Evidence in rebuttal

By Gerard Mullins

Evidence in a case at trial does not always unfold as planned. If it did, the parties probably wouldn't be there at all. Sometimes the lack of clearly defined issues in pleadings, a misunderstanding of the opposition's case, or simply an oversight, might lead a party to recognise, during the course of the trial, that further evidence is needed. That party may need to seek leave from the judge to 'call evidence in rebuttal' or 'reopen' the case.

At common law,[1] a party is ordinarily required to call all of his or her evidence during the course of the case. Once the case is closed, the party is not normally permitted to adduce fresh evidence. But the court retains the discretion to permit further evidence in limited circumstances.

The learned authors of *Cross on Evidence* recognise that a distinction is sometimes made between 'calling evidence in rebuttal' and 'reopening' a case. If evidence is legitimately capable of being called in rebuttal, either as of right or because circumstances are such that the court can and should properly exercise its discretion to do so, the party calling the evidence is not reopening its own case, but answering its opponent's. A party calling evidence to avoid the consequence of a mistake in failing to call it earlier is seeking the court's discretion to permit it to call additional evidence. But the distinction appears to matter little in practice. Most cases do not distinguish between evidence in rebuttal and reopening a case.[2]

In *Downes Irrigation Co-Operative Association Limited v the National Bank of Australasia Limited*,[3] Thomas J, in the Queensland Court of Appeal, noted that when issues raised by the other party are known (as they are in all cases requiring pleadings), counsel will call all the available evidence relating to all disclosed issues in the case. This is usually done regardless of whether they are plaintiff's or defendant's issues, or whether the onus of proof lies on the plaintiff or the defendant. If it becomes necessary at a later time, counsel for the plaintiff might rely upon the court's discretion to call rebuttal evidence. Leave might be obtained when 'some line emerges in the defendant's case' which was not reasonably foreseeable; when the plaintiff has been misled or taken by surprise; or, generally, when the interests of justice require it, even though the rebutting evidence may confirm the plaintiff's own case.

1. His Honour then summarised the practice and principles applicable to civil procedure in Queensland in circumstances where an issue of proof lay upon the defendant (described as 'a defendant's issue'):

   Where a plaintiff desires to reserve the right to call evidence in answer to a defendant's issue, s/he should disclose that intention to the court before finally closing the case, so that the judge may decide upon the preferable course.
2. No party has a right to call rebutting evidence or an entitlement to reserve evidence upon a defendant's issue. The right to do so lies entirely at the discretion of the trial judge.
3. However, where there is a defendant's issue, and the plaintiff desires to reserve evidence on that issue, the usual expectation is that s/he will be permitted to do so. But the court's discretion to order otherwise is completely unfettered.
4. The fact that the defendant's counsel cross-examines the plaintiff's witnesses on the issue does not mean that the plaintiff's case on that issue is split; nor does seeking a favourable exercise of the court's discretion in any way weaken the plaintiff's position.
5. If a plaintiff desires to follow this course, s/he must astutely avoid leading evidence upon the defendant's issues. To do so will mean splitting the case on that issue, and for that reason almost certainly being denied the right to enter upon the same issue again after closure of the defendant's case. Even re-examining a plaintiff's witness on a defendant's issue would constitute leading evidence by the plaintiff.

His Honour then cited the following passage from the fourth edition of Halsbury's Laws of England,[4] identifying the general rules applicable in this area of practice:

> 'When the onus of proof on all issues is on one party, that party must ordinarily, when presenting his case, adduce all his evidence, and may not, after the close of his opponent's case, seek to adduce additional evidence to strengthen his own case. In theory, when the onus is partly upon the plaintiff and partly upon the defendant, the plaintiff may in the first instance limit his evidence for proving those issues in respect of which the onus is upon him, and then, after the close of the defendant's case, adduce evidence in rebuttal upon those issues where the burden is upon the defendant. Such evidence in rebuttal must be confined solely to rebuttal and not merely be evidence in confirmation of evidence-in-chief.'

In most cases, 'splitting the case' is a tactic that must be exercised with considerable care. If an advocate intends to do so, a sensible course is to advise the court that this approach will be taken to ensure that the discretion will be favourably exercised. Equally, an advocate should not be afraid, in an appropriate case, to apply for leave to reopen his or her case on behalf of the plaintiff if an aspect of the evidence has been overlooked. The court retains the discretion to admit evidence, particularly in circumstances where the interests of justice so require. ■

Notes: **1** Note that some jurisdictions have enacted statutory modifications to the common law position. **2** *Cross on Evidence*, Lexis Nexis, 'Evidence in Rebuttal' at paragraph [17,620]. **3** [1983] Qd R 130 at 138. **4** Volume 17, para 18.

Gerard Mullins *is a barrister at Ronan Chambers, Brisbane.*
PHONE *(07) 3236 1882.* **EMAIL** *gerrymullins@ozemail.com.au*