Unfavourable witnesses (Section 38)

Legislative provision

Section 38 Unfavourable witnesses

(1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about—

(a) evidence given by the witness that is unfavourable to the party; or

(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or

(c) whether the witness has, at any time, made a prior inconsistent statement.

(2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).

(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

Note

The rules about admissibility of evidence relevant only to credibility are set out in Part 3.7.

(4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

(5) If the court so directs, the order in which the parties question the witness is to be as the court directs.

(6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account—

(a) whether the party gave notice at the earliest opportunity of the party's intention to seek leave; and

Note

Paragraph (a) differs from the Commonwealth Act and New South Wales Act.

(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

(7) A party is subject to the same liability to be cross-examined under this section as any other witness if—

(a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person; and

(b) the party is a witness in the proceeding.

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Statement of the rule

A party who called a witness may, with leave of the court, question the witness as though cross-examining the witness about:

(a) Evidence given by the witness that is unfavourable to the party;
(b) A matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
(c) Whether the witness has, at any time, made a prior inconsistent statement.

'Unfavourable'

Evidence is unfavourable if it is not favourable to the case the party is seeking to advance. In deciding whether evidence is unfavourable, the court does not need to decide whether the witness is untruthful, or adverse, or 'hostile' in the common law sense. The focus is on assessing whether the witness' evidence (as distinct from the witness personally) is not favourable to the party that called the witness. This may include where a witness gives no evidence that detracts from the party's case, but the party contends that the witness should be able to give evidence supportive of its case (*DPP v Garrett* [2016] VSCA 31, [64]-[74]; *R v McRae* [2010] VSC 114, [21]).

A party may call a witness expected to give evidence that is unfavourable and seek leave under s 38. The section is not limited to situations where the evidence is unexpectedly unfavourable (*Adam v The Queen* (2001) 207 CLR 96).

Timing

Cross-examination of a witness as an unfavourable witness must take place before the other parties cross-examine the witness, unless the court directs otherwise (s 38(4)).

Where the relevant evidence emerges in evidence-in-chief, an application for leave should be made before cross-examination (*Meyer v The Queen (No 1)* [2018] VSCA 140, [182]).

Where the relevant evidence is expected to emerge during cross-examination, the party may either seek an advance ruling, or defer the application until after cross-examination (compare *Deacon v The Queen* [2018] VsCA 257, [92]-[99] and *R v Parkes* [2003] NSWCCA 12).

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Granting leave

In deciding whether to grant leave, the court must take into account:

- Whether the party gave notice at the earliest opportunity of its intention to seek leave;
- The matters on which, and the extent to which, the witness has been or is likely to be questioned by another party (s 38(6));
- The extent to which granting leave would be likely to unduly add to, or shorten, the length of the hearing;
- The extent to which granting leave would be unfair to a party or a witness;
- The importance of the evidence in relation to which the leave is sought;
- The nature of the proceeding;
- Any power of the court to adjourn the hearing or make another order or give a direction about the evidence (s 192(2)).

Whether a party gave notice at the earliest opportunity depends on when the party learnt that the witness' evidence may be unfavourable, evasive or inconsistent. This may arise when a prosecution witness expresses a desire to change his or her statement, or gives unfavourable evidence on a pre-trial hearing (*R v Semann (Rulings 11 & 12)* [2016] VSC 552).

Extent of leave and extent of questioning

A grant of leave does not give permission for wide-ranging cross-examination. The court must confine the grant of leave by reference to the basis for the grant (*Murillo v The Queen* [2020] VSCA 68, [101]).

The court must balance the need to control questions by limiting a grant of leave with the need to avoid a stop-start approach to proceedings with incremental grants of leave (*R v Le* (2002) 54 NSWLR 474, [73]).

When the court grants leave to cross-examine on the basis of one of the matters listed in s 38(1), the party may also seek leave to cross-examine the witness on matters solely relevant to credibility (s 38(3)). Pure credibility questions are not permissible unless the court separately grants leave under subsection (3). However, the line between questions about facts in issue (including questions that challenge the truthfulness of the witness' evidence about facts in issue) and credibility questions is sometimes elusive and must be decided based on the facts and circumstances of the case, and the proximity between the questions and the facts in issue (*Odisho v The Queen* [2018] NSWCCA 19, [158]).