# Practice note: The Hostile or Unfavourable Witness

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## Introduction

At common law, it is a general rule that a party who calls a particular witness to give evidence may not ask that witness questions designed to discredit him.[1] This rule is justified on the basis that if the party has reason to believe that the witness called is not to be believed on his oath, then the party has no business to try and support their case by that witness' evidence.[2] However, the rule hardly applies where the party calling the witness is surprised that the witness is hostile or unfavourable. Where a party calls a witness in expectation that that witness will give evidence favourable to that party's case only to discover that the witness is hostile or unfavourable, the party who called the witness stands in a position as if opposing counsel had called the witness. Thus, the justification for the rule that a party calling a witness cannot impeach their own witness falls away when, in the course of giving evidence, the witness is hostile or unfavourable and the party's expectation of that witness has altered. The same logic underpins the unfavourable witness provision of the *Uniform Evidence Acts*.

The questions that then arise are as follows:

- When is a witness hostile, within the meaning of the common law, or unfavourable under the *Evidence Act* 1995 (Cth)?

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1 An extension of the rule is that it is impermissible to call a witness solely for the purpose of discrediting an earlier witness: *R v Welden* (1977) 16 SASR 421. But this does not prevent a party from calling two witnesses who give inconsistent evidence and then inviting the trier of fact to prefer the evidence of one over the other: *R v Welden* (supra); *Wells v South Australian Railways Commissioner* (1973) 5 SASR 74.

2 In *Wright v Beckett* (1834) 1 M & Rob 414 at 425 Lord Denman CJ succinctly stated the position, 'You shall not prove that man to be infamous, who you endeavoured to pass off to the jury as respectable.'

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- How is hostility or a lack of favour to be determined?
- What is the consequence of the witness being found hostile or unfavourable for the party who called that witness?

In common law jurisdictions, these questions must be answered against the background of statutory provisions that affect the extent to which a party may impeach his or her own witness. In South Australia, for example (and to South Australia we shall continually refer as the exemplar of the common law), s 27 of the *Evidence Act* 1929 provides:

> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but if the judge is of the opinion that the witness is adverse, the party may:
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> (a) contradict the witness by other evidence; or
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> (b) by leave of the judge, prove that the witness has made, at any other time, a statement inconsistent with his present testimony: Provided that, before giving such last mentioned proof, the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made the statement.

The Evidence Acts of Queensland, Western Australian and the Northern Territory contain similar provisions,[3] which are based upon s 3 of the *Criminal Procedure Act* 1865 (UK). However, this position has been altered by the *Evidence Act* 1995 (Cth), which applies in all proceedings in a federal court or an ACT Court.[4] It has also been enacted in New South Wales, Tasmania and Victoria.

The significance of the alteration effected by the *Uniform Evidence Acts* is twofold. The first relates to the circumstances in which cross-examination will be allowed. The second is the use that may be made of evidence obtained from the cross-examination. It should be remembered that the *Uniform Evidence Acts* have been in operation for a relatively short period of time. Much about their application and the extent to which they alter the prior existing position, therefore, remains unresolved.

Section 38(1) of the *Uniform Evidence Acts* relevantly provides:

> A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
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> (a) evidence given by the witness that is unfavourable to the party; or

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3 *Evidence Act 1977* (Qld) s 17; *Evidence Act 1906* (WA) ss 20-21; *Evidence Act* (NT) s 18.

4 *Evidence Act 1995* (Cth) s 4.

(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or

(c) whether the witness has, at any time, made a prior inconsistent statement.

## When is a witness hostile or unfavourable?

Section 27 of the *Evidence Act* 1929 (SA) refers to the witness being 'adverse'. Wells has indicated that -

> ... it is essential to observe that an unfavourable witness is not necessarily adverse; he may, by his testimony, destroy the calling party's whole case and yet not be adverse. The test is often said to be whether the witness be 'unwilling' [for example, per Alderson B in *Parkin v Moon* (1836) 7 C&P 408], or 'hostile'. This gives the clue. The true test is this - is there reason to believe that the witness, not only desires the party calling him to lose, but desires him to lose whatever the justice of the case may be?[5]

In *R v Hutchison* King CJ held -

> I deduce from the passage cited [Dixon CJ, Kitto and Taylor JJ, *McLellan v Bowyer*] that the correct test as laid down by the High Court is whether the witness is deliberately withholding material evidence by reason of an unwillingness to tell the whole truth at the instance of the party calling him or for the advancement of justice. The test so formulated does not depend upon the motive of the witness in withholding evidence or, of course, giving false evidence. ... If a witness gives false evidence or withholds evidence by reason of an unwillingness to tell the truth or the whole truth at the instance of the party calling him or for the advancement of justice, it matters not whether his motive is hostility to the cause of the party calling him, sympathy for the cause of that party's opponent, desire to advance or protect his own interest in some way, or some other motive. The crucial consideration is that the party calling the witness is unable, by reason of the witness's unwillingness to tell the truth or the whole truth, to elicit the facts by non-leading questions.[6]

As such, the fact that a witness' evidence merely differs from their proof does not authorise the examiner to embark on a cross-examination. In situations where the witness is confused or forgetful, counsel should attempt to get the witness back on track by having the witness refresh his or her memory. In cases of extreme confusion or forgetfulness, a judge may allow counsel to give the witness a prior statement and put leading questions to the witness on the basis of his or her proof, without declaring

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5 J Stone and W A N Wells, *Evidence Its History and Policies*, (1991) 635.

6 (1990) 53 SASR 587 at 592; see also *R v Hayden* [1959] VR 102; *McLellan v Bowyer* (1961) 106 CLR 95.

the witness hostile.[7] This is an exceptional course and will only be allowed when it is apparent to the Court that the witness is extremely confused.

The common law test of 'unwilling to tell the whole truth for the advancement of justice' is significantly modified by the *Uniform Evidence Acts*. Section 38 contains no requirement that the witness be hostile or adverse and there is no need to seek a declaration that the witness is such. It is enough that the witness is unfavourable, is not making a genuine attempt to give evidence, or has made a prior inconsistent statement. It is evident that 'unfavourable' imposes a less burdensome requirement than 'hostile'. In *R v Le*, McLellan J stated:

> The word 'unfavourable' should be given a broad meaning thereby ensuring that in the course of any criminal trial the Court would not be denied evidence as to any relevant issue and would not be denied the opportunity for that evidence to be appropriately tested.[8]

That a wide interpretation of 'unfavourable' should be given has been confirmed in a number of cases. If evidence is considered 'not favourable' it will be 'unfavourable' for the purposes of s 38.[9] Section 38 is also not confined to situations in which a party calling a witness is confronted unexpectedly by unfavourable evidence, evidence inconsistent with prior statements, or where the witness unexpectedly appears not to make a genuine attempt to give evidence.[10] A party may call a witness, known to be unfavourable, for the purpose of getting a prior inconsistent statement before the court.[11] It is left to the proper exercise of judicial

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7 *R v Thynne* [1977] VR 98; *R v Neal, Regos and Morgan* [1947] ALR 616.

8 [2001] NSWSC 174 (Unreported, 2 March 2001) at [15].

9 *R v Souleyman* (1996) 40 NSWLR 712 at 715 (Smart J); *R v Velevski (No 2)* (1997) 93 A Crim R 420 at 422 (Dunford J); *R v Lozano* (Unreported, NSW CCA, 10 June 1997). *R v Taylor* [2003] NSWCCA 194 (Unreported, 7 November 2003) at [74] (Bell J). On the other hand, this view has been subject to some criticism. See for example *Hadgkiss v Construction, Forestry, Mining and Energy Union* (2006) 152 FCR 560 at 562, in which Graham J criticises this view. Graham J instead adopts the approach taken in *Klewer v Walton* [2003] NSWCA 308 (Unreported, 14 October 2003) at [20] (Hogson JA, with whom Meagher JA agreed at [30]), that evidence that is simply neutral to a party's case should not be considered 'unfavourable'.

10 *R v Adam* (1999) 47 NSWLR 267 at 277 (Spigelman CJ, James and Bell JJ); *R v Fowler* [2000] NSWCCA 142 (Unreported, 23 May 2000) at [121] (Wood CJ at CL).

11 *Adam v The Queen* (2001) 207 CLR 96 at 104-105 (Gleeson CJ, McHugh, Kirby and Hayne JJ).

discretion to curb inappropriate grants of leave, in order to prevent abuse of the relaxed requirements of s 38.[12]

It should also be noted that it is only necessary for some part of the witness's evidence to be unfavourable. Despite the fact that the heading to s 38 refers to 'unfavourable witnesses', it need not be found that the witness is unfavourable. The section itself refers to evidence. As such, leave to cross-examine may be granted if a part of the evidence is unfavourable to the party calling him or her even when much of the witness's evidence is favourable.[13]

## How is hostility or unfavourableness to be determined?

As is clear from s 27 of the *Evidence Act* 1929 (SA) and equivalent sections, there is no automatic right to treat a witness as hostile. Hostility has to be shown to the satisfaction of the trial judge before a party calling a witness can proceed to impeach that witness' credit.[14]

In practice, the issue of a witness being hostile or unfavourable will generally arise in the course of examination-in-chief at that point where the examiner concludes that the witness is unwilling to tell the whole truth having regard to the test for hostility. As contemplated by s 27, it is then a matter of applying to the trial judge for leave to cross-examine the witness on the grounds that he or she is hostile. The application should be made in the absence of the jury. It is for the trial judge to determine hostility. A voir dire may be necessary if there is a genuine issue about hostility or if a prior inconsistent statement must be proved. During the voir dire, a limited cross-examination will be allowed, but may only relate to the issue of hostility.

In *McLellan v Bowyer*, Dixon CJ, Taylor and Kitto JJ made the following observations regarding the material to be taken into account in determining hostility:

> ... it has been settled for many years that although hostility, or adverseness, may appear from the demeanour of the witness, this is not the only factor to which a court may have regard. In particular, it may have regard to previous inconsistent statements made to a party: *Dear v Knight* (1859) and *Russell v*

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12 *R v Souleyman* (1996) 40 NSWLR 712 at 715 (Smart J); *R v Fowler* [2000] NSWCCA 142 (Unreported, 23 May 2000) at [120] (Wood CJ at CL); *R v Ashton* (2003) 143 A Crim R 354 at 361 (Underwood J).

13 *R v Pantoja* [1998] NSWSC 565 (Unreported, 5 November 1998) (James J).

14 *Price v Manning* (1889) 42 Ch D 372. Under the *Uniform Evidence Acts*, see ss 38 and 192: see also *Stanoevski v R* (2001) 75 ALJR 454; *Adam v R* (2001) 75 ALJR 1537 and *R v Fowler* [2000] NSWCCA 142.

> *Dalton* (1883); or to a party's attorney: *Faulkner v Brine* (1858); or upon oath in a court of bankruptcy: *Pound v Wilson* (1865) or to an officer of police: *R v Hunter* (1956). In some cases there seems to be implicit the notion that leave may be granted when the party calling the witness is, by reason of the earlier statement, entitled to assume that the witness will, upon being called, testify in accordance with his statement. This, of course, tends to treat the character and circumstances of the earlier statement as a matter of vital importance ... although it must be conceded that not every witness who testifies inconsistently with an earlier statement can properly be regarded as hostile, or adverse, it is clear that the existence of an earlier inconsistent statement, in whatever circumstances it may have been made, will always be a material matter and, when taken into consideration with other features of the case may furnish grounds for concluding that the witness is hostile.[15]

In *Price v Bevan* it was held that despite the composition of s 27 (which would tend to indicate that a judge cannot consider a prior inconsistent statement until he has declared the witness hostile), it was open to a trial judge to consider a proven prior inconsistent statement in the course of determining whether or not the witness was hostile.[16] Bray CJ set out the procedure to be followed:

> Firstly, counsel should indicate that he or she has an application to make in the absence of the jury. Further, before revealing the nature of the application and, in all likelihood, the basis of it (a prior inconsistent statement), the witness should also leave the courtroom.
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> Secondly, when the hostile witness returns to the witness box, and before the prior inconsistent statement is proved *aliunde*, the witness must be asked whether at some particular time and place he made some particular statement inconsistent with his evidence.
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> Finally, if the prior inconsistent statement is not admitted, it may be proved. This may mean interposing a particular witness. Only the prior inconsistent statement should be proved and tendered. The trial judge may then rely upon the statement in determining whether or not the witness is hostile.

Whether such a determination will follow will depend upon the nature of the inconsistency between the evidence given in chief and the prior statement and also whether an adequate explanation of the inconsistency can be provided.

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15 (1961) 106 CLR 95; See also *R v Hutchison* (supra); *R v Jacquier* (1979) 20 SASR 543 – in *Jacquier* it was held that the established fact that the witness had given a previous statement contradictory to what he had said earlier in examination in chief was sufficient basis to declare him hostile (at 554).

16 (1974) 8 SASR 81.

In *Price v Bevan* Walters J said:

> ... the inconsistency should be clear and vital and should go only to matters which are essentially in issue and which specifically relate to the particular topics on which the witness has already given evidence. ... And it must be kept in mind that a witness confronted with a prior inconsistent statement may be able satisfactorily to explain the content of it and any manifest inconsistency between it and his present testimony.[17]

Under the *Uniform Evidence Acts*, there is no requirement that the witness be declared unfavourable. However, counsel is still required to obtain leave of the court to cross-examine his or her own witness. Section 192(1) provides that the court may grant leave 'on such terms as the court sees fit.' Section 192(2) lists certain matters that the court is to consider in deciding whether to grant leave, including the extent to which to do so would be unfair to a party or to a witness, and the importance of the evidence in relation to which leave is sought.[18] In addition to s 192, s 38(6) provides that the Court is to take into account whether the party gave notice at the earliest opportunity of his or her intention to seek leave, and the matters on which, and the extent to which the witness has been, or is likely to be, questioned by another party.

## What is the consequence of the witness being found hostile or unfavourable for the party who called that witness?

Once a party is permitted by the trial judge to cross-examine his or her own witness, such witness having been declared hostile, it is considered to constitute a full cross-examination, which may relate to facts relevant to the issue and also to credit.[19] The options open to the cross-examiner include:

- Cross-examining the witness generally and upon their previous convictions;
- Calling evidence to suggest that the witness should not be believed upon their oath;
- Calling relevant evidence to contradict the witness;
- Calling evidence of the witness' general reputation for truthfulness;[20]

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[17] (1974) 8 SASR 81 at 97.

[18] *Uniform Evidence Acts* s 192(2) (c).

[19] *Price v Bevan* (supra); *R v Hunter* [1956] VLR 31.

[20] In *R v Hunter* [1956] VLR 31 at 36, Martin, O'Bryan and Dean JJ provided that independent evidence may not be given to show that a party's own witness has a general reputation for untruthfulness. A Ligertwood, *Australian Evidence* (4$^{th}$ ed, 2004) at 538 cites *R v Hunter* as authority for the proposition that a party will not be permitted to pursue credit of their own witness beyond cross-examination by calling witnesses to establish bias or untruthfulness. However, such a limitation must be

- Proving the inconsistent statement in accordance with s 27(b) *Evidence Act* 1929 (SA);[21]
- Proving any additional prior inconsistent statement in accordance with ss 28 and 29 *Evidence Act* 1929 (SA).[22]

In practice the judge may in some cases impose limitations on the matters upon which cross-examination may occur.[23] The underlying rationale is that the party is entitled to do what is necessary to nullify the effect of the adverse evidence. There is much to be said for the prosecutor in a criminal case exercising a degree of restraint in case the conduct of a full cross-examination goes beyond nullifying the effect of the adverse evidence and renders the trial of the accused unfair.

As the application for a declaration of hostility is heard in the absence of the jury, counsel may need to undertake a line of questioning to prove a prior inconsistent statement twice; once before the judge when seeking a declaration of hostility and once before the jury in order to show that the witness is not to be believed.

Bear in mind that at common law, the calling of a witness known to be hostile for the sole purpose of getting before the jury an inadmissible, prior inconsistent statement to prove facts against the accused is improper and may well give rise to a miscarriage of justice.[24] The position is not so clear under the *Uniform Evidence Acts*, where if the prior inconsistent statement was properly received as hearsay evidence, this principle does not apply.[25] However, courts have expressed some reluctance to allow s 38 to be used as a 'forensic device' for manipulating trial procedure to gain an unfair or improper advantage that would not arise in the absence of s 38.[26]

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questioned as it limits the ability of a party to properly put their case that the hostile witness ought not be believed.

21 *Evidence Act* 1977 (Qld) s 17(1); *Evidence Act 1906* (WA) ss 21-22; *Evidence Act* (NT) s 18(b).

22 *Evidence Act* 1977 (Qld) ss 18 & 19; *Evidence Act 1906* (WA) ss 21-22; *Evidence Act* (NT) ss 19 & 20.

23 *R v Jacquier* (1979) 20 SASR 543 at 549 (Walters and Wells JJ).

24 *Blewitt v R* [1988] 80 ALR 353; *R v Thompson* [1964] QWN 25; *R v Hall* [1986] 1 Qd R 462.

25 *Adam v The Queen* (2001) 207 CLR 96 at 104-105 (Gleeson CJ, McHugh, Kirby and Hayne JJ).

26 *R v Mansour* (Unreported, NSW SC, 19 November 1996, Levine J); *R v Nguyen* (2002) 127 A Crim R 102 at 106 (O'Keefe J); *R v Parkes* (2003) 147 A Crim R 450 at 463 (Ipp JA).

Section 38(1) of the *Uniform Evidence Acts* provides that the party may question the witness 'as though the party were cross-examining the witness'. Section 38(2) means that the provisions in the Act with respect to cross-examination apply in respect of such a witness.[27]

The extent of the entitlement to cross-examine under the *Uniform Evidence Acts* is a matter that is not clearly decided. On one view, the cross-examination should be limited to the matters within s 38(1). It has been provided that in order to prevent diverting the focus of the trial, a judge should take a cautionary approach to the ambit of questioning allowed by the grant of leave.[28] In contrast, in *R v Le*, Heydon JA took a wide view of the ambit within which cross-examination should be allowed:

> In my opinion, on the true construction of s 38, leave may be granted under s 38 to conduct questioning not only if the questioning is specifically directed to one of the three subjects described in s 38(1), but also if it is directed to establishing the probability of the factual state of affairs in relation to those subjects contended for by the party conducting the questioning or the improbability of the witness's evidence on those subjects. In establishing the probability or improbability of one or other state of affairs, the questioner is entitled to ask questions about matters going only to credibility with a view to shaking the witness's credibility on the s 38(1) subjects.[29]

Section 38(3) explicitly provides that questions relevant only to the witness's credibility may be put.[30] However, to do so requires a specific grant of leave and will probably not be granted at the first instance.[31]

## What use may be made of the hostile or unfavourable witness' inconsistent evidence?

In seeking to nullify the effect of the witness' adverse evidence it will almost invariably be the case that a prior inconsistent statement is put to the witness. That statement will be adduced for the purpose of undermining the witness' credit and, in the absence of an adoption of its

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27 *Uniform Evidence Acts* Part 2.1, Division 5.

28 *R v Hogan* [2001] NSWCCA 292 (Unreported, 3 August 2001) at [80]-[81] (Greg James J).

29 (2002) 54 NSWLR 474 at 486.

30 However, that provision is subject to the constraints on admission of credibility evidence in Part 3.7. Importantly, s 103 requires that cross-examination of a witness as to credibility is allowed if it "could substantially affect the assessment of the credibility of the witness."

31 A Ligertwood, *Australian Evidence* (4th ed, 2004) 542.

truth coupled with the disavowal of the truthfulness of all other statements, can only be used for the purpose of discrediting the witness.[32] The position is different under the *Uniform Evidence Acts*. Section 60 provides an exception, which allows evidence admitted for another purpose to be used for a hearsay purpose.

In Tasmania, a prior inconsistent statement may be used as truth of the facts so stated,[33] subject to the discretion to limit its use within s 136. This was also the situation in NSW, Victoria, ACT and in federal Courts until the recent insertion of s 101A, which was enacted as a response to the decision in *Adam v The Queen*.[34] The effect of this change is that the evidence must first be independently admissible as credibility evidence. This may occur via s 103, which allows cross-examination as to credibility if the evidence 'could substantially affect the assessment of the credibility of the witness'. Alternatively, if the substance of the prior inconsistent statement is put to the witness and it is denied, s 106 makes it admissible in order to rebut that denial. Only once admitted can s 60 operate to make the evidence also admissible as hearsay evidence.

32 *Golder v The Queen* (1960) 45 Cr App R 5 at 11 (Parker LCJ); *R v Thynne* [1977] VR 98 at 100 (Young CJ, McInerney and Newton JJ). See also *Driscoll v The Queen* (1977) 137 CLR 517 at 535-7 (Gibbs J); *R v Lawrie* [1986] 2 Qd R 502 at 511 (Williams J).

33 *R v GAC* (Unreported, NSWCCA, 1 April 1997); *R v BD* (1997) 94 A Crim R 131 at 137 (Hunt CJ at CL); *Adam v The Queen* (2001) 207 CLR 96; *R v Duncan and Perre* [2004] NSWCCA 431 (Unreported, 8 December 2004) at [237] (Wood CJ at CL).

34 Indeed, this is expressly stated as a note to s 101A.