The Scope of Re-Examination on Discovery

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There are many frustrations in the litigation process, the most recent of which crossed my desk during the course of an examination for discovery of an opposing party where at the conclusion of my examination, the opposing lawyer chose to conduct a re-examination of their witness.

The Applicable Rules

The right of a lawyer to re-examine his or her own witness is governed by Rule 34.11(1) of the *Rules of Civil Procedure* which states that a person being examined for discovery may be re-examined by his or her own lawyer and by any party adverse in interest to the examining party.

The *Rules* stipulate that the re-examination shall take place immediately after the examination. Pursuant to Rule 2.03 of the *Rules of Civil Procedure* however, the court may dispense with this requirement where the interests of justice so require (for example, if the witness became seriously ill and could not proceed[1]).

Rule 34.11(1) itself is silent to the scope of re-examination during examinations for discovery, but does include a clear prohibition against a re-examination taking the form of a cross-examination. The Ontario Court of Appeal addressed the nature of this concern in the context of a criminal proceeding and recognized that a witness, who in many instances favours the party who calls him or her, may readily agree to the suggestions put in the form of a question rather than give his or her own answers to the question.[2]

[1] *Green v Mirtech International Security Inc,* 2012 ONSC 7500, at para. 13
[2] *R. v. Rose* (2001), 2001 CanLII 24079 (ON CA), 53 O.R. (3d) 417 (Ont. C.A.) at p. 421

The Rules in Practise

The Court has shown itself protective both of the manner in which an examining party chooses to conduct his or her examination[3], and the scope of the re-examination that can follow thereafter[4].

The primary purpose of an examination for discovery is:

> (a) to enable the examining party to know the case he or she has to meet;
>
> (b) to enable him or her to procure admissions which will dispense with other formal proof of his or her own case; and/or,
>
> (c) to procure admissions which will destroy his or her opponent's case.[5]

An examination for discovery can be a carefully crafted and strategically planned dissection of your opponent's case, where there may be issues or questions you purposefully chose not to ask or explore during the examination (while at all times being fair to the witness and the evidentiary record).

On the other hand, the purpose of re-examination is to allow a witness to correct or clarify answers given during the examination that may be wrong or ambiguous.[6]

The case law is clear that counsel is not entitled to use re-examination as a "wide-open opportunity" to neutralize the effect of any favourable admission received by the examining party and/or to conduct lengthy examinations with a view to recasting the opposing party's examination in a more favourable light. Rather, this effort should be reserved for the party's examination-in-chief at trial.[7]

The Court considered this type of situation in *Roumeliotis v. David*[8] where counsel went beyond the scope of permissible re-examination and was found to have embarked upon a new avenue of examination with two proposed questions, both of which invited a yes or no answer. The following is one such example:

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[3] *Green v Mirtech International Security Inc,,* 2012 ONSC 7500
[4] *Roumeliotis v. David,* 2004 CarswellOnt 426, [2004] O.J. No. 471
[5] *Kay v. Posluns (1989),* 71 O.R. (2d) 238 (Ont. H.C)
[6] *Roumeliotis v. David,* 2004 CarswellOnt 426, [2004] O.J. No. 471 at para. 14
[7] *Ibid* at para. 14
[8] *Ibid*

Q. You talked – Mr. Ozere put a letter to you from Dr. MacGregor that she had written to your family physician, Dr. Davidson, where you had indicated to her that you thought you were 50 per cent better.

A. Mmhmm.

Q. After the injury and over the course of the year since the date of the injury, has there ever been an occasion where you thought that you were 50 percent better?

The Court agreed with the examining party that counsel was attempting to address new issues that had not arisen during the examination for discovery process. The questions were found to be leading and constituted cross-examination of the witness.[9]

At all times during the examination for discovery or re-examination process, counsel should remind themselves of the words of Master Dash:

> Counsel must not communicate with his or her client during the examination except on the record, and even then, this communication should be made sparingly so as not to interfere with the flow of the examination. Counsel must not lead his or her own witness after the witness has given a damaging or incorrect answer since this serves to cue the witness to offer an explanation for his damaging answer. Counsel must not suggest directly or indirectly to the client how a question should be answered.[10]

Remedying the Breach

Where the Court finds that counsel asked improper questions during re-examination, it may order that the answers to those questions be struck from the record of the examination for discovery.[11]

As such, and if you find yourself in the midst of a re-examination where you feel counsel is asking questions beyond the bounds of permissible re-examination, whether that be in an effort to rehabilitate testimony that is damaging to their client's case or otherwise, it would be sensible to make your objections regarding the impropriety of said questioning known on the record.

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[9] *Ibid* at para. 17
[10] *Madonis v. Dezotti*, 2010 CarswellOnt 2195, 2010 ONSC 2180 at para. 16.
[11] *Roumeliotis v. David,* 2004 CarswellOnt 426, [2004] O.J. No. 471 at para. 18

Thereafter, and in the aftermath of the examination, consider whether it is necessary to move to have the Court strike the answers from the record of the examination for discovery, if counsel will not otherwise agree.

If you find yourself considering whether to re-examine your witness at the end of an adverse party's examination, consider whether it is most appropriate to do so, or whether it would be better to provide any necessary clarification, correction or completion of the answer in writing after the conclusion of the examination[12].

[12] Rule 31.09(1)(a) of the *Rules of Civil Procedure*