Evidence in Civil Cases

Law Association of Trinidad and Tobago
Training Programme

LATT Office
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Presenter:
Justice Ronnie Boodoosingh

About the Presenter

Ronnie Boodoosingh is a Judge of the High Court of Trinidad and Tobago since September 2007. He has presided in both the criminal and civil courts. He was admitted to practise in October 1992 after completing the Bachelor of Laws degree (Honours) in 1990 and obtaining the Legal Education Certificate in 1992. On being admitted, he practised as an advocate in the firm of J. D. Sellier and Company. He then moved to the Office of the Director of Public Prosecutions where he spent 7 years prosecuting cases before all levels of the courts of Trinidad and Tobago. In 2001, he became a lecturer at the Hugh Wooding Law School where he was the Director of the Trial Advocacy programme and taught Ethics, among other courses. He also started the Human Rights Law Clinic. He has conducted numerous training programmes to lawyers, law students, police officers, immigration officers, court personnel, school teachers, among others.

Justice Boodoosingh has a Master of Laws degree (Merit) specialising in International Dispute Resolution from the University of London. He has been certified as an adult education trainer by the University of the West Indies, Institute of Business; an advocacy trainer by Grays's Inn, and a Judicial Education Trainer by the University College of London. He has participated in numerous training programmes and conferences including the Edinburgh Colloquium to prepare a Plan of Action for the Commonwealth (Latimer House) Principles in July 2008. He tutors the Trial Advocacy Course at the Law School. He has written three books, including a textbook on Trial Advocacy. He has conducted several Judicial Settlement Conferences and has been trained in settlement conferencing and mediation.

Justice Boodoosingh is married to Aberleen Boodoosingh, an attorney-at-law, and they have a daughter together.

Programme

Part 1

Evidence in Civil Cases

Part 2

Drafting Witness Statements

Part 3

Cross-examination in civil cases

Part 4

Closing Submissions

Evidence in Civil Cases

Learning Outcomes

- Identify what are facts
- Identify what is evidence
- Understand the purpose of evidence
- Identify what is hearsay
- Understand the advocate's role in the management of evidence
- Identify cross examination dos and don'ts
- Understand relevance, weight and admissibility
- Apply better approaches to civil evidence

What is evidence?

Evidence is the means by which contested facts are proved.

Phipson on Evidence 1-10 (17th ed):

> "Evidence, as used in judicial proceedings, has several meanings. The two main senses of the word are: first, the means, apart from argument and inference, whereby the court is informed as to the issues of fact as ascertained by the pleadings; secondly, the subject-matter of such means. The word is also used to denote that some fact may be admitted as proof and also in some cases that some fact has relevance to the issues of fact. In a real sense evidence is that which may be placed before the court in order that it may decide the issues of fact.
> ...
> Evidence, in the first sense, means the testimony, whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute. In the second sense it means the content of that testimony."

What is a fact?

A fact is a statement or assertion that a party/witness says is true.

What is a contested fact?

One that is disputed between the parties.

How do you know the contested facts?

You look at the pleadings.
In detail.
You also look at the issues (agreed / not agreed) in the case.

Lord Hoffman in Re: B (Children) [2009] 1 AC 11 at 17, para 2:

> "If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. The law operates a binary system in which the only values are zero and one. The fact either happened, or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

Burden of Proof (Phipson 17th ed)
Contract: Claimant: existence of contract, performance of conditions precedent, breach, damages; Defendant: confession and avoidance, e.g. infancy, release, rescission, accord and satisfaction; fraud.
Negligence: Claimant; Contributory negligence: Defendant
Mitigation: Defendant to prove Claimant failed to mitigate
Malicious prosecution: Claimant to prove
False imprisonment: Defendant to prove existence of reasonable cause

Failure to Explain / Res Ipsa Loquitur

Ellor v Selfridge & Co. (1930) 46 TLR 236 per Scrutton LJ:

> "The fact that in the present case the van appeared upon the pavement, where it had no business to be, and injured the plaintiffs on the pavement, and the further fact that the defendants offered no explanation why their van was there seem to be more consistent with negligence than with the exercise of reasonable care."

What is the difference between facts and evidence?

A fact is a statement/assertion.
Evidence is the way the statement or fact is proved.

Fact: This wall is blue.
Evidence:
I saw it.
I painted it.
This is the can of paint I used.
Some paint is left in it.
I took a photo. Here is photo.

Fact: The driver was speeding.
Evidence:
Saw him. Saw car.
Distance. Time took. Calculate speed.
Supported by another person.
Admitted to police he was speeding.

Fact: I have been in exclusive, undisturbed possession of the subject land.
Evidence: details of the following:
Planted it.
Fenced it.
Chased people out.
Ignored demands to move.
EACH OF THESE TOPICS ARE FACTS TO BE DEVELOPED BY EVIDENCE.

Fact: I lost money because of accident.
Evidence:
I used it to sell ice cream in Palmiste.
I would drive from house to house.
I would sell about 100 cones on a Sunday.
Here is a bill from Len Hap Supermarket.
It shows I purchased 200 cones on Saturday 1 December...
Another bill. Purchased 250 cones on Friday 7 December.

Different Types of Facts
Material fact
Collateral fact

Material fact:
The defendant was on wrong side of road.
The defendant overtook when unsafe to do so.
The defendant was speeding.
The claimant got a broken injury to right arm.

Collateral Fact:
Subordinate or collateral facts which may be in issue are those affecting the competence or credibility of a witness and those affecting the admissibility or cogency of certain items of evidence; they may be in issue in a particular case on account of the law of evidence itself, and not on account of the substantive law or statements of case.
Cross & Tapper on Evidence, 10th ed. LexisNexis 2004

Collateral Fact: Examples
The witness is friendly with the claimant.
Or married to the claimant.
The witness did not report the accident.
Witness did not note it in station diary.
Did not say it in witness statement.
Generally, answers given on collateral facts are final, i.e. you cannot call rebuttal evidence to refute.

Primary / Secondary Evidence

> Primary evidence means the best or highest kind, that which the law regards as affording the greatest certainty of the fact in question: thus, production of the original document, or proof of an admission of its contents by the party against whom it is tendered, is considered primary in this sense. Secondary evidence means inferior or substitutionary evidence, that which itself indicates the existence of more original sources of information; thus, a copy, or the testimony of a witness who has read the document, is secondary.
> *Phipson 1-15*

Purpose of Evidence
Phipson 1-08

> The two key objectives of the rules of evidence are fairness and ascertaining the truth through accurate fact finding. Whilst other objectives can be added, these two predominate. Many of the rules are flexible in the sense that there is a judicial discretion

involved as to whether a certain piece of evidence may be admitted, but in applying their discretion courts are guided by these key objectives.

Fairness

- Not by ambush (Disclosed)
- Not too late
- Give other side opportunity to respond
- Consistent with pleaded case
- Admitted by following correct procedure
- Legally admissible

Ascertaining the Truth

- Reliable
- Credible
- Supported
- Independent (as possible)
- Trustworthy (eg not manipulated / doctored or tainted)
- Cogent
- Compelling

Pleadings vs Evidence

Lord Woolf MR stated in McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at 793, cited in Bernard v Seebalack [2010] UKPC 15 at paragraph 15:

> "What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old and the new rules ... No more than a concise statement of those facts is required."

Opinion

Witnesses must confine themselves to informing the court of what happened.
The opinion rules requires the court to ensure that testimony is "given in the most informative and testable manner" and the witness "does not express views about conformity to general standards of behaviour"
The opinion rule seeks to reserve to the court the drawing of inferences that go beyond the reporting of impressions gained from immediate perceptions.
Zuckerman 22.118 to 119

Two Examples

I saw my friend John cross the road.
The claimant drove on the right side of the road.
Vs
The defendant drove carelessly.

Hearsay Notice

> "Where notice of hearsay has been given, other parties may apply for permission to cross-examine the witness whose evidence is tendered as hearsay. The court would normally be bound to give permission to cross-examine the witness if the hearsay testimony is of significant importance…
> the court must have the power to exclude their evidence, especially if it considers that entertaining the evidence without cross examination would significantly prejudice the party seeking cross-examination."
> Zuckerman on Civil Procedure, 3rd ed, 2003, S&M

Where can evidence be found?

Affidavits
Witness Statements
Agreed Bundle of Documents
Admitted or agreed facts
Documentary evidence properly admissible as attachment to witness statement including plans, photos, receipts, etc
By virtue of a hearsay notice
Oral testimony (live or by video link)
Witness summaries (provided the witness is produced at trial)

What is Not Evidence

Documents attached to pleadings (these have to be properly admitted into evidence)
Unagreed Documents (must be proved)
Documents on List of Documents (these have to be properly admitted into evidence)
Hearsay documents for which counter-notice served
Witness statements/affidavits for which permission is needed
Witness summaries

Proving a Document

The general rule is that the maker of a document is the person who must be called to prove a document.

There are exceptions to this:
. Where the document is agreed
. Where a valid hearsay notice has been served and there is no counter-notice
. Where statute permits (eg certain public documents)
. Where it contains a clear admissions by the opposing party

Hearsay
Evidence Act Chap. 7:02

> 36. (1) In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings is admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Part or by virtue of any other statutory provision or by agreement of the parties, but not otherwise.

Hearsay (Modern Law of Evidence Keane, 9th ed. p 10)

> "The common law concept of hearsay may be defined as any statement, other than one made by a witness in the course of giving his evidence in the proceedings in question, by any person, whether it was made on oath or unsworn and whether it was made orally, in writing, or by signs and gestures, which is offered as evidence of the truth of its contents. If the statement is tendered for any purpose other than that of proving the truth of its contents, for example to prove simply that the statement was made or to prove the state of mind of the maker of the statement, it is not hearsay but 'original evidence'. Provided that it is relevant to a fact in issue, original evidence is admissible."

Hearsay
Evidence can be admissible for one purpose and inadmissible for another:
Eg. To prove the fact something was said, not the truth of the statement:
Mary told me she was with child.

Subramaniam Principle
Subramaniam –v- Public Prosecutor (PC) [1956] 1WLR 965 at 970:

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the 'statement, but the fact that it was made. The fact that the statement was made quite apart from its truth, is frequently relevant in considering the mental state and

conduct thereafter of the witness or of some other person in whose presence the statement was made."

Why is hearsay excluded?

Hearsay is not the best evidence.
Hearsay would be easy to fabricate.
There is a risk of error in transmission.
The demeanour of the original source is lost.
Hearsay statements are not made on oath.
The maker of the statement is not available to be cross-examined:

- Can't test the witness on faulty perception or faulty memory;
- Testimony may be ambiguous or the witness may be lying.

The right of Defendant to confront an accuser is lost.
Allen, Taylor & Nairns Practical Guide to Evidence, 5th Ed. Routledge, 2016.

Hearsay

However, Hearsay can be admitted in evidence subject to statute especially in civil cases.
It is a matter of what weight can be attached to the evidence.

Hearsay CPR

30.8 The court may permit a party to adduce hearsay evidence falling within sections 37, 39 and 40 of the Act even though the party seeking to adduce that evidence has—
(a) failed to serve a hearsay notice; or
(b) failed to comply with any requirement of a counternotice served under rule 30.7.

Getting Evidence In: The Advocate's Task

Complete Witness Statements
Laying the Foundation: Eg photos in the modern age
Serving hearsay notices
Having read opposing witness statement is there need for supplemental witness statement?

Laying the Foundation

You must lay the foundation before you can have certain evidence admitted:
Photos; whats app messages; email; sketches; plans; records of a company etc

Explain the process how the document was generated/ prepared.
Think of it as doing an examination in chief with someone waiting to object.

Amplifying Witness Statements

> "The verb "amplify" suggests that permission may only be given to expand what is already in the statement rather than embark on wholly new matters of which there was no hint in the statement. If, for instance, the statement describes what the witness saw at the scene of an accident, it would normally be inappropriate to allow the witness to testify in court for the first time that after the accident he went to see the claimant in hospital where he observed certain facts."
> Zuckerman on Civil Procedure 22.133

Getting Evidence Out: Also the Advocate's Task
A Contest: Who is Better?
Familiarity with Evidence Act
Evidence Principles
Knowledge of the provisions of CPR

Quality of Evidence in Support of Applications: Generally Inadequate
Why do you need more time to file witness statements or to file a defence?
Why were you unable to file it on time?
What efforts have you made?
Why do you need to file a witness summary?
DETAILS, DETAILS, DETAILS

Attachment of Exhibits: Pay Attention
Wrong exhibit
Incomplete exhibit
Not annexed
Wrong numbering
Unclear copies (photos) / properly stapled
Not tabbed or labelled

Evidence CPR 29

Evidence by video link or other means 29.3
Form of witness statements 29.5
Application with evidence for witness summaries 29.6
Supplemental witness statement where further matters arise or become relevant or known after the witness statement was served 29.8
Amplifying where substance disclosed already in witness statement **or** on new matters arisen since the witness statement and which could not reasonably have been put in a supplemental witness statement 20.10

No evidence where failure to file witness statement or summary without good reason for 26.7 relief

Evidence Hearsay CPR 30

A hearsay notice must be served should a party wish to give hearsay evidence no later than that by which witness statements are to be served 30.2
Contents of notice- statement admissible under s.37 of the Act
Reasons for not calling person as witness 30.6
Party on whom hearsay notice has been served may serve a counter-notice 30.7

Affidavits CPR 31

Contents of affidavit- only facts that can be proven 31.3
Documents used in conjunction with affidavit must be exhibited 31.4
Content must be relevant
Appropriate deponent
Hearsay evidence permissible in interim applications
Hearsay generally not allowed if affidavit in support of final order

Expert Evidence CPR 33

Court's permission mandatory for expert evidence 33.5
Court may direct that single expert is appointed 33.6
Parties must give instructions to single expert however where instructed by two or more attorneys, expert examination must be joint 33.7 (1) and (2)
Contents of expert report- requirements include: expert's qualification, literature/ material relied upon, test/ experiment details, qualification of person carrying out test/ experiment, summarize and give reasons for opinions 33.10 (a), (b), (c), (d)
Attorney to guide expert on requirements of CPR

Court Attendance by Witness CPR 34

Witness summons 34.2
A party wishing to obtain permission to have a witness summons must make an application supported by evidence 34.3 (3)
Generally, witness summons is binding only if served at least 14 days before date of required court attendance unless directed by the court and supported by evidence 34.5 (1), (2) and (3)
Witness summons to be served by party on whose behalf it is issued 34.6
Enforcing attendance of witness- upon failure of witness to attend, party may apply for an order to requiring attendance. Evidence of service of summons and payment of person serving needed for order 34.8 (1) (2)

Relevance:
"…any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other."
Think of it as a syllogism.
Stephen's Digest of the Law of Evidence (12 ed) as quoted in Cross & Tapper, 10th ed p 71.

Relevance Phipson 7-07:
"In deciding whether to exclude relevant evidence because of concerns such as distraction, unnecessary delay or repetition, the weight or probative value of the evidence is an important factor. But English courts, particularly in civil cases, have tended not to see the matter in terms of a discretion to exclude relevant evidence, principally because orthodoxy has maintained that no such discretion exists in civil cases. Instead, English civil courts have achieved similar results by talking of evidence having to attain a sufficient weight before it will be admitted in the face of such concerns. This need for a sufficient weight has often, confusingly, been described as a need for sufficient relevance or for evidence to have a sufficient degree of relevance. Thus, Hoffmann L.J.in the case of Vernon v Bosley [1994] P.I.Q.R. 337 at 340 has said that:

> "The degree of relevance needed for admissibility is not some fixed point on a scale, but will vary according to the nature of the evidence and in particular the inconvenience, expense, delay or oppression which would attend its reception. […] [A]lthough a judge [in a civil case] has no discretion to exclude admissible evidence, his ruling on admissibility may involve a balancing of the degree of relevance of the evidence against other considerations which is in practice indistinguishable from the exercise of a discretion".

Weight of Evidence (Keane)

> "The weight of evidence is its cogency or probative worth in relation to the facts in issue. The assessment of the weight of the evidence is in large measure a matter of common sense and experience, dependent on a wide variety of factors such as:
> The extent to which it is supported or contradicted by other evidence adduced;
> In the case of direct testimony, the demeanour, plausibility, and credibility of the witness and all the circumstances in which she claims to have perceived a fact in issue; and
> In the case of hearsay, all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the out-of-court statement, including, for example, whether the statement was made contemporaneously with the occurrence or existence of the facts stated and whether its maker had any incentive to conceal or misrepresent the facts.

Weight vs Admissibility (Keane)

> "The issue of weight to be attached to an item of evidence is related to, but distinct from the issue of admissibility. The weight of evidence is a question of fact, its admissibility a question of law. In determining admissibility, the judge must consider whether evidence is sufficiently relevant and this will depend, to some extent, on his assessment of its weight. The judge has a discretion to exclude certain items of evidence and for those purposes also may have regard to, inter alia, the weight of the evidence in question."

No Right to Silence in Civil Cases

R v IRC ex parte TC Coombs & Co. [1991] 2 AC 283 at 300 (HL):

"In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But if the silent party's failure to give evidence (or to give necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."

Admissions

A statement which contains an admission is always admissible as a declaration against interest and is evidence of the facts admitted.

R v David Pearce (1979) 69 Cr. App. R. 365, 370

Inferences

Adverse inference from failure to call a material witness:

Cross examine to show that there was no good reason why a material witness was not called.

Adverse Inferences

Ian Siuenarine v Doc's Engineering Works (1992) Limited, No. 2387 / 2000, delivered 24 May 2005, Justice Rajnauth-Lee noted that an adverse inference can be drawn from a failure of a party to call a relevant witness on a material issue.

Calling All Important Evidence

The importance of calling all important evidence was emphasised by Moosai J in the case of **Mahadeo Sookhai v The Attorney General of Trinidad and Tobago, CV 2006-00986, delivered 15 October 2007**

Producing Documents

In **Shairoon Abdool v Band L Insurance Company Limited, HCA No. 434 of 2001, delivered 25 November 2002**, Mendonca J. spoke of the need of a party to produce documents which could substantiate a claim and the need for explanation when the document is not produced.

Special Damages

Jody Ali v Donnie Ramai, CV 2013-00262, delivered 4 July 2014, Master M. Alexander on how special damages are to be proved
3. It is accepted, however, that courts tend to take a realistic approach with regard to the proof of special damages and that particularity must be tailored to the facts. Generally, the quality of evidence that the court will insist upon in proof of a particular item of special damage will vary according to a number of factors, most notably: the nature of the item in respect of which the claim is made; the difficulty or ease with which proper evidence of value might be obtained; the value of the individual item; the character of the acts which produced the damage and the circumstances under which these acts are done. It is to be noted that this realistic approach must not derogate from the overriding obligation imposed on a claimant to prove his special damages claimed and not to simply, by a process of random estimation or guesswork, pluck figures out of the air with the hope that his claim will be accepted by the court.

Special Damages / Loss of Use

In **Great Northern Insurance Company Limited v Johnson Ansola, Civil Appeals Nos. 121 and 169 of 2008**, delivered 5 April 2012, Mendonca JA made remarks on how special damages and medical evidence should be proved.
Further, on pre-trial loss, the learned Justice of Appeal commented on the evidence led by the plaintiff to prove pre-trial loss. Having reviewed local cases where proof of damages was discussed, at paragraph 97 he stated that oral evidence can in an appropriate case be sufficient to prove losses. However, note the caution at paragraph 98.

Special Damages

In **Kent Hector v Indranie Bhagoutie and Reinsurance Company of Trinidad and Tobago, No. 1115 of 2000, delivered on 14 June 2006**, Kokaram J addressed the issue of proving special damages:
"2.2 Special damages are generally those past pecuniary losses calculable at the date of trial. Generally, special damages must be specifically pleaded and proven. However the Courts generally tend to take a realistic approach with regard to the proof of special damage and accept that particularity must be tailored to the facts."

How to Get Documents in Evidence

In **Dennis Peter Edwards v Namalco Construction Services Limited and Guardian General Insurance Company Limited, CA No 28 0f 2011, delivered 25 July 2013**, Narine JA made the following on how documents are admitted into evidence through witness statements and what a court can take judicial notice of:

> "A witness statement stands as the evidence in chief of a witness on which he will be cross examined. Documents on which the witness relies are usually annexed to the witness statement. Such documents are subject to the usual rules of admissibility. The mere attachment of a document to a witness statement does not automatically make the document admissible into evidence without the consent of the other side or without fulfilling the usual requirements for admissibility: Narine JA."

On Evidential Objections
If you have to make them, try to be helpful / Only where needed.
Quote the whole paragraph you are objecting to and italicise or highlight or bold the objected parts.

Civil Evidence
Be sensible and let common sense be your guide.

Drafting Witness Statements

Learning Outcomes

By the end of this session participants will be able to:

- Identify key characteristics of witness statements
- Recall key principles in drafting witness statements
- Apply these principles to drafting witness statements

The Four Links

Pleadings: All of the material facts upon which the claim is based
List of Documents: All of the documents on which the party relies
Witness Statements: All of the evidence which prove / disprove the material facts pleaded (alongside permitted hearsay documents, agreed documents, cross-examination)
Closing Submissions: Counsel's argument on the law and evidence and who succeeds

What is a witness statement?

The content of the examination in chief of the witness, when adopted at the trial.
All the evidence the witness would have said if he/she had stood in the witness box and was being asked questions in examination in chief.

CPR 29.5 (1)

A witness statement must:
(d) so far as reasonably practicable, be in the intended witness' own words;
(e) sufficiently identify any document to which the statement refers without repeating its contents unless this is necessary to identify the document;
(f) not include any matters of information or belief which are not admissible and, where admissible, must state the source of such or belief of any matters of information or belief;
(g) include a statement by the intended witness that he believes the statements of fact in it to be true.

In the Witness' Own Words
"A witness statement must be in the witness's own words. "It cannot be too strongly emphasized", Toulson J. said of this requirement, "[that] this means the words which the

witness wants to use and not the words which the person taking the statements would like him to use." (Aquarius Financial v Certain Underwriters at Lloyd's [2001] 2 Lloyd's Rep. 542) Zuckerman on Civil Procedure, 3rd ed. 2013

Comment on CPR Rule:

A witness statement (or an affidavit) should be in the witness's own words and should be restricted to matters to which the witness himself could readily speak if cross-examined on it.... In the Final Report, it was said (at p. 130) that witness statements should, so far as possible, be in the witness's own words, should not discuss legal propositions, and should not comment on documents.

When You Are Drafting the Witness Statement Imagine You Are Standing in Court Asking Non-Leading Questions to Get the Evidence Out

Content of Witness Statement

What the witness saw.
What the witness did.
What the witness heard or said directly.
A document the witness prepared and sent.
A document the witness received and acted on.
Geoffrey Hancy, Barrister, Australia

Content of Witness Statements: Evidence, Not Conclusions

NOT THIS:
The witness was speeding.
SAY THIS:
I saw the car at 100 metres away. The driver took about 3 seconds to get to me. There was a loud screeching sound from the car as it approached my car. Then it slammed in to my car.

NOT THIS:
My father always possessed the land.
SAY THIS:
I saw my father plant short crops such as…
I was present in December 2001 when my father and his brothers pulled chain link wire…
I used to see when my father would cut the grass…

NOT THIS:
He gave me permission to build a house on the land.
SAY THIS:
He told me, select a spot on the land and go ahead and build my house. He pointed out the area I could use. He told me I could live there for as long as I want as long as I don't use more than one lot around the spot I chose.

NOT THIS:
The officer then went on to assault me.
SAY THIS:
I saw the officer raise his left hand. He came at me. The officer cuffed me on my face with his fist. I saw him coming, but I could not get away. I fell back against the wall. He then took out his baton…

Test every sentence in the witness statement

Ask:
How does the witness know this?
Does he say how he knows this?
Is it something he saw; heard; did?
Have I sufficiently detailed the event?
Do I need to rephrase to make it clear how he knows?
Have I used the specific verb applicable?
Are all the relevant documents annexed?

Common starters with appropriate verbs

I saw…
He told me…
I went…
I said…
I looked for…
I received and read an email…
I felt…
I wrote an email…
I took a photograph…
I made a sketch…
I was present when…
I met…
She showed me…
He gave me…
I called…
I purchased…

Accuracy

Try to be accurate in capturing what the witness is saying.
The best way is to report the words used, if possible.
If the witness cannot recall the words used, try to capture the substance of what was said.
Example: The defendant and I spoke. I do not remember the exact words used, but I told him I would send him the quotation within one week. In our discussion we agreed on…

What must it cover?

Issues raised on pleadings
Issues raised in disclosure
Issues raised in Statement of Issues
Gordon Exall, Barrister, Leeds

Structure of the Witness Statement

Set out Preliminaries
Use Chronological Order or
Topical Order
Refute other side's facts if needed
Conclude what you are asking for briefly
John Antell, Barrister, England

Style: Make it Easy for the Reader

Use active voice / Avoid passive voice
Speak of what I did, not what we did
Avoid states of mind: I believed; I understood; I thought; I intended; I meant
Use short paragraphs
Use numbered paragraphs
Simple language that the witness understands
Be thorough but only as long as necessary
Use approximations or tie the evidence to an event if the witness can't remember specific dates
Link evidence to documents but don't regurgitate the documents

Style and Format: Easy on the Eye

Use correct grammar
Use correct punctuation
Leave white spaces between paragraphs
Number the pages
Use proper heading, as the claim
Keep hearsay to a necessary minimum
Use correct tense: usually past tense
Use temperate language
Don't argue the case: let facts / evidence speak
Use first person
Don't be repetitive
Proofread the witness statement

Statements to Invite Objections

The claimant used to plant the land.
I know as a fact that Dan never told the defendant the land was his.
He was driving in a reckless manner.
The claimant is lying when he says…
The medical report shows…

My father gave the land to my sister.
Over $100,000.00 was spent on the renovations.

A Few Ethics Ticklers

1. Should a witness statement include adverse evidence?
2. Should leading questions be asked in preparing a witness statement?
3. What if the attorney becomes aware that the statement is untrue? Should the attorney not call the witness to give evidence?
4. Should a witness be shown the witness statement of another witness?
5. Should joint witness statements be done?

WITNESS STATEMENT CHECKLIST FOR RUNNING DOWN

Facts: Two Vehicles; property damage to vehicles; personal injuries to driver and passenger.

1. Preliminaries: Name, address, occupation, age, place of work, qualifications.
2. Insured by whom? Type of insurance.
3. Role in events: driver/ passenger/ witness.
4. Who else involved?
5. Vehicles involved?
6. When did it occur? Where? Describe location. Circumstances.
7. How did it happen? Details, details, details: logical and sequential. Step by step.
8. What were road conditions like?
9. Sequence of time.
10. Direction of vehicles.
11. Give details of speed, distances when first seen, point of observation, where other witnesses were.
12. Use particulars of negligence and give the evidence to support / defend each particular pleaded.
13. Attach a sketch drawn by witness.
14. Any admissions at scene by other party? Exactly what was said? Any discussions?
15. What happened after accident? Made report to police? Any admissions by other party to police in your presence? Reported to insurance? Went to hospital or doctor? When? If delay, why?
16. Property damage: exactly how was vehicle damaged? Show where. Attach photographs. Before and after pictures if you have.
17. Where repaired? When? Cost. How long did it take to repair? How long were you without the vehicle? What do you use the vehicle for?
18. Did you have to buy parts? New or second hand? If new, why?
19. Did you rent one? From whom? For how long? Why in particular did you have to rent one? For work? Drop children to school? Receipt.
20. Personal injuries: what exactly were injuries? Medical reports attached?

21. How did injuries affect you? What did you do before? Exercised? Played sports? Had a hobby? To what extent has it affected you? What can't you do now that you did before accident? For what period of time? Any supporting evidence that you did it before? Eg. Photo playing football or cricket with a team. Any previous medical condition? Was it worsened by accident? How? Any previous injuries?
22. Pain for how long? Healing time? Injury continuing?
23. Medical expenses? Details. Attach all receipts. Private care or public? Why chose private? Medications purchased? When? Why? Explain any unusual delay in going for treatment. Why 6 months after or 12 months after you had to visit a doctor? Why a specialist? Continuing medical treatment/future expenses?
24. Loss of income? How long away from work? Supporting evidence? Payslips? Bank statements? Payslips before and after.
25. Any special care? By whom? Did a relative have to take time off from work? Hired a helper? Any expenses incurred? Why specifically did you need a helper? Receipts for payment.
26. Transport costs? Did you have to hire transport? Why? Receipts?
27. Do you need to address whether contributory negligence? Do you need to say something about the version set out in the other side's pleaded case?
28. Gather all available documents. Are there other documents you can request or seek?
29. Use of schedule (of damages etc.) and exhibits. All documents correctly identified and annexed.
30. Think about which documents you may need to serve a hearsay notice for along with your witness statement.
31. Any obvious witnesses not being called? If so, why?

Cross-examination in Civil Cases

What We Will Cover

Purpose of cross-examination
Pitfalls of cross-examination
Approaches to cross-examination: Content and Method
Practical advice
Purpose of civil trial: To resolve dispute based on facts as found on the evidence

Evidence must be:
Reliable
Credible
Supported
Independent (as possible)
Trustworthy (eg not manipulated / doctored or tainted)
To be: Cogent and Compelling

CROSS-EXAMINATION IS TO SHOW THE EVIDENCE IS THE OPPOSITE OF THESE buzzwords above.

Purposes of Cross Examination

To elicit evidence that:

1. Undermines the other side's case
2. Tests
3. Supports your case
4. Puts your case

Cross Examination in Verse

Practice

Cross examination is a very refined skill
That you practice from the start until
The end of your days in the law
And work at it you must for sure

Preparation

It all starts with a defined plan

Meticulous preparation, as much as you can
Identify the points you wish to make
And stick to these for goodness sake

List Contested Facts

Make a list of every contested fact
Such an approach is an essential tact
Thus you will know what must be asked
To have the witness's weaknesses unmasked

Undermine
Cross is meant to undermine the case
Of the other side at its base
To chip away at their story
And with this you'll earn fame and glory

Credibility
Credibility of witnesses is what you attack
To keep your case right on track
Look for interests they have to serve
To show belief they do not deserve

Inconsistencies and Implausibilities
Point out any material inconsistencies
And any implausible tendencies
Identify what makes no sense
And demonstrate their version is all too dense

Omissions
Omissions you can briefly flag
And errors in their chief you can also tag
But be careful how you do it
A crafty witness will match your wit

Collusion
Look to see if there's been collusion
Or if what is said is a smokescreen or delusion
When the versions all seems all too exact
Scorn and derision it should attract

Exaggerations
Some witnesses just like to exaggerate
And their entitlements they proudly escalate
Show how their evidence is a boast
As they deserve a thorough roast

Agreement
See if the witnesses will agree your clients' facts
Or show they conspired in secret pacts
This requires deftness in approach
Cautiously treading to avoid reproach

Testing
Find the means to test reliability
And to target the witness's believability
Small points add up a lot
And help to unravel the other side's plot

Put
Don't forget to put your case
So the witness can your instructions face
When you're done please do stop
So you can end being way on top

Method of Cross-Examination

Lead
Put words in the witness's mouth
But do so without needing to shout
Ask leading questions all the way
If you do you'll keep the witness at bay

Leave Alone
Look to see what has not been said
Witness statements must be carefully read
If the evidence does not your case harm
Leave it alone, don't raise the alarm

Control
Control you must try to maintain
The answers must your questions contain
That way the story **you** tell
And rambling you thus can surely quell

Slow
Polite but firm is the way to go
Take your time, do it slow
Ask just one question at a time
Compound questions are a cross-examining crime

Short
It's your job to create some doubt
But not to linger and mess about
Ask what you need to and get quickly out
As you're in enemy territory and can be dealt a clout

Rein In
Ask questions to the answers you know
And ensure your interrogation has an even flow
Don't allow the witness much room to explain
Or you'll throw your case down the drain

Calm
Don't be tempted to cross too much
Don't let the blood to your brain rush
Asking the one question too many
Will not help you very much any

Stop
Don't over cross-examine at all
Or your case will crumble and fall
So stop when you've gotten enough
And don't end up in a bottomless trough

Closing
Remember you are gathering material for the closing
To break the arguments of those opposing
So the decider will rule in your client's favour
And bring a sweet victory for you to savour

Care
Cross can be a most powerful tool
But you've got to keep calm and cool
It must be conducted with care and thought
A battle of wits to be fairly fought

Special Considerations / Some do's and don'ts

Previous Inconsistent Statements: How to do it

Evidence Act, Chap 7:02
6. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it; but before such proof is given, the circumstances of the supposed statement, sufficient

to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he made the statement.

Evidence Act, Chap 7:02

7. 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 indictment or proceeding without the writing being shown to him; but if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof is given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; but the Judge, at any time during the trial, may require the production of the writing for his inspection, and may make such use of it for the purposes of the trial as he thinks fit.

Previous Inconsistent Statements

You can undermine by showing previous inconsistent statements.
This can include omission to say something that is important:
You did not say that in your witness statement, did you? (OK).
That was not in your Defence (material fact)?

BUT NOT:

If another witness said... would they be lying?
Show me where in your witness statement you said that?
What did he mean when he said…?
Do you think it would have been important to say that?

Cross Examination

R -v- Baldwin (1925) 18 Cr App R 175, 178-79 per Lord Hewart CJ:

> "One so often hears questions put to witnesses by Counsel which are really of the nature of an invitation to argument. You have, for instance, such questions as this: 'I suggest to you that…..' or 'Is your evidence to be taken, to be suggesting that…..?' If the witness were a prudent person he would say, with the highest degree of politeness: 'what you suggest is no business of mine. I am not here to make any suggestions at all. I am here only to answer relevant questions. What the conclusions to be drawn from my answers are is not for me, and as for suggestions, I venture to leave those to others.' An answer of that kind, no doubt, requires of a good deal of sense and self-restraint and experience… It is right to remember in all such cases that the witness in the box is an amateur and the Counsel who is asking questions is, as a rule, a professional conductor of argument, and it is not right that the wits of the one should be pitted against the wits of the other in the field of suggestion and controversy. What is wanted from the witness is answers to questions of fact."

The Witness' Previous Inconsistent Statement

It is fine to point out something inconsistent in a document the witness signed, prepared or verified.
BUT not to point out inconsistency in someone else's document to them.

Relevance
Cross-examining on issues which are not contested:
Cross exam must be relevant

Cross-examination as to Credit
The credibility of a witness depends on his knowledge of the facts, his intelligence, his disinterestedness, his integrity, his veracity.
Facts affecting weight include his means of knowledge, opportunities of observation, reasons for recollection or belief, experience, powers of memory and perception, special circumstances affecting his competence to speak on the issue.
(Phipson)

Questions Permissible
All questions are permissible which tend to expose:
Errors
Omissions
Inconsistencies
Exaggerations
Improbabilities

Duty to Cross-examine
As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share, e.g. if the witness has deposed to a conversation, the opposing counsel should put to the witnesses any significant differences from his own case. If he asks no questions he will generally be taken to accept the witness's account and will not be permitted to attack it in his final speech; nor will he be allowed in that speech to put forward explanations where he has failed to cross-examine relevant witnesses on that point. *(Phipson)*

Don't ask for an opinion on things the witness does not know about.

Don't ask the witness to comment on the truthfulness of another witness.
That is for the court to find

Don't ask the witness to comment on issues which should form part of the closing argument.

Submissions are for the closing.

Don't ask witnesses to read documents like Deeds or Survey Reports to see if they agree with it. What's the point?

Don't cross-examine on matters which are not issues in the case. If it is admitted or not contested it is not an issue.

Make a list of all the factual issues in the case.

Don't ask the witness if he thinks the omitted evidence is important
The court's opinion on that is what is important: deal with in submissions.

Use simple language, simple sentences, short sentences.

Think out the question before you ask it.

Show the witness photographs if this would help to explain the scene.

Familiarise yourself with the trial bundle and know where every document you want the witness to see can be found.

Don't waste time in court.

Cross-Examining the Expert

What aspects of the expert's evidence is contested?
Qualifications?
Experience?
Methodology?
Omissions?
Errors?
Inconsistencies?
Prepare your own witnesses for cross-examination.
Explain process, alert them to what to expect

Part 4

Drafting Written Submissions

Learning Outcomes

By the end of this session participants will be able to:

- Identify key characteristics of written submissions
- Recall key principles in drafting submissions
- Apply these principles to drafting submissions

Do We Write Like This?

> "When it comes to plain talk, lawyers are the worst. Most speak and write as if they live in a repository for dead bodies. When they right briefs that some poor trapped judge must read, they fill them with heavy, gray, lifeless, disgustingly boring word gravel – piles of it, tons of it. When I read most briefs I want to scream. I want to throw the brief out the window and jump. If I could find the author and had the power, I would make the villain eat the thing a page at a time without salt or catsup."

Gerry Spence, How to Argue and Win Every Time, p. 104 (1995)

Types of Written Submissions

In support of applications eg extension of time, relief from sanctions, for specific disclosure, strike out a defence
On a preliminary issue eg limitation
In support of evidential objections
Propositions of law
Closing Submissions

Tailor To the Type of Submission

You need to tailor your submission to what it relates to.
What would be good for one may not work for the other.

Examples

Evidential Objections vs Full Closing Submissions
Full Written Submissions or Written Submissions with an oral hearing to elucidate
Is it a submission on law only?
Is the case fact driven, eg. Adverse Possession, Running Down, False Imprisonment

Other Considerations

Is the law well settled or novel / controversial?
Who is the judge? A new judge or experienced? What is the judge's background?
How does the judge write?

Applications

Relief from sanctions / Extension of time

The court must consider…
List the criteria and use the evidence from the affidavit(s) to show how each criteria is met (or not met) by the evidence.
Therefore…
Refer only to the key case or cases

Evidential Objections

Set out the evidence being objected to
State the ground: inadmissible hearsay, irrelevant, material fact not pleaded, impermissible opinion, scandalous
State authority (only if needed)
Say why the ground is made out. Usually a sentence or two is all that is needed
Point form is helpful

Preliminary Issue(s)

State the issue(s) in simple form:
The issue is whether this claim was filed after the limitation period.
The facts pleaded do not establish a cause of action in negligence.
Set out the principle of law supported by authority if needed
Set out the needed facts / evidence
Say why the facts / evidence establish the point you are making
Therefore…

Propositions of Law

State the principle of law
Support by authority quoting briefly the relevant section or dicta
Given that this is filed before the trial, the purpose is really to guide the judge on the authorities you say are relevant to deciding the case.

Closing Submission

Legal issues only? Eg constitutional or judicial review where facts are not in dispute
Factual issue only? Eg running down, landlord and tenant or adverse possession
Legal and Factual issues? Which principle of law applies or how it applies will depend on the facts found.

Submission on Law

Wilson Huhn identifies 5 types of legal argument:

Text: what does the text of the law or document say. Use canons of construction
Intent of the text: Purpose of legislation or the document
Precedent: Hierarchy of precedents
Tradition: issue of practice (eg banking or admiralty)
Policy: eg constitutional cases; big ticket arguments

Always start with first principles: what legal principle is at the foundation of the present case
Note the hierarchy of authorities
Find the landmark cases
Find the most recent application of the landmark cases by the highest court
Show how the principles apply to the facts of the case: never forget the facts

Role of the Judge in Fact Driven Cases

"The common law judge… is not concerned with establishing the truth of what did or did not happen on a given occasion in the past but merely with deciding, as between adversaries, whether or not the party upon whom the burden of proof lies has discharged it to the required degree of probability." Lord Bingham in The Business of Judging
"The administration of justice does not always depend on eliciting the truth. It often depends on the burden of proof": Lord Denning in Air Canada v Sec of State [1983] 2 AC 394 at p 411.
FOCUS THEREFORE: Has the claimant proved the case?

Not So Easy For The Judge

James II having dismissed all the judges and decided he would judge all the cases himself, remarked:

> "There is nothing in it: this judging business is easy. I find I can make up my mind when I have heard the first party.
> It is when I have heard both sides that things get difficult."
> *Quoted in **May It Please You Madam**, Neil Hickman, p. 174*

Help The Court To Do Justice

> "Judges are conversant with the law in general, and in their search for rules that will do justice and equity they look to you for guidance. They need you, the advocates, with your great understanding of the parties and their dispute, to show them why the result you seek is the soundest of available alternatives, and the one that will bring about a just result for the parties, the public, and the development of the law."
> *William Eich, former Chief Judge, Wisconsin Court of Appeals as quoted in Point Made, Ross Guberman, 2011*

Closing Submissions

Is the law clear? Straightforward? Then state is simply and briefly. If the other side has set out the law and you agree you can say so without regurgitating.
Quote relevant legislation or case dicta but avoid over long quotations. Is it necessary?

Focus on persuading the court why your client's case should be accepted and the other side's case rejected.

Methods of Persuasion: Logos or Logic

Use of Syllogisms:
Premise: All lawyers wear black
Premise: Safiya is a lawyer
Conclusion: Safiya wears black
Enthymemes: Less formal than syllogisms: Reasoning by implication:
He lied before so he is lying now
There is smoke so there must be fire
It is cloudy so it will rain
(Keith & Lundberg: The Essential Guide to Rhetoric)

Methods of Persuasion: Logos or Logic

Supporting the argument by concrete examples:
This relates to matters such as the sufficiency of the evidence.
Example: We have proved his losses because he said he lost wages (oral testimony); his employer said he lost wages (supporting witness); and we have his pay slips from before the period and during the period to show he lost wages (documentary support).

Methods of Persuasion: Ethos

This relates to credibility and trustworthiness arising from conduct; history; antecedents; expertise.
Example:
He should not be believed because there are many inconsistencies in his evidence.
Examples: In his statement he said this. In his cross he said that.
In the letter before claim he said this. In his pleading he said that.
In the pleading he said this. Now he is saying that.

Methods of Persuasion: Pathos

This relates to the emotions of the hearer or reader; his or her state of mind.
Lawyers can provoke feelings by the language they use:
struck or **bumped in**;
crash or **collision**;
removed the structure or **bulldozed**;
cuffed 10 times or **restrained**;
was regrettably unable to meet his financial obligations or **has refused to pay the $100.00 per week**;
erected a makeshift shack or **built a home for his family**

Ask "Why"

Why
Why should witness X be accepted?

Why should witness Z be rejected?
Why is document A important?
Why is document A relevant?
Why is this opinion acceptable?

Guideposts to Balance of Probability

Sufficiency of the evidence: Is it supported by other evidence; documents; should there reasonably be more; how much.
Plausibility: Does this story make sense?
Consistency / Inconsistencies: Are there significant inconsistencies in the other side's case. Is my client's evidence internally consistent? Is the client's evidence consistent with his / her other witnesses? Whose case is more consistent with the documentary evidence?
Reasonableness: Is what my client is saying reasonable? Does it sound right?
Credibility: Many factors affect credibility. Who is giving the evidence; interests to serve; are there falsehoods or exaggerations?
Reliability: Is the evidence reliable? Can it stand up to scrutiny? What was the witnesses' perception? Are there errors? Important omissions? Can the witness' memory be relied on? Is it hearsay? What is the state of play after cross-examination?
Demeanour of witnesses: especially evasiveness, attitude (CAUTION)

Careful About Demeanour

Conduct, manner, bearing, behaviour, delivery, inflexion; in short, anything which characterises his mode of giving evidence but does not appear in a transcript: Lord Bingham
It involves "not only what is said, but how it is said" Lord Ormrod (1980 Lecture)
Refers to impressions left.
But exercise care: Cultural factors; nervousness of witnesses; personal habits and characteristics, eg shy or boisterous; educational levels.

The Expert Witness

Why accept an expert? Why prefer one expert over another?
Some guideposts include: experience, qualifications, methodology and approach, information provided to the expert, disinterest, previous court findings regarding the expert, supporting information, understanding duties to the court, fair investigation, thoroughness, quality of explanations, reasonableness, consistency with other evidence, attitude and demeanour in cross-examination.

Introduction

What the case is about? A short statement identifying key facts
This is the case of a barmaid who was badly bitten by a big dog: Lord Denning.
Not necessary to give a chronology of procedural facts:
On 5th June 2017 the claimant filed a claim supported by statement of case. The defendant filed a defence on 5th August 2017. The claimant claimed as follows:
….

Set out the issues simply and clearly

Who had the green light? Was he speeding?
How long was the claimant on the land? What were the acts of possession? How was it exclusive?
What were the terms of the contract? What obligations did these terms place on the parties?
What did the defendant fail to do?
Did PC Ben hit the defendant? In what circumstances?
What did the claimant do to mitigate his losses?

Build the Argument: Bit by Bit

Start with a topic sentence: The witness' evidence is not reliable.
Develop the argument: Say why it is not reliable.
Conclusion: Therefore it should be disregarded or given little weight.
The argument is built by a series of topic sentences supported by reasons.

Additional Tips (Influencing the Judicial Mind – Andrew Goodman)

Engage the judge
Complete accuracy about the facts and evidence
As short as needed
Tell a good story
Don't overstate (low key language)
Make it seem you are trying to help rather than persuade the judge
Tell a good story
Get to the point
Make your view seem the sensible one

Additional Tips on Content

Think of submission as the judgment you would like to get
Concede Bad Points
Address difficult issues in your case as they will not go away
Don't gild the lily
Be reasonable
Show how it is the right or just decision
Look for points of agreement
Find the least offensive way to discredit a witness
Attack the message, not the messenger
Don't mislead
Be careful when citing authorities
Don't repeat unnecessarily

Being Reasonable

> "Exaggerated words go hand in hand with unreasonable arguments…Manifestly, clearly, fatal, clear beyond peradventure, logic that is fatally flawed, egregious, contumacious, mere gossamer, must necessarily fail, totally inapposite. These are the kinds of words

and phrases you should cross out on your first revision of any brief. If you can't be reasonable, at least try to sound reasonable."
James W. McElhaney, Twelve Ways to a Bad Brief, A.B.A. J., Dec. 1996, at 74-75 as quoted in Professional Writing for Lawyers by Margaret Z. Johns

Use of Language Can Emphasise or Minimise

To emphasise: Ammonia gas escaped frequently from the defendant's factory into the plaintiff's home. The ammonia choked the plaintiffs and triggered asthmatic attacks.
To minimise: On occasion some vapours and smells would drift to the adjacent property causing moderate respiratory symptoms according to the plaintiff's allegations.
: Professional Writing for Lawyers, Margaret Johns, p. 172.

Length of Submission must be just right:

Long enough to cover everything;
Short enough to keep it interesting

Beware of Fallacies

Hasty Generalisations: She is his wife, therefore she is lying
Faulty Logic: 1 + 1 = 11
Stretching the point: The conclusion doesn't follow from the evidence
Red Herrings: Going down an irrelevant path / Distracting
Straw man: Setting up a different issue to the one to be decided
Reductio ad absurdum: Taking opponent's point and reducing it to the absurd
Slippery slope (This is where they are carrying us)
False Comparisons: Apples and Oranges (case law)

Beware: Circular Reasoning, (Taken from Nonsense by Robert J. Gula, p.120)

Martha: George, do you remember all those times when we were dating and my father would be waiting for us? Well, I actually wanted him to be there.
George: Why?
Martha: I didn't want to be alone with you in such uncomfortable circumstances.
George: (apprehensively): Why?
Martha: Because I was afraid of what I would do. I was afraid I might not be able to control myself.
George: Oh, there was nothing to worry about. I wouldn't have done anything.
Martha: (apprehensively): Why?
George: Because your father was there.

Beware: Selectively Quoting from Cases (An advertisement for a movie) (Gula)

ADVERTISEMENT: Everyone is raving about the film. In fact, *Movie Magazine* described the film as ***fantastic***, ***unbelievable***, and ***hypnotic***. The reviewer was at a loss for words to describe the impact that this movie had upon her.
Here is what the reviewer actually wrote: This movie is fantastic and unbelievable – it's hard to believe that such trash could come out of Hollywood. I am at a loss for words to describe the impact that the movie had upon me, but I'll try: tedious, boring, and hypnotic: it put me to sleep.

Tips on Style

Prefer short sentences, but vary sentence length
Use the active voice: this reads easier
Use strong, but simple verbs
Simple plain language
Cut out legalese
Precise use of language
Cut the clutter: William Zinsser (On Writing Well)
Form topic sentences followed by supporting statements
Use a logical structure: point by point
Use footnotes sparingly: only if needed
Include relevant quotations from cases and legislation, but only if they assist in resolving the case
Use signposts or labels and use them consistently: where multiple parties find a simple way to refer to each. Eg. NIB, Texaco, Ms Jones, the contract, the January report etc.
Where parties have the same surnames use first name: Ganesh, Boodram.

Use punctuation correctly. It can impact on meaning

1 (a) Let's eat, Rodney.
1(b) Let's eat Rodney.
2(a) When the car struck, Bill James yelled.
2(b) When the car struck Bill, James yelled.
Grammar, Punctuation & Style: A Quick Guide for Lawyers and other Writers, Deborah Cupples and Margaret Temple-Smith, West

Tips on Document Design

Intitule as the pleadings
Use headings
Use paragraphs
Number pages
Use one font type consistently
12 point size is good
Bold key phrases, headings or words
Leave white spaces (on margins and between paragraphs)
Indent quotations
Justify

Simple and elegant
Professional look

Advice from a Lord: Denning, as quoted in Point Taken by Ross Guberman, p. 162

> "I try to make my judgment live…I start my judgment, as it were, with a prologue – as the chorus does in one of Shakespeare's plays – to introduce the story. Then I go from act to act as Shakespeare does – each with its scenes – drawn from real life… I draw the characters as they truly are – using their real names… I avoid long sentences like the plague: because they lead to obscurity. It is no good if the hearer cannot follow them… I refer sometimes to previous authorities – I have to do so – because I know that people are prone not to accept my views unless they have support in the books. But never at much length. Only a sentence or two. I avoid all reference to pleadings and orders – They are mere lawyer's stuff. They are unintelligible to everyone else. I finish with a conclusion – an epilogue – again as the chorus does in Shakespeare. In it I gather the threads together and give the result."

Miller v Jackson [1977] QB 966 per Lord Denning

In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practise while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that when a batsman hits a six the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at week-ends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped: with the consequence, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.

Lady Hale in Webster v The Attorney General [2015] UKPC 10

Trinidad and Tobago has two classes of police officer, regular police officers (RPOs) and special reserve police officers (SRPs) (as well as the municipal police force, which is the subject of the Board's decision in *Alleyne v Attorney General* [2015] UKPC 3). The issue is whether, by virtue of

section 4(d) of the Constitution of Trinidad and Tobago, present and former SRPs are entitled to equal treatment with RPOs.

Lord Hodge in The Attorney General v Dumas [2017] UKPC 12

1. **This appeal raises an important question about the jurisdiction of the High Court to hear an application by a citizen for the Court to interpret a provision of the Constitution.**
2. The respondent, Mr Dumas, as an engaged citizen with an interest in the good governance of the Republic, seeks a determination of the meaning of the phrase "qualified and experienced" in section 122(3) of the Constitution and declarations that the nomination and appointment of two persons to the Police Service Commission under that section of the Constitution were invalid because, he asserts, the nominees lacked the specified qualifications and experience. Mr Dumas claims no personal interest in the appointments. He asserts a right as a citizen to seek the assistance of the courts in the upholding of the Constitution.
3. In this appeal the Board is not concerned with the merits of Mr Dumas's challenge and expresses no view on the interpretation of the relevant provision of the Constitution. Its only concern is the question of the jurisdiction of the High Court.
4. Mr Dumas is not seeking redress for a contravention in relation to himself of any of the provisions of Chapter 1 of the Constitution, which protect fundamental rights and freedoms. Accordingly, he cannot invoke the procedure to enforce those protective provisions by application to the High Court by originating motion, which section 14 of the Constitution provides. He looks elsewhere in the law for the jurisdiction of the Court.

Lord Wilson in Recreational Holdings v Lazarus [2016] UKPC 22

1. A is the registered proprietor of land in Jamaica. Without A's permission, B takes possession of the land and remains in open and undisturbed possession of it for more than 12 years. Thereafter A sells (or purports to sell) the land to C. C provides valuable consideration and has no notice of B's possession of the land. Who owns the land … B or C?

Lord Bingham in Sharma v Deputy DPP [2006] UKPC 57

The central issue before the Board is, in legal terms, whether the Court of Appeal should have disturbed the orders made by the judge. **In practical terms the question is whether the decision to prosecute the Chief Justice, by whosoever made, should be examined by way of judicial review, or whether the criminal process (subject to any application the Chief Justice may hereafter make) should at this stage be allowed to take its course.** It is not suggested that both processes can be pursued at the same time. For convenience, we will refer to the various parties by their professional titles, irrespective of their standing in the proceedings at any stage.

Lord Carnwath in Petrotrin v Ryan [2017] UKPC 30

1. The claimants (respondents to this appeal), Stanley Ryan and, his daughter, Athena, have since 1994 lived at 13 Hickling Village, Fyzabad, some 45 feet to the south-east of a disused oil well FZ94, owned and formerly operated by the appellants ("the company"). In 2006 they were diagnosed with, respectively, pulmonary fibrosis and reactive airways disease. They attributed

their conditions to emissions of hydrocarbon gases from the well and adjoining land under the company's control, and sought damages from the company, in negligence or nuisance. The claims were dismissed by the High Court (Rajkumar J), but allowed by the Court of Appeal (G Smith and P Moosai JJA, A Mendonca JA dissenting). The company appeals to the Privy Council. The appeal **raises issues as to the appropriate test of causation in such cases, whether the Court of Appeal were entitled to reverse findings of fact made by the trial judge, and whether there was sufficient evidence to support their conclusions.**

Please note that the Main sources of this presentation were set out in the body of the presentation. You are encouraged to read them for further guidelines.

Better Writing is always a work in progress. We have to keep at it.

Thank you very much for the opportunity to engage you and the kindness of your attention.