



## Cross-examinations #2

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#### Sequence from the direct examination of Mr. Minchella

Assume the direct examination ended with this sequence:

1. HL: Let's discuss the tumbler in which you served the ice cream to Mrs. Donoghue.
2. I am showing you a photograph, already marked Exhibit 2. Do you recognize it?
  - a. Yes, I do. That's either the tumbler we used or one that looks just like it.
3. Who carried it to Mrs. Donoghue's table?
  - a. I did.
4. What did it contain?
  - a. White ice cream.
5. What else?

- a. Nothing.
6. How do you know?
  - a. The tumbler is completely clear glass. If there had been anything other than vanilla ice cream, I would have seen it.
7. What did you do with it at the table?
  - a. I placed it before the customer and poured half the contents of the bottle of ginger beer onto the ice cream.
8. Mrs. Donoghue says she saw the remains of a snail emerge from this bottle. What did you see as you poured it?
  - a. Nothing but pale yellow liquid foaming onto white ice cream.
9. A few minutes later, Mrs. Donoghue reacted audibly to something she said that she saw. What did you do?
  - a. I went to her table.
10. Where was the glass tumbler?
  - a. Before her on her table.
11. What did you see in the tumbler?
  - a. Nothing but vanilla ice cream.
12. I have no further questions.

Counsel for Mr. Stevenson: May I request a short recess to gather my thoughts, your Honour?

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During the break, ask yourself, what was that last point made? Perhaps it is this: *there is doubt whether there was any contaminant (snail or otherwise) in that bottle of ginger beer.*

How would you attack that? There appear to be two steps. First, complying with *Browne v. Dunn*, present what Mrs. Donoghue has said (and maybe what Audrey MacIsaac confirmed?). Then, show that the other witness was better positioned to observe than this witness. Remember that litigation is rarely about absolutes. You usually need only show that your (witness, inference, or record) is more persuasive than theirs.

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### **Initial sequences from the cross-examination of Mr. Minchella**

1. HL: In your direct examination, you discussed the tumbler in which you served the ice cream to Mrs. Donoghue. Let's start there.
2. Mrs. Donoghue has already testified. She said that she saw the remains of a snail emerge from the bottle as she poured ginger beer onto the ice cream in the tumbler. Do you understand what I just said?
  - a. Yes.
3. But you disagree with her testimony, correct?
  - a. Yes, I do.
4. So one of you is mistaken. Can we agree to that?
  - a. Yes, I suppose so.
5. When you served the ice cream to Mrs. Donoghue, you were speaking to both Mrs. MacIsaac and Mrs. Donoghue, am I right?
  - a. I don't recall, but that is likely so.
6. And you paid attention to what your customers were saying, correct?
  - a. Yes. I usually do.
1. HL: Now, let's talk about the Scotsman's Float for a moment.
2. It's a popular dish at your café, correct?
  - a. Yes, it is.

3. And you have served it many times?
  - a. Yes, I have.
4. To many customers?
  - a. Yes, I have.
5. Mrs. Donoghue was, therefore, one of many, correct?
  - a. Yes, that's true.
6. You said earlier that you can't recall specifically speaking with Mrs. Donoghue while you served the dish on this occasion, right?
  - a. Yes.
1. HL: Now, let's move on to when you went to Mrs. Donoghue's assistance after she called out.
  2. You heard her exclaim in discomfort. Is that fair to say?
    - a. Yes.
  3. You rushed to her table?
    - a. Yes.
  4. To render assistance?
    - a. Yes.
  5. Not to conduct an inspection, do you agree with me?
    - a. Yes, I do.
  6. May Donoghue was the focus of your attention, correct?
    - a. Yes.
  7. The only focus of your attention?
    - a. Yes.
  8. The incident happened quickly, do you agree?
    - a. Yes. It seemed like only a few seconds.

From the above, you have cast doubt on what Mr. Minchella said as he finished his testimony in the direct examination. We will revisit these sequences in a later episode when we discuss the 'question-too-many' and possibly when considering how to deal with negative questions.