

# Dunn & Baker

## 4.10 APPEARING AS A WITNESS IN COURT

### Outline of Hearing

- 1) The Prosecution is entitled to make an opening speech before calling their evidence.
- 2) Witnesses are called commencing with the Complainant.  
  
After the Complainant has given evidence, then witnesses of fact will be called, and lastly expert witnesses.
- 3) The Advocate for the Defendant has the right to cross-examine the witness. These questions may be pertinent to the matter in issue, or be calculated to attack the witness's claim to creditability. If there is more than one Defendant, the First Defendant will cross-examine the Prosecution witnesses before the Second Defendant's Advocate.
- 4) The Prosecution has the right to re-examine the witness on any matters raised in cross-examination.
- 5) Witnesses of fact are those who are called to Court to give evidence as to what they have seen or heard. Expert witnesses are called to Court to give an expert interpretation of those facts.
- 6) When the Prosecution have called all their evidence, the Defence can make a submission of "no case to answer" if there is no evidence to sustain the Prosecution case.
- 7) If no submission is made, or the submission is unsuccessful, the Defence will then call their evidence – starting with the Defendant, then witnesses of fact, and ending with expert witnesses.
- 8) The Representative for the Opponent addresses the Judge on law and fact.
- 9) The Representative for the Claimant addresses the Judge on law and fact.
- 10) The Judge gives his or her judgment (unless reserved to another date of hearing).

Criminal Cases are similar, except Counsel for the defence must choose between making an opening speech or a closing one.

### **Appeals**

If you have given evidence in a trial at the Magistrates' Court and then are called to give evidence in the Crown Court, you must expect to be questioned on any inconsistencies in your evidence on the second occasion.

Although there is no official Court record of the evidence given in the Magistrates' Court, it is likely that the legal clerk to one of the parties will have taken a note, and you should ask to see whether there is a transcript of the original evidence available, before you go to Court.

### **Presence in Court**

- 1) Witnesses of fact must wait outside Court until called to give evidence. This is so they are not tempted to change their evidence of what they saw or heard, in the light of anyone else's evidence that they hear.
- 2) Expert witnesses are normally permitted to remain in Court until they give evidence, specifically so that they can adjust their opinions, in case they hear facts which cause them to revise their expert views.
- 3) After giving, evidence witnesses can ask the Judge directly to be released and should do so, if they do not wish to remain in Court until the end of the case.

### **Oath/Affirmation**

You may swear on your relevant holy book.

Any person who objects to being sworn is permitted to make a solemn affirmation instead of taking an oath. All you have to do is say to the Court "may I affirm please?".

### **Correct mode of address to the Court**

- 1) High Court – My Lord/My Lady
- 2) Crown Court – Your Honour
- 3) County Court Circuit Judge – Your Honour
- 4) County Court District Judge – Sir/Madam
- 5) Magistrates' Court – Sir/Madam
- 6) Coroner's Court – Sir/Madam
- 7) All Tribunals – Sir/Madam

#### 4.10 Witness

##### **Burden of proof**

The basic principle is that the party who brings the case must prove the case.

- a) In civil cases, the standard of proof is satisfied on the balance of probabilities (a 51% likelihood of being correct).
- b) In Criminal Cases, the standard required of the prosecution is beyond all reasonable doubt (a 99% degree of certainty of being right).

##### **The best evidence rule**

This rule states: -

- 1) The best evidence is that given by the person who observed what happened, who is present in Court to describe it, and is available to be cross-examined about it.
- 2) The best evidence of a document, is production of the original.

It is only in the unavoidable absence of the best or primary evidence, that the Court will instead accept secondary evidence.

Unless you are permitted to do so by the Court, you should give evidence only of what you saw and heard, and not report anybody else's evidence.

If you have referred to a document in your evidence, you should bring the original document to Court with you.

Evidence about what you heard someone else say, is known as "hearsay". Hearsay is only generally admitted into evidence in Proceedings if there is a very good reason why the original witness is unable to come to Court. However the exception to that is Family Proceedings, where hearsay rules do not apply to statements made by children, or statements by carers who are alleged to have assaulted a child in their care.

##### **Examination in chief**

Before you go into Court, ensure that you draw the Solicitor or Barrister's attention to any weak points in your evidence. If you have the chance to discuss this in advance, this will give your Solicitor or Barrister the opportunity in full in examination in chief to deal with it, hopefully to the satisfaction of the Judge. If instead you gamble on the Opponent not spotting the weakness and it comes to light, in cross-examination the damage will be greater and you risk being thought either fool or a rogue.

- 1) Counsel/Solicitor should ask you short questions which enable you to give a full explanation.

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- 2) You will be asked to establish your name and address and confirm basic initial details before you give your evidence. At this stage, instead of constantly repeating the answer "yes" to every question, you can keep yourself alert and keep the interest of the Judge by varying the response, for example "that is correct" or "this is so".
- 3) Do not repeat the same point.
- 4) Breathe and think before you answer.

#### **Cross-examination**

After you have given your evidence, you will be made available to the Opponent's Solicitor/Barrister to answer questions challenging your evidence. He or she may suggest that you are either mistaken or lying.

It is his/her job professionally to disbelieve you, and you should not take it personally.

- 1) Speak clearly and slowly.
- 2) Listen carefully to the questions and allow yourself time to think. If you do not fully understand the question, ask for it to be repeated.
- 3) Answer only what is asked.
- 4) Be brief – try and answer in sentences of 10 words or less.
- 5) Use simple words.
- 6) Do not evade questions – if you do not know, say so clearly.
- 7) Answer calmly, no matter how impertinently you may be addressed.
- 8) If you do not agree, disagree firmly but politely.
- 9) If make a mistake, say so as soon as you realise it, apologise, and correct that mistake.
- 10) Never answer a question "yes" or "no", if you feel the question requires more than that.
- 11) Do not guess or speculate – if you do not know an answer, never be afraid to say "I don't know".
- 12) Whilst you are giving oral evidence, you must not discuss your case with anyone else. This means that if the court takes a break part of the way through your case, you must not be seen to talk to anyone except your own advocate. This guards against any accusation that you have told other witnesses what to say, or that other witnesses have told you what to say.

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- 13) Do not forget that although the questions will be directed at you by a Solicitor/Barrister, you are to turn and face the Judge when you deliver your answer.
- 14) Never argue with the opposing counsel / solicitor
- 15) Never talk when the Judge / Magistrate is talking

#### **Re-examination**

In re-examination, your Barrister/Solicitor can only deal with issues that have arisen in cross-examination, and ask you questions by way of clarification or correction.

#### **Consequences of giving evidence**

Witnesses enjoy an absolute immunity from any civil action brought against them in respect of anything they say or do in Court during the course of a trial. You cannot be sued for giving "negligent answers"!

The one exception to that is perjury. If a person is lawfully sworn as a witness in judicial proceedings, then makes a statement knowing it to be false or not believing it to be true, he or she may be prosecuted for perjury if that untrue statement was material to the judicial proceedings.

#### **Checklist for a witness**

- 1) Bring a pen, spare pen and note paper in the event you wish to jot down notes of evidence.
- 2) Ensure you check in advance the location of the Court so it can be easily found.
- 3) Determine in advance the nearest available car park or carefully check the public transport arrangements.
- 4) Plan to arrive at least 30 minutes earlier than the time of the hearing.
- 5) Bring cash including small change for parking and telephone calls.
- 6) On arrival, (after you have found the toilets) enlist the help of the Court Usher to find out which Court you are in and to assist you meet up with the Solicitor/Barrister. If you arrive sufficiently early, you can ask the Court Usher whether you can be shown around the inside of the Court before the day's proceedings start, so that the Usher can show you where you will have to stand, where you can sit afterwards and where everybody will be sitting during the trial. You may feel less nervous in advance if you know this.

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- 7) Take something to read with you – you may have to wait some considerable time.
- 8) Bring a diary with you, which shows on what dates in future you are available. Hearings seldom run to time, and the Judge may unexpectedly ask if the Parties are free to come back to Court on the next day, or the next week, or even the next month.
- 9) If it is a lengthy hearing, feel free to ask in advance whether or not you need to attend throughout, or whether arrangements can be made for you to attend only after a certain time, or even in response to a telephone call.
- 10) If you have incurred any travel expenses attending Court, please provide details of these to the Counsel/Solicitor on the day of hearing, supported if possible by documentary proof, so these may be reclaimed in due course.

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