# Our Greatest Trial Lawyer?

*Mr Justice McHugh, who appeared as J.W. Smyth Q.C.'s junior on many occasions analyses the Master's trial techniques.*

The late J.W. (Jack) Smyth QC whose lecture on cross-examination appears in this issue of the Bar News was probably the greatest trial lawyer that the New South Wales Bar has produced. Other practitioners have excelled him in individual aspects of advocacy. Sir Garfield Barwick QC, for one, was undoubtedly a better legal advocate; the late Clive Evatt QC probably excelled him in the ability to obtain a verdict from a jury when the weight of the adduced evidence was strongly against his client. But in all round ability I doubt whether any member of the New South Wales Bar has brought to the conduct of a trial the range of skills which Jack Smyth could bring. Indeed he was a master of all branches of the law and all branches of advocacy. He was equally at home in the High Court arguing important constitutional cases such as *Clayton v Heffron* (1960) 105 CLR 214 and *Air Lines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1 or in appearing for the defence before a magistrate or jury in a sordid criminal case or in demurring *ore tenus* in the old Equity Court to a Statement of Claim on the ground that it disclosed no equity. On any reckoning, he must rank as one of the greatest legal practitioners that the New South Wales Bar has produced.

But it was as a trial lawyer that he was at his best. The arena of the trial gave scope for his remarkable power as a cross-examiner, a power which has probably never been surpassed if indeed it has ever been equalled. Not even his mentor and great friend, J.W. Shand QC, excelled him as a cross-examiner. I have read many books on cross-examination, many of the volumes of the Notable Trial Series, and most of the available biographies and articles on the lives of the great advocates who have practised in the United Kingdom and the United States. But nothing in any of those works can compare with the many cross-examinations by Jack Smyth which I had the privilege of watching during the ten year period when I frequently appeared as junior to him or his opponent. The cross-examinations of English and American advocates such as Edward Carson, Rufus Isaacs, Patrick Hastings, F. Lee Bailey and Edward Bennett Williams seem very ordinary compared to the cross-examinations conducted by Jack Smyth.

It was inevitable that, in 1961 when the Bar Council decided to hold a series of lectures for Readers, Jack Smyth would be asked to give the lecture on cross-examination. As a Reader, I was present at that lecture. But the audience was not confined to Readers. The old Common Room, which then consisted only of the 180 Phillip Street end, was packed — with seniors and juniors as well as Readers.

What was it that made Jack Smyth such a formidable cross-examiner? Undoubtedly, the use of the techniques set out in the accompanying lecture were an essential part of his success. But his greatest asset was a quickness of mind which enabled him to dominate the witness. Quickness of thought is an indispensable characteristic of the great advocate whatever his special field of advocacy may be. It undoubtedly played an important part in the success of Sir Garfield Barwick enabling him to turn almost any question from the Bench into a platform for restating the essentials of his argument or to demonstrate the persuasiveness or absurdity of a proposition, as it suited him, by an apt illustration. In the case of Jack Smyth, quickness of thought was accompanied by a natural coolness and confidence which coupled with a complete mastery of the facts of the case and the use of the subjective method of cross-examination invariably enabled him to obtain the answer which he wanted.

Jack Smyth was an extremely disciplined advocate. Like all successful advocates, he placed great emphasis on preparation. At the age of seventy he prepared cases with a thoroughness which amazed juniors half his age. He gave the lie to the statement of the great US trial lawyer, Edward Bennett Williams, that old trial lawyers retire for the reason old fighters do — it is not that they dislike fighting but they cannot stand the training. For a case which was likely to take seven or eight days, three days of conferences with his junior, solicitor and witnesses were commonplace.

Before he went into court, Jack Smyth was determined to be a master of every fact and circumstance relating to the issues and every explanation or motivation for each actor's conduct. As the accompanying lecture makes clear, his prime concern was to establish the ultimate facts which as a matter of law were necessary to the success of his case together with any facts which made those ultimate facts more probable than not. So obsessed did he seem with the preparation of his own positive case that a stranger, observing his preparation, might have thought that he had no confidence in his own capacity to obtain admissions from the other side's witnesses or, where necessary, to destroy their evidence. Yet more often than not his great skill as a cross-examiner enabled him to address the tribunal of fact on the admissions made by his opponent's witnesses.

His step-by-step, subjective technique of cross-examination frequently enabled him to change the whole complexion of the case with a few questions. Here is a short illustration from a culpable driving trial where the Crown alleged that the accused, while eating a chocolate, had driven in a dangerous manner and injured a detective. The incident occurred at night just off the Pacific Highway in a bush area north of Newcastle. The detective was using a torch to examine the nearside back wheel of his car which was parked some yards off the highway. The accused's car, travelling at high speed, suddenly veered off the highway, went on the inside of the detective's car, and knocked him down as he attempted to run off into the bush.

Q. You said you heard the vehicle roaring down the highway.
A. Yes.
Q. And stood up to see what it was.
A. Yes.

Q. Facing the oncoming car.
A. Yes.
Q. Turning your body as you did.
A. Yes.
Q. With the torch in your right hand.
A. Yes.
Q. The torch turning with you.
A. Yes.
Q. Like this (indicating).
A. Yes.
Q. You have been to many traffic accidents.
A. Yes.
Q. And seen police officers using a torch to direct traffic around vehicles.
A. Yes.
Q. You appreciate that to a driver coming down the highway your torch could have been a signal to go around your car.
A. Could have.
Q. You began to run after the car came off the highway.
A. Yes.
Q. Running across and away from your car.
A. Yes.
Q. The accused's car would have been quite close to you when you entered the beam of its headlights.
A. Yes.
Q. Which did not give the driver much chance of avoiding you.
A. No.
Q. You appreciate that if you had stayed where you were the car would not have hit you.
A. I didn't think about it.
Q. But looking back you appreciate now that if you had not run you would not have been hit.
A. Yes, I suppose so.

Smyth's subjective technique of cross-examination could be used with devastating effect even in respect of witnesses whose evidence came as a suprise. Procedures in the Commonwealth Industrial Court were not noted for clarifying the issues. An affidavit in support of an order nisi was the usual procedure. Trial by ambush was the order of the day. In one case the former President of the New South Wales Branch of the AWU applied to set aside a resolution which had removed him from office. The resolution was made by the Federal Executive for whom Smyth appeared. Central to the case of the President was an allegation that he did not receive the telegram notifying him of the meeting which removed him from office.

A telegram boy was called on behalf of the former President. He said that he had made a mistake and delivered the telegram to the office of the "Australian Worker" in the same building. The witness's evidence clearly took the respondents by surprise. But Smyth soon got the boy to say that, when he left the building, he had had no doubt that he had delivered the telegram to the correct place. The cross-examination then explored the process by which he had come to change his mind. It turned out that a complaint that the telegram had not been received had been lodged. A Postal Investigator had gone with the boy to the building. It had been suggested to him that, if the New South Wales Branch had not received the telegram, he must have delivered it to some other office. One suggestion was that it was to the office of the "Australian Worker" which was the newspaper of the Australian Workers' Union and in the same building. Influenced by these suggestions, the boy had accepted that he delivered the telegram to the "Australian Worker". Smyth's cross-examination then played on his natural reluctance to admit that he could be responsible for an error which would have had the consequence that a man summoned to a meeting did not attend. The boy became adamant once again that his original belief that he had delivered the telegram to the NSW Branch was correct.

Paradoxically, Smyth's great strength as a cross-examiner was occasionally a weakness. Sometimes he was guilty of the overkill. So one-sided would the contest between cross-examiner and witness become that it seemed unfair. An intelligent, well educated witness, who had given his evidence in chief with assurance — even cockiness, would be reduced to incoherence, his will broken, unable to resist giving any answer Smyth wanted, openly admitting he was prepared to lie when it suited himself. A jury's contempt for a litigant could sometimes change to sympathy as he flailed helplessly before the destructive force of Smyth's cross-examination. If the conduct of Smyth's own client left something to be desired, this sympathy could sometimes result in a perverse verdict. A good illustration is the malicious prosecution action of *Atkinson v Custom Credit Corporation Pty Ltd.* Atkinson, a car dealer, had been prosecuted for fraud at the instigation of Custom Credit. He was acquitted. In an action for malicious prosecution he was, I thought, totally destroyed by Smyth's relentless cross-examination. Yet the jury awarded him a very substantial sum of money. The verdict was so outrageous that a Full Court set it aside and entered a verdict for Custom Credit. Atkinson unsuccessfully appealed to the High Court and the Privy Council.

The determination of the Labor Party to get rid of Dr. Evatt as Federal Leader of the Opposition probably prevented the New South Wales Government in 1960 from offering the post of Chief Justice of New South Wales to Jack Smyth. Although he would have filled the office of Chief Justice with great distinction, I doubt that he would have been as great a judge as he was a barrister. Whether he would have accepted the post is open to doubt. The Bar was his natural home. Throughout his life, Sir Owen Dixon believed that the barrister played a more important part in the adminstration of justice than the judge. Jack Smyth shared that belief. He had often rejected the offer of an appointment as a puisne judge of the Supreme Court.

He retired in 1974 after being told that he had hardening of a neck artery. He was 71. His decision to retire upon receiving that advice was typical of the decisive nature of his character. He was not a man who wished to stay around while his great forensic powers declined. His last case was *McRae v Mirror Newspapers Ltd.* He persuaded Maxwell J to direct a verdict for the defendant. It was a fitting end to a great career, but a sad day for the New South Wales Bar. He had practised as a barrister for over forty years. He died in 1984 aged 81. □