

LEHRMANN v NETWORK 10 & WILKINSON

Cross-examination of witnesses

A. PRINCIPLES

1. Every party has a right to a fair trial, and the entitlement to cross-examine is part of the practice and procedure of a fair trial. Historically any party against whom a witness has testified was entitled to cross-examine.
2. The cases and principles at common law were considered in detail by Young J in *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No. 3)* (1990) 20 NSWLR 15 at 22-24. His Honour set out a number of principles, including in relation to cross-examination by parties in the same or similar interests. Relevant factors include notice to cross-examine, where issues are complex and there is no overlapping cross-examination. In that case the plaintiff objected to other parties' counsel both cross-examining a witness where they those parties had near identical interests. His Honour concluded that he should permit cross-examination whenever it was not oppressive and that ordinarily only one counsel in the same interest should cross-examine. In that case His Honour considered it fair to allow both counsel to cross-examine and ordered that counsel agree between themselves who would go first and that both might cross-examine but that there should be no overlapping material.
3. Section 27 of the *Evidence Act* 1995 provides that a party may question any witness, except as provided by the Act.
4. FCR Rule 29.09 entitles a party who has given notice to require another party who intends to rely on an affidavit to attend for cross-examination.
5. In *Canberra Residential Developments Pty Ltd v Brendas & Ors* [2010] FCAFC 125 the Full Court (Finkelstein, Siopsis and Katzmann JJ) held that the decision of trial judge to refuse leave to junior counsel to cross-examine a witness that senior counsel was in the middle of cross-examining before quitting the trial was erroneous.

6. Their honours noted that “*the common law frowns upon cross-examination by multiple counsel because of the possibility of oppression*” (at [44]). However, their Honours went on to identify reasonable exceptions – for example where counsel on one side have split their trial preparation on a topic by topic basis, which can be an extremely efficient way in which to conduct complex litigation subject to ensuring no unfairness to the witness: at [45]. Given junior counsel had said he would not ask questions on any topic already dealt with, that was sufficient to ensure the witness was not burdened by unfair cross-examination and it would cause no injustice: at [46].
7. The Full Court further held that the trial judge should have considered the issue by reference to the *Evidence Act* – which may mean that the party calling the witness bears the onus of showing that cross-examination is unfair or should otherwise not be allowed: at [50].
8. Justice Katzmann further considered the position in light of the enactment of s27 of the Evidence Act in *Tarrant v Statewide Secured Investments Pty Limited* [2012] FCA 582 at [34]-[35] which was cited with apparent approval in *Barkla v Allianz Australia Insurance Limited* [2018] FCA 2070 at [132]-[133] per Charlesworth J.
9. The ultimate question is one of fairness, and the right to a fair trial, having regard to the provisions of the *Evidence Act*.

B. SUBMISSIONS

Fairness

10. Here the witness in question is the applicant, who brings the proceedings against each respondent and is the most important witness of the trial.
11. The trial is listed for 4 weeks, and concerns complex issues, and serious matters that will have a substantial impact on the individuals involved, the applicant, the second respondent, and Ms Higgins, a witness in the first respondent’s case.
12. The applicant has briefed two senior counsel and two junior counsel for the trial. They appear to have divided the issues between them – justification on the one hand, and other defamation issues (identification, s30, damages) on the other.

13. The first respondent has briefed one senior counsel and one junior.
14. The second respondent has briefed one senior counsel and one junior.
15. They have similarly co-operated to manage the significant workload involved in the conduct of the case – as has already been seen by the cross-examination and objections to evidence that have occurred in the first days of trial.
16. Senior counsel for the second respondent has (at the outset of the trial) informed the court that there will not be duplication in subject matter already traversed by senior counsel for the first respondent. Senior counsel for the applicant has also been kept informed of the division in topics.
17. There will be no unfairness to the witness in the circumstances.

Difference in interests

18. The Court has required the second respondent to identify in these submissions the difference in interests between the respondents. Given the submissions made above, the second respondent does not consider this matter determinative of the present issue, but in accordance with the direction says as follows.
19. The second respondent has asserted a right to separate representation because:
 - a. she is an individual who has been separately sued as a party;
 - b. she has an entitlement to choose her own counsel;
 - c. the proceedings affect her reputation and profession directly;
 - d. the outcome of these proceedings will have a material impact on the second respondent's future ability to work and be remunerated in her chosen profession;
 - e. the second respondent, although still employed by the first respondent, has not worked at all, and not been on air for a year – since about the time the criminal proceedings against Mr Lehrmann were discontinued and since these proceedings were commenced;

- f. the applicant has made direct allegations against her professionalism as part of the proceedings, separate and in addition to, allegations against Network Ten;
 - g. the second respondent alleges that applicant has engaged in a media campaign directly against her in connection with these proceedings;
 - h. the second respondent contends that there is a conflict between her interests and the first respondent's interest in the proceedings;
 - i. the first respondent requested that the second respondent obtain advice from Bret Walker SC about whether there was any such conflict, and whether the second respondent required separate representation in the proceedings;
 - j. Bret Walker SC concluded that there was a conflict between the second respondent's interest and the first respondent's interests in the proceedings, it could not reasonably be expected that she retain the same lawyers as Network Ten in the proceedings, and that the second respondent is entitled to separate representation in the proceedings;
 - k. the second respondent does not waive privilege over the content of that advice;
 - l. the first respondent has accepted Bret Walker SC's advice and has agreed to indemnify the second respondent for the proceedings;
 - m. the first respondent and the second respondent are in dispute as to when such indemnity monies should be paid, and the extent of such payment.
20. Given the second respondent is separately represented, her lawyers are conducting her defence on her behalf in accordance with her interests, her instructions and having regard to their professional obligations. That involves differences in the pleadings, different forensic decisions, and different approaches to the conduct of the case.
21. The fact that she is named as the second respondent (that is, as opposed to first respondent) should not disadvantage her in the conduct of her defence.
22. The applicant could have limited his claim to the first respondent. He chose not to and his decision impacts not only costs, but also the conduct of the proceedings. It impacts the second respondent personally and she is entitled to defend herself.

Pleadings differences

23. The respondents have no difference of position in relation to the justification defence.
24. The pleaded differences between the respondents are:
 - a. Identification;
 - b. Common law qualified privilege (not pleaded by 10 – interacts with identification issue);
 - c. Section 30 (wholly common for Network 10 but additional factors to take into account for LW);
 - d. Aggravated damages; and
 - e. Mitigation of damages.

Division of topics

25. The first respondent's senior counsel has cross-examined the applicant on justification and on events in 2019 (and related subsequent admissions and prior inconsistent statements) and expects to conclude that cross-examination on 27 November. He will also cross-examine the applicant in relation to communications from producer Angus Llewellyn sent on 12 and 15 February 2021 and his conduct in relation to and knowledge of the proposed Project broadcast and related admissions.
26. The second respondent's cross-examination will not traverse questions of justification at all. Senior counsel proposes to cross-examine the applicant on the remaining issues (a-e above) to the extent that they have not been addressed by the cross-examination to date and the matters in paragraph 25 above.
27. Those questions principally concern matters upon which senior counsel for the first respondent cannot cross-examine having regard to the differences in the pleadings, namely: (i) identification to the extent of its intersection with the common law qualified privilege defence relied on by Ms Wilkinson but not pleaded by Network 10; (ii) the reasonableness of Ms Wilkinson's role in relation to the broadcast; and (iii) Ms

Wilkson's conduct subsequent to the broadcast that has allegedly aggravated the applicant's damages.

28. To the extent that the remaining issues are common to both respondents, senior counsel for the parties have agreed that it would be most efficient for the cross-examination on those topics to be undertaken by senior counsel for the second respondent. For example, it is intended that senior counsel for the second respondent will cross-examine in relation to mitigation, although it is relevant to both respondents, because it is logical for that cross-examination be conducted by the same counsel responsible for cross-examination in relation to aggravated damages (which is principally, though not exclusively, a matter concerning Ms Wilkinson).

Sue Chrysanthou

26 November 2023

Barry Dean

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