Witnesses

Witnesses Basics

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Witnesses Basics

Most evidence is introduced to the court through witnesses giving oral testimony (spoken evidence given under oath).

Rule 12-5(27) says that unless another statute or Rule says something different, a witness at a trial shall testify:

- In open court and
- Orally (unless the parties agree otherwise)

Key Terms

A **witness** is a person who gives evidence to the court orally under oath or affirmation or by affidavit (a sworn written statement).

Witnesses can be the parties themselves, or others who have particular knowledge or information about the dispute. Witnesses are a critical part of the trial process, whether they are giving evidence about what they saw happen or confirming that a document is authentic. A witness must be prepared to answer questions and give good information to the court.

There are generally speaking 2 types of witnesses:

- **Lay Witness** A "lay" witness is an ordinary witness who has been called to give evidence only on the facts that they observed, not to offer a professional or "expert" opinion on an issue at trial. Most witnesses are lay witnesses
- **Expert Witness** An expert is someone qualified with special knowledge, skill, training, and experience, like an engineer or a doctor. For more information on expert witnesses, see **Expert Witnesses**.

Opinion Evidence

Opinions of Lay Witness	Opinions of Expert Witness
Admissible if it is based on personal observation of something that is commonly known. The judge will decide whether the opinion is an assessment that ordinary people with ordinary experience and common knowledge are able to make. For example, a lay witness may be able to give an opinion about the speed of a car that they saw driving down the street, but not the speed of an airplane that was flying overhead.	An expert can express an opinion based on information that they have personally observed, or information that was provided by others. For example, an expert in motor vehicle accident analysis could go to the scene of the accident, measure skid marks, and give the court an expert opinion about the speed of the cars involved in the accident. Or, the expert might be able to give an opinion based on photographs of the accident scene.

It is usually a good idea to ask the judge to exclude witnesses during the trial. This means that they have to wait outside the courtroom until it is their time to give evidence. It prevents the witnesses from hearing each other's testimony and changing their evidence in response to what they've heard.

Telling the Truth

Before a witness gives evidence to the court, they must agree to tell the truth.

Witnesses can take an oath to tell the truth by placing a hand on a religious text (like the Bible) and swearing that the evidence they give will be true. Or, witnesses can

make a solemn affirmation that they will tell the truth. In this case, there is no religious meaning to the commitment to tell the truth.

The judge will give the same amount of weight to evidence given whether the witness takes an oath to tell the truth or affirms to tell the truth.

Competence

A witness must be competent to give evidence. This means that they must have the mental ability (called capacity) to give accurate evidence.

Except in the most extreme circumstances (for example, a witness with a severe brain injury), anyone can be called as a witness in your case. Remember, however, that the evidence must be relevant and material to your case. If your witness cannot give accurate and believable information to the court, the judge will not attach much importance to it.

The evidence of children is an exception to this general principle that anyone can be called to give evidence. The BC ***Evidence Act*** **(s. 5),** states that children over the age of 14 are presumed to be competent to testify in court. The other party can challenge that presumption, and it will be up to the court to decide whether the child is capable of giving good evidence.

The court must make a decision whether to allow evidence from children under 14. In general, young children must be able to understand the nature of an oath or solemn affirmation and be able to communicate the evidence to the court.

Requirement to Give Evidence

Witnesses who do not want to testify or cannot be relied upon to come to court can be compelled (required) to give evidence at trial by serving them (Formally giving them a legal document at their home or place of work) with a subpoena. A subpoena is a legal document that tells a witness that they are required to attend court to give evidence.

Find the Form
Form 25 - Subpoena to a witness

If witnesses under subpoena do not appear in court to give evidence, a warrant can be issued for their arrest and they can be brought to court to testify.

Preparing Your Witnesses

Preparing your witness before trial involves meeting with your witness to review the evidence that they will provide, including facts and documents.

If you have more than one witness, you should review the case with each witness individually. In particular, you should review these matters with your witness:

- Evidence that the witness will be giving in court
- Documents that you will be showing the witness in court
- Types of questions that you will be asking in your direct examination
- Types of questions that the other party might be asking in cross-examination
- How to answer the questions clearly (in other words, just give the facts) and
- Courtroom etiquette (See **At Court** for information on how to behave in Court that you can share with your witnesses)

While you should prepare your witness to give evidence in court, your witness should not give "scripted" answers to your questions. You should not try to influence your witness to change their evidence.

They should be straightforward and honest at all times. If a witness tries to lie or bend the truth in your favour, they will probably only end up hurting your case. Judges are extremely good at telling when they are not being dealt with in a straightforward way.

Refreshing the Witness's Memory

Trials are often held several years after the event that led to the dispute. Not surprisingly, witnesses may have trouble remembering the details that they are asked to provide to the court. You can help "refresh" your witness's memory before and during trial.

Before trial, it is reasonable for witnesses to refresh their memories on information and events that they will be asked about. You may talk to the witness about the issues in dispute, and talk about the type of questions that you will be asking. You may also want the witness to review documents that will be introduced into evidence.

Remember that how you prepare your witness may affect the weight the judge gives to the witness's testimony. For example, if your witness sounds like they are reading from a script you have written, the judge may not believe that her answers were genuine, and not much weight will be given to the evidence.

During trial and with permission from the judge, a witness may refresh their memory by referring to notes or documents that were made closer to the time of the event in dispute. The witness can do this if:

- The document was made near the time of the event, while the witness's memory was fresh or
- The witness created or reviewed the document around the time it was made and confirmed that it was accurate

The document does not have to be notes or a description of the event in dispute. A witness will often be asked to look at a signature on a document, such as a contract, and verify that this contract is the same one in dispute. Seeing someone's signature on the document may remind the witness that, in fact, they saw the document being signed.

Questioning Your Witnesses

When your own witness takes the stand to give evidence and has been sworn in, you will "examine" or ask them questions first. This is called direct examination, or examination in chief.

After your witness has given their evidence, the other party will have an opportunity to cross-examine that witness. After your direct examination, the other party will be allowed to cross-examine that witness.

Witnesses provide critical evidence at trial, but they do not take a stand and simply talk about issues in the case. It is your responsibility to structure questions for the witness to answer so that the evidence is presented to the court in a logical way.

Ask questions that allow your witnesses to tell their stories in their own words. This makes their evidence more credible. Some examples of appropriate questions are:

- What happened when you reached the intersection?
- What did the other driver say to you after the accident?
- Where were you looking?
- Why did you go there?

Leading Questions

Generally, you cannot ask “leading” questions when you are examining your own witnesses. A leading question suggests the answer to the witness. For example, “The car was speeding, wasn’t it?” is a leading question. “How fast was the car going?” asks the same question in a way that is not leading.

Note that you *can* ask leading questions when you are cross-examining the other party’s witness.

There are some exceptions to the general rule that you cannot ask your own witness leading questions. The only time it is appropriate to ask your witness leading questions is when:

- The information is introductory (for example, the time, date, and location of the accident)
- People or things are being identified (for example, the name and occupation of the witness)
- The matter is not disputed (for example, ownership of the car) or
- The court gives permission to ask a leading question (for example, when your own witness is “hostile” or having difficulty answering a question. A witness is “hostile” when they are withholding evidence or not telling the truth)

Re-Examination

You can re-examine your own witness if the cross-examination(the other party questioning your witness)raised an issue that you did not deal with in your direct examination.

The judge may give permission for you to cross-examine a witness for a second time. This may happen if the other party raised new issues with the witness on the re-examination.

Giving Evidence Yourself

If you are representing yourself in court, you will not have anyone to ask you questions when you have to give evidence (tell the court your version of the dispute). You will simply get into the witness stand and talk about the facts that you want the court to know. As you are doing this, imagine that you are asking yourself questions and give the answers in a clear and logical way.

For example, if you are telling the court what happened when you were in a car accident, present your story by “answering” imaginary questions such as:

- What day was it?
- What time was it?
- What was the weather like?
- Was it light or dark outside?
- Where were you going?
- Were you in a hurry?
- What was your route?

Cross-examination

Cross-examination is when you ask the other party and their witnesses questions, and when the other party’s lawyer asks you and your witnesses’ questions.

The purpose of cross-examination is:

- To get testimony from the other party’s witness that supports your own case; and

- To discredit the witness (make the witness's evidence look less believable)

The scope of questions in cross-examination is broad; you can ask any questions that are relevant to the case, as long as you do not harass the witness. Unlike direct examination of your own witness, you will often ask the witness leading questions.

When a witness takes the stand to give evidence, their credibility is on the line. Therefore, in cross-examination, you can ask questions intended to make the witness look less credible. For example, a witness may have testified under direct examination that he drove directly home after work on the day in question. Your cross-examination may focus on your knowledge that, in fact, he was seen drinking at the bar for three hours after work.

Your cross-examination can focus on these areas:

- Showing that the witness favours the other party (biased)
- Showing that the witness has contradicted themselves in previous statements
- Challenging the witness's memory on certain points
- Challenging the witness's version of events

You are not required to cross-examine every witness, but if you do not cross-examine a witness, their evidence may be accepted because nothing has been introduced to contradict it.

During cross-examination, the witness should have a chance to explain things that are being introduced as evidence against them. It is not appropriate to "ambush" the witness by bringing in unexpected evidence that they cannot explain or disagree with. For example, if you want to bring evidence to the court that the plaintiff was intoxicated during a child access visit, you must ask the plaintiff about their behavior during the access visit before introducing a witness to give evidence of the intoxication.

It is not easy to cross-examine a witness effectively. This section only outlines a few of the basics of conducting a cross-examination. A judge *may* give you some direction when you are conducting a cross-examination.

Inconsistent Statements

A witness may say something at trial that contradicts something they said before trial. For example, the witness may have stated in a motor vehicle accident report

immediately after the accident that they heard a crash, and turned to see the two cars touching bumpers. Then at trial, the witness may say that they saw the defendant's car crash into the rear of the plaintiff 's car.

A witness's earlier statement could have been oral or written, sworn (for example, in an examination for discovery; in an affidavit), or unsworn (for example, a statement to an accident investigator).

You will want to bring these inconsistent statements to the court's attention in order to challenge the credibility of the witness. While you may not be able to prove the truth of either statement (unless the witness concedes that one statement is true), you will show that the witness's evidence is probably not reliable.

The BC *Evidence Act* (**s. 13** and **14**) tells you how you can challenge a witness's credibility on written or spoken statements, but the technique is basically the same for challenging all previous statements made by the witness – you get the witness to confirm that they made the previous statement before showing that it is inconsistent with their present testimony.

In your cross-examination you ask the witness if they made the earlier statement. If the witness does not distinctly admit making that statement, you must prove that they did so by calling evidence of your own to confirm that the statement was made.

Written Statements

If a witness made a previous statement in writing, you can cross-examine that witness about the written statement (see **s. 13** of the *Evidence Act*.). While you do not have to show the document to the witness (unless the judge asks you to), you must point out the specific parts of the document that are contradictory.

For example, if you were cross-examining the witness about the accident report in the example above, you would ask the witness if they made and signed that written statement. When that is acknowledged, you have the witness read the contradictory parts of the written statement to the court.

If the witness denies making the earlier statement, you must prove that they did so by calling another witness to confirm that the statement was made, such as the police officer or insurance adjuster who took the statement.

You would use the same technique if the witness's inconsistent statement were made in an earlier examination for discovery. In that case, you would ask the witness

if they attended an examination for discovery on a certain day and remind the witness that they gave certain answers to certain questions under oath or affirmation. You would then read specific questions and answers from the examination for discovery transcript and have the witness confirm that they were asked those questions and gave those answers.

Verbal Statements

You can cross-examine a witness about a prior inconsistent oral statement. In the example above, a written accident report may not have been prepared – the witness may have told a police officer what they saw.

You would begin your cross-examination by asking the witness if they made that statement to the police officer. If they deny making that statement, you must prove that they did so by calling the police officer to confirm that the statement was made. (See **s. 14** of the BC *Evidence Act*.)

Hearsay

You have probably heard the term "hearsay". However, many people misunderstand what it means. Hearsay describes any statement (oral or written) that is made out of court; and led in Court to try to prove what was said or written is true.

Hearsay is generally not admissible as evidence in trial, but may be admissible in some chambers hearings (see **Chambers Applications**). For example, if you are the plaintiff in a car accident and a witness to the accident told you that he saw the defendant drive through a red light, you would have to call that witness to give that evidence in court.

It is not good enough if you tell the court that someone who witnessed the accident told you what happened. The reason is fairness. The other side must have the opportunity to hear that witness's evidence in court and to cross- examine the witness about their statement.

A statement made out of court is admissible if it is *not given for the purpose of proving that the content of the statement is true*. The statement may be told to the court simply as proof that the statement was made.

For example, imagine a case where a plaintiff claimed that they suffered a foot injury in an accident. Imagine the defendant cross examined the plaintiff and suggested that they had, right before filing the lawsuit and nearly two years after the accident, made up the foot injury to pad the lawsuit. Now imagine the plaintiff's boss was called to testify. The boss told the court that the plaintiff complained of back pain right after the accident.

This evidence is **not admissible** to prove that the plaintiff actually had foot pain. It is merely hearsay on that point. It is an out of court statement, and it cannot be used to prove the truth of its contents.

However, this evidence **would be admissible** for the limited purpose of rebutting the suggestion that the plaintiff made up the foot injury nearly two years after the accident.

Double Hearsay

Double hearsay is not admissible in any type of court hearing. Double hearsay is when the source of the information is two people away from the person who gives the evidence to the court.

For example:

- **Direct Evidence:** If Antonia comes to court and says that they saw Bryan hit their car, that is direct evidence and clearly admissible
- **Hearsay:** If Antonia comes to court and says that Caitlyn told them that they saw Bryan hit their car, that is ordinary hearsay evidence
- **Double Hearsay:** However, if Antonia comes to court and says that Diana told her that Caitlyn told her that Bryan hit her car, that is "double hearsay" and is not admissible in any court hearing

Exceptions to the Hearsay Rule

There are exceptions to the rule against hearsay. If the hearsay falls into one of these categories, it may be accepted into evidence during trial.

Verbal statements. Some verbal statements made by others may be admitted into court at trial:

- A statement made by someone, who is no longer living, against their own interest. For example, if a deceased person was heard to say that they owed someone money, the court may assume that they would not have made such a statement unless it were true

- A spontaneous statement or an excited utterance made when doing something (sometimes called "res gestae"). For example, a person cries out in pain when picking up a heavy object. A witness who saw that person cry out in pain can give evidence that the person experienced pain

- Testimony in a former proceeding. (See Supreme Court Rule **12-5(54)**). Transcript evidence given by a witness in a previous court proceeding is admissible if the witness is not available for this trial

Documents. The general rule is that statements of fact contained in a document are not evidence of those facts unless the document falls within one of the exceptions to the hearsay rule, such as the exception for business records under **s. 42** of the *Evidence Act*.

For more information about how to admit specific documents into evidence and exceptions to the hearsay rule for documents, see **Documents as Evidence**.