Personal injury claims and the (lost?) art of interrogating[1]

Introduction

1. Before moving to Melbourne in 2009, I had never drawn interrogatories, nor answers. At first, I viewed them both as antiquated and North American; it must have been one of those steps that everyone just does in Victoria too, "because we've always done it that way", or so I thought.
2. It probably wasn't until I ran my first trial, weeks after signing the Bar roll, that I appreciated fully their use; in that case, their necessity.
3. I was for a plaintiff. The defendant called no evidence after I closed my case. Thanks to some nifty interrogatories prepared by my instructors, and the defendant's answers, I didn't need the defendant to call any evidence, and I didn't need to go scrounging around looking for defendant witnesses to call myself. I simply tendered the answers where they admitted key facts and, uncontested, *¡Ay, caramba!*, I won the case.
4. That trial taught me many valuable lessons, and I have never since treated interrogatories lightly.
5. When the question was put in this seminar's blurb, 'when should interrogatories be served?', I knew immediately the answer had to be: in every case!
6. So listen up.

Matters of history and the birth of the common law interrogatory

7. I was, by accident, right about one thing when new to interrogatories, they are antiquated.

[1] This is based on a paper delivered at MinterEllison on 16 November 2023.

8. Historically, the common law did not generally permit discovery or interrogatories. This right was limited to claims brought in the Court of Chancery, a court of equity. The Court of Chancery approached equitable claims rather differently to a court of law.

9. Justice Leeming, writing extrajudicially, explained the now extinct distinction between courts of equity and common law courts thus:[2]

> *The procedure at common law was designed to produce binary issues of fact which could be determined by a jury, or else to raise a question of law. Equity's procedure…lent itself to an evaluation of the entire case so as to exercise a discretionary remedy, perhaps on terms, perhaps on a different or more limited basis than the plaintiff had sought. The essential distinction was identified two centuries ago:*[3]
>
> > *A court of law works its way to short issues, and confines its view to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination up on the real justice of the case.*

10. It was the 'comprehensive view' taken by courts of equity that permitted discovery and interrogatories. Thus, the *Court of Chancery Procedure Act 1852* recognised the ability of a plaintiff to interrogate the defendant.

11. In equity, the ability to interrogate was available under what was called a 'bill of discovery' which was brought in the Court of Chancery. The

---

2 In this text, *Common Law, Equity and Statute – A Complex Entangled System*, the Federation Press, 2023 at 10.

3 Citing *The Juliana* (1822) 2 Dods 504 at 522.

only relief sought in the 'bill of discovery' was discovery, which included interrogating.

12. The power of interrogatories under the 'bill of discovery' is explained further in *Discovery & Interrogatories Australia.*[4] Possibly the most fascinating aspect of the interrogation process was that it could take many rounds, like a boxing bout. The publication explains:

> *This procedure enabled a process known to the Chancery practitioner as "scraping the defendant's conscience". A bill was filed making various allegations and accompanied by a mass of interrogatories aimed at a complete discovery of the defendant's position. The defendant had to answer on oath. Having received the defendant's answers the bill was amended upon the information supplied and the defendant was interrogated again.*

13. That process teased out whether the defendant was liable to the plaintiff.

14. We cannot, therefore, complain when we are drafting 30 answers to interrogatories in a proceeding!

15. By section 24 of the *Australian Courts Act 1828* (Imp), the laws of England became the laws of the colonies of Australia. At that time, common law rules had not yet fused with principles of equity. In the United Kingdom, that was achieved by the passing of the *Judicature Acts 1873* and *1875*.

16. The colony of Victoria was formed from 1 July 1851 under the *Australian Colonies Government Act 1850* (Imp). Victoria passed an act equivalent

---

[4] LexisNexis.

to the *Judicature Acts 1873 and 1875* when parliament enacted the *Judicature Act 1883* (Vic).

17. When equity fused with the common law in Victoria in 1883, then, the process of interrogating became available in common law proceedings.

18. The *Judicature Act 1883* (Vic) set out, under Order XXXI, the discovery and inspection process, which included the ability to interrogate one another. Unlike today, without leave of the Court, interrogatories had to be issued before the close of pleadings.[5]

19. So, with the passing of the *Judicature Act 1883* (Vic), interrogatories in common law claims were born.

20. Today, similar provisions are contained in Order 30 of the *Supreme Court Rules* and the *County Court Rules*.

21. Superior Courts, including the High Court, Federal Court and the Supreme Court of Victoria, also have inherent powers, quite apart from those set out in Rules of Court, to order discovery and interrogatories,[6] but it is hard to see when or why that power would be exercised given Rules of Court, at least in the Supreme Court.

What to interrogate on

22. Once you have established that you can and, in my view, must interrogate the other side in a common law claim, the next question is – what should I interrogate on?

---

5 Rule 30.02(2) provides that no leave is required for interrogatories, provided they are served after the close of pleadings. This is to see that parties interrogate only on issues between the parties by reference to the pleaded case.

6 See, for example, *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623.

23. When it comes to liability, as simple as it sounds, to my mind, a good starting point is to ask oneself the so-called "5 Ws" (plus an "H") about the proceeding, thus:

    a. who – is involved;

    b. what - happened;

    c. when – did these events happen;

    d. where – did the events happen;

    e. why – did the events happen; and

    f. how – did the events happen.

24. Those questions should, to some extent, be identified by reference to the pleadings, at least when carefully drawn. In every case when I draw interrogatories, or prepare draft answers, I first compare the Statement of Claim against the Defence, paragraph by paragraph, elucidating the issues in dispute.

25. In some cases, the first issue will be about whether the correct defendant is sued. In other cases, it will be about where the incident occurred – in whose property or over an area where multiple people or entities may have had control. In yet further cases, a key issue will be how the incident occurred, its mechanism, or why it occurred, or who was involved in the incident.

26. Next, I go to the discovery in the case, by reference to the Affidavits of Documents, which are hopefully properly enumerated and described in the Affidavit, as required by the Rules of Court. I then consider the material against the "5 Ws".

27. I then go to proofs of evidence, where such evidence is available, to see what the witnesses have to say about the events in question.

28. Quantum material is also sometimes relevant to interrogatories on liability issues – such as ambulance reports, hospital notes, or GP records, as well as descriptions of incidents in medico-legal reports.

29. In causes of action where interrogatories on quantum remain available, that is, not workers' damages and transport accident claims, one will again look to the pleadings and in particular what is set out in response to Rule 13.10(4), a provision sometimes overlooked by a pleader. It, of course, provides as follows:

> *(4) The pleading of a party who claims damages for bodily injury shall state—*
>
> > *(a) particulars, with dates and amounts, of all earnings lost in consequence of the injury complained of;*
> >
> > *(b) particulars of any loss of earning capacity resulting from the injury;*
> >
> > *(c) the date of the party's birth;*
> >
> > *(d) the name and address of each of the party's employers commencing from the day being 12 months before the party sustained the injury, the time of commencement and the duration of each employment and the total net amount, after deduction of tax, that was earned in each employment.*

30. Where this is not particularised, a defendant lawyer, when drafting a Defence, ought to also draw a request for particulars, so this information may be interrogated about in due season.

The art of drafting an interrogatory

31. Having identified the issues about which to interrogate, the author of interrogatories must then ask themselves – what am I really trying to achieve in this particular case by issuing these interrogatories? How can I advance my client's case? What is my 'case theory' here?

32. There are at least three likely aims to interrogatories:

    a. to extract admissions to be used against the other party at mediation or trial;

    b. to better understand the position of the other party, which may be unclear from the poorly pleaded case or want of documents or simply by dint of the complexity of the case; and

    c. to highlight the strength of your client's own case against the weaknesses in the opponent's.

33. Let me explain what I mean by each of these three aims.

<u>Extracting admissions</u>

34. To me, when the aim is to extract admissions, good interrogatories are like good cross-examination - one narrows the other into a corner. The deponent of the answers, acting properly, cannot squirm out of the truth.

35. I will come to objections shortly, but here it is critical that you do not create an 'own' goal. If your interrogatory is vague, you won't extract the

answer you are seeking. If your interrogatory is needlessly broad, it will be objected to or become meaningless.

36. You should therefore carefully define all key terms or phrases in the interrogatories, before the questions, narrow the time frames, and then try to break down the interrogatories into parts, so that a deponent, abiding by the Rules, is forced to answer the interrogatories, and may be left reeling by doing so.

37. Poor drafting can also lead to irrelevant answers to interrogatories, even if the interrogatories are not objectionable. It is common, for example, to see a question like this – "describe in as much detail as possible what happened to you when the incident occurred?" While the question might not be objectionable, its answer is unlikely to assist.

38. Let's say it's a footpath case against a local council. If your aim in that interrogatory is to extract an admission that the Plaintiff was not watching where they placed their feet at the time of the incident – is that interrogatory likely to extract an admission about that?

39. The answer is probably no, if your opponent is well schooled in interrogatories. The deponent, on advice, could legitimately answer the interrogatory as follows –

> *I was walking along the street and there was a lip that I tripped on. That lip caused my foot to strike the cement. I lost balance. I then fell forward. I fell really forcefully. I broke my ankle as I twisted it. I then fell hard on my wrist and broke it. I was then lying on the ground in tears. An ambulance had to be called. It was just horrific, the worst day of my life.*

40. The better way to try to eke out an admission about the plaintiff not watching where they placed their feet might be interrogating as follows:

    a. where were you looking 10 seconds before the incident;

    b. where were you looking 5 seconds before the incident;

    c. where were you looking immediately before the incident;

    d. where were you looking at the time of the incident,

    breaking the interrogatories down, step-by-step.

41. If a plaintiff says they cannot remember, that in itself may be a useful admission or useful to know as the plaintiff may be a vague historian.

42. If the plaintiff says they watched carefully where they placed their feet, then how was it that they fell?

43. So, whatever the answer is that you receive to these specific interrogatories, they are probably going to assist in your assessment of the plaintiff's case.

44. If you have a proof of evidence of a witness who says that the plaintiff was actually texting at the time of the incident, you might follow that line of inquiry with the following:

    a. were you holding anything in the 30 seconds before the incident;

    b. if 'yes' to the preceding sub-interrogatory:

        i. what was it you were holding;

        ii. were you holding the said item in your hand or hands, stating which;

        iii. were you looking at the item at the time of the incident.

45. Confident of the witness's evidence, you might even be more specific and ask whether, at the time of the incident:

a. you were looking at a mobile phone;

b. texting a message on a mobile phone.

46. You will need to determine how direct or broad you will need to be on a case-by-case basis. If the plaintiff was not texting, but was looking at an iPad, a plaintiff can simply deny looking at a mobile phone at the time of the incident, so you won't get your admission.

Better understanding the other party's case

47. In a lot of cases, particularly where the pleadings are broad or vague, interrogating is also an opportunity simply to understand what the case is really about ahead of mediation and trial.

48. The Statement of Claim may say, for example, that "the Plaintiff was walking along Berry Street when she fell on the pavement and sustained significant injuries". Going back to your "5 Ws", what actually happened on the pavement? Was it a lip between two bays of the pavement, or a large crack in the pavement, or a hole or did it even happen off the pavement? Did the incident happen at night or during the day?

49. You might need to break down the interrogatories to piece this together and avoid allowing the Plaintiff to remain vague about what occurred, or force an admission that the Plaintiff might not remember what happened, which the other side is hoping you to do not identify before trial. A vague witness rarely makes a good witness in a trial.

50. Indeed, your interrogatories in such an example might be of the most basic type:

a. what was the number of the street where you fell;

b. what time of the day was it;

c. what was it that caused you to trip?

Selling the strength of your client's case

51. By this point, I mean that you can draw to your opponent's attention helpful parts of your own case in interrogatories to reveal weaknesses in your opponent's case and force them to deal with that evidence in answering interrogatories.

52. To use an example, buried under a pile of discovered documents is an email exchange between the parties where the plaintiff's version of events is wholly inconsistent with the case they now bring.

53. You might wish to make this document front and centre of your case theory and, at the interrogatory stage, draw this document to the attention of the other side and have them answer questions about it, making them doubt the strength of their claim ahead of mediation and trial.

Attaching documents to interrogatories

54. Speaking of interrogating on documents, in many interrogatories that I prepare, I attach documents, including photographs.[7]

55. Going back to the footpath case, what better way to understand where the incident occurred than by attaching a photograph and asking that the plaintiff mark where the incident occurred.

56. What better way to force the hand of the other side than to ask them to answer interrogatories by reference to a document. This assists the

[7] See further *Civil Procedure Victoria* at [30.02.175] about how this is to be done.

drafter of the interrogatory to focus on the words used in the document, and makes it hard for the deponent of the answers to be evasive.

Limits on numbers of interrogatories

57. Today, practice notes usually limit interrogatories to 30, including sub-parts. This rule forces drafters to be succinct, and sometimes forces the drafter to pick which topics they will ask about and which they will leave for trial.

58. Most cases probably turn on only one or two issues, so 30 interrogatories ought to be ample here, once you have identified your case theory and the one or two key points in your case.

59. It is also important that one counts the number of interrogatories before issuing the interrogatories to the other side, to avoid a refusal to answer the interrogatories or to miss out on answers to all of the questions you wanted to put to the other side.

How to draw answers to interrogatories

60. The starting point to approaching answers to interrogatories is this - while cases can be lost on interrogatory answers, as my first trial revealed, they are never won on interrogatory answers.

61. A trap for young players is to try to 'win' a case in answers to interrogatories, inviting your client to go into every possible detail, often off the point, to try to demonstrate why your client has a 'great' case.

62. Clients themselves frequently fall into the same trap when preparing their own draft answers.

63. This is foolhardy, and often objectionable by the other side,[8] as one cannot tender their own self-serving interrogatory answers, and often what seem to be helpful at the interrogatory stage can suddenly come undone at trial. Do not give fodder for cross-examination at trial. Stick to answering the interrogatory and not more.

64. Let's take an example.

65. The interrogatory might ask – did you complain about the footpath to the council before the incident? The interrogatory required only a yes or no answer. Let's assume in this case the defendant did not complain, so the answer should simply be 'no'.

66. Instead, the deponent wants to explain the reason there was no complaint, and answers instead:

> *Although I did not complain, I knew about the terrible footpath and I told Jane, my next-door neighbour, about it many times. I was also going to call the council about it, but I hadn't got around to it yet and I figured it wasn't that urgent, and I wasn't to know I was going to fall on it in the meantime, but I would have within weeks if the incident did not occur.*

67. Suddenly, a defendant can investigate who Jane is and what she knows about this, and her evidence might not assist. Come trial, the cross-examiner can then explore the issue of urgency, the knowledge about the risk and all manner of things, all in a case where the answer should have

[8] See [30.06.10] of *Civil Procedure Victoria* where superfluous answers may be removed from the answers.

been ‘no’, rendering the interrogatory probably nugatory from a trial perspective.

68. So, advise the deponent to answer the question asked, but to do so succinctly and not answer more than the interrogatory asks.

Who may answer interrogatories

69. Generally speaking, it is the party themselves who must answer the other side’s interrogatories.

70. But where you act for a legal fiction, for example a corporation, who then must answer the interrogatories on behalf of the legal fiction?

71. The Rules state that an officer of the corporation, or someone duly authorised by the corporation, may answer the interrogatories.

72. The rules define an officer of the corporation as, “director, secretary, receiver, receiver and manager, official manager, liquidator and trustee administering a compromise or arrangement made between the corporation and another person or persons.”

73. From time to time deponents of answers to interrogatories are required to give evidence, so make sure that the person swearing the answers is the appropriate representative of the corporation.

Interrogating parties under a disability

74. Sometimes, a party may be very young or suffer from dementia or some other condition rendering that person unable to answer interrogatories.

75. In such a case, it is permissible for the litigation guardian to answer interrogatories on behalf of the litigant. However, the litigation guardian cannot be interrogated, as they are not a party to the proceeding.[9]

Source of the answers and all due search and inquiry

76. The source of answers is particularly relevant when acting for corporate defendants.

77. Rule 30.05(1)(g) deems the person answering the interrogatory to be answering those interrogatories as if they were the corporation.

78. Rule 30.05 sets out that:

    a. first, a party must answer interrogatories from their own knowledge;

    b. secondly, if that party has no knowledge, the party must answer interrogatories from any belief that the party has of the fact; or

    c. thirdly, if the party has no knowledge or belief, the party must make all reasonable inquiries of that party's servant or agent to form a belief and answer the interrogatories accordingly.

79. It does not matter that the servant or agent has ceased to be a servant or agent at the time of answering the interrogatories. "All reasonable" inquiries must still be made of such persons, probably something often overlooked.

80. My practice, at the conclusion of the interrogatories, is to note that the other side must make all due search and inquiry, including of any servants or agents. This is unnecessary as the Rules require this

[9] See Rule 30.08(1)(a)(ii).

anyway, but it is probably worth reminding the other side of their obligations.

Knowledge versus belief

81. The difference is succinctly explained in *Civil Procedure Victoria*:[10]

> *The distinction between knowledge and belief is that between knowing the facts personally and not having personal knowledge of the facts but having a belief as to the facts.*

82. Whether the answers are from direct knowledge or formed from belief affects the answers' probative value when it comes to tendering admissions, as I explain below, so it is important to note if an answer is given on the basis of a belief formed.

Inquiries leading to inconsistencies

83. It may be that inquiries of servants or agents lead to inconsistent information. It is the role of the proper officer of the corporation who is swearing the interrogatory answers to "carefully weigh all the information available" in answering the interrogatories.[11]

Evasive answers

84. The Rules specifically state that answers cannot be evasive, unless the interrogatory is objectionable and objected to.[12] In other words, the deponent must answer the substance of the interrogatory.

---

10 At [30.05.0].

11 *Commercial Bank of Australia Ltd v Whinfield* [1920] VLR 225, also cited in *Civil Procedure Victoria* at [30.05.60].

12 Rule 30.06.

Avoiding answers by reference to documents

85. Commonly, a party will answer interrogatories by simply referring to various documents, or sections of documents. This has the effect of evading the interrogatory and is objectionable.

Interrogating on missing documents

86. It is generally permissible to interrogate a party about documents that are now missing, including asking them about what occurred leading to the document going missing.

Privilege

87. At every stage of litigation, issues of privilege may arise and legal practitioners must be familiar with the rights and obligations of parties when it comes to matters of privilege.

88. The privilege is the client's, not yours, and a client needs to be advised about their right to seek privilege or to waive it.

89. Waiving a right to claim privilege might be thought in some cases to do more good than harm, but this is a matter to consider on a case-by-case basis.

90. Matters of privilege need to be the subject on their own, but I will briefly set out the usual grounds of objections.

<u>Legal professional privilege</u>

91. Legal advice to a client is *prima facie* privileged.

92. Likewise, communications between a client and their lawyer or another person and the lawyer for the dominant purpose of providing legal advice is also *prima facie* privileged.

93. If an interrogatory asks about investigations into an incident, be careful that that does not extend to waiving privilege, for example if lawyers are involved in the investigation and its dominant purpose is for anticipated legal proceedings or proceedings on foot.

Self-incrimination privilege

94. If answers to interrogatories may tend to prove that the deponent has committed an offence or is liable to a civil penalty, then the deponent may object to answering the interrogatory on the basis of self-incrimination.

Medical privilege

95. Unlike the above privileges, which stem from the common law,[13] medical privilege is a creature of statute under section 28 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).[14]

96. This 'privilege' is the patient's. A physician or surgeon cannot divulge in any proceeding any information acquired in attending to the patient without the patient's consent.

97. Because of 'issue waiver',[15] this is usually only an issue when a health facility is sued, and it concerns the treatment of a patient not involved in the proceeding.

98. The issue arose in *Smith v Colac Area Health.*[16] Here, an ambulance officer (the plaintiff) was transporting a patient. The patient became

---

13 But are mostly now caught by the *Evidence Act 2008* (Vic).

14 Although confidential information is protected by contract law or in equity. See *Medical Board of Australia v Kemp* [2018] VSCA 168 at [111].

15 See *Elliott v Tippett & Anor* [2008] VSC 175.

16 [2013] VCC 1892.

agitated and tripped the plaintiff. The incident happened at the defendant nursing home.

99. The plaintiff's interrogatories asked the defendant about the patient's mental state before the incident. The defendant objected on the basis of medical privilege.

100. The way the judge dealt with that issue was to find that the patient's behaviour, and assessments of it, were not made in a medical context and fell outside the ambit of medical privilege. To that extent, the interrogatories about that behaviour had to be answered.

Objections to interrogatories

101. In drafting interrogatories and answers, one must keep foremost in mind the objections to interrogatories.

102. Any objection taken to the interrogatory, must be explained in the answer so that the other side understands the nature of the objection.

103. Here, I am wary about 'hard and fast' rules, as whether a particular interrogatory is objectionable is often case specific or debatable.

104. But there are some general rules that assist.

+ relevance / issues in dispute

105. Once the pleadings have properly been discerned, no interrogatory should be objectionable for relevance.

106. But the following principles apply:

(a) a party is entitled to interrogate the other on matters within that party's knowledge on issues relevant to the proceeding;[17]

[17] *Spedley Securities Ltd (in Liq) v B R Yuill & Ors* (No 4) 5 ACSR 758 at [762] per Cole J.

(b) a yardstick for determining relevance is whether the witness could be asked the question if giving oral evidence at trial;[18]

(c) an interrogatory is not objectionable merely because the answer may turn out to be of no relevance;[19]

(d) interrogatories may be addressed both to matters directly in issue, but also to facts which are relevant to some question in issue;[20] and

(e) although 'fishing' interrogatories are impermissible, they must be distinguished from interrogatories directed to obtaining information as to facts relevant to an issue raised in the pleadings.[21]

+ too broad

107. If an interrogatory is too broad, it cannot sensibly or relevantly be answered.

108. It is therefore important that interrogatories be limited by reference to a date or timeframe in many instances.

+ too vague

109. Likewise, interrogatories that are too vague are apt to confuse a deponent and make it difficult to answer the interrogatory.

110. As I have mentioned, defining terms, narrowing timeframes and asking questions with precision avoids this pitfall.

---

18 *Ibid*.

19 *Petchem Ltd (In Liq) v B F Goodrich Chemical Ltd* [1982] VR 485 at [488].

20 *Booth v Navarro* [2017] ACTSC 353 at paragraph [20].

21 *Ibid* at paragraph [30].

+ oppression

111. One needs to be careful not to ask interrogatories that might require the deponent to go trawling through endless records to answer interrogatories, or to speak to endless persons, as this might be oppressive and objectionable.

+ seeking evidence

112. While one may interrogate on facts, they cannot interrogate on evidence.

113. There is sometimes a tricky distinction to be drawn between the two, like trying to distinguish between material facts, particulars and evidence in a pleading/particulars dispute.

114. Perhaps the litmus test when drafting an interrogatory is to ask – would an answer to this interrogatory require a deponent to go to evidence that supports the facts, or to set out how they intend to prove their case at trial by setting out evidence relied on in support? If so, this might suggest the interrogatory goes outside proper bounds and into matters of evidence.

115. If we return to the footpath case, it would seem to be permissible to ask the plaintiff whether she was texting on her phone at the time of the incident, but not ask the plaintiff to set out the details of the text message, unless the content of the text was somehow directly relevant to the facts of the case.

116. As to damages, the Supreme Court of Tasmania[22] upheld a plaintiff's objections to interrogatories that asked the plaintiff whether he was able

[22] In *Squires v Australian Casualty & Life Ltd* [1998] TASSC 117 cited in *Discovery & Interrogatories* at [25,140].

to carry out any employment and other social activities after the incident. The judge found that that was going to the evidence by which the plaintiff intended to prove his case, not the facts.

117. On the other hand, it does not seem to be objectionable to ask what, if any, employment the injured person has had since the incident, as a matter of fact.

+ seeking the identity of witnesses

118. Questions solely seeking the identity of witnesses is usually objectionable on the same basis that it seeks the evidence by which the party intends to prove their case.

119. Such questions are permissible if one can prove that the sole purpose of the interrogatory is not to ascertain the name. An objection may be avoidable by asking in the interrogatory the job title of the person, as opposed to the person's identity, assuming the job title is relevant.

120. In some cases, where there is a fictitious defendant, it may be permissible to ask about the identity of relevant people in the organisation.[23]

+ interrogatories going solely to credit

121. Interrogatories going solely to credit are objectionable. This is because they do not, as such, go to the specific issues in dispute between the parties and are therefore considered irrelevant at the interrogatory stage, but not at the trial stage.

---

[23] *Discovery & Interrogatories* at [25,150].

+ opinion

122. Interrogatories that require a person to offer an opinion that they are not qualified to give are objectionable.

123. However, where a party is an expert, if the interrogatory is otherwise permissible, then the expert must answer the interrogatory by giving their opinion.

+ matters of law

124. Interrogatories on matters of law are objectionable.

+ facts not admitted

125. It is objectionable to interrogate another party on the basis that some fact has been admitted, where it has not.

126. An example of this would be interrogating a party about what they witnessed of an incident where they deny or do not admit that the incident occurred.

+ hypotheticals

127. Like a good politician, a deponent is generally entitled to object to hypothetical scenarios, as they do not go to direct facts in issue.

+ privilege

128. I have noted privilege above as a ground of objection.

+ site views

129. If an interrogatory would require a party to go on a site view to answer an interrogatory, the interrogatory is objectionable.

Answering under cover of objection

130. It is not uncommon to answer an interrogatory 'under cover of objection'. What this quaint phrase means is that the deponent notes their objection to the question, but is prepared nevertheless to answer the interrogatory.

131. Sometimes this is worth taking to avoid a fight about not answering the interrogatory, but at the same time noting that the interrogatory is badly worded, making it difficult to answer the interrogatory with precision.

132. Sometimes instructing solicitors ask – 'why bother taking the objection then?' I think it is useful where one can see what the question is probably driving at, but it is badly worded or contains a typographical error.

133. You would not want your answer to be misconstrued, so it is worth pointing out the defect in the interrogatory, and then provide an answer to what the interrogatory seems to be driving at.

134. In short, taking the objection gives context to the answer and assists the tribunal of fact weigh up the evidence. It also avoids fights about whether the interrogatory ought to have been answered.

Inability to answer

135. Sometimes, a party simply cannot answer an interrogatory and that party must state that in the answers.

136. Of course, this may only be the case after that party has made all due search and inquiry.

137. Answering an interrogatory this way probably leads to the most disputes about adequacy of answers. It is therefore important that the deponent

to the answers can justify what due search and inquiry they have made in answering the interrogatory.

Interrogating related parties/third parties

138. The general rule appears to be that third parties may be interrogated by any other party to the proceeding, even if no direct claim is brought against that third party.[24]

139. However, it is worth noting Rule 30.02(1) requires that interrogatories may be served on any party provided they are limited to "any questions between them in the proceeding". Whether there is any question between a party and a related party may be debatable.

140. Where an insurer is sued by a defendant seeking coverage, other parties cannot interrogate that insurer.[25]

Timetabling

141. As a rule, interrogatories follow receipt of the other side's discoverable documents.

142. It is not unusual that I receive briefs to draw interrogatories where the other side has not yet provided discovery. This is undesirable, as it is an important part of the evidence relied on to draw the interrogatories.

143. If discovery is late, good practice is to write to the other side pointing out that interrogatories will not be served until a sufficient period after receipt of the discoverable documents.

---

24 *Discovery & Interrogatories Australia* at [21,115] citing *Bates v Burchell* [1884] WN 108.

25 *Ibid* citing *Eden v Weardale Iron and Coal Co* (1887) 34 Ch D 223; cf *Molloy v Kilby* (1880) 15 Ch D 162; *M'Allister v Bishop of Rochester* (1880) 5 CPD 194 at 210.

144. In some cases, further and better discovery is provided late, sometimes on the eve of trial, and it might be appropriate to seek leave or consent to serve further interrogatories limited to interrogatories on that late discovery.

145. As to the timing for answering the interrogatories, the default rule is six weeks (42 days), excluding the summer vacation, 24 December to 9 January. Usually, parties will be able to resolve any dispute about late service, failing which a Notice of Default should be served, as discussed below.

Serving further interrogatories

146. It is not unusual to serve further interrogatories, sometimes by leave of the Court under Rule 30.02(4), but sometimes by consent.

147. A common example is when a party provides late discovery. The discovery might give rise to additional issues that your client did not have the benefit of knowing when the initial interrogatories were drafted. Or the other side may amend its defence and raise a new issue.

148. When this happens, one should think carefully about whether further interrogatories might assist one's client or the Court in narrowing issues, and explore this option.

Filing

149. Do not forget to file the interrogatories and the answers.[26]

[26] As required by Rule 30.04.

150. A judicial officer at a directions hearing might think that the steps have not been done, or counsel reviewing the County Court's CourtConnect might think that they have not been prepared, so don't forget this step!

Notices of default

151. The moment 42 days lapses and answers have not been received, it is open to a solicitor to lodge a Notice of Default.

152. It is probably advisable to put the other side on notice before doing so – as a polite warning or 'nudge' to get the other side moving.

153. It is also advisable to issue a Notice of Default after a little leeway has proved ineffective, as otherwise the Court may also be critical of the parties falling behind in the timetable.

Dismissing proceedings or striking out a defence

154. In extreme circumstances, the Court has to the power to dismiss proceedings or strike out a defence if a party defaults in answering interrogatories.

Applications for further and better answers

155. I am surprised how rarely parties take issue with the evasive answers or objections to interrogatory answers given how readily we see such responses.

156. On receipt of such answers, they ought to be challenged by letter and, failing agreement by the other side to furnish further and better answers, an application ought to be made to the Court.

157. It is generally too late to complain by trial.

Amending answers to interrogatories

158. From time to time, parties will amend answers to interrogatories.

159. According to *Civil Procedure Victoria,* however, it is impermissible for a party to withdraw any admission made in an answer to interrogatories, but they may call evidence that is inconsistent with the answer and invite the Court to accept the inconsistent evidence over the answer.[27]

Originating motions

160. Where a proceeding is brought by Originating Motion, leave is required to serve interrogatories under Rule 30.02(3).

161. Leave was refused in a Medical Panel appeal in *Russell v Abbey (Ruling No 2)* [2018] VSC 260, but it is conceivable that there might be cases where interrogatories may assist in resolving such a dispute, for instance if there is a factual dispute relevant to procedural fairness.

The *Civil Procedure Act 2010* (Vic) and interrogatories

162. Interrogatories are not specifically addressed in the *Civil Procedure Act 2010* (Vic), although 'discovery' generally is.[28]

163. That said, the overarching obligations apply to proceedings generally, which include the interrogatory process.[29]

Costs

164. Costs are rarely an issue when it comes to interrogatories.

165. However, it does crop up when a Notice of Default is served. Once served, the party who serves the Notice has a *prima facie* right to the costs it incurs. This would seem to include an application to the Court if the party is still in default of providing answers.[30]

---

27 At [30.02.110].

28 See in particular section 55 of the same.

29 See section 11 of the same.

30 See Rule 63.16.1.

166. From time to time, applications are made to the Court about outstanding answers without a Default Notice, which is undesirable given the prima facie costs rule that is only triggered on a Default Notice.

Use of interrogatories in trial

Admissions

167. The Rules permit use of one or more answers to interrogatories as evidence of admissions against the other side's interest.

168. Admissions of this sort can then be used by the party relying on that evidence as proof of the truth of the statement, without calling other evidence, as occurred in my first trial referred to above.

169. Admissions as a form of evidence are also persuasive to the tribunal of fact because it said that a party would not make a concession against their own interest unless it were true.

170. But ultimately it is a matter for the Court to determine whether the answer to interrogatory is an admission and how much weight to attribute to that admission when weighing up all of the evidence.

171. Finally, where an answer is given on the basis of belief, its probative value has to be considered in the context of the answer.[31] This is because it is not based on actual knowledge by the witness.[32]

Prior inconsistent statements

172. A witness may be cross-examined about their own answers to interrogatories, especially where they have given evidence inconsistent with the oral evidence at trial. This will be done with a view to

---

31 As set out in Rule 30.11(3).

32 *Discovery and Interrogatories* at [25,240].

diminishing the witness's credibility or seeking to persuade the tribunal of fact to accept the earlier statement as true.

173. It is important to note that the interrogatory answers need to be tendered first, and then shown to the witness.[33] This is to avoid misstatements about the interrogatory answers.

174. It is permissible to ask another witness whether they agree with the evidence in the answers to interrogatories of another. One then needs to be careful, however, not to cross-examine the witness about the truthfulness of another person's account under oath. It is said that this is a form of bullying, trying to bully the witness into retracting their own evidence based on the truthfulness of another's evidence.[34]

Preparing interrogatories and answers for tender

175. There are a few important tasks for instructing solicitors before or during a trial.

176. The first is to keep a note of admissions in the other side's interrogatories that assist your client's case. Flag them in the observations to the brief or raise them with counsel. Perfect counsel will identify these anyway, but a little assistance here would not go astray.

177. Likewise, before your client closes their case, make sure that the interrogatory answers your client wishes to rely on are tendered into evidence.

178. Usually, the instructing solicitor will put together on a Word document the relevant interrogatories (properly numbered) followed by the answers.

---

33 *Rees v Bailey Aluminium Products Pty Ltd* [2008] VSCA 244 at [54].

34 *Ibid* at [57].

Where there are defined terms, these need to be included in the Word document so that the Court, be it judge or jury, can understand the context of the interrogatory and answer.

Tendering interrogatories

179. As I have mentioned, one of the principal purposes of interrogatories is to tender admissions from the other side's answers to interrogatories.

180. It is important to bear in mind that one cannot tender their own, often self-serving, answers to interrogatories – you must call the witness to give that evidence orally, except perhaps if the deponent has since died.

181. The process of tendering answers is set out in Rule 30.11. A party is entitled to tender as evidence one or more of the other side's answers, or even part of an answer.

182. If an answer tendered is so connected to another answer, then the Court may order that the other answer or answers are also tendered, as a matter of fairness.

In closing

183. In all claims, it is important to think about each interrogatory – how is the question going to help? What am I setting out to achieve?

184. It is equally important to scrutinise every interrogatory when assisting clients answer interrogatories. How do I answer the substance of the interrogatory? Is the client being evasive? Is the interrogatory objectionable? Should the objection be taken?

185. When it's all put together, interrogatories have many uses to assist litigants. Yet they are probably an under-used tool in our toolboxes. It is probably time we re-visited that.

P G HAMILTON

Owen Dixon Chambers West

16 November 2023