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ADVOCACY TRAINING

What is the Hampel Method?

**Part 2: Demonstration Review lead by Professor The
Honourable George Hampel and Mrs Justice Hampel**

(transcript of [video](#))

- A** **Mrs Justice Hampel:** Now we're moving on to actually doing a couple of extended reviews aren't we?
- B** **Professor George Hampel:** Yes, we're going to do two reviews. One of an appellant argument and one of some evidence, some cross-examination, and we're going to do it as if we're doing a review, so we'll play the piece and we'll each do a review each and then we'll deconstruct it and see how it works.
- C** **Mrs Justice Hampel:** So we're very grateful to our two practitioners, who are reprising their performances from... was it Wooten last weekend? Yes?
- D** And the first one we're calling on is Carolina.
- Professor George Hampel:** Carolina, Carolina?
- E** **Mrs Justice Hampel:** George can you just [unintelligible]
- Professor George Hampel:** Yes
- ***
- F** **Professor George Hampel:** Now, Carolina, what was the... before we start looking at the DVD what was the point in the group review that was given to you?
- G** **Carolina:** My headline was "Know the layout of your skeleton argument", and I could have used that a lot more to make the-
- Professor George Hampel:** -Know the?
- H** **Carolina:** Layout of your-
- Professor George Hampel:** -Layout of your skeleton argument?
- Carolina:** Yes

- A** **Professor George Hampel:** And what did you get from that? What was the point that you got from that?
- B** **Carolina:** There were certainly points you see when I'm talking in particular about the direction on self-defence when I was trying to set out a test which I had written down in my skeleton - which is quite wordy - and I could have just referred to a particular paragraph-
- C** **Professor George Hampel:** -Did you know what that test was?
- D** **Carolina:** I knew what it was and I was saying it, it just would have been a lot more fluent and a lot quicker and a lot more succinct
- E** **Professor George Hampel:** So did you get from that that you should read your skeleton?
- F** **Carolina:** No, simply refer to it
- G** **Professor George Hampel:** Refer to it to get that accurate point?
- H** **Carolina:** Yes
- Carolina:** Yes
- Professor George Hampel:** Yes, and that's pretty useful stuff isn't it?
- Carolina:** It was, I did that then in the review and it meant I got an awful lot more argument into-
- Professor George Hampel:** -When you say review, your replay?
- Carolina:** Yes
- Professor George Hampel:** Good, alright well let's have a look at... at your performance. And we're going to look at two things; we're going to look at the

A substance of what you're doing, particular in relation to those formulations, and then we'll have a look at a matter of style as well OK?

Carolina: Yes

B

Professor George Hampel: Right

C

Carolina: My lady I propose to deal with each of the three of the ground... each of the three of the grounds in turn. The grounds are set out at page one of my skeleton argument and the factual background and relevant decisions of the trial judge is set out in pages two to four - I don't propose to go through those at this stage, unless that would be of assistance?

D

Judge: No thank you.

E

Carolina: My Lord dealing firstly with ground one, the real issue is this: there were comments made by the appellant to PC Skinner at the scene-

F

Judge: -Can we go to ground three first please?

Carolina: Yes of course. My Lord if I can refer you to page ten of the skeleton argument?

G

Judge: Yes, I'm there thank you.

Carolina: There are three issues in particular with the direction that was given to the jury in respect of self-defence.

H

Firstly there were errors in respect of direction as to the appellant's-

Judge: -Yes we've already grasped that... what if the judge had not uttered the words "on balance"?

- A** **Carolina:** Well my Lord that would've removed that particular difficulty but it would have given no indication at all as to the proper standard to have been applied. So still, that would have been insufficient.
- B** What he should have done was direct them specifically as to not only where the burden of proof lay in respect to this but effectively that it is the negative burden, so that the prosecution is specifically proving that the appellant was not acting in
- C** self-defence. Even removing the words "on balance", is not at all making that clear.
- That would have simply read "however if you think he could have used less force...
- D** or he was not really scared or he could have walked away, you would convict", but my Lord obviously we know that the judge gave some general directions in respect of the burden and the standard of proof, there's nothing at all to suggest
- E** that he linked that specifically with what they had to be sure of.
- And my Lord in the particular context of self-defence, it's not simply like a simple offence where it might be obvious what you need to be sure of, this is rather
- F** more complex and hence the need for more specific direction.
- Judge:** Isn't it implicit in the earlier part of the direction, where the judge makes
- G** it clear that the Crown must prove that the appellant hit the complainant with the weapon-
- Carolina:** -Well my Lord there's no dispute about that-
- H** **Judge:** -And does not go on to say that they must be sure that he acted in self-defence? Do you see the distinction that's to be made from that?
- Carolina:** Well my Lord there's obviously no dispute that the complainant was hit, but what the judge should have done specifically is address the jury as to each

- A** element on which they have to be sure. What he did not do is give them any guidance by which to reach that decision.
- B** So, for instance, he gave no assistance with respect to the various circumstances in which the appellant found himself and how those circumstances should have been considered to them - by them - in reaching their decision whether or not they are sure.
- C** **Judge:** As a matter of impression - looking at the exact words spoken at the trial - as a matter of impression [unintelligible]-
- D** **Carolina:** -I'm so sorry I couldn't quite hear the question.
- E** **Judge:** What impression do you think the jury might have had when they hear these words? The reason I ask the question is because nobody at the conclusion and summing up got to their feet and said to the judge "you've got it wrong", did they?
- F** **Carolina:** My Lord yes, if I can address it on this point; "however if you think on balance he could have used less force" does not at all address the real test that should be applied when deciding whether or not someone is acting in self-
- G** defence. "Could have used less force" in my submission is a far cry from the use of *reasonable force*, and of course "not really scared" does not get us anywhere near giving the jury a proper direction in respect of the appellant's belief and whether that belief was honestly held.
- H** **Judge:** But the "less force" he's speaking of, is less than the level spoken of in the previous sentence; the level of force "necessary".
- Carolina:** My Lord yes, frankly that simply adds to the confusion; that the judge is using two different standards of the level of force that might be used within two separate sentences. He should have been very clear that there is one level of

A force that you should be considering and that level of force is: was the force used reasonable?

B **Judge:** I think your argument is - yes I thought that - your argument is stage one; was he scared and was the use of force necessary?

Carolina: Yes quite.

C **Judge:** And secondly, was the use of force, was the level of force proportionate?

Carolina: Yes quite, that can only compound the confusion.

D **Judge:** Ground two then please.

Carolina: Grateful my Lord.

E I'm turning to page eight of the skeleton argument - my Lord would you wish me to address you in respect of the conviction or in respect of the [unintelligible]?

Both are contained within ground two.

F **Judge:** Both please.

G **Carolina:** Firstly in relation to the conviction; well my Lord we say that this simply has nothing to do with this offense at all it's very plain we say that this conviction should not have been allowed to be adduced in evidence.

My Lord I won't address you in respect of the law but the reality is the judge failed to apply the very simple test set out in section 101(1d) and section 103.

H The offense is not at all of a similar nature to that which the appellant was facing trial before the trial judge, and it could not have gone to any of the important issues between the prosecution and the defence.

Judge: But what's the correct approach of the appellate court to the admission of bad character evidence?

A

Carolina: My Lord-

Judge: -The court has a say about this in the case of Hanson.

B

Carolina: My Lord yes, we would say simply this: that obviously the trial judge is in a particular position to have heard not only the arguments that were made in court but understand the true context of the trial. So on that basis the court of appeal may be required to analyse the impact of the decision to admit some bad character evidence, notwithstanding that it was incorrectly admitted.

C

Having said that, it would be right to interfere with a decision if the decision to admit that bad character in respect of propensity is plainly wrong.

D

E

Professor George Hampel: Right I think we'll pause it there please.

Thank you.

F

Sorry we're not giving you a chance to watch it all but I think there's enough there for me to talk to you about a couple of points-

Carolina: -I'll forgive you.

G

Professor George Hampel: The point that was made to you in the group is an important one and I want to take that up but in a slightly different way, but it leads to the same sort of result I think.

H

You - I think rightly - and obviously knew your case, you knew where you wanted to go, and you had your grounds. You were taken to the second ground first, didn't throw you badly - you went straight to it and that was good. And then when you started to articulate the ground you said there are three issues with this direction, but as the conversation went on those issues were totally lost.

- A** There was no "the second is... the first is... the third is...", and so what I want to talk to you about is how you might think of articulating each one of these difficulties with the direction as a clear, complete statement.
- B** So, what we're going to do, is go back to your notes or the way you've prepared it. You said there were three issues with this direction, what's the first issue?
- C** **Carolina:** I think I broke it down into the various things that the judge didn't do so I addressed the issue of force being reasonable.
- Professor George Hampel:** Force - was that the first one you wanted to address?
- D** **Carolina:** Yes, force was the first one.
- Professor George Hampel:** Right, OK. So let's think of how you might say that to the court: "The first issue with this direction relates to the degree of force"?
- E** **Carolina:** Yes
- Professor George Hampel:** And what is that problem? The judge went wrong in what way?
- F** **Carolina:** So he gave them two different directions in relation to the-
- G** **Professor George Hampel:** -Right, so let's formulate that:
- The first issue is the direction about force; it was formulated in two ways...*
- ...What's your next point?
- H** **Carolina:** And he should have... neither of those ways were that is needed to be "reasonable"... So he did two conflicting directions-
- Professor George Hampel:** -They were conflicting directions because?

- A** **Carolina:** One was saying he could have used less force, and one was... I can't remember what I said it was but neither of them touched on the issue of reasonable force.
- B** **Professor George Hampel:** And what he should have done is?
- Carolina:** Just gone for reasonable force.
- C** **Professor George Hampel:** Because?
- Carolina:** That's the-
- D** **Professor George Hampel:** -That's the correct... that's the... alright.
- OK so you see what we're trying to do?
- E** **Carolina:** Yes
- F** **Professor George Hampel:** We're trying to actually - in your performance preparation if you like - actually formulate for yourself, write them down - but you probably don't need to write them down, you know them - be able to articulate them, and say immediately "the first problem with this direction was in relation to force; dah, dadah, dadah, dadah, dadah..." and you complete the picture.
- G** The reason why you got some intervention is because - at that early stage - is because it wasn't clear what you were talking about.
- So the second issue was?
- H** **Carolina:** The honest belief.
- Professor George Hampel:** Honest belief - and what's the point there? The judge also misdirected the jury because?
- Carolina:** All he said was "do you think he could have done that"-

A

Professor George Hampel: -And the problem with that is?

Carolina: It doesn't address at all what the defendant says his side was-

B

Professor George Hampel: And what should have been said?

Carolina: It should have been focused on whether or not the belief was honestly held.

C

Professor George Hampel: Not focused, what should the judge have said?

Carolina: He should have asked the jury whether they thought the belief was honestly-

D

Professor George Hampel: -Sorry, say that louder.

Carolina: Sorry - asked the jury whether they thought belief was honestly held.

E

Professor George Hampel: The issue was the honest belief?

Carolina: Yes

F

Professor George Hampel: And that's what should have been directed?

Carolina: Yes

G

Professor George Hampel: I think when you're arguing about misdirections it's always important to say what the problem was, how it manifests itself - what its difficulty is - and what it should have been.

H

Carolina: Yes

Professor George Hampel: And that completes the picture. The third one, the same sort of thing.

Carolina: Yes

- A** **Professor George Hampel:** Do you follow the way we may do that?
- Carolina:** Yes
- B** **Professor George Hampel:** So it is a matter of probably - in a sense that relates to what was said to you - namely; you had all of these things no doubt in your skeleton-
- C** **Carolina:** -Oh they were written one, two three...
- D** **Professor George Hampel:** Precisely, but when you got to talking about it, it got lost and there was no two, three or one even it was overall generalising and the court's going you know "what's this about?"
- E** So if you say "one, two, three" then do it one, two, three, and make sure that every one is complete in those steps. *What is it? Why is it wrong? What should it have been?* That sort of...it's the clarity and that sort of thinking. Once you do that you're much more focused - as you should have been if you read your skeleton.
- F** **Carolina:** Yes
- G** **Professor George Hampel:** Because you obviously were prepared - so that's good.
- H** Now, I want to talk to you about something else very briefly and that's this idea about primacy. Try and get to your point immediately without any preliminaries or introductions, you don't want to take you to page this and page that and... get up and just say "the problem with the direction about self-defence was three, the problems were three...the first was this" - just go straight for it. It gives you a lot more confidence and makes the court... arrests its attention immediately.
- Carolina:** OK

- A** **Professor George Hampel:** Instead of trying to say anything before you actually make your point.
- Now let's have a look at the question of style; you had three grounds to argue...
- B** **Carolina:** Yes
- C** **Professor George Hampel:** You had organised the ground; one, two, three - and that's good. In respect of each ground you may have had to have referred to a particular sentence or two, in the ground about self-defence you had to say what the judge said - so you've got to have it in front of you.
- D** In relation to the other grounds you had to have the prior convictions in front of you.
- E** **Carolina:** Mmm
- F** **Professor George Hampel:** And in relation to the third... the next... the other ground, you'd have to have what was said to the constable and what the constable said.
- G** So in order to avoid doing a lot of paper movement and a lot of shifting, and a lot of looking and finding things - you weren't very bad at it but you were still doing a lot of moving and so on...
- H** **Carolina:** Yes
- Professor George Hampel:** And the way to change that is really to make sure that you've got three pages in front of you - ground one: page, and you've extracted the precise words of what you're complaining about, you've got it in front of you, you don't have to find it. You've ground two is on this page ground three on this page and you've got them in front of you. So all you need to do it just glance at them - you don't have to shuffle notes.

A

Carolina: Yes

B

Professor George Hampel: And if you're just able to stand up, and have them in front of you, you can actually be speaking to the court and saying "in relation to the first ground the learned trial judge directed the jury by saying this - and read it straight away without going, you know into your papers.

C

So have it all there in big letters like this, so you've got it in front of you, you can just glance at it and engage the court.

D

If they move you to the next ground you've already got it open because you know they have to argue it, so it's all there.

E

Professor George Hampel: So it's really preparing your notes or your material to help you, in a way that is immediately accessible and doesn't require finding things, and looking at them, and trying to find what you should read, and avoid all that paper stuff which detracts from your level of confidence and so it's really a technical thing in the way that you set your material out in front of you so it's all there, right? OK?

F

Carolina: That makes sense.

G

Professor George Hampel: OK, now would you like to try to formulate for me the ground about the convictions?

Carolina: There are three difficulties with the direct... oh in relation to the-

H

Professor George Hampel: -No the convictions, the admission of the conviction.

Carolina: There were two issues in relation to bad character. The first was in relation to a conviction for insider trading that was many years old...

Professor George Hampel: Yes

A

Carolina: It was wholly unrelated and the conviction itself didn't show-

B

Professor George Hampel: -So what you're saying should not have been done is; the trial judge should not have admitted the conviction about insider trading because?

C

Carolina: It was an old conviction.

Professor George Hampel: Old conviction and?

D

Carolina: It was unrelated to this type of offense.

Professor George Hampel: Unrelated to the offense therefore it was irrelevant and stale?

E

Carolina: Yes

Professor George Hampel: Right, it wasn't a discretion thing it was just irrelevant wasn't it?

F

Carolina: It was-

Professor George Hampel: -That's what your point is, yes?

G

OK, so then the next point about the second conviction?

Carolina: The next was when the defendant was arrested he was found in possession of cocaine, he was later cautioned for that and that's simply irrelevant.

H

Professor George Hampel: Right so make your point first, the conviction in relation to the possession of cocaine was irrelevant, because?

Carolina: Factually it had nothing to do with the-

- A** **Professor George Hampel:** -Right, in argument it's often better to say why it's right... why your proposition is right.
- B** **Carolina:** Yes
- Professor George Hampel:** OK, so - does that help you?
- Carolina:** Yes that's really useful, that's really helpful.
- C** **Professor George Hampel:** Right
- ***
- D** **Mrs Justice Hampel:** Thank you Carolina, thank you George.
- Now we'll move to the second performance, which is a performance of cross-examination.
- E** Now just before we start... we met just before but I'm Felicity Hampel, Sanjay.
- Sanjay:** Hi there, Sanjay, hi.
- F** **Mrs Justice Hampel:** Now what we're looking at here is the cross-examination you did of the accountant Jones.
- G** **Sanjay:** Yes
- Mrs Justice Hampel:** And I know that was a couple of weeks ago now but do you remember the review point that was made to you in group about that?
- H** **Sanjay:** Yes; *don't let them off the hook* was the title, you'll see when we go through the film that I've - I think relatively successfully - got the expert to say that various items of management and administration costs were not part of the business that was being sold. What I didn't go on to say in relation to each of those items was that the expert shouldn't have allowed a quarter of those costs

A in relation to their valuation. I asked a group question at the end - a wrap-up question - saying "you shouldn't have awarded 25 % of all of them" and I lost control of my witness, slightly, no... I lost control of my witness.

B **Mrs Justice Hampel:** OK... Do you acknowledge that you lost control of your witness?

C *(laughter)*

Mrs Justice Hampel: Did you... when you were cross-examining or when you were reviewed did you understand that you had lost control of the witness at that stage?

D **Sanjay:** Yes, I could feel I was losing the power that I'd gained I suppose.

E **Mrs Justice Hampel:** Right, and what were you told or what have you thought about since to stop that happening again?

F **Sanjay:** I think putting the question after each particular item of management and administration costs would have helped.

Mrs Justice Hampel: OK

G **Sanjay:** And that's what I would have done differently.

H **Mrs Justice Hampel:** Now I have an advantage that I don't normally have when I'm reviewing these because I actually saw your performance earlier... And so what we're going to do now is not watch the whole of it, but there are two particular parts that I want to go through that are again a slightly different aspect of what you were reviewed on but come back to the same message which is not losing control of the witness. OK, so having flagged that for you it's something I want you to think about as we start to watch it.

A

Thanks David...

B

Sanjay: Ms. Jones good afternoon, could you turn to the contribution statement please? Which I think you'll find is exhibit A; to Mrs. Godfrey's report.

Ms. Jones: Yes I have that.

C

Sanjay: Now Ms. Jones what you said to my Learned Friend in examination-in-chief is that the word "contribution" has a specific accounting meaning does it not?

D

Ms. Jones: That's right, yes.

Sanjay: And the specific accounting meaning is revenue less variable costs, isn't that right?

E

Ms. Jones: That's right, yes

F

Sanjay: It's also right to say that Ms. Jones that those variable costs appear in this contribution statement under the heading: *Direct Costs*?

Ms. Jones: Yes that's right.

G

Sanjay: It's for that reason that immediately under that heading *Direct Costs* you see in bold *Gross Profitability (Contribution)*?

Ms. Jones: Yes

H

Sanjay: Wouldn't you agree with me Ms. Jones that contribution has been accurately calculated as the revenue less variable costs?

Ms. Jones: Yes

- A** **Sanjay:** And so everything that we see below that line of contribution is not relevant to contribution calculation at all is it?
- B** **Ms. Jones:** Not contribution in terms of the accounting idea or concept.
- Sanjay:** Yes, and wouldn't you agree with me Ms. Jones that the point of the contribution statement is to state the contribution in the accounting sense?
- C** **Ms. Jones:** I would say that that would be part of it but there would is no set pro forma or similar saying what exactly a contribution statement should cover.
- D** **Sanjay:** That's quite right Ms. Jones but simply as a matter of language wouldn't one expect the contribution statement to be the statement of contribution?
- Ms. Jones:** I would imagine that it would have to be within there yes.
- E** **Sanjay:** And its primary purpose would be to state the contribution would it not?
- Ms. Jones:** Yes it would have that element in there.
- F** **Sanjay:** And so wouldn't you agree that if a contribution statement had an accurately calculated contribution it would not be misleading?
- G** **Ms. Jones:** Not in terms of the contribution calculation, however there have been other elements included in there at the choice of Timothy Farthing and Mr. Walker, which they wanted to present as part of the sale of the business, and showing the performance of that business.
- H** **Sanjay:** And of course that's right isn't it, what the *Other Costs* section of this statement does is it turns gross profitability into net profitability isn't that right?
- Ms. Jones:** That's right yes.

A **Mrs Justice Hampel:** That's the first part of your cross-examination where you're dealing with that part of the contribution statement that deals with the gross profitability and how that is calculated for contribution. You then move on don't

B you to cross-examine about the second part of the statement, which is the overhead administration and management and administration costs?

C **Sanjay:** Exactly

Mrs Justice Hampel: I want to go to the very last part of your cross-examination, where you deal with the last part of the calculation of management and administration costs because some of what you do there is similar to what I've

D seen you do here, and that was the same sort of point I want to make, so David can you go to the eight-minute mark please?

E **Sanjay:** its right isn't it that only the receptionist that works in the showroom near the garage would have any dealings at all with the garage, isn't that right?

F **Ms. Jones:** It's likely yes that they had done.

G **Sanjay:** The receptionists of the two showrooms that were nowhere near the garage have no dealing with the garage do they?

Ms. Jones: I haven't seen any evidence that would contradict that.

H **Sanjay:** And wouldn't it be right that in effect that that receptionist's time would be shared?

Ms. Jones: Between the showroom and the garage? Is that what you mean?

Sanjay: Yes

- A** **Ms. Jones:** Yes, yes, that's likely to be a reasonable allocation between the two segments.
- B** **Sanjay:** And so do you agree with Mrs Godfrey that allocating 50 % of that receptionist's time to the garage would be appropriate?
- Ms. Jones:** That would seem reasonable, doing it in half.
- C** **Sanjay:** And then other staff Ms. Jones, cleaners and maintenance staff for the three show rooms, you agree with me don't you that in fact those cleaners and maintenance staff have nothing to do with the garage?
- D** **Ms. Jones:** It specifies showrooms there, I don't know if they would have any dealings with the garage, with the related showroom.
- E** **Sanjay:** Ms. Jones, in relation to all of these costs, you've said that it's appropriate to allocate a quarter of them to the garage, isn't that right?
- Ms. Jones:** Yes, I do.
- F** **Sanjay:** And yet we have gone through each one of them, and you haven't stated at all that there is any basis for allocating a quarter of them to the garage...
- G** **Ms. Jones:** The way the contributions statement is working is showing the position of the business at the end of 2013, when these costs were incurred, and therefore in my opinion the contributions statement - if it's showing the performance of the business at the end of that year - should include costs that
- H** were incurred in that business.
- Sanjay:** Ms. Jones, perhaps we'll go through it again; you agreed with me that showroom managers were irrelevant to the garage business did you not?

A

Ms. Jones: Correct

Sanjay: So there's no basis for applying a quarter of those costs to the garage?

B

Ms. Jones: I imagine there would be some element of having to deal with the garage if they were in a related showroom, but perhaps a quarter is a little bit too substantial in that respect.

C

Sanjay: Ms. Jones there's no basis for saying that any of those showroom managers have anything to do with the garage is there? You've agreed with me on that already...

D

Reviewer: OK let's stop there...The fightback starts!

E

Mrs Justice Hampel: Right, what I wanted to talk to you about was the difference between the questions you asked that were simply trying to establish the factual foundation you wanted - so at the start for example you said contribution had a specific meaning, revenue list, variable costs, that appears under direct costs on the contribution statement, that's where you've got gross profit less direct costs and then contribution - and you were getting simple yes or no answers from the witness to all of that.

F

G

Then you were moving in for what you thought was the kill, and your language changed. Do you remember what the sort of things were that you started saying after that?

H

You were prefacing your questions with things like "wouldn't you agree... so... wouldn't you agree... wouldn't it be right... so, do you agree... and yet you have". They're just a number of the phrases that you used to preface questions after that where you were trying to force a conclusion on the witness which was

- A** adverse to what the witness had said. And each time you did it the witness got feistier and feistier, and started to answer back and give qualified answers, or qualify her answers, and then when you know "wouldn't you agree?", "no,
- B** because..." she'd say and off she'd go and give you answer and that was why your reviewer said at the end there "the fightback starts", because you were inviting the witness to fight back by the use of that sort of language.
- C** You understood what you wanted to do, first of all to say that so far their definition of what a contribution was, meant that you would only be looking at revenue and variable costs, and that the variable costs had to be calculated in a particular way. And then you wanted to go through each of those variable costs
- D** one-by-one, and show the difference, but instead of simply establishing the facts; that this was a variable cost but the witness hadn't... you know, worked out a basis for the apportionment - that it was an unfair or inaccurate or misleading
- E** contribution statement - that was essentially the point you wanted to make wasn't it?
- F** **Sanjay:** Sure, sure yes.
- G** **Mrs Justice Hampel:** But each time you went from establishing the fact that something hadn't been included or something hadn't been considered or the apportionment hadn't been... didn't relate to the actual use or distinction between the garage and the showroom, you said "yes, you do this" and gave the witness the chance to come back and explain why, or "yet you didn't do this", you know, you didn't quite say "why not?" but you were really inviting the witness to
- H** tell you why she had come to the conclusion she had.
- So, the point I want to make is once you start prefacing questions with fighting words like "wouldn't you agree" or "isn't it right" or "do you agree", what you are

A doing is signalling that you're trying to draw a conclusion through your witness rather than establish the facts from which you want to argue the conclusion later.

Sanjay: Yes

B

Mrs Justice Hampel: Yes?

Sanjay: So would you just not ask those questions?

C

Mrs Justice Hampel: Well, what did you need to establish? You needed to establish that contribution had a specific meaning, and first of all you had your direct costs, your gross profit, and then a calculation of contribution. Then so far as the variable costs were concerned identify the components that have been taken into account and the basis on which they had and do the distinctions that you drew between the...what was showroom-related and what was garage-related, what was other premises-related and what was related to the premises that had both the showroom and the garage.

E

F

Establish that in the contributions or the averaging that had taken into account the off-site showrooms as well as the on-site showrooms, the salespeople managers that had nothing to do the garage, so that you have the foundation facts, and then the conclusion that you needed was "and it was you aggregated or agglomerated all of those in coming to your fixed costs, you didn't distinguish between the garage on the one hand and the showrooms on the other".

G

H

But you establish the facts of the aggregation before that conclusion that there was no de-segregation of the garage from the showroom, or the showroom-related expenses - that conclusion has to follow from those first questions that we put but you don't say "wouldn't you agree that that means that this was misleading... wouldn't you agree that that should have been done?".

A Once you take out the fighting words and just put the facts in more neutral terms
it's much harder for the witness to disagree with you or to start to give
explanations. If the witness does start to give explanations when you're just
B putting "you counted the cost of all showrooms, not just the one related to the
garage when dealing with this particular cost", the witness says "yes but..." - it's
clear the witness is being the argumentative one rather than you establishing the
C facts that will allow you to put your argument when she's not there to answer
you back.

Sanjay: Yes

D **Mrs Justice Hampel:** OK? So, beware of those "would you agree" words because it
means you're getting into a fight with the witness, you're trying to get her to
agree with you that you're right and she's wrong, and you're giving her the
E opportunity to answer back.

So each time you hear yourself preface a question with "would you agree", stop
and say what am I trying to do here? Am I trying to simply establish the fact?

F **Sanjay:** Yes

G **Mrs Justice Hampel:** In which case I don't need that language, or am I trying to
force her to accept a conclusion that's got a value judgement in it as opposed to
the factual conclusion?

Professor George Hampel: You've got half a minute for the style review.

H **Mrs Justice Hampel:** Right, so in terms of your preparation try and go for fact
and not conclusion, or conclusion without the "would you agree" type of question.

- A** As you develop the cross-examination make sure that each time you start a question with words to the effect of "would you agree", you stop; take a breath and go for the factual foundation below it.
- B** Now there's one minor style point I wanted to make on that and I'm not sure how much you were watching yourself as opposed to listening to your substance...
- C** **Sanjay:** I mean there were various points where I sort of surprised myself and then I kind of leant back and looking at the ceiling, which I kind of... I didn't think I did...
- D** **Mrs Justice Hampel:** Usually when you were getting a bad answer to the "would you agree", but the think I wanted to talk to you about was the swaying.
- E** **Sanjay:** Yes, right.
- Mrs Justice Hampel:** I was feeling somewhat sea-sick at times
- F** **Sanjay:** Right
- Mrs Justice Hampel:** Because particularly as you're under fire, you would rock from side to side, and as you moved from one topic where you got a bit of a belting to the next topic, you'd give it a little sway again before you got started. It can be mesmerising, and distracting for people who are listening.
- G**
- H** One way to avoid doing that is to give yourself a much more comfortable stance from the start. You were obviously uncomfortable on your feet, and holding on to that lectern at times... we could almost see your bare knuckles. But a more comfortable and relaxed stance will do a number of things; it will stop the rocking, it'll allow you to get more breath down here so have your natural voice

A because speaking to me now your voice is a bit lower and deeper isn't it? You're a bit higher and there's a little bit of tension up there.

Sanjay: Oh right yes, OK.

B **Mrs Justice Hampel:** Because you were breathing up there, not down there. So let's stand.

C **Sanjay:** Yes

Mrs Justice Hampel: Feet slightly apart, toes pointing out, weight on the balls of your feet. One foot slightly in front of the other... comfortable? Drop your shoulders... now you can breathe down there can't you?

D **Sanjay:** Yes

E **Mrs Justice Hampel:** Lift your shoulders up, and when you breathe up there where does your voice go?

F So you get up, you start your cross-examination, you stand with your feet apart, drop your shoulders, take a breath to get a lot of breath in there, and then speak in your normal voice, it'll give you so much more control.

G If you want to move do, but plant your feet again before you do. You'll notice that public speakers, actors and the queen will all stand with their feet apart because if you can stand that way for a long time, feeling comfortable.

Sanjay: OK, great.

H **Mrs Justice Hampel:** Drunks in pubs do it too but I don't need to point that out to you.

Professor George Hampel: OK, we'll leave a one-minute review on each of the [unintelligible], I'll do yours first - right?

A

Mrs Justice Hampel: OK, alright you do it first?

B

Professor George Hampel: Yours first? Right... OK we're running a little short of time as always is the case so we just have one or two comments about each of the reviews and may I comment on Felicity's review?

C

What I hope you've noticed is the selection of the point - and it's such a fundamental point in cross-examination that you don't need to persuade the witness, you don't need to get the witness to agree that you were right and they're wrong, you don't have to persuade them that conclusions are right, you need to lay the foundational facts for your argument later.

D

And unless there's a compliance requirement with Browne and Dunne, you don't have to go to any argument or any persuading of the witness you are right. And so the other interesting thing about this review is that although Felicity chose the matter of style in the stance which is you know a nice one and something to practice, there is this overlap that she talked about earlier between style and substance, because one the one hand you can say to a pupil "don't use words such as do you agree with me... would you agree with me... isn't it right" because psychologically witnesses under cross-examination feel that they're under siege, and if you say to a witness "would you agree with me?" the first thing they want to do is not to agree with you, because they can see it coming - it's the attack. So don't use that, just use conversational things, not "would you agree with me about..." and so on.

F

G

H

That's a style matter - but the reality is that behind that style matter is the fact that you are trying to put the argument to the witness, you're trying to persuade the witness that your conclusion is right, and you want them to agree with it. You don't want to persuade them, you want to persuade the judge - and that's a fundamental aspect of cross-examination and one of the major deficiencies or

- A advantage of really good cross-examination; there's never an opportunity for the witness to argue back - it's just hard, cold material for your argument later.
- B So that was a combination of style and substance, the reason for the "would you agree with me" was the real reason was your argument. So that was the sort of combined style and substance review illustration.
- C **Mrs Justice Hampel:** The one point I wanted to make about George's review was something we've been developing recently which is the different type of demonstration you do when what you're teaching somebody is structure.
- D So, it's no point talking to somebody about structure and then just getting up and demonstrating the way you would have structured it, the demonstration of structure that George did was to try to pose the sort of questions that the Pupil should have been asking herself in organising it. To throw questions to her to get
- E her to formulate the proposition, the reason for it, putting the word "because" on the end of her answer and getting her to then give the next point.
- F So he was demonstrating a method of preparation of organising the structure, so instead of say simply "start by stating your proposition, go to exactly what the judge did wrong, say why it was wrong, and say what it should have been" - that's
- G good, that's a good sort of four-step plan - but then demonstrating not only that but by asking her to formulate it herself, by posing the questions and get her to answer them - is the demonstration.
- H So we're actually starting to think about doing that type of demonstration of structure, not only in the extended DVD review, but also working through how we can do it as a formal demonstration in group review. So we can still be saying a teacher is doing a proper demonstration but it doesn't necessarily mean getting on your feet, standing at the lectern and repeating a part of the advocacy performance. Because if you're teaching structure that's not actually the best

- A** way to demonstrate it, demonstrating how to learn to structure it differently is what we should be doing.
- B** **Professor George Hampel:** And so getting the pupil to say "what will you first say first? How can we with this...?" and so on so actually an interactive go-at-it-together, in a sense. Alright-
- C** **Mrs Justice Hampel:** -Can I just... I just did a very short demonstration of how we demonstrate something and get the Pupil to do it too in the DVD review by getting Sanjay to get up and stand with me, to do exactly the same stance instead of just telling him about it, getting him to do it and feel it - and throwing
- D** in those extra bits of information for him about the breathing, about the deep breath, about the natural voice, as well as the stance.
- E** **Professor George Hampel:** Right, well we're going to have a short session of questions and comments about this later but I want to spend just a little time talking about the second aspect of the other sort of advanced training before we do that. And that's something that as far I know hasn't actually been done here
- F** yet, but I'm pretty keen to - and hope that somehow - that'll be taken on for a number of reasons.
- G** First of all, is that beyond advocacy training of Pupils and new practitioners - which is the first form of advanced training that you're doing - there's a third lot of advanced training and that is advanced training of people at all levels. And that is meaning at all levels; we now in Australia over the last ten years have had
- H** any number of silks and really senior barristers come along to workshops. We don't compel but we suggest and try and get all our teachers to come and do a workshop as an advocate - as a Pupil - it doesn't matter who they are, whether they are silks or junior barristers or whatever - for the simple reason that we are trying to increase the advocacy skills and assess the advocacy skills of our

A teachers, and then select teachers who are capable of doing the more advanced... the most advanced aspect of it, for the senior bar.

B And of course, it's a question of developing a culture that as an advocate you will always improve and learn and develop and adapt to new techniques, to different techniques, to developments in the way advocacy is done... These years as a theme from 20 years ago and so on... The different needs of the courts... it's all a changing thing and someone who says to you "I can no longer learn any more about advocacy" I think has a problem.

C

D So, we're always learning, and what is terribly exciting in that development is the fact that we're getting senior people - and some of them it's almost an exchange of ideas in the process - we learn as much from some of our Pupils who come to those workshops as they do from what we have to offer them.

E Now the great benefits of that are firstly that the culture of consistent, constant development of skills, and that is critical and some of our best teachers keep coming along to workshops as Pupils - and that's a terrific insight. And of course

F the teaching at that level is really moves it up another notch or two, obviously.

G The problem with that sort of teaching is that we've had self-selection, so we advertise it to the bar as whole - this is not required, this purely voluntary - we advertise it to the bar and say "we're putting on an advanced cross-examination workshop... today, advanced cross-examination workshop...", so we get people who come along who say they're advanced and they should be back at the

H Pupils' level - some of them are silks - and others come along and are really terrific, and we have no control - of course you get such a range of people at one of these workshops, it makes it very hard.

And so, it's such an important aspect of our work and as judges we constantly see that seniority is no guide to quality of advocacy. There's a sort of an assumption,

A easily rebuttable assumption, that most senior people should have a level of
senior competence, but it is highly rebuttable, and I cannot resist telling you of
the day that Felicity and I came to see a trial that Anthony was running - a fraud
B type trial. There was a silk who was very eloquent and you know had all the
characteristics of a very spectacular looking silk, and someone who didn't analyse
his advocacy would be very impressed.

C But this fellow had a point which he made in the first five minutes - and it was a
good point - he set up the basis for conclusion that these two people would have
communicated with each other about the wrongdoing, and he did it in about the
first five or ten minutes at the most. Then he went on for the next half an hour
D actually giving the witnesses all the opportunities in the world to counter his
position, and to explain it and to justify it and to... and losing all the impact and
the impetus of that sort of cross-examination.

E Now that is not a hard thing to teach, because a adopting this first method of
advanced teaching - if that advocate was forced to identify what facts he had on
F which he could rely to support his argument, then work out where he could get
those facts from, then prepare the cross-examination exactly as was
demonstrated here to establish those foundation facts - of which there about
half a dozen or so about what these people did and how they went about their
G work... It would have been tonnes for his argument, but then he just couldn't
resist further... more argumentative... more suggestions... more of the sort of
thing that was happening here, just not waiting, not having the patience to wait
H for the argument rather than to try and put it to the witness. And it just lost
everything and Anthony... we were sort of too far away to have our eyes meet but
after the event we had a discussion accordingly along these very lines with all of
the view that this was unfortunate.

- A** Now, I have no doubt that a workshop or two for that sort of advocate - unless they're just... they're not interested - would work in teaching them to think differently about it... It's not a hard thing to do.
- B** There are lots of subtle aspects of advocacy too, which can't be taken out at new practitioners' level and other levels, which can be done in the more advanced stuff. And we allow ourselves much more time for the more, sort of more subtle
- C** and the more artistic aspects of performance... their communication skills and all sorts of other things.
- And so what I'm hoping is that your bar, which is.... your inn, which is one of the
- D** inns we've worked with most - although we've worked with other inns before - or somebody, will take the initiative and say "right, let's try and put on a workshop, a weekend workshop, open to anyone who wants to come along... " Pitch at that
- E** senior level - we still might have a problem of self-selection, but at least say that it's pitched at that level, that "we expect certain basic knowledge before - and ability - before we have people come to it", and let's do it - just limit it to a small
- F** number of people, you produce - of course - your best teachers.
- Now finally, what's needed for those sort of workshops? First, the first things needed are case studies, which have sufficient subtleties in them to raise more
- G** advanced advocacy issues. We did some two years ago now, we did an advanced cross-examination workshop here and the feedback we got was that the case studies had a tremendous number of twists and turns in them, which enable
- H** much more sophisticated thinking about your case theory and your performance. So really good case studies which raise and challenge the advocates are the first pre-requisite.
- The next is obvious, you really need teachers who are good advocates themselves, and who are experienced teachers. Now the beauty of beginning to

A do such workshops will be that your teaching faculty will immediately start improving and hopefully becoming much more enthusiastic about teaching. In Australia we probably only have about ten teachers or fifteen teachers who we

B would trust with one of these more advanced workshops, and these are teachers who have been teaching for years and been advocates forever and you know - are very much at the top of the tree.

C It would be - with your numbers - it would be difficult if there was a course for everyone, but as a small workshop it would be the beginning of a whole new culture and whole new development of thinking about the fact that advocacy can forever be improved, changed, refined, and it's exciting. Those teachers learn

D from each other and learn from their own skills as advocates and we wouldn't - hopefully - we'd hopefully eliminate this concept that seniority is the answer to quality - and that's very important.

E So, I mean we can talk a lot about how it's done and what sort of work we do in that area, we do it in appellate advocacy, advanced cross-examination, cross-

F examination of experts and so on - in those more sophisticated areas, particularly appellate advocacy, but you know we take a full weekend to do appellate advocacy in one case study. A short case study too, but it's subtle - lots of twists and turns, yes?

G

Audience Member: Do you have judges in that faculty?

H

Professor George Hampel: We do, but we do not let judges teach at that level unless they are also, or have been and continue to be good advocates – not just because they're judges.

Audience Member: Well that's the point, that's really the point I was getting at, the difficulty as a judge is to keep all your advocacy skills-

- A** **Professor George Hampel:** -The mere fact that they're judges is almost irrelevant, except in appellate advocacy where we have... the bench of three consists of one appellate judge - but one who is at least sympathetic to this idea
- B** of development and learning - one very highly qualified teacher and one of the participants who in the group... in turn, sitting up there. Because you learn a tremendous amount when you're the victim of advocacy - it's really quite something.
- C**
- So... and then people really come back and say it's been great being up there because you see lots of things about advocates that you don't see when you're not sitting and being advocated at, from the bench.
- D**
- So apart from that situation we don't use judges unless they are judges who - like Felicity and a number of others - have been terrific advocates for 25 years, and great teachers, so that's very, very important-
- E**
- Mrs Justice Hampel:** -But there are the benefits to what I call judge teaming; it's best to get judges engaged in the process of helping upskill the advocates who are appearing before them. It often makes more realistic expectations, but allows the advocates to see - **this** is what judges actually want. It has such authority when judges say "this is what really works for us", and we found it to be terrifically helpful, but also gives a real [unintelligible] to a workshop - the mere number of appeal judges sitting or participating as teachers in an appellate workshop.
- F**
- G**
- Professor George Hampel:** And the last one we did just before we left to come overseas, we had three of the most senior judges, or two of the most senior appeal court judges sitting as teachers, president at the court of appeal and another very senior judge-
- H**
- Mrs Justice Hampel:** -Who's a member of this inn in fact

A

Professor George Hampel: He is too. Alright.

END

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