GRAYA NEWS

LEADING BY EXAMPLE *Criminal Cases*

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The Resident Scholars and some of their colleagues suggested that Graya News *might start a series of articles to explain how they should set about tackling the practical exercises run by the course providers – in the BPTC course, students are assessed on their ability to conduct, for example, examination in chief and cross-examination. Our brief was to give basic, but useful, ideas in the 1000 words the editor would allow us. We thought this would be easy. It wasn't! We welcome comments from our readers – both from beginners and those old in wickedness when it comes to asking leading questions.*

What is a 'leading question'?

The rule against 'leading' is simply that you must not ask your own witness questions about matters which are in dispute in such a way that you suggest the answer you want your witness to give. This can be much more difficult in practice than you would expect. Sometimes nobody objects. But, as a beginner, you need to expect your opponent (or the judge) to object to your 'leading the witness'.

Prompting the witness in criminal cases

Nobody would want to 'lead' a witness who can give an accurate and complete account in their own words of the events in question – the judge and jury want to hear the witness telling them what happened – not the advocate. But in real life, witnesses often cannot remember the details of events that occurred perhaps months before – or get them wrong. Sometimes they just cannot understand the question. Sometimes they do not want to answer the question. The rule against asking leading questions is really a rule against *illegitimate* prompting of a witness.

The prosecution witnesses will always have made witness statements to the police and the defendant and his witnesses will have given proofs of evidence to the defence solicitor. You need to know when they are allowed to look at these statements in court. For instance, what questions the prosecutor has to ask before police officers are allowed to 'refer to' (in practice, 'read aloud from') their notebooks when giving evidence.

An example – to show it isn't as easy as you might think!

Example – D is charged with unlawful wounding victim (V) contrary to s 20 OAPA 1861 on 30 September 2014 at The Fat Cats Bar, a nightclub in Clerkenwell. Prosecuting counsel calls witness (W) who made a statement to a police officer to the effect that she clearly saw D (whom she knows) at the door of the nightclub throwing a bottle which hit her friend (V). D's case is that he had left the club before this incident occurred.

How not to do it

Counsel: *Did you see D at the door with a bottle in his hand* ?

Objection from defence – the question, although it could be answered 'No', is really an attempt to prompt the witness into repeating the account of the incident she gave to the police. It is also objectionable because (as is often the case with leading questions) it wraps up several matters in issue in one question (did she see W at the time of the incident; where was he; did he have a bottle in his hand?)

Second attempt

So counsel tries again: *Do you remember where you were in the evening on Tuesday 30 September last year?*
Witness: *No, I don't have a good memory for dates*

This is not a leading question but it is wholly unnecessary and almost invites the reply. There is no dispute that W was in the club on the evening in question so counsel did not need to elicit this fact by a non-leading question. He should have led this fact and then asked W about what really was in issue – namely, whether she saw D at the door with a bottle in his hand, etc. Often it is a good idea to use as a starting point something which the other side cannot object to. In an assault case, there may be an agreed bundle of photographs; if so, why not start with that.

Third and final attempt

Counsel: *Would you look at the bundle of photographs – look at photo 3. Can you see in this picture where you were standing?*
Witness: *Yes I was by the bar – where the bar stool is.*

Counsel: *Do you know the defendant, Mr Twist?*
Witness: *Yes*
Counsel: *Was he in the bar at any time that evening?*
Witness: *Yes*
Counsel: *Where was he standing when you first saw him?*
Witness: *By the door . . . .*

You haven't led the witness but you have brought her to the point where she should be able to give her own account of the incident.

But things can still go wrong

What if W says she cannot remember whether D was holding anything or what he did or anything else?

Prosecuting counsel may now need to ask the judge to allow W to 'refresh her memory' by looking at her witness statement.

Counsel: *Did you make a statement to the police about this matter?*
Witness: *Yes*
Counsel: *Do you remember when that was*?
Witness: *Yes, it was on the night in question*
Counsel: *And did you tell the police officer what you remembered at the time about the incident?*
Witness; *Yes*
Counsel: *And at the time was your recollection of the events of that evening significantly* better than now*?
Witness: *What do you mean 'significantly'?*
Judge to counsel: *Why couldn't you just say 'a lot better'?*
Counsel: *'a lot better'?*
Witness: *Yes*
Counsel: *Your Honour, may the witness be shown a copy of her witness statement?*
[to witness]: *Please take a moment to read the statement to yourself – don't read it aloud – and let me know when you're ready.*
[After a pause] *We have got to the stage where D was by the door – did he have anything in his hand?* [But is that a leading question? – no, the witness is not being *'illegitimately'* prompted when she knows that she has said in her statement that D had a bottle in his hand.]

Note

*Section 139(1) Criminal Justice Act 2003

A person giving oral evidence in criminal proceedings about any matter may, at any stage in the course of doing so, refresh his memory of it from a document made or verified by him at an earlier time if (a) he states in his oral evidence that the document records his recollection of the matter at that earlier time, and (b) his recollection of the matter is likely to have been *significantly* better at that time than it is at the time of his oral evidence.

This is the basis upon which police officers are invariably allowed to 'refresh their memory' by reading from their notebooks.

Judge to counsel: Wasn't that a leading question, Mr Thursby?

Brothers in Law by Henry Cecil

Ethical point

Can a witness be shown his statement at court before giving evidence? The answer is 'Yes' – but you must not discuss the evidence in dispute with the witness (except in rare cases, eg where you are prosecuting and the witness tells you that he thinks his statements is wrong – in which case you must inform the defence of what has happened). ■