

Beaver - EVIDENCE

Topic: Re-Examination, Reply, Rules on Re-Opening

Re-Examination 1. Where a case-in-chief is called, the opponent has the opportunity to cross-examine each witness after they are examined in chief. After a witness is cross-examined, the trier of law will look to the examiner in chief to see if they wish any re-examination. Re-examination means further examination in chief by the examiner in chief. Note that the same rules apply to this examination, ie. no leading questions, no cross of your own witness without leave etc. **Note as well that re-examination is NOT for the introduction of new matters.** It is there for clarification of answers given on cross, and for addressing matters *raised for the first time on cross-examination*. Therefore, if the examiner in chief begins re-examining on new matters, not raised on cross, but merely completing their case examining on matters they may have forgotten in chief - object to the questioning. Maintain that the question does not properly arise from your cross (ie. indicia example I will give in class). Finally, note that the trier of law does have the discretion to allow questioning that is not proper re-examination based on their view of the importance of the evidence, fairness to the parties, and considerations of prejudice as well. However, you will also find that many triers of law will strictly enforce the rule against the examiner. Therefore, as an examiner in chief, make sure all of your questions are asked before turning the witness over for cross, as this will likely be your only opportunity.

Note that if re-examination is allowed, re-cross-examination will also be allowed in the normal course. Also note that re-examination is a proper opportunity for an examiner in chief to “rehabilitate” the credibility of its witness attacked for the first time on cross (in fact, the examiner could not have called this evidence previously), or to introduce a prior consistent statement after a suggestion on cross of recent fabrication.

Reply 2. The Plaintiff or Crown calls their case, with each witness being cross-examined (or at least being available for cross-examination). The Plaintiff or Crown then closes their case formally on the record. The defence then elects whether to call evidence. Each witness they call in chief is subject to cross-examination by the Plaintiff/Crown. When the defence is complete, they formally close their case on the record. The trier of law will then turn to the Plaintiff/Crown and inquire if there will be any *reply* or *rebuttal evidence*. This area of the law speaks to what is, and what is not, proper reply or rebuttal evidence. **The relevant rule is the Rule against splitting your case as the Plaintiff/Crown.** The Rule essentially directs the Plaintiff/Crown to call all relevant evidence it wishes to *in its case in chief* and not reserve portions thereof for rebuttal or reply. The theory behind the rule is that the Defendant is entitled to know the “case to meet” and not have it change on him after he has elected whether to call evidence, and have the last thing the jury hears being “extra” evidence from the Plaintiff/Crown. If the evidence was available to the Plaintiff/Crown in their case, and if the relevant fact in issue was foreseeable, it has to be called in chief, and not in rebuttal. Having said that, if there is a new matter (perhaps a defence) raised for the first time in the Defendant’s case, and the Crown has relevant evidence on that matter, it may be allowed to call it in rebuttal. As usual, these decisions are discretionary matters for the trier of law, who will undoubtedly consider the facts in issue in the particular trial, fairness to the parties, and what would be foreseeable by counsel as an issue in the case at any given time - given the opening statements, questions on cross etc. The best example I can give

you is this. In a criminal case, if the accused has given a statement to the police, it is unlikely that a trier of law is going to allow the Crown to “sandbag” the defence, by excluding the statement from its case in chief, the accused then taking the stand and providing his version of events, followed by the Crown calling what they feel to be a completely different version of events in reply by choosing to call the accused’s statement then. It was available to them at that time (their case in chief), and they made a tactical decision knowing their case and the substantive elements they need to prove. The Court will not let them remedy this decision by calling the statement in reply. Note that rebuttal may also be a time that the Plaintiff/Crown can call evidence contradicting a defence witness’ denial of a matter, where allowable under the collateral fact rule.

Re-Opening 3. The general rule, again, is that parties are to call their case in their case, and not thereafter. The trier of law has the ability to allow a party to “re-open” their case and call further evidence at any point in a trial. This is not reply, rebuttal, or re-examination, but an actual re-opening of an otherwise closed case. As above, a trier of law will not act to re-open a case to cure negligence on the part of a party, or to help them reverse a tactical decision they have made such as not calling a witness they knew about. The trier will, however, try and do justice in a case, and consider fairness and prejudice to the parties. The trier of law will be interested in the materiality of the evidence to a fact in issue, and the reason why it was not called earlier. If it’s a technical (yet important) matter (perhaps a jurisdictional question), the trier of law will be more likely to let the evidence in. If a party did not call certain evidence in apparent reliance on representations of the other or former counsel, the trier of law is more likely to allow the “re-opening.” The further the case has proceeded, the more likely the request will be denied. For example, the SCC stated in P(M.B.) that it would be a rare case indeed whereby the Court would allow a Crown re-opening after an accused had begun to answer the case. However, it is clear that the trier of law has that power, which can even be exercised after verdict! The test for re-opening after verdict is a tough one: (a) the evidence could not, by due diligence, have been presented earlier; (b) the evidence bears on a decisive or potentially decisive issue in the case; (c) the evidence is reasonably capable of belief; and (d) the evidence could reasonably have affected the outcome of the trial. The best advice I can give you is that it is much harder to correct a case on appeal, than it is at the trial itself. Take the example of you as counsel exercising due diligence and having a witness subpoenaed for trial. This witness, on a crucial fact in issue, does not appear. You apply for an adjournment, but are denied. If after the cases are in, and even while closing arguments are made (or even after a negative verdict), the witness walks into court, you have nothing to lose (and everything to gain) in asking for your case to be re-opened and that witness to be called. It is better to do it then than on an appeal.