Chapter 3

A Judicial Perspective on Cross-Examination*

The adversarial system is based upon the assumption that in civil and criminal proceedings, a just result is most likely to be achieved as the outcome of a trial, which takes the form of a contest between parties represented by lawyers, and which is presided over by an impartial adjudicator who leaves it to the parties to prove the relevant facts and who decides all disputed questions of fact.

It is not my present purpose either to question or to justify that assumption. The point is that in our legal system the assumption defines the respective roles of the parties, the lawyers, the witnesses, and the judge or jury. It provides the context in which cross-examination of witnesses occurs and in which it is evaluated.

When a judge is sitting, without a jury, to decide issues of fact in a civil or criminal trial, what the judge wants from a cross-examination is assistance. When the judge is presiding at a trial with a jury, what the judge wants from cross-examination is assistance for the jury.

By assistance I mean that, from the judge's point of view, useful cross-examination is cross-examination which will help the tribunal of fact to reach a just decision on the issues of fact which require determination.

It follows that from the judge's perspective, the first prerequisite of good cross-examination is that the cross-examiner should have an accurate understanding of the issues which arise for decision. To be of assistance, the primary requirement of cross-examination is that it be relevant.

Understanding what is relevant requires knowing the principles of law which govern the outcome of the case, and having a correct appreciation of what would constitute the view of the facts most likely to result in an application of those principles in a way that favours the cross-examiner's client.

Additionally, the cross-examiner must have a good working knowledge of the rules of evidence because they will determine the approach which the tribunal is required or permitted to take in deciding the issues of fact in the case. The rules of common law, and the provisions of the *Evidence Act 1995*, which prescribe how the court is to go about its task of decision-making, what matters it may take into account, and what matters it must disregard, are the cross-examiner's basic working equipment. Nobody who does not understand the rules of evidence can be a competent cross-examiner, just as no one who does not understand the rules of the road can be a competent driver.

It may be useful if I were to give a piece of advice about the effect of cross-examination on judges. I have no doubt that what I am about to say is also true of juries. Barristers owe their clients a duty to look and act as though they think there is at least

* An address to the New South Wales Bar Association Cross-Examination Workshop, Sydney, 8 April 1997.