CROSS-EXAMINATION

"*In the case of one who will not speak the truth against his will. The greatest happiness in an examiner is to extort from him what he does not wish to say and this cannot be done otherwise than by questions which seem wide of the matter in hand; for to these he will give such answers as he thinks will not hurt his party and then from various particulars which he may confess he will be reduced to the inability of denying what he does not wish to acknowledge …*" Quintillian (42AD – 118) Institutes of Oratory

Introduction

It has been said that it would be extremely foolish to pretend that Lawyers excite nothing but respect and admiration from the public.

Some occupations set out to please everyone whereas unless the Lawyer is extremely naïve he does not. In every quarrel there are at least two sides and in every adjudication there can only be but one successful party.

The art of cross-examination particularly in difficult cases is not for the faint hearted but it is important to remember that the English style of justice inherited here has permitted the right of a person to be represented in the Courts and the role of the advocate to represent him in certain forms has been recognised since at least 1200AD.

That right has not been universally approved of and has been met with a cordial dislike from a percentage of laymen and newspapers ever since.

As *Du Cann* opines in the Art of the Advocate it should be remembered that in the Peasants Revolt of 1381 more Judges and Lawyers were killed than any other single class of person. Be that as it may, you should take pride in your occupation it having proved itself over countless centuries to be a noble profession without which liberty would be unknown.

White settlement commenced in New South Wales in January 1788. However, it was not until 1839 that criminal trials as we understand them today were enacted in New South Wales.

From the 31 October 1839 all jury trials in New South Wales were heard by a civilian jury of twelve and this applied to all Courts.

Cross-examination from that date is recognisable as being almost identical to the provisions applying to cross-examination today.

Objects

Cross-examination is the process whereby you seek:

a To test the veracity and accuracy of the evidence in chief; and
b To elicit from that witness any relevant facts, which may be favourable to you and your case.

It is then plain that it is of paramount importance to establish in advance of commencement of your cross-examination to know where you want to go – vide – it is "*better to understand a little than to misunderstand a lot – Anatole France (1844-1924)*."

No useful cross-examination will be achieved without thorough preparation.

That does not just mean the reading of the Brief but takes in any relevant and related material available, subpoenaed material, conference notes, statements and notes taken with potential witnesses. One is not to know every person's level of experience at this talk fest today and it will be self evident that some of what I have to say may well be trite. However, having said that there is no substitute for preparation, the issuing of subpoenas and the appropriate application of Discovery – these aids are invaluable to your

preparation generally and should be carefully considered at all stages during your client's passage through the Legal System.

What follows is that you must have a detailed knowledge of Case Law, Legislation and the Practice and Procedures concerning Subpoenas, Discovery and Notices to Produce etc that require other parties or related persons to the proceedings to produce documents or things for your inspection.

You must also master the rules governing public Interest Immunity and the verbiage and tactics employed by those who file Affidavits and other documents that appear at times to allege identical problems and disasters if certain information is to be provided to you – again there is no substitute for hard work in the mastery of detail.

When you are dealing with the cross-examination of Police Officers or the issuing of Subpoenas to the Police Department you should refer constantly until you have mastered the detail to the relevant rules and guidelines governing Police behaviour and the requirements of their office.

When you issue Subpoenas you should try to disclose a legitimate forensic purpose concerning same and reference should be had to at least two authorities namely *R v Saleam* (1989) 16 NSWLR 14 and *RTA of New South Wales v Connelly & Anor* (2002) 57 NSWLR 310.

Both these cases will be of assistance to you in dealing with such issues as to what a legitimate forensic purpose is.

Examination of CCTV, photographs, videos and written plans should also be inspected to aide your preparation.

A View of relevant scenes involved in the case should be carried out and you should garner as much information as possible from careful and detailed conferences with your client and all potential witnesses.

For my part the use of a video recorder for your own use to assist your memory at any View is an extremely helpful tool particularly where there is a lengthy time span between the Committal and Trial.

Whether to cross-examine at all

Firstly

Well then, once you are adequately prepared you will have to decide in consultation with the client and any other Lawyer involved in the case whether it is really necessary to cross-examine any witness in the case at all.

Obviously your preparation will render that decision all the more simple if you are properly prepared.

Many advocates do not in my view take the time and sometimes considerable effort in making meaningful and comprehensive Submissions to Magistrates pursuant to the provisions that flow from S.91 of the *Criminal Procedure Act* 1986. Unfortunately, there has been a practice that has arisen that such Submissions will not find favour and that one should "*keep one's powder dry*" until the trial.

This is a silly and dangerous practice.

Most Magistrates if fully and comprehensively taken to the reasons why a cross-examination of a witness is needed, will if it is based on a firm foundation, will permit cross-examination at the Committal and in many instances will even permit the cross-examination of victims where such cross-examination is permitted under the *Criminal Procedure Act*.

As a guide when making Submissions in writing and where there is no agreement with the prosecution, the relevant Case Law should be referred to together with paragraph numbers of the relevant issues that arise in the Police

statements should be brought to the Magistrate's attention and in some instances where your client is not prejudiced and in many cases that is demonstrably the case, the Magistrate should be informed in basic terms what your defence is, thus, providing the Court with a more fulsome picture of the important issues that are going to be before the Court.

Benefit can be had by the inspection of a second reading speech of the government of the day when issues concerning a S.91 Application were brought before Parliament.

It is your job to take the Magistrate to all these matters – do not assume that they will know absolutely everything about the Legislation and the Case Law or that they will not welcome your assistance.

However, you should explore fully with the Prosecutor before such submissions are required, the prospect of an agreement.

Such agreement is more readily entered into where you explain concisely and fully the purpose of your proposed cross-examination.

Secondly

Inform the client of the reasons why you are proposing to take a certain course and inform them of the consequences of basically allowing some statements to be admitted without challenge.

There are so many variables as to whether you should cross-examine or not that it is impossible to touch on all in this paper, suffice to say that the more you are prepared the easier the choice of options will be.

One particular case which will be of assistance to you in dealing with the limits of cross-examination and the parameters of cross-examination generally is *R v Wakely* (1990) 93 ALR 79. In that case the High Court held that the limits of cross-examination are not susceptible of precise definition, for a connection

between a fact elicited by cross-examination and a fact in issue may appear if at all only after other pieces of evidence are forthcoming. The Court went on to say there is no test of general relevance, which a trial Judge is able to apply in deciding at the start of cross-examination whether a particular question should be allowed. Indeed some of the most effective cross-examinations have become by securing a witness' ascent to a proposition of seeming irrelevance.

A thorough understanding of this case will be of considerable benefit to all cross-examiners.

Style

It is axiomatic that each person will have a different style and presentation in the way and manner that they cross-examine. Each person has a different sounding voice, different body language and appearance.

Thus, no specific presentation covers all; you should never ever copy a particular style of any other advocate experienced or otherwise unless you feel quite comfortable doing so. Even then you should try to evolve your own techniques, which should combine your observations of others, your conversations with others and your own perception of what is best for you.

The application of certain principles are apposite as general guides only:

a Don't mumble or whisper but rather keep your voice up at a medium level so everyone including the Court Reporter or sound monitor can hear clearly;

b Do not have your head stooped or buried in your Brief. Keep your head up facing the witness – if you need to look at any particular document when cross-examining, pause and ask by way of "*Would your Honour just pardon me for a moment?*" and then find what you are looking for;

c If there is a lectern in Court then use it – the height of the lectern brings documents to your eye level and it allows reading of them whilst upright and it also permits more structured freedom of the use of your hands and arms. It also provides a secure platform for your papers when they are opened or put to one side and according to many studies on the subject presents a more authoritative and dignified method of asking questions; and

d When you ask questions use plain, concise, direct words that are capable of ready understanding.

This plainly is not always easy when dealing with expert witnesses. However, preparation will provide you with considerable background and knowledge of the expert's field of expertise.

Too many advocates shirk the hard and long reading hours gaining essential knowledge of crucial matters particularly in criminal cases of blood, booze, bongs, banks, bruises and bullets.

Everyone, repeat everyone can read up on expert evidence – once you are prepared you can reduce much so called expert language to plain speech.

"*…the Lawyer wrote the details down in ink of legal blue*."

There's Minnie, Susan, Christopher they stop at home with you.
There's Sarah, Frederick and Charles I'll write to them today.
But what about the other son – the one who is away?
You'll have to furnish his consent to sell the bit of land
The widow shuffled in her seat "Oh, don't you understand?
I thought a Lawyer ought to know – I don't know what to say –
You'll have to do without him boss for Peter is away."
But here the little boy spoke up – said he "We thought you knew, he's done six months in Goulburn Gaol – he's got six more to do."

Thus in one comprehensive flash he made it clear as day the mystery of Peter's life – the man who was away."
Excerpt from "The Man Who Was Away" A B Paterson 1895

I vividly recall a now retired Forensic Pathologist referring regularly in homicide cases to the victim's state being incompatible with life – Q Does that mean Doctor that he was dead? A If you wish to put it in that form then I would say yes.

A further example of my point occurred in a famous exchange between W D Hosking, QC as he then was in a District Court trial where the following took place:

Hosking, QC

Q.: Bouncers at this place are pretty keen on giving troublemakers a bit of a hiding, aren't they?

His Honour

Q.: Please Mr Hosking could you use the Queen's English?

Hosking, QC

With an ironic and sarcastic tone

Q.: Is it your practice to offer some form of physical chastisement to those patrons of the establishment who engender in you feelings of personal antipathy?

His Honour

Q.: Can we please have that in language the witness might have some chance of comprehending? His occupation is as I recall Mr Hosking, Doorman not Professor.

Hosking, QC

A. Alright. Why do you go the knuckle when you do your nana?
Answer: I don't.

Plainly the witness understood. So did the Jury and I have no doubt so do we.

There is no excuse for any cross-examiner to be reasonably able to cross-examine a medical practitioner about most aspects of basic anatomy. It applies equally to a working knowledge of firearms, DNA and related matters.

Having the expert merely repeat his report twice, once in chief and once in cross-examination is not competent cross-examination.

You should invest either in a short list of forensic books or download material from a computing machine and keep it for future reference and annotate and update it.

Much benefit can be obtained when using documents in cross-examination and a complete understanding of the relevant provisions of the *Evidence Act* concerning documents eg *S.43, 44 and 45* is absolutely necessary if such cross-examination is to be effective.

You should endeavour to put your questions so plainly that even the most obscure technical material can be understood – always ask the expert to explain things plainly even if it makes you appear to be obtuse.

Don't approach the witness unless it is absolutely necessary. Many witnesses and the results of numerous studies have found such approaches are considered intimidatory particularly when Counsel or Solicitors are leaning over the witness pointing to various documents and come in close physical contact with the witness.

If you must approach, seek permission and deal with the relevant questioning as quickly as possible and resume your position behind your lectern and remain there unless it is absolutely necessary to approach again.

If the witness is trying to fudge and give answers that could be deemed to be unclear then ask him or her to agree or disagree with your repeating of what they have said – Mm's, Uh's and answers like maybe don't help a lot. Make sure you get clear and concise answers if at all possible.

Listen very carefully to the answers given and even where it is recorded make sure that if it is important you make a note of what has been said or have someone else make one for you.

Do not cross-examine for lengthy periods unless there is some material gain in doing so.

Irving Younger's Ten Commandments

You should apply Irving Younger's Ten Commandments of cross-examination if at all possible. They are as follows:

a Be brief;
b Use plain words;
c Ask only leading questions;
d Be prepared;
e Listen carefully;
f Don't argue with witnesses;
g Avoid repetition;
h Limit witnesses explanations;
i Limit questioning; and
j Save the main point for your closing address.

All these points have validity and can be adapted to an Australian setting. One addition that is crucial to good fair and appropriate cross-examination is

to understand and apply the legislative requirements relevant to cross-examination and the New South Wales Bar Association Rules that are applicable.

You cannot and should not embark upon questioning witnesses alleging impropriety or mendacity unless you have instructions preferably in writing from the client or your Solicitor.

You must apply the Legislative and Procedure and Rules of the Bar Council strictly and without exception.

Cross-examination in many cases will bring you into disfavour with some parties to litigation simply because you act for someone who has been charged with a criminal offence or is the so-called "*enemy*" in a civil or family law dispute. To perform your task sometimes requires both courage and commitment. However, that does not encompass you being merely a cipher or conduit for anything and everything the client wishes to be said in cross-examination.

Scrupulous attention to the Bar Rules will guide you. Should you feel that you may be entering unchartered waters ask for guidance from senior members of the profession or indeed Bar Councillors themselves.

Sometimes the appropriate course is to withdraw rather than be placed in the perilous position of being guilty of professional misconduct.

By the same token if your instructions are to cross-examine a witness and the questions are in accordance with your client's instructions and they comply with the Bar Rules and the legislative requirements, you should ask such questions particularly ones going to honesty with directness and clarity and with an appropriate forthrightness.

"…*there was things that he stretched but mainly he told the truth. That is nothing. I never seen anybody but lied one time or another without it was*

Aunt Polly or the widow ….” The Adventures of Huckleberry Finn – Mark Twain

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It cannot be denied by those properly familiar with Court proceedings that many witnesses for both sides exaggerate their evidence and regularly do not tell the whole truth and nothing but the truth.

Regrettably even some professional witnesses like Police sometimes exaggerate or minimise their evidence. In my opinion the standard of Police evidence these days is immeasurably more honest and of more assistance to the Courts than in past decades.

Indeed as recently as the 1980’s Police would often knowingly mislead the Court to the point where false confessions were so well known that they were regarded with a macabre humour.

Times change – you should not assume that any witness will not tell the truth but you should be sufficiently prepared well in advance because you would have already been provided with their Statements or Affidavits giving you the ability to concisely indicate your client’s stance in cross-examination.

“*Let me speak to you honestly, frankly, open heartedly. You are a liar*.” Le Duc Tho to USA Secretary of State Henry Kissenger Paris Peace Talks 1972.
Rise to Globalism
Penguin Books 1997

Where you have instructions that a witness is lying you should cross-examine that witness plainly so that in fairness to your client and the witness everyone understands your position.

That is to be much preferred to the approach of not putting the allegation directly and unambiguously and addressing on the point in your address when the witness is absent.

Another approach, which can sometimes be interpreted as being unfair, is indirectly dealing with such issues with other witnesses without having put the issues squarely to the witness that you claim has been guilty of telling untruths.

The approach suggested of directly and unambiguously of putting your instructions allows the question to be put and answered and does not permit the suggestion that you have pursued a dishonourable course of suggesting grave matters behind a person's back. If you are not able to handle the difficult times that such occasions present, then there is always conveyancing and mediation, two areas that apparently are still available for the use of legal skills.

What should never be done is to introduce, particularly with Police witnesses privately held views of a political nature that in effect seek to hold responsible the Police Officer often lowly in rank for the conduct of the government of the day. Similarly, private views concerning sexual preferences, racial policies, the role of women etc should be left to other forums unless of course, they have a relevance to the case and your client's instructions.

A useful reminder of the duties of Counsel is contained in *R v McFadden* (1976) Vol 62 Criminal Appeal Reports 187.

You should resist the temptation of constantly requiring witnesses to give a yes or no answer.

Any regular attender at Court will quickly realise that most Lawyers who are themselves constitutionally incapable of answering any questions with a yes or no are always demanding of witnesses that they should do so.

A more sensible approach if you want to get clear and unambiguous answers to your questions is to ask such witnesses the following questions:

Q His Honour or Her Honour, as the case may be, does not allow unfairness in this Court.
Q Did you hear my question?
Q Did you understand it?
Q Then will you please answer it so that we can understand your position plainly?

This will result almost inevitably in the Judge rendering what assistance they can if the witness does not co-operate and you will generally receive a fairly plain answer to your question.

Dangerous waters

A thorough understanding of the ruling *Browne v Dunn* (1893) 6 R. 67.

Considerable benefit can be gained by referring to the speech in *Browne v Dunn* of Lord Halsbury:

"*My Lords I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with the witness.*

Sometimes reflections have been made upon excessive cross-examination of witnesses and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth…. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached

and is to be impeached is so manifest that it is not necessary to waste time in putting questions to him upon it."

You should be aware of other following cases in respect of the abovementioned rule, namely *Ellis v Wallsend District Hospital* (1989) 17 NSWLR page 553; *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 and *GIO v Foot* (1990) 12 MVR 455 where Kirby was then the President of the Court of Appeal said at page 457:

"*Where the party has made plain in its case the contention which it raises against the other party. I do not consider that the rule in Browne v Dunn requires a tedious recapitulation of the case and a presentation of that version in terms during cross-examination so long as the version of the party being contended for is sufficiently plain*."

This is important to bear in mind and it is inappropriate cross-examination to pedantically put to witnesses matters that are either not of any importance or in significant dispute.

Finally, one other cautionary rule is never ask a question to which you do not know the answer unless the answer will not hurt you or hurt your case or you are indifferent to it. However, the strict application of such a rule should not be blindly followed for in committal proceedings it is sometimes of considerable advantage to ask questions of witnesses even if you do not know the answer to them so that a more complete picture of the case is available to you. Indeed, even in the trial situation many important points have been made where cross-examiners do not know the answer to a question but have made a decision to proceed anyway because such answers will have no damaging effect.

Experience will dictate when and if such a course should be taken and it is not something to be done if you are faint-hearted.

Never try to improve on a favourable answer – put simply if you succeed in getting favourable answers do not keep on going blithely in the hope the situation will get even better – either move on to another topic or conclude your cross-examination on the basis that further questioning will only result in making the matter worse.

I hope this has been of assistance to you and that you continue to enjoy the art of cross-examination.

Winston Terracini SC
March 2017

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