable and thus more persuasive.

Of course you should not show exhibits to witnesses without purpose. It wastes time, risks unnecessary error and generally detracts from the persuasiveness of your presentation. However, if you have an exhibit which will help explain what a scene looked like, what a receipt looked like, what an injury looked like or what a relevant object such as a weapon looked like, then tender it. Better still, if you have the relevant object, tender it if it is safe to do.

Plans, photographs and other physical evidence provide a double persuasive advantage to the plaintiff's or prosecution's case. They can be referred to in the course of a witness's evidence to better explain that evidence. Then, because they become exhibits, they will linger in possession of the judge or jury, in constant reminder of your evidence, through to deliberation.

Sequence the tender of exhibits purposefully

I have already explained you should plan the timing and sequence of your tendering of exhibits. I have also explained your preparation for such tender should include ensuring you have the means of the jury seeing the exhibit while you are questioning the witness about it.

It warrants reiteration though that, if your witness's account will be more readily understood by reference to plans and photographs, it will generally be preferable to have them tendered early, preferably before you ask for that account to be given. Indeed it is even more preferable that you tender them before calling the witness in question. This reduces the risk of the witness confusing your audience by conflating an explanation of what the exhibits show with the witness's account of what occurred.

Asking for the witness's account when the judge or jury cannot picture what is being discussed will frustrate your audience and make the account more difficult to understand. Your audience is at its most uncritical of your witness when the witness gives the account for the first time. That is when the account will be best received. Doubling back to have the account repeated by reference to belatedly tendered exhibits detracts from the persuasive momentum of the account.

Ensure your audience can see the exhibit you are questioning your witness about

Your audience must see the exhibit you are asking the witness questions about for your audience to properly comprehend the evidence being given. As earlier indicated, this means you should ensure a copy can be broadcast on screen, an enlargement can be displayed or documentary copies can be distributed to the jury at the time the evidence is to be given.

Agreed bundles are not always apt

In civil trials the tender of an agreed bundle of documents at the outset, before a witness is even called, is ubiquitous. Sometimes they are assembled and tendered in consequence of a direction by the judge, generally because of the forecast complexity of the case and the need for ease of exhibit management. However, they have become common even in the absence of such an order. If practitioners think the judge particularly wants such a procedure followed even though the judge has not directed it, they are wrong.

Agreed bundles are a tool of logistic convenience only. They are not of themselves a persuasive way to present evidence. Generally they are longer than they should be because of a lack of consensus on what the truly relevant documents are. Often the judge has insufficient time to read them before the evidence in chief begins yet advocates question the witness assuming the judge is familiar with documents in the bundle.

Where logistical demands do not warrant the tender of an exhibit bundle your default position should be to lead exhibit evidence conventionally. Introducing exhibits gradually to your audience via the accompanying explanation of a witness makes them and your case much more comprehensible. It makes your case more persuasive.

Volume up, speed down

The witness must be made to speak loudly and slowly enough to be understood by the judge or jury. Tips to help that occur include:

set an example the witness is likely to mimic by asking questions loudly and slowly;

tell the witness to speak up and or slow down as appropriate;

let the witness finish, avoid over-talking;

preface some questions with “tell his Honour…” or “tell the jury…” and gesture at the judge or jury as you do so;

where a softly spoken response may not have been audible to your audience consider incorporating the answer into your next question and or asking the witness to repeat the answer;

if all else fails seek out a mobile microphone to amplify the witness’s answers.

Short, simple questions

Use short, simple questions.

Long, complex questions will confuse the witness and your audience.

Prefacing

It is permissible and not regarded as leading, for you to announce the next phase of the witness's evidence as you come to it. For example, "I want to ask you now about the night your husband was injured".

The advantage of prefacing like this is that it allows both the witness and the judge or jury to clearly understand the nature of the topic you are coming to. The context it gives makes it more likely the ensuing questions and answers will be properly understood.

Listen to the answer

Never assume the witness has said what he or she was expected to say. Listen to the answer given. It will invariably influence what the next answer should be.

Proper preparation through familiarity with the witness's statement, pre-trial conference and your noting of the evidence you intend to elicit from the witness is important in this context. It will allow you to look at the witness and listen to the answer rather than be looking down, reading and worrying about what the next question should be.

Encourage professional witnesses to refresh memory from contemporaneous notes

Professional witnesses such as police and doctors will have often made contemporaneous notes of information about which they are giving evidence. They will generally be permitted to refer to those notes to refresh their memory whilst giving evidence. In conference with such witness's you should encourage them to do so. You may even prompt them to do so through your questioning when they are giving evidence.

Why promote such a course? Obviously it will promote accuracy. But the act of refreshing memory from notes will also be witnessed by your audience. That has persuasive value. The theatre of the witness appearing to refresh their memory from notes in the witness box will convey an air of professionalism and reliability on the part of the witness.

Disclose weaknesses to blunt the defence.

If there is obvious weakness in the evidence of your witness, bring it out in evidence in chief.

Disclosing a weakness on your terms, in a way you can control and compensate for, is less damaging than the weakness appearing for the first time in cross-examination.

Be wary of asking questions without knowing the answer

In the set piece move which examination in chief is, it should be out of the ordinary to need to ask a question that you do not know the answer to. That will be particularly so if you have conducted an effective pre-trial conference.

If the temptation arises to ask a question you do not know the answer to it is imperative that you weigh up the risk of damaging your case with an unfavourable answer against the need to ask the question. It will be rare that the risk is justified.

Expert witnesses

Time does not permit an analysis of how to adduce evidence in chief from an expert. On this topic you again may find it useful to refer to my paper, *Expert Evidence – A View From The Bench*, accessible on the court's website.

Use your instructor

If you have an instructor then make sure you use your instructor. Arrange for him or her to follow the evidence in chief so that before you sit down you can double check whether you have overlooked anything.

Approach re-examination with caution

Re-examination should be the exception, not the rule. If your habit is to re-examine the majority of your witnesses then you are allowing your competitive desire for the last word to obscure your objectivity.

Re-examination rarely goes well and often takes the case backwards. Why? By the time of re-examination the witness is less likely to be as composed and confident as the witness was in evidence in chief. Moreover, the evidence you seek will be less obvious to the witness. This heightens the risk the witness will not understand what your question is getting at. In short the risk of the witness tending to speculate or guess or give an otherwise unreliable answer is much higher in re-examination than in evidence in chief. Unless your question is simple and seeks simple information which the witness will inevitably be able to remember, the risk will rarely be worth taking.

Experience suggests that you will be better able to deal with the damage done in cross-examination through your closing address, or through the evidence in chief of a witness to come, than through re-examination.

Conclusion

This evening we have canvassed a wide array of advice about proving the plaintiff's or prosecution's case persuasively.

In conclusion I highlight that most of that advice flows from the three rules or guiding principles we canvassed at the outset: be sure of your case's foundations, exercise control of your case and remember your audience.

I used those principles because of their all-pervasive importance in the mindset you must bring to your task as an advocate when seeking to prove the plaintiff's or prosecution's case persuasively. Approach your task with those principles in mind and a professional and persuasive case for the plaintiff or prosecution will follow.