ELEMENTS OF THE CASE FOR THE DEFENDANT

THE SETTING

"A trial is not really a struggle between opposing Lawyers but between opposing stories".

(Johnnie L. Cochran Jnr. - Journey to Justice)

That short quotation, I believe, encapsulates with engaging simplicity and self embracing truth what a **trial** is really about. This is particularly so in a Trial where *"facts"* are in dispute and the tribunal of fact is called upon (out of a basic human curiosity subject to the rules of evidence and procedure) to determine what really happened.

Keep in mind that a **trial** does not involve a search for *absolute* truth, rather, depending on the issue to be resolved, it is a search for *"truth"* beyond a reasonable doubt or *"truth"* on a balance of probabilities. Both standards allow for tolerable doubt and a measure of inexactitude.

A possible third standard has been suggested for certain types of civil case. That is a standard higher than proof on a preponderance of probability and yet lower than proof beyond a reasonable doubt. It may well be that different amounts of evidence is required to satisfy the same standard in relation to different types of allegations (like fraud, OR, arson as a Defence to an Insurance Claim).

According to Lord Denning:-

> "In civil cases the cases must be proved by a preponderance of probability, but there *may be degrees of probability within that standard.* The degree depends on the subject matter. A civil Court, when considering a charge of fraud, will

naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established". (Bater vs Bater 1951 P35 at 37).

The party who has the burden of proof on a particular issue will lose on that issue if, at the end of the trial, the tribunal of fact DOES NOT CONSIDER that the standard of proof that is appropriate has been reached. For example the fact that it is proven that the Plaintiff's driver was not negligent and did not cause the accident does not mean that the Defendant's driver was negligent. Such negligence must be established at the requisite standard of proof (see Hollington vs. F. Hewthorn & Co. Ltd.(1943) 2 ALL E.R. 35 for discussion as to how inconclusive evidence is to be approached).

Defence Counsel must also keep in mind that if there is a counterclaim, that too must be established at the requisite standard of proof .

SOURCES OF THE DEFENDANT'S STORY

Counsel for the Defendant will look to his main sources for the mastery of the Defendant's case. These include, but are not necessarily limited to:-

(1) The instructions furnished by and/or on behalf of the Defendant viz; statements from the Defendant and the proposed witnesses to be called on his behalf.

(2) Correspondence, photographs, plans, reports, documents and proposed exhibits in support of the Defendant's case.

(3) The Defence as pleaded and the matters in issue, on the face of the pleadings, as a whole.

(4) The Defects and/or other shortcomings manifest in the pleadings filed on behalf of the Plaintiff.

(5) Pre-trial Orders and the information gleaned as a result of compliance therewith by the opposing party (e.g. answers to interrogatories; inspection of documents as a result of discovery).

The importance of thorough pre-trial preparation cannot be over-emphasized as Counsel for the Defendant must come to the trial with a complete understanding of the issues to be litigated and a complete mastery of the facts, principles and legal authorities to be advanced on behalf of the Defendant.

Keep in mind that as Counsel for the Defence your duty to the Defendant is multi-faceted.

(1) TAKING NOTES

Let me remind you of one basic essential - make careful notes of the testimony as given by the witness (particularly if you are not gifted with an excellent memory). Try to take an exact notation of *all* of the substantive portions of the evidence of the witness.

If possible write both questions and answers. At the very least write the answers of the witness in such a way that the question posed is made evident from the answer you have recorded in response thereto.

THE STRUGGLE

(2) OBJECTIONS

It is also part of your duty as Counsel to make appropriate objections to have excluded inadmissable evidence AND to protect the record should the matter go to Appeal. Listen carefully to the question posed and almost instantaneously ask yourself inter alia:-

(a) Has a foundation been laid?

(b) Is the witness being asked to give hearsay evidence?

(c) Is the question leading?

(d) Does it call for opinions or conclusion by a non-expert witness?

(e) Is the question a compound question?

(f) Is the question relevant?

(g) Does the question misstate the evidence or misquotes a witness?

(h) Is Counsel cross-examining his own witness?

If your opponent is trying to put a document in evidence, ask yourself inter alia:-

(1) Has the document been stamped in compliance with the Stamp Act, where applicable?

(2) Has a proper foundation been laid to establish the authenticity of the document?

(3) Is the document an original and if not is there a proper explanation for the absence of the original? (e.g. Has a Notice to Produce been served? Is the original lost or destroyed?)

See also the Evidence Amendment Act.

The above are some of the categories of objectionable matters to look for. Mark you, the witness may have blurted out, OR, is likely to give an answer which HELPS you, in which event you may wish to maintain a tactical silence. You therefore have to master the trial skill of when and how to make an objection. When objecting you must object promptly (i.e. before the witness gives an answer).

It is essential that you have clear in your own mind the precise legal basis on which you are making the objection. Unless the Judge of his own volition readily indicates that he/she will sustain the objection you must state the legal basis:-

(e.g. M'Lord I'm objecting to that question as it calls for the witness to give hearsay evidence).

It is not enough to simply say *"I object"* without having readily at hand the legal basis for so objecting as the Judge may ask you to state the basis of your objection and your opponent may counter your objection, if he wishes to persist with the question, leaving the Judge to make a ruling. Make sure the objection has been noted fully by the Judge.

It is vital that you maintain your credibility with the Judge so you should not object merely for the sake of objecting as that could give the impression that you are trying to hide truthful testimony from the Judge (and in so doing you are likely only to highlight that testimony).

THE JUDGE

Know your Judge. Try to assist the Judge as much as possible without being obsequious. Judges have bad days too and sometimes are in a disagreeable mood. Avoid confrontation as you have a duty to maintain the decorum of the Court.

However, you must be FIRM. Do not allow a Judge to dictate your case to you and if you have to, *"stand-up"* to the Judge, be strong, without being disrespectful. A ready wit, will always avail. Let me illustrate.

The great English Barrister, F.E. Smith (later Lord Birkenhead) tangled with Judges in his time. One exchange went thus:-

A. Judge: "I have listened very carefully, Mr. Smith to what you have said, but I am none the wiser".

F.E. Smith: "None the wiser perhaps, M'Lord, but far better informed".

B. We find the redoubtable F.E. Smith in yet another exchange with a Judge.

Judge: "Mr. Smith I think you are trying your best to show your contempt for this Court".

F.E. Smith: "On the contrary M'Lord, I'm trying my best to conceal it."

The Judge has a diminished role in a civil case and unlike a criminal case, in a civil case, the Judge has no power to call a witness himself *without the consent of the parties.* (See Enoch and Taretsky, Bock & Co. 1910 1KB 327).

Please note however that the Judge has complete discretion in allowing a party to *recall* a witness. The discretion will be used sparingly.

The role of the Judge is best illustrated by the case of Jones vs. National Coal Board (1957) 2 ALL E.R. page 155. The headnote has the following passages:-

> "The part of a judge at the trial of a civil action is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies AND

> .... it is only by cross-examination that a witness's evidence can be properly tested,
>
> .... the very gist of cross-examination lies in the unbroken sequence of question and answer ... excessive judicial interruption inevitably weakens the effectiveness of cross-examination ... for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and
>
> diverts cross-examining counsel from the course which he had intended to pursue and to which it is by no means easy, sometimes, to return". (Denning L.J.)

In regard to the ethics of Counsel traipsing off to see a Judge in Chambers, during a trial the observation of Lord Parker L.C.J. in R vs. Turner (1970) 2 Q.B. 321 pages 326 should, it is submitted apply *mutatis mutandis* a civil case:-

> "Where defending Counsel does ask to see a Judge, Prosecuting Counsel must also be present and the Defending Counsel should subsequently inform the accused of what took place" (see also Sir William Boulton's Conduct and Etiquette at the Bar).

CROSS EXAMINATION

> ***"A wise Lawyer does his fishing before the trial starts, not during cross - examination."***

After the Plaintiff's Counsel has completed his examination in chief and you see a critical five to ten minutes, before the break try and "put in a few punches", ask questions designed to pin the witness to a glaring falsehood in his story (before he can avail himself of the opportunity of the adjournment to refresh his memory, retract his testimony, or, confer with others as to how to cure or explain the weakness).

It is also good to start your cross-examination at the first opportunity to close off the examination in chief. Often times after an adjournment Counsel for the Plaintiff, although having previously indicated that he has no further questions, returns to say "I have a few more questions M'Lord" (usually designed to improve on the examination in chief). Start your cross-examination at the first opportunity (if even with a few formal questions) to forestall the Plaintiff or his witness having "another bite at the cherry".

Generally there are *six broad categories* of witnesses:-

(1) The incurably dishonest witness who will lie on all matters (including his name and address).

(2) The selectively dishonest witness - who will speak the truth on the marginal matters but will lie emphatically on the central allegation which he is called to support.

(3) The stupid witness - who is at once a help and a hindrance.

(4) The truthful (but mistaken) witness

(5) The truthful and intelligent witness.

(6) The expert witness (who will be dealt with separately).

When you get up to cross-examine you would have "sized-up" the witness to see what category he or she falls in and temper your tone and adjust your line of attack appropriately. The dishonest witnesses are usually vulnerable on the small, though related matters, as they all come to tell the BIG LIE so you try to get a number of discrepancies and inconsistencies "which you must then suddenly relate and contrast with the real matters in issue".

Be reminded that "the art of cross-examination does NOT lie in cross-examining crossly".

To begin with you have to assess the witness as to whether he is a lying witness or a mistaken witness to determine your basic approach. However, you have to first of all ask yourself, how much has that witness's testimony affected the Defendant's case and what areas of the witness's testimony, if any, needs to be challenged or even discredited?

Cross-examination has two main purposes:-

(1) "to challenge the evidence in chief insofar as it conflicts with your instructions; and

(2) to elicit facts favourable to your case which have not emerged, or which were insufficiently emphasised in chief".

I would add three other important purposes viz;

(a) Laying the foundation of the Defendant's case.

(b) It provides an opportunity for putting the Defendant's case to the witness being cross-examined (where there are conflicting versions and the Defendant or his witness later gives evidence to the contrary it is always dreadful to hear at that stage an objection or observation that so and so was not put to Plaintiff or his witness).

© Also an opportunity to put a new or different perspective to the evidence on behalf of the Plaintiff.

Counsel for the Defendant must keep in mind also that a failure to cross-examine MAY be taken by the Judge as an acceptance by the Defendant of any part of the examination-in-chief which is NOT CHALLENGED. The cross-examiner should therefore cross-examine the witness about any matters on which his instructions differ from the evidence in chief and about any parts of his

case with which the witness can reasonably be expected to deal.

However, you must be forever vigilant not to use cross-examination to improve on your opponent's case. Sometimes if the situation warrants you may even decide NOT to cross-examine at all, if no damage has been done to your Defence.

The following story is worth repeating. In a case involving an allegation that the Defendant had bitten off his neighbour's ear, the sole eyewitness was asked on the stand if he saw the Defendant bite off the ear. He answered no.

Prosecutor: "You didn't see him doing anything to the ear?"

Witness: "I didn't see him bite anything at all".

Prosecutor: (turning to the Judge) "Well, I guess I have no case, your Honour".

Instead of asking for a dismissal and taking his seat the Defence Counsel, a pompous ass, chose to cross-examine.

Defence Counsel: "Sir, if you didn't see this happen, why have you had the gall to come into this Court and testify against my Client".

Witness: "Well, I didn't see him bite off the ear, but I did see him spit it out".

I'm sure that even the most inexperienced amongst us gets the point.

Equally important is that when you do an effective cross-examination you must not kick-over the pail of milk obtained from the cow (figuratively speaking). You should not attempt to milk the cow dry either KNOW WHEN TO TAKE YOUR SEAT.

Our great exemplar, F.E. Smith was once cross-examining a boy whose right arm, the Plaintiff alleged, had been crippled through the negligence of the Defendant, a Bus Company.

"Will you show me", F.E. asked with great sympathy toward the boy, "just how high you can lift your arm?"

His face exhibiting great pain, the boy could barely bring his arm in line with his shoulder.

"Thank you", said F.E. "and now will you show me how high you could lift it before the accident?"

The boy's arm immediately shot up in the air, and the Defence had no further questions.

Another point to bear in mind (indeed a skill to develop) is that as cross-examiner you must maintain control of the witness. You and not the witness choose the parts of his evidence on which to ask the questions. The cross-examiner chooses the angle of the attack, not the witness. As a trained Lawyer the cross-examiner/advocate has a better understanding of the rules that bind them both (i.e. rules of relevance and admissibility). No witness knows how much the advocate knows.

Remember also that in cross-examination you may lead the witness as much as you like and through leading maintain control of the witness (it is only when examining his own witness that Counsel must not lead the witness). It is unwise to lead a witness whom you are cross-examining when that witness is giving favourable testimony (e.g. a Co-Defendant) as leading may affect the weight the Judge places on such evidence as it exposes the witness' partiality. However, as you cross-examine ensure that your cross-examination at the very least resonates with a theme as you build bit by bit the foundation for your own case.

In the cut and thrust of cross-examination project a confident, take charge attitude. Once again a ready wit will avail you.

Sir Edward Carson (a lethal cross-examiner) pointed his long index finger at a red-nosed witness:

"I believe you're a heavy drinker?" Carson asked.

"That's my business!" replied the witness.

"And have you any other business?" countered Carson and sat down.

Effective cross-examination is in many ways an acquired skill but I offer for your consideration the following additional points:-

(a) Think out a well structured set of questions/areas for cross-examination.

(b) Try to open and close your cross-examination on strong points.

© Vary the order of your topics (without being jerky and scatter-shot).

(d) Don't remind the witness of his direct examination (you can point out discrepancies to the Judge in closing).

(e) Know the probable answer to your questions before you ask the questions (while remembering that you have to put your case to certain witnesses).

(f) Make a statement of fact and have the witness agree with it.

(g) Use short, clear questions bit by bit.

(h) Be a good actor (keep a stiff upper lip when you get a bad answer - shift the focus smoothly - as if nothing happened).

(I) Do not ask one question too many. Resist the temptation. Sit down when you have extracted the optimal favourable point from the particular witness. Often a further question ruins what has been built up before.

A young man was once charged with having unlawful sexual intercourse with a girl under sixteen. The corroborative evidence supporting the girl's story came from a farmer who said he had seen the pair lying together in a field. He was asked:

Counsel: "When you were a young man did you never take a girl for a walk in the evening?"

Farmer: "Aye, that I did".

Counsel: "Did you never sit and cuddle her on the grass in a field?"

Farmer: "Aye, that I did".

Counsel: "And did you never did lean over and kiss her while she was lying back?"

Farmer: "Aye, that I did".

Counsel: (continuing, with one question too many) "Anybody in the next field, seeing that, might easily have thought you were having sexual intercourse with her?"

Farmer: "Aye, and they'd have been right too".

CONFRONTING THE WITNESS

Keep in mind that it is permissible for a party to prove that the witness of another party has made a previous inconsistent statement. This enables impeachment of the credit of the witness in general or on a particular point. The previous inconsistent statement must relate to a fact in issue and not to a collateral point (see R vs. Hart 1958, 42 Cr. App Rep; 47).

Section 16 of the Evidence Act provides that:

> "If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, 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 such statement".

As worded section 16 of the Evidence Act is NOT restricted to statements in writing.

Note also section 17 of the Evidence Act:

> "A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him:
>
> Provided always, that it shall be competent for the Judge at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he shall think fit".

In confronting a witness Counsel is permitted to put into the witness's hand a document whether the document is one created by the witness or not. The document may even be a newspaper clipping. The witness can be asked to read the document to himself, Counsel can ask the witness,

whether in view of what he has read, he still adheres to his testimony. (See R vs. Peter Blake (1977) S.C.C.A. 122/76 - delivered October 21, 1977).

If the witness maintains his position with an affirmative yes, Counsel will have to move on, unless he can bring himself within the provisions of the statute or common law. It is however improper for Counsel to describe to the Judge the nature of an inadmissible document which Counsel holds in his hand while asking the witness to look at it.

Keep in mind that if a witness who makes a previous inconsistent statement, during cross-examination admits part of the previous inconsistent statement, then, such admissions made under oath become evidence (See R vs. Charles Jones 15 J.L.R. 20). In that case the following observation was made by His Lordship Henry J. A.(page 22) when commenting on the conflict of a witness's evidence at the trial with that previously given at the preliminary enquiry:

> " If there is a conflict, the jury, having due regard to any explanation offered by the witness, are entitled to take that conflict into account for the purpose of deciding whether the evidence of the witness ought to be rejected as unreliable either generally or in so far as it conflicts with his earlier evidence. The jury cannot, however, reject the evidence at the trial and act instead on the evidence at the preliminary enquiry unless the witness admits that the conflicting evidence at the preliminary enquiry was truthful".

The statement or parts thereof only becomes evidence by the witness making admissions on oath and not by tendering the statement in evidence. The dominant view seems to have been that where the witness denies the statement or parts and it is put into evidence, the only effect of the statement is to destroy the credibility of the witness (see however Warren vs. Pitt and Davis RM Civil Appeal 1972 C.A. Vol. 1X where the matter was discussed and the majority view that a

previous admission by a witness in a statement to the police "is direct evidence of those facts" was later vindicated by section 31 1 (2) of the Evidence Amendment Act 1995).

The general rule is that a witness should have his attention drawn to any fact with respect to which it is intended to impeach his credit by other witnesses.

You should also bear in mind section 27 of the Judicature (Resident Magistrates) Act:

> "....the Magistrate shall take notes of the evidence in the trial of all indictments and in all civil suits; and such notes, heretofore taken, or hereafter to be taken, by the magistrate, or a copy thereof, purporting to bear the seal of the Court, and to be signed and certified as a true copy by the Clerk of the Courts, *shall at all times be admitted in all Courts and places whatsoever, in the trial or hearing of all civil proceedings suits and matters, for the purpose of impeaching the credit or contradicting the evidence of any person in accordance with the provisions of sections 15 and 17 of the Evidence Act, as prima facie evidence that the statements therein appearing to have been made by such person were so made".*

This section could prove useful in negligence and certain fatal accident actions particularly where there has been a prosecution in the Resident Magistrate and evidence given on the same issue.

For sake of completeness I draw your attention to the fact that it is not a permissible to use the conviction of the Defendant (for say careless driving) in evidence in the civil proceedings *as proof of negligence.*

"A certificate of a conviction cannot be tendered in evidence in civil proceedings and, in the present case (Hollington vs. F. Hewthorn & Co. Ltd.) the Certificate was rightly rejected. On a subsequent civil trial the Court should come to a decision on the facts before it without regard to the proceedings before another tribunal". (Hollington vs. F. Hewthorn & Co. Ltd.1943 2 ALL E.R. 35).

In that case, Counsel for the Plaintiff contended that a Certificate of Conviction of the Defendant's driver (for driving without due care and attention on the same day the accident occurred and in the same parish) was admissible as *prima facie* evidence of negligence. That contention was rejected.

In fact the conviction cannot be pleaded and may be struck out, if pleaded, as improper frivolous and vexatious. (See Florence Samuels vs. Michael Davis S.C. GLS 268 of 1990 - Judgement of Courtney Orr J.).

However, section 18 of the Evidence Act allows the opposite party to prove the conviction at the trial if the witness denies the conviction OR refuses to answer.

PITFALLS

It is settled law that a witness is not entitled to put in evidence a document containing a prior consistent statement i.e. to furnish self corroboration (Gillie vs. Posho Ltd. (1939) 2 ALL ER 196). If Counsel in cross-examination suggests that the evidence in chief is a recent fabrication the document containing the previous consistent statement can be admitted in re-examination to negative the suggestion.

One should therefore be careful not to make unfounded or imprudent suggestions to a witness in cross-examination as that may render admissible (in re-examination) a document with fatal

consequences to the Defendant's case. (See also the Evidence Amendment Act 1995).

In civil cases where a party calls for a document in the possession of the other party and that party produces the document without putting it in evidence, and the party calling for the document reads it, the other party can require the party calling for the document to put it in evidence. (Stroud vs. Stroud 1963, 1 W.L.R. 1080), (see also Wharam vs. Routeledge 1805 5 Esp 235).

However:-

> "Where a document was used to refresh a witness's memory, cross-examining Counsel might inspect the document, in order to check it, without making it evidence, provided that his cross-examination did not go further than the parts which were used for refreshing the memory of the witness; accordingly, the mere inspection of a document did not render it evidence which Counsel inspecting it was bound to put in, but if a party called for and inspected a document held by the other party, then he was bound to put it in evidence if required to do so". (Senat vs. Senat 1965 2 ALL ER 505).

EXPERT WITNESS

Expert witnesses often have some form of bias, tending to favour the cause of the party calling the expert. An expert can be confronted using the same general principles as govern confrontation of a "lay witness".

The expert is no "scared cow" and often you can get experts having differing opinions. Bear in mind always the distinction between expert *opinion* as against scientific, medical or forensic *fact* on which such opinion purports to be based. You may have difficulty in challenging the factual

basis for the expert's testimony but you may well find more fertile ground in challenging the opinion or conclusion of the expert.

If your client has the resources to enable you to procure the services of your own expert to counter the testimony of that of the Plaintiff's that can prove advantageous.

The late Mr. Justice Parnell took a common sense approach when dealing with the conflicting opinions of experts.

Said he;

> "This clash of opinion between the two experts (*handwriting experts*) reminds one of the difference of opinion between medical men which may arise in a case. Where a Court is caught in the middle of a dispute between men of science, one safe way of dealing with the situation is to *examine other evidence in the case,* if there is any, before a conclusion is drawn from the division of the competing opinions propounded....
>
> Who shall decide when experts disagree,
>
> And soundest causists doubt like you and me".
>
> (See Sarah Eliza Perez vs. Agatha Sandcroft (1980) 17 J.L.R. 133)

The following appears in the headnote of Eileen Sumintra Bankay & Others vs. Sukdai Sukhdeo (1975) 2 W.I.R. page 10:-

> "That the expert opinion evidence on which the appellants heavily relied to prove the will was not made by the deceased was devoid of reasons for the opinion that the deceased's signature was forgery. The evidence only indicated in a general way the matters and things the expert considered in

reaching his conclusion; no comparison being made in court the evidence was unsatisfactory and unhelpful. The trial judge would have been entitled to treat it as valueless and was not wrong to reject it. That the trial judge was justified on high authority in comparing the signature on the disputed will with the admitted signatures of the deceased and on the evidence of his own eyes to reach a firm conviction that the signature on the will was indeed that of the testator and no one else".

I pause to note that ,

"Experts should inform the Court of *the facts* on which their view of the question submitted to them is based and the Court should be furnished with *the necessary scientific criteria for application to the facts established in evidence"*. (H.A. Hammelman Vol. 10, Modern Law Review page 33).

To avoid loss of time and expense in calling, say, medical evidence at the hearing an order can be obtained at the hearing of the Summons for Directions that medical reports be agreed between the parties, if possible, and that failing agreement the medical evidence be limited to an agreed number on each side.

Note however the observations of Lord Green M.R.:-

".....what was done was this. Each side put in a report by its Doctor, and the Plaintiff having received the report of the Defendant's Doctor, *submitted to another examination by another Doctor and his report was put in;* and the solicitors for the parties purported to agree those three reports, which were then put before the Court as medical reports agreed pursuant to the order..... the

> reports appear to be, *in particulars of some importance,* inconsistent with one another. If a Judge is confronted with *two or more medical reports which are inconsistent,* with one another and the Doctors are not called, he is immediately placed in the position of having to select, if it be material, between the two views and the two statements.....*you cannot have an agreement on two inconsistent statements of fact, and the phrase "agreed medical report" means, and means only, a report where the facts stated are agreed as true medical facts, or other facts as the case may be, and the medical opinions expressed are accepted as correct".* (Harrison vs. Liverpool Corporation 1943 2 ALL E.R. 449).

An expert must not be asked the very question which the Court is to answer. The proper form is to ask the expert what, *assuming such and such facts is HIS OPINION.* The Judge (acting as jury) is then left to say whether the assumed facts exist. (See Crosfield & Sons vs. Techno Chemical Laboratories Ltd. 1913 T.L.R. 379).

> "The facts upon which an expert's opinion is based must be proved by admissible evidence, and he should be asked in chief what those facts are. If he observed them, he may testify to their existence, but, *when the facts in question are dependent upon ordinary human powers of perception, the expert may be contradicted by a lay witness,* as when a police officer and a doctor give different accounts of the behaviour of someone accused of drunken driving when he was being questioned at a Police Station. A Doctor may not state *what a patient told him about past symptoms as evidence of the existence of those symptoms* because that would infringe the rule against hearsay, but he may give evidence of what the patient told him in order to explain the grounds on which he came to a

conclusion with regard to the patient's condition. In these cases an opinion based solely upon uncorroborated statements by the patient is not automatically inadmissible, but is likely to be of very little weight....." (See Cross and Tapper on Evidence 8th Edition page 556).

Lord Wilberforce in Whitehouse vs. Jordon (1981) 1 ALL ER 267 (at page 276) observed that:-

> "While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that the expert evidence presented to the Court *should be seen to be the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation* to the extent that it is not, the evidence is likely to be not only incorrect but self-defeating".

With the above principles in mind cross-examination of the expert should in general be approached as follows:-

(1) Read the expert literature on the particular field and area of expertise.

(2) Consult your own experts on the relevant material (and/or the Expert's qualifications).

(3) Establish, if you can, that despite the expert's apparent expertise he has NO REAL EXPERTISE directly applicable to the case on trial.

(4) Sneer (if you can) at his qualifications if they fall short of *real pre-eminence.*

(5) Postulate hypothetical questions designed to get the expert to make admissions favourable to your Defence.

(6) If you intend to call YOUR OWN expert use the Plaintiff's expert to corroborate many of the propositions that underpin the opinion and reasons of your own

expert.

(7) Get the witness to agree that, in his field of expertise, legitimate differences of opinion between qualified experts can exist and often do occur.

(8) If you are SURE of your ground have the witness spell and define technical terms and phrases. This may prove embarrassing to an expert who has an imprecise manner (although it could backfire on you).

(9) Force him to use common language to demonstrate that you UNDERSTAND and he is trying to bedazzle the Court with the mystery and aura of high - sounding phrases and multisyllabic words.

(10) Point out (if you can) that his opinion is based solely (or largely) on an unreliable patient who may or may not have been truthful in the interview.

(11) Show a number of tests or examination the expert could have done to come to a more precise (and more favourable) conclusion.

Remember also that a witness may be confronted with written authorities in his field even though he is not the author of them. He can also be confronted as to the opinions and sources of writers he acknowledges as authoritative sources.

DOES ANY PARTY HAVE "PROPERTY" IN A WITNESS?

The English Court of Appeal answered that question with a resounding "NO" in the case of Harmony Shipping Co. S.A. vs. Davis & Others (1979) 3 ALL E.R. 177.

That was a case in which a handwriting witness first gave an opinion as to the authenticity of a document (on which the Plaintiff sought to rely) to the Plaintiff's Attorneys. The opinion was not favourable and therefore the Plaintiff decided not to call the expert.

Some six weeks later the same expert (without recalling or realising that it was the same matter) inadvertently gave his opinion as to the authenticity document to the Defendant's Attorneys who were delighted with the opinion.

The expert on realising that he had given an opinion to the other side advised that he could go no further in the matter. The Defendant's Attorneys subpoenaed him and the Plaintiffs Attorney sought to set the subpoena aside. The Court refused so to do. It was held that:-

> ".....there is no property in a witness.....neither one side or the other can debar the Court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other side from seeing a witness of fact, from getting the facts from him and from calling him to give evidence or from issuing him with a subpoena".

The Court will however protect communication from the expert to the Attorney covered by legal professional privilege.

THE EVIDENCE (AMENDMENT) ACT 1995 (NO. 12 - 1995)

This amendment apart from repealing section 8 of the Evidence Act (concerning the competence of a spouse as a witness in proceedings) has inserted comprehensive provisions as PART 1A dealing with "Hearsay and Computer Generated Evidence".

The amendment has resulted in some notable changes:-

(1) Where the party notified of the intention to put the statement in evidence does *NOT* exercise his right and requests that the maker of the statement be

CALLED as a witness then the statement may be admitted (providing it complies with the statute as amended), in such event you would not have to prove that the maker is dead, or, as the case may be (See section 31 E).

(2) Where the party intending to tender a statement in evidence has called, as a witness in the proceedings, the person who made the statement, the statement shall be admissible ONLY WITH THE LEAVE OF THE COURT. (See section 31 E (7).

It appears that with this amendment the Judge can in certain circumstances in effect permit self-corroboration.

(3) Section 31 F deals with the admissibility of documents created or received in the course of a trade business or other occupation etc; a number of pre-conditions are therein enumerated.

Document can be admitted where there is no Counter-notice requiring attendance of the maker as a witness.

(4) Section 31 G a document produced by a computer may be admitted if it is established, inter alia, that the computer was operating properly at all material times and was properly programmed.

The Computer document must satisfy all of the requirements set out in 31 G.

(5) Note section 31 I which states as follows:-

> "(1) Where in any civil proceedings:-
>
> (a) a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue

of sections 15 to 17; or

(b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that his evidence has been fabricated, that statement shall, by virtue of this subsection, be admissible in evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(2) Nothing in this section shall affect any rule of law relating to the circumstances in which, where a person called as a witness in any civil proceedings is cross-examined on a document used by him to refresh his memory, that document may be made evidence in those proceedings; and where a document or any part of a document is received in evidence in any such proceedings by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh his memory shall, by virtue of this subsection, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible".

The amendments require detailed analysis as a subject in itself in order to appreciate the CURRENT position.

There seems to be no specific definition of the word "statement" and it may well include a receipt or other notation.

However, document is defined to include any map, plan, graph or drawing. Any photograph, any disc, tape, soundtrack or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom.

Also any film (including microfilm) negative, tape or other device in which one or more visual images are embodied so as to be capable (without the aid of some other equipment) of being reproduced therefrom.

The opinion of a handwriting expert who has not seen the original, of say, a cheque, but only a photocopy may be admissible and it was for the Judge to assess the weight as was the case in Lockheed-Arabia Corp. vs. Owen 1993 2 ALL E.R. 641.

Mana L.J. took the view that:-

> "An ongoing statute ought to be read so as to accommodate technological change".

THE STORY (OPENING SPEECH)

I have attempted to set out in some detail the matters fro consideration before the Defendant's Counsel stands up to make his opening speech, as, you will no doubt appreciate Counsel has "work to do" throughout the Plaintiff's case. I also assume for the purposes of this paper that a no-case submission is not applicable.

It should be noted that the principles which govern the opening of the case for the Defendant and the presentation of the evidence on behalf of the Defendant are the same and no advantage will be gained in repeating these as Learned Queen's Counsel who presented the case for the Plaintiff in the morning session would have dealt with these principles *in extenso*.

You will recall though that we opened with the observation that "a trial is not really a struggle between opposing Lawyers but between opposing stories".

"Telling the story is the trial Lawyer's real task - and it isn't easy. First of all, the story you present cannot simply be concocted out of wishful thinking. It must be a clear, coherent, credible framework into which the actual evidence and testimony presented will plausibly fit. Second, your tale must be told according to the rules of law.... the trial lawyer must look to the Statute for his structure and to the case law for his cadence".

The approach to the structural presentation of the Defendant's case will of course be determined by factors such as sharp conflicts on the "facts" general agreement on the facts but disputes as to the construction and purport of documents (or statute) as well as the principles applicable to the admitted facts.

In openings brevity married to simple, though picturesque language, can sometimes be effective. Basically after a brief introduction Defence Counsel sets out with clarity the basis of non-liability. To this end the Judge's attention will be invited to the pleadings and in particular the paragraphs which show the real issues joined between the parties. In much the same way as the Plaintiff's Counsel would we will refer the judge to the documentary evidence as contained in the agreed bundle and will make references to plans and photographs where agreed.

Keep in mind that the Judge should be made to focus on the pleadings so as to be reminded (or in some cases informed) as to what the Defence as pleaded is .

Most importantly remember that you are always fighting a case on two levels (1) the issue of liability and (2) the issue of damages. You therefore can and should touch on the issue of damages as appropriate.

In the end however you must paint a clear, concise chronological, coherent and credible picture of the Defendants case which you hope to prove. Keep in mind always that "if the facts related by the opener and then by his witness differ, it does not require very skillful cross-examination to imply that the witnesses have changed their evidence". You would thus have undermined your case.

I remind you that in presenting the Defendant's case you cannot ask leading questions as to disputed matters. Simply put a leading question suggests the desired answer to the witness.

Let me illustrate with this passage (involving an allegation of negligence against a surgeon who performed a lithotomy - surgical removal of stone from urinary tract - from which the patient later died).

"Counsel: Did he (the patient) request to be loosened?

Witness: He did to that effect...

Counsel: Did the operator at the same time declare he could not explain the difficulty?

Witness: Yes

Judge: You must ask what he said

Counsel: What did the operator say?

Witness: He said more than once I think, but once certainly, that he could not explain the difficulty....

Counsel: Did the operator appear hurried and confused?

Judge: How did the operator appear? You appear to be a man of intelligence .....

Counsel: Did he introduce his finger with great force?

Judge: Did he introduce his finger, and how did he introduce it? If you make it necessary for me to be constantly interrupting you, I must desire that all questions be put through me....".

Remember always that if *the witness must not be led, he must be guided.*

However where a witness is "hostile" and uncooperative a Judge will permit a relaxation of the rules and allow cross-examination. A "hostile" witness is essentially one who is not giving his evidence fairly and with a desire to tell the truth because of a hostile animus toward the party whose Counsel called his as a witness.

If you are presenting your own expert it is important to develop his background as the credibility of the expert will depend significantly on his professional credentials and experience. So matters of his education, training, certificates, diplomas, degrees and licences as well as his professional association, teaching positions, publications, lectures, consultancies, specialties and experience should all be put forward.

THE SUMMATION (CLOSING SPEECH)

In the average civil trial there is no jury and accordingly the professional lawyers (the Judge and opposing Counsel) will hardly be impressed with rhetorical flourishes. As I reminded you at the outset, in a civil case, the party wins whose version of events is more likely to be correct than the opponent's on a balance of probabilities.

Obviously you will be at a distinct advantage if the oral evidence on your behalf has been supported by the doucmentary evidence as against the oral evidence of your oponent, if such be the case, which either unsupported or even contradicted by the documentary evidence.

In your submissions you will invite the Judge to make certtain finding of fact based on the evidence (and reasonable infrerences to be drawn therefrom). You will of course do an analysis of the salient portions of the evidence to throw light on the issue, on what really occurred according to your case and the basis for non-liability on the part of the Defendant. You should always be on the lookout as to what the cases sighted by your opponent really established. Has the authority established some general principle of law or is it a case decided on its own facts? Secondly what is the ratio of the case as against the obiter dicta? As Counsel for the Defendant you will also have to assist the Judge with authorities in support of your argument on behalf of the Defendant.

Finally you will have to review the damages claimed and as appropriate urge that if the Plaintiff has been damaged, the evidence led in his case exaggerate his damages. Your objective in addition to denying liability is also to reduce damages as much as possible.

It is improper for either Counsel to tell the judge what figure to award for damages. However the Judge may be assisted with past awards.

In the area of special damages these must be proved with particularity.

As Mr. Justice Rowe noted in Hepburn Harris vs. Carlton Walker S.C.C.A 40/90

> "Plaintiffs ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to rely on logical argument to say that specific sums of money must have been earned".

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MONTEGO BAY

NOVEMBER 16, 1996

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