Cross-examining a Witness on Their Criminal Record

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Purpose of this paper:

- This purpose of this paper is to provide some guidance on how to cross-examine a witness on their criminal record.

- In order to cross-examine a witness on their criminal record effectively, you need to have some understanding of the credibility rule and the exceptions to that rule. The paper does not deal with these in great detail, but does touch on them.

1. Credibility evidence – an overview:

1.1. What is credibility evidence

- The Evidence Act provides the following regarding the credibility of a witness: 'the credibility of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence'.

- Credibilty evidence is defined in section 101A of the Evidence Act as follows:

> *'credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that—*
> *(a) is relevant only because it affects the assessment of the credibility of the witness or person, or*
> *(b) is relevant—*
> *(i) because it affects the assessment of the credibility of the witness or person, and*
> *(ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.'*

- In short, there are two types of credibility evidence. Type 1 - evidence that is solely relevant to a witness's credibility. Type 2 – evidence that is relevant to a witness credit and is relevant for some other purpose, but is not admissible for that other purpose.

- An example of type 1 is evidence that is solely relevant to a witness credibility is a matter of dishonesty on their criminal record.

- An example of type 2 could be a prior inconsistent statement. Normally, a prior inconsistent statement by a complainant about the incident in question will be admissible under s 66 of the Evidence Act - the maker available exception to the hearsay rule. However, if this exception does not apply because the statement was not made at time when the facts asserted were fresh in the maker's mind, then it may not be admissible for a hearsay purpose. The statement would be relevant to the complainant's credit and also relevant, but not admissible, for a hearsay purpose and thus would be an example of the second type of credibility evidence.

- If the evidence is relevant to a witness's credit and is relevant and admissible for another purpose then it is NOT credibility evidence.

- I note that unless otherwise stated when I refer to credibility evidence in this paper I am referring to type 1 and type 2.

1.2.The credibility rule

- Section 102 provides that credibility evidence is not admissible (the credibility rule), however, this is subject to a number of exceptions, see below.

1.3. Credibility evidence vs evidence that is also relevant to a fact in issue:

- The distinction between credibility evidence and evidence that is also relevant to a fact in issue is not always clear.

- That issue could be a paper in its own right. For present purpose, it is sufficient to note that matters on a person's criminal record are almost always credibility evidence (an exception would be if it the matter was also relied on, and admissible for, a tendency purpose).

2. Main exceptions – an overview:

2.1. Section 103 - cross-examination

- Section 103(1) provides that the credibility rule does not apply to evidence adduced in cross-examination of a witness if that evidence could substantially affect the assessment of the credibility of that witness.

- Section 103(2) sets out factors the Court must have regard to in determining whether evidence could substantially affect the credibility of a witness, including how much time has passed since the act to which evidence relates occurred.

- In short, you cannot cross-examine a witness about credibility evidence, unless it could substantially affect the Court's assessment of that witness's credit.

- Section 103 previously provided that the credibility rule did not apply to evidence that has substantial probative value. A number of the decisions cited below were determined under the old test. The tests are broadly the same and those decisions remain useful. Arguably, the old test is more onerous.

- While every case turns on its own particular facts, it always helpful to have a case or two to hand where it was held that a particular matter on a witness record could substantially affect the witness' credit (or, where the old test applied, had substantial probative value). This can be used to convince the Magistrate (or Judge) that you should be allowed to cross-examine a witness about a particular matter on their criminal record.

R v Jones & Ors (No 7) [2007] NSWSC 1158:

Facts:

- The were a number of accused persons charged with murder.

- Mr Smith was a key prosecution witness. He gave evidence that had seen the accused persons attack and kill the deceased. His credibility was a central issue in the trial.
- Mr Smith had previously been convicted of "with intent to obtain for himself $500 in cash, made a statement 'we have finished paining your house' which he knew to be false or misleading in a material particular".
- In short, he told an old lady that he had finished painting her house, which resulted her paying him $500, when he had not finished painting her house.

Issue:

- Whether Mr Smith could be cross-examined on this offence.

Held:

- This matter, having regard to the fact that a central issue in the trial was the credibility of Mr Smith, had substantial probative value and Mr Smith could be cross-examined on it.

Observations:

- This is useful case from a defence perspective. While it turns on its own facts, the offence of dishonesty occurred many years before the murder, it was a single instance of dishonesty and the facts were quite removed from the facts relating to the murder, yet it was still held to have substantial probative value.

R v Ronen & Ors [2004] NSWSC 1290:

Facts:

- The were a number of accused charged with serious offences.

- Mr Segal was a key prosecution witness. His credibility was a central issue in the trial.
- He had a number of charges pending against him, namely, defrauding the Commonwealth and a group of charges under the Financial Transactions Reports Act 1988.
- The accused persons wanted to cross-examine him about these matters, even though he had not yet been convicted of them.
- He object to giving evidence about this on the grounds that it would tend to incriminate him.

Issue:

- Whether the accused person could cross-examine him about these charges. This gave rise to two issue. First, whether he could be cross-examined about these matters even though he had not been convicted of them. Secondly, whether they had substantial probative value.

Held:

- It was held that both matters could affect the witness' credit in substantial way, and that he could be given a s 128 certificate so any evidence he gave about them could not be used against him in the pending proceedings.

Observations:

- This is a particularly useful case if you want to cross-examine a witness on a pending matter.

- The decisions of *R v Bradley Burns* [2003] NSWCCA 30 and *DPP v Kocoglu* [2012] VSC 185 are also good cases to have in your back pocket.

2.2. Section 108A - credibility of a person who is not giving evidence

- This provision is exactly the same as s 103, except it deals with the situation where a witness does not give evidence. As with s 103, the evidence cannot be adduced unless it would substantially affect the assessment of the credibility of that witness.

2.3. Section 104 - cross-examination of the accused

- This provision only applies to the accused person/s in the proceedings and only applies when an accused person gives evidence.

- It is in addition to section 103. That is, even if the hurdles in this provision are cleared, the Court still needs to be satisfied that the evidence could substantially affect the accused's credibility before the accused can be cross-examined about that evidence.

- Section 104(2) provides that the accused person must not be cross-examined about matters that are only relevant to the credibility unless the Court gives leave.

- Section 104(3) sets out a number of situations where leave is NOT required. These include: whether the accused is biased or has a motive to be untruthful; is, or was, unable to be aware of or recall matters to which his or her evidence relates; has made prior inconsistent statements. This is probably consistent with your experience in Court. Motive to lie, prior inconsistent statements, the ability to recall matters are all things that an accused person is routinely cross-examined on without leave.

- Section 104(4) provides that leave must not be given to cross-examine an accused person about credibility evidence unless the accused has adduced evidence that 'tends to prove that a witness called the prosecution has a tendency to be untruthful and is relevant solely or mainly to the witness's credibility'.

- There is also a provision dealing with co-offenders.

- In short, if you cross-examine a Prosecution witness about their criminal record (and the evidence adduced tends to show that this witness has a tendency to be untruthful), then the Prosecution can, with leave, potentially cross-examine the accused about matters on their record.

- While it is always good to be careful, concerns that cross-examining a Prosecution witness about their record will open the accused up to cross-examination about their record are greatly overstated.

- If you are concerned about triggering this provision, you can always seek an advanced ruling under s 192A of the Evidence Act – see below.

- In *R v El-Azzi* [2004] NSWCCCA 455 it was held at [199] – [200]:

> *'Legal representatives of persons charged with serious criminal offences must have substantial flexibility in their approach to cross-examining prosecution witnesses, without fear that attacks on those witnessed, if made within proper limits, will expose their clients to the potential disclose of their criminal history'.*

- Factors that will affect whether leave is granted to cross-examine the accused about a matter on their record include: the ferocity of the attack on the Prosecution witness; the "legitimacy" of the attack on the Prosecution witness; the importance of the Prosecution witness; the nature of the matter on the accused's criminal record that the Prosecution want to cross-examine about.

- Before the Court grants leave it must consider the factors under s 192 of the Evidence Act. You should always object under s 137.

- In short, before the Prosecution can cross-examine an accused person about a matter on their record the Court must:

    i. Be satisfied that the accused person has adduced evidence that would tend to prove that a Prosecution witness has a tendency to be untruthful and this is evidence is solely or mainly relevant to the witness credit. Not every matter on

a witness' record that you cross-examine them about will meet this description. For example, drug offences.

ii. Grant leave, which includes considering the factors under s 192 of the Evidence Act. When determining this the Court should have regard to what said in *R v El-Azzi* [2004] NSWCCCA 455 at [199] – [200].

iii. If an objection is taken under s 137, be satisfied that the probative value outweighs the unfair prejudice.

iv. Be satisfied that the evidence could substantially affect the accused's credit.

- To perform this task the Court will need to look carefully at the evidence the Prosecution is seeking to adduce as some matters might clear these hurdles, whereas other matters may not.

2.4. Section 108B – credibility of the accused, where the accused is not giving evidence

- This provision is identical to s 104, however, it deals with a situation where an accused does not give evidence.

- In short, you cannot avoid the Prosecution adducing evidence of your client's criminal history simply by not calling them to give evidence. However, as with s 104, there are a significant number of hurdles that have to be cleared before that evidence can be adduced.

2.5. Section 106 - rebutting denials

- This provision is not discussed in any detail in this paper.

- In short, it provides a mechanism for adducing evidence of, for example, a matter on a witness's criminal record where the witness refuse to accept that matter. You can, with leave of the Court, adduce evidence of this matter from a source other than to witness to whom it relates, so long as the substance of the matter was put to witness to whom it relates and they denied it.

2.6. Section 108 – re-examination

- This provision is not discussed in this paper.

2.7. Section 108C – expert evidence relating to credibility

- This provision is not discussed in this paper.

3. Cross-examining a witness on their criminal record:

3.1. Getting a witness' criminal record and the relevant fact sheets

- Simply put, the Prosecution have a duty to disclose all material that is relevant or potentially relevant to a fact in issue (this is a simplified way of looking at the duty of disclosure). This includes material that could affect the credibility of a witness. The duty of disclosure applies to Police Prosecutors, as well as the DPP.

- The duty of disclose is a complex topic and is beyond the scope of this paper.

- Generally speaking, if a witness' credibility is in issue then the Prosecution should, at a minimum, disclose the details of any matter of dishonesty on their criminal record.

- Whether other matters should be disclosed will depend on what is in issue in the hearing. For example, if the defence case is that witness was on parole at the time and has minimised their involvement so as to avoid the consequences of breaching parole, then the Prosecution should disclose the details of the matter they are on parole for.

- In my experience, Police Prosecutors rarely, if ever, disclose a witness's criminal record without you asking.

- If you ask, they may ask you why the witness record is relevant. This may involve revealing your case, or an aspect of your case. This can be done in a general way. For example, you could say, "the credibility of that witness's evidence is in issue". If you do not want to answer that question, you can simply issue a subpoena. That said, if you issue a subpoena, and NSW police objects to producing the material, you may have to answer this question regardless.

- If the Prosecutor tells you to issue a subpoena, it is often worth pointing out to them, politely, that the duty of disclose applies regardless of whether a subpoena has been issued. It may also be worth providing them with the decision of *Bradley v Senior Constable Chilby* [2020] NSWSC 145.

- If you ask the Prosecutor to disclose a particular fact sheet, it is important to bear in mind that the fact sheet they have may not be the fact sheet the witness pled guilty to. If you are after a particular fact sheet, it is often better to issue a subpoena.

3.2. What kinds of matters on a witness's criminal record can you cross-examine them on

- It depends on what is in issue in the hearing, and what evidence the witness gives.

- If, for example, the issue is whether the witness is giving a truthful account, matters of dishonesty on their record are likely to be a legitimate topic of cross-examination so long as they could substantially affect the credibility of that witness.

- If, for example, the issue is whether the witness's identification of your client is reliable, matters of dishonesty on their record are unlikely to be relevant. Generally speaking, it is easier to convince a Magistrate (and a jury) that a witness is honest but unreliable (as opposed to dishonest). In my experience, if you can make a matter about the reliability of a witness (as opposed to their honesty) this is usually preferrable. A submission that

a witness is honest but unreliable is generally far more palatable than a submission that they are dishonest.

- If, for example, the issues are whether the witness attacked your client and whether your client hit the witness in self-defence, matters of violence on the witness's record ***may*** be a legitimate topic of cross-examination, depending on the evidence that is adduced in the hearing. Prime facie, in my view, such matters, are not a legitimate topic of cross-examination. The reason they are not a legitimate area is because they are only relevant if your employ tendency reasoning: i.e. the witness was violent on occasion Y, therefore it is more likely the witness was violent on the occasion in question, and are not being truthful when they say they were not. If, however, the witness said something like, "I am not a violent person" or "I would never be violent", then matters of violence on their record would likely be a legitimate topic of cross-examination to rebut this evidence.

  Further, such matters might also be relevant to your client's claim that they were acting in self-defence. Again, it would depend on what evidence was adduced. In my view, if your client gave evidence that they believed the witness was a violent person, with matters of violence on their record, this would not, without more, allow you to cross-examine a witness about matters of violence on their record. The reason for this is your client's belief, and whether this is genuine, is what matters. Not whether the witness in fact has a history of violence. If, however, the Prosecutor sort to impugn that belief, then you may be able to adduce evidence of those matters of violence to re-establish your client's credit.

- If, for example, part of the defence case was that the witness was affected by drugs at the time of the incident and that this affects their ability to give a reliable account, "drug use" matters on their record may a legitimate topic of cross-examination. If the witness said, "I don't use drugs", then you could probably cross-examine the witness about "drug matters" on their record to rebut this. As always it would depend on whether it could substantially affect their credibility. Similarly, if part of the defence case was the witness was part of the drug milieu, you could probably cross-examine them about "drug matters" on their record.

Spruill v R [2008] NSWCCA 39:

Relevant facts:

- Mr Spruill was charged with, among other things, wounding with intent to murder.
- Mr Spruill's case at trial was that the complaint's injuries were caused by the complainant.
- Mr Spruill asserted, among other things, that he had seen drug use at the premise where the injuries had been inflicted.

Issue:

- Whether Mr Spruill's barrister could cross-examine the complainant about an incident, which occurred seven years prior, where she attacked people with a syringe.
- It was argued that it was relevant because it indicated the following about the complainant: an aggressive personality, a willingness to use weapons, and familiarity with drug use.

Held:

- It was held that the Trial Judge was correct to hold that the complainant could NOT be cross-examined about this incident.
- At [43], 'In the present case, ….. the evidence was not relevant. The bare fact of the alleged aggression against others, seven years earlier, had no relevance to the appellant's case that the complainant could have inflicted the injuries on herself, and no relevance to the suggestion on behalf of the appellant that two men (not the complainant) were using drugs when he entered the premises. Particularly this is so in circumstances where the complainant was not disputing her history of suicide attempts and not disputing her own drug taking.'

My observations:

- This case illustrates how the evidence of witness will often determine whether a matter on their record is relevant.

R v Cakovski [2004] NSWCCA 280:

Relevant facts:

- Mr Cakovski was charged with murder, having stabbed an unarmed man.
- Mr Cakovski raised self-defence.
- His case was that the deceased had been aggressive towards him and made threats to kill him, despite Mr Cakovski been armed.

The issue:

- Whether Mr Cakovski's barrister could lead evidence that the deceased had killed three people 23 years earlier and that a few hours before his death he had threatened to kill another person 'like I killed the other three people'.

Held:

- The evidence could be led on the basis that the accused's assertion that the deceased had acted this way, would, in the absence of this evidence, likely be considered extremely improbable.

My observations:

- This was a very unusual case and turned on its own particular facts.
- It does not establish that just because you are saying a witness was violent you can lead evidence of matters of violence on their record.

R v Jones & Ors (No. 6) [2007] NSWSC 1157:

Facts:

- There were a number of accused persons charged with murder.
- John Smith was a key prosecution witness, as was Noah Smith. Both gave evidence that had seen the accused persons attack and kill the deceased.
- Both men said they was not armed with anything at the time, nor were any of the other members of their family.
- It was alleged by one or more of the accused persons that John Smith and Noah Smith were in fact armed and had attacked them.
- Weapons were located the scene. Noah Smith's DNA was found on that weapon.
- Both men were involved in an incident in 1996 where they armed themselves. Both men were convicted of assault, affray and malicious damage.

Issue:

- Whether they could be cross-examined on these charges.

Held:

- The position with respect to John Smith was relatively straightforward. In cross-examination, John Smith was asked, 'you wouldn't arm yourself?' and he said 'no, I'm not that type of man to do that'. In light of this assertion, it was held that evidence that he had previously armed himself could have substantial probative value.
- With respect to Noah Smith it was held that the evidence had substantial probative value, even though he had not asserted he would never arm himself. At [23], 'The evidence has potential significant for the present case because it reveals that the two witnesses are capable of arming themselves with weapons, and then attacking another person whilst in the company of other family members'.

Observations:

- It is hard to see how the evidence with respect to Noah Smith is not tendency evidence. Indeed, as much was acknowledged in the judgment. At [24], 'However should I be wrong in my analysis of s 103 of the Act, I would nevertheless conclude that the impugned evidence would amount to tendency evidence …. I formally dispense with the requirement that notice be given. That being so, the evidence needs to have only significant probative value. For reasons which have been given earlier, I am of the view it readily meets that test.'

3.3. When to do it

- The answer to this will depend on whether you are in the Local Court or the District Court.

- If you are in the Local Court, you should ask yourself whether the Magistrate will actually care. In my experience, even if a matter could substantially affect a witness' credibility, most Magistrates don't care unless it is dishonesty offence that has the potential to undermine the functioning of the criminal justice system (e.g. offences that involve perjury or making a false declaration). From what I have observed, most Magistrates are of the view that matters of dishonesty (aside from offences that involve perjury or making a false declaration) tell you very little about whether a witness is telling the truth. I once heard a Magistrate say to a lawyer who was cross-examining a complainant at length about her record, 'while the complainant may have a lengthy record for shoplifting, this sheds very little light on whether she is telling the truth when she says your client punched her'.

- This is not to say you should never cross-examine a witness about such matters, but before you do you should ask yourself is this actually going to affect the Magistrates assessment of the witness' credibility or is the Magistrate just going to think I am wasting the Court's time. It might also suggest to the Magistrate that you don't have much of a case because you are focusing on more peripheral issue rather than the incident itself. Further, if you cross-examine a witness about their record, and they agree with everything you ask them, it may make them look more reasonable and may set the Prosecutor up to make a submission that the witness can be believed, in part,

because they are willing to make concessions against their interests. You can counter this by saying these were concessions that the witness was inevitably going to have to make because your cross-examination revealed that you had the evidence to back your questions up, but this may do little to blunt the impression that witness is reasonable.

- In the District Court, in my experience, juries appear to care about matters of dishonesty more than they average Magistrates does. This line of attack is more likely to affect a jury's assessment of a witness' credit if it reveals a pattern of dishonesty, as opposed to an occasional instance of it. There is also the risk that a protracted cross-examination of a witness about their record will engender sympathy for that witness, especially in sexual assault matters. You need to be particularly live to this consideration when the Tribunal of Fact is a jury.

3.4. Section 192A – advanced ruling

- Section 192A of the Evidence Act allows a party to seek an advanced ruling on a range of issue, including whether matters on a witness' criminal record are admissible and whether, if they are raised, the Prosecution will be granted leave to adduced evidence of matter on the accused's criminal record.

- How do you get an advanced ruling? You could simply raise the issue with the Magistrate at the start of the hearing or before the witness gives their evidence.

- **Why you would seek an advanced ruling:** First, you may want to know in advance whether you can cross-examine a witness about that issue, rather than having your opponent object (successfully) midway through your cross-examination, which may impede the flow of your cross-examination and/or dimmish your standing in front of the Tribunal of Fact. Secondly, you may want to know in advance whether the Prosecution will be allowed to adduced evidence of your client's record if you raise the witness's record.

- **Why you would not seek an advanced ruling:** First, by seeking an advanced ruling you are giving your opponent prior notice of the issue. Secondly, if you don't raise it in

advance, and your opponent hears it for the first time, when you raise the issue in cross-examination, they may not object because they are, for example, they are slow to make objections.

3.5. How to do it, including examples

- Before you cross-examine a witness about a matter on their record, you should always ask yourself, "How can I do this in a way that maximises the damage to the witness's credit?".

- How a witness responds to cross-examination about a matter on their record often matters just as much as the fact that they have something on their record. Sometimes the theatre of the cross-examination matters more than the point itself.

- Below are some tips on how to cross-examine a witness on their record.

- **Tip 1 – start broad, then go to the particulars.** This technique is illustrate in the example set out below. Do not, for example, start with, "Do you agree that in 2016 you were convicted at Wentworth Local Court of making a false declaration to Centrelink?". This is anticlimactic. Try and build to that point.

- **Tip 2 – use open-ended question.** This is a good time to use open-ended questions because you have the material to contradict the witness if they lie. By asking open-ended questions you increase the chances that the witness will tell another lie along the way. The notion that you should only ask closed questions in cross-examination is a fallacy. Open ended questions, done in the right way, can be very effective.

- **Tip 3** – **adduce evidence of the particulars, but not always.** The particulars can include: when the offence happened; when they were convicted; precisely what they did; what their punishment was. Whether you adduce evidence of the particulars or keep the evidence general will depend on the particulars. If, for example, the offence was from a long time ago, you may not want to adduce evidence of when it happened. Similarly, if the offence was of knowingly making a false declaration, but the false declaration was to Centrelink, you may want to adduce evidence that the witness has

been convicted of making a false declaration, but not the fact that it was to Centrelink. You have to be careful, as the Prosecutor may adduce those details in re-examination, especially if the matter of dishonesty was not particularly significant. You do not want to make it look you are hiding details from the Tribunal of Fact.

- **Tip 4 – do it towards the end of your cross-examination, but do not end on it.**

- **Tip 5 – link it back to the matter in question.** This is illustrate in the example below.

- **Tip 6 – do not be sneaky.** Questions like, "You would never tell a lie would you" or "you would never lie under oath would you", which are designed to trick or trap the witness should not be employed. They are unfair. They are also risky. For example, if the witness turns around and says, "actually there was an occasion I lied under oath", this may enhance the witness' credit while diminishing your credit.

- Below is an example that employs the above techniques for a witness that has a perjury charge on their record.

  Advocate: Are you taking your oath to tell the Court the truth seriously?

  Witness: Yes, of course.

  Advocate: Do you always tell the truth when you are under oath?

  Witness: Of course I do.

  Advocate: Are you sure about that?

  Witness: Yes, what do you mean?

  Advocate: I'll show you a document. Read that document to yourself and let me know when you done.

  Witness: I've read that.

Advocate: I'll ask you again – do you always tell the truth when you are under oath?

Witness: Well there was one occasion where I didn't, but that was it.

Advocate: I asked you before whether you always tell the truth when you are under oath and you said, 'of course I do'. Was that a lie?

Witness: I forgot about that.

Advocate: Are you telling this Court that you forgot about lying under oath?

Witness: it was a long time ago.

Advocate: did you just make that up to cover for the fact that you were just caught in a lie?

Witness: No. I just forgot.

Advocate: I've got some questions about incident. On that occasion you took an oath to tell the truth?

Witness: Yes.

Advocate: Did you look the judge in the eye and promise to tell the truth?

Witness: Yes.

Advocate: Just like you did today?

Witness: Yes.

Advocate: And that was a promise to God to tell the truth?

Witness: Yes.

Advocate: Just like the promise you made today?

Witness: Yes.

Advocate: despite that promise to tell the truth, you lied to the Court?

Witness: I guess so.

Advocate: you guess so or you did?

Witness: I did.

Advocate: Are you lying under oath again?

Witness: No.

(If you know the particulars and want to go into them)

Advocate: When did the incident happen?

Witness: I can't remember, it was a few years ago.
Advocate: Look at the document again – do you agree it was only 2 years ago?

Witness: I agree.

Advocate: What was the lie about?

Witness: etc.

3.6. How to use this evidence in your closing address

- How you use the evidence in your closing is just as important as the evidence itself.

- Depending on what the evidence is, it may be worth acknowledging that the evidence is not determinative, but explaining why it is relevant.

- For example, in a sexual assault matter that I instructed in, the barrister cross-examined the complainant about making a false declaration to a Pawnbroker knowing that declaration to be false. In closing, the barrister dealt with the evidence this way:

> *'You have heard evidence that the complainant knowingly made a false declaration to a PawnBroker, and you might be thinking that there is a pretty big gulf between that and lying about a sexual assault. That's a fair enough response, but what we would say is that that lie was as big as it needed to be at the time.'*

- For example, in domestic violence matter, where the complainant had a long history of shoplifting offences:

> *'You have heard evidence that the complainant is a seriel shoplifter. That she committed shoplifting offences before this incident, as well as after this incident. You might initially think that does not tell me very much about whether she is being honest when she says the accused hit her. But what this shows is a pattern of dishonesty. A pattern the existed before this incident, and continued after it. The central issue in this matter is the credibility of the complainant. There are problems with her account, some of which I have already been through with the Court. If the complainant's account was beyond reproach then the history of shoplifting might not be worth much. But where there are issues with her account, a pattern of dishonesty that started before the incident and continued after it, is important. Especially if Your Honour is on the fence about whether to accept the complainant as a witness of truth. This is the sort of thing that would tip the scales in favour of not accepting her evidence to that high standard'*

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Trial Advocate

30 March 2023