The dangerous art of cross-examination

By Ian Barker QC

The nature of cross-examination

One of my earliest acquisitions as a solicitor was a book published in England in 1937 called Harris's Hints on Advocacy. A bit read:

> Next to examination-in-chief nothing is more important, or difficult in advocacy than cross-examination. It is infinitely the most dangerous branch, inasmuch as its errors are almost always irremediable. It is in advocacy very like what cutting out is in naval warfare, and you require a good many of the same qualities; courage with caution, boldness with dexterity, as well as judgment and discrimination. You must not go too steadily and with too direct a course, lest the enemy should measure your distance, and taking advantage of your simplicity, sink you with a single shot. Nor must you remain too long in one position. You must circumvent a good deal, firing a shot here and a shot there, until, maybe, you shall catch your adversary unawares and leap on board. Cross-examination has been likened to a two-edged sword, but it is infinitely more dangerous than that. It is more like some terrible piece of machinery – a threshing machine for instance - into which an unskilful advocate is more likely to throw his own case than his opponent's.

He talks at length about cross-examination and purports to lay down rules entirely impossible to follow in the twenty-first century. One such rule is never ask a question the answer to which may be adverse to your case. It is a variation on the so-called rule that you should never ask a question unless you know what the answer will be.

No doubt such notions are counsels of perfection and philosophically sound but not entirely practicable. How can you ever be certain of a favourable response to any question?

Much more has been written about the art of cross-examination., e.g. the late David Ross QC in his book *Advocacy* said this:

> Cross-examination is the questioning of an opponent's witness. Some learned judges have described cross-examination as a potent weapon for probing the credibility and reliability of accuser's version of events and a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. Another judge said: Cross-examination is an art, and the means used to cut down the effect of the evidence of a witness... are multifarious.
>
> Planning will show whether it is necessary to cross-examine a witness at all. You will not cross-examine if the witness does your case no harm, and if you cannot get some advantage to your whole case or disadvantage to your opponent's case.
>
> . . . in cross-examination, every question that does not advance your case injures it. If you do not have a definite object to attain, dismiss the witness without a word. There are no harmless questions here; the most apparently unimportant may bring destruction or victory.

Sometimes you must cross-examine when it is the last thing you want to do. If the witness gives devastating evidence-in-chief you must do your best to limit the damage. A cross-examination that simply repeats evidence-in-chief is a serious misjudgment.

Evidence Act

The Evidence (National Uniform Legislation) Act has quite a lot to say about cross-examination which I will come to. But the essential principles are largely preserved. The dictionary part 2, 2(2) tell us that reference in the Act to cross-examination of a witness is a reference to the questioning of a witness by a party other than the party who called the witness to give evidence.

Unlike examination in chief, a witness can be asked leading questions (although in some circumstances at the court's discretion): s.42.

So, usually, it will consist of the questioning of your opponent's witness.

So much for the philosophy.

Practice

If I have learnt anything about advocacy the principal rule of cross-examination is that you should approach it with terror. Successfully done it will lead you to heights of exultation. At the same time it has the potential to lead you to the very brink of suicide.

It is a dangerous pastime which on any view must be approached with the greatest care.

After all, what is the object of cross-examination? As we have seen, it all boils down, I think, to two:

- obtaining evidence to support your client's case;
- obtaining evidence to erode your opponent's case.

Cross-examination must be focussed. Don't cross-examine for its own sake or to show how clever you are.

Don't embark on a cross-examination unless your journey is very carefully charted and you know, as near as can be, where you are going. The question is, is it going to be worth powder and shot?

A cautionary principle emerges from The Horses Mouth, an entertaining novel, by Joyce Carey. It has nothing to do with advocacy, but does prescribe a valuable wider principle, in the context of modern art and its limitations. In a dissertation about various paintings the artist Gully Jimson put it this way:

> Some of it is like farting Annie Laurie through a key hole. It's very clever but is it worth the trouble?

Preparation for cross-examination requires meticulous care. For example, your opponent might have a witness whose evidence, on its face value, has the potential to destroy your client's case. So you must find out all you can about the witness: is there some undisclosed objective fact upon which you can build a destructive cross-examination?

A good example of what I am talking about was a defamation case brought some years ago by John Marsden the former president of the NSW Law Society, against Channel 7. Channel 7 had publicly accused Marsden of having sexual relations with a number of young men all of whom were under 18. In support of the defendant's plea of justification, Channel 7 rounded up a number of witnesses, some of whom made detailed statements to the police attesting to having had sex with Marsden when they were considerably younger than 18.

A close examination of the police statements proved invaluable to the plaintiff because in many cases some outside objective evidence proved their falsity. Marsden's case came down to two principle issues:

- he didn't know the person and denied ever meeting him;
- he did have sexual relations with some accusers, not at a time when the witness was a juvenile, but when he was over 18.

One witness said he was 14 when he went to John Marsden's house. He said he remembered a woman bringing a donkey to the house in a horse trailer. That was true – the donkey was a birthday present for Marsden, delivered at a time when the witness, as it happens, was 18 years old. Marsden's solicitor was able to find the receipt from an organisation called Good Samaritan Donkeys or some such name when the animal was bought.

Another who claimed under age sex with Marsden identified a Chinese restaurant where Marsden bought takeaway food on the way to his house. But it wasn't built for some time after the alleged takeaway purchase.

One witness said he was about 15 at the material time and remembered seeing Sydney's Centre Point Tower from a window in Marsden's house. But the tower was not built then.

One said when aged around 15 he watched a pornographic movie with Marsden at his house. Research showed the movie had not then been made.

One said he stole a bottle of Johnny Walker Blue Label whiskey when he was leaving Marsden's house, then aged under 18. But Blue Label was not then available in Australia.

This is not just entertaining. The evidence demonstrated the critical importance of searching for objective material in preparing to cross-examine important witnesses.

Sometimes you will by good fortune come upon a witness who is by nature a cross-examiner's dream, who will choose to lie just on principle, for the hell of it, and you can afford to be a bit reckless. It doesn't often happen.

One such witness I once struck was a psychopathic criminal called Jim Anderson. He gave evidence for the Crown in the trial of Abe Saffron tried for tax fraud. He was an accomplice. His stock answer to almost every accusation put to him was not that I can remember at this point in time. So repetitive was this answer that I felt compelled to ask should I put the question again in 20 minutes. He said I could try. But things did not change. For example:

> Q: Mr Anderson, in 1970 did you shoot a man dead in the Venus Room at Kings Cross?

A: Not that I can remember at this point in time.

His evidence was incapable of belief. Unfortunately it was of lesser importance than a second, false set of books of account.

The unhelpful answer

The unexpected answer will be given sooner or later. The problem is to know when to stop.

Sometimes the unexpected answer may be damaging. Sometimes it will not matter. Sometimes it may even be helpful.

But the one question too far can be avoided by not asking it. It usually happens in the context of a cross-examination proceeding successfully until the roof falls in because the cross-examiner becomes greedy for more. Let me give you an actual example.

In Alice Springs once I acted for the petitioner in a defended divorce, in the good old days before the *Family Law Act,* when divorce required proof of misconduct. The issue was whether my client's wife had committed adultery with a doctor from Mt Isa. The allegation was she cleaned for him, and one day he drove her to Alice Springs in his red Austin Healy, where they took a flight to Adelaide to attend a conference and formal dinner.

On the way back from Alice to Mt Isa, so our allegation went, they called in at the Barrow Creek Hotel and paid for a room for the day, in which they drank champagne and did other things. Our main witness was the publican at Barrow Creek who said he remembered the two people spending the day in a room at the hotel.

Well, counsel for the wife cross-examined the publican in a cautious conventional way. All this happened a year or so ago, it was June, the height of the tourist season, lots of people called into the Barrow Creek Hotel on their way north along the Stuart Highway and it would usually be difficult to remember two particular people amongst all the others, and so on. To all such questions the witness agreed. But counsel went just a step too far, asking, well how is it then that from all those customers you can remember this particular man and this particular woman?

Well, the publican replied, it's just that it was unusual at Barrow Creek for a man in a dinner suit accompanied by a woman in what looked like a ball gown and some sort of tiara to turn up in a red open Austin Healy convertible, and stay for the day.

There is a principle which applies here. Regrettably it is now a cliché, but it is worth remembering. If you succeed in escaping from the lion's cage it is better not to go back for your hat.

Sexual cases

Advocates should always be polite. Witnesses are entitled to be treated with respect and courtesy. And it usually won't help to treat them otherwise.

Cross-examination does not *have* to consist of leading questions. Obviously, as a technique, if you can get the right answers without suggesting what they should be, the evidence will have a greater impact. Scandalous and offensive questions have always been forbidden.

The *Evidence (NUL) Act* forbids improper questions (s 41). Part 3 of the *Evidence Act (NT)* takes the matter much further in making specific provisions for evidence given by vulnerable people. In my opinion they go too far in protecting witnesses to the detriment of accused persons: see ss.21B, 21E and 26E.

But there is no doubt that cross-examination of those claiming to be victims of sexual assaults is probably, in criminal cases, the most difficult exercise of all. Its very special nature calls for the greatest delicacy of approach and inquiry. For example, one must explore:

- The antiquity of the allegation.
- The venue.
- The time of day.
- The opportunity for secrecy.
- The likely presence of others.
- The possibility of invention and collusion.

Cross-examination closely directed to the act complained of and perceived inconsistencies in the story, can be very damaging because of the sympathy it may well attract for a person struggling to deal with unpleasant accusations whether or not they are factually true.

Experts

Expert evidence is a problem partly because some witnesses claiming expertise are not expert at all.

Section 76(1) of the *Evidence (NUL) Act* provides that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. However, s.79 permits such evidence if the opinion derives from specialised knowledge based on the person's training, study or experience.

A great deal has been written about this. The courts seem to have adopted the view of Heydon J when sitting in the NSW Court of Appeal in *Makita v Sprowles* (2001) 52 NSWLR 705 at 743.

You must carefully consider whether the witness's evidence is admissible at all. This is part of what Heydon J said:

> In short, if the evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of specialised knowledge; there must be an identified aspect of that field in which the witness has become an expert; the opinion proffered must be wholly or substantially based on the witness's expert knowledge; so far as the opinion is based on facts observed by the expert, they must be identified and admissibly proved by the expert; and so far as the opinion is based on assumed or accepted, facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of specialised knowledge in which the witness is expert by reason of training, study or experience, and on which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v The Queen* (at 428 [41], on a combination of speculations inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise.

A good example of a witness who claimed expertise without having it, gave evidence for the Crown in the trial of Bradley Murdoch. The witness, Dr Sutisno, obtained a PhD in forensic anatomy which, she said, gave her the skills to identify people from their anatomical parts, looking at the whole anatomy in terms of identification. She claimed she could rely on face and body mapping as a means of identification. She offered the opinion that images of a man taken from a security video at a service station were identical with other images proved to be those of Murdoch. The trial judge let the evidence in, over protest. At the trial it was not argued that facial mapping was not a recognised field of specialised knowledge, but the point was raised on appeal. The CCA were taken to a NSW decision of *Tang* (2006) 65 NSWLR 681 where the NSW CCA held that such evidence was inadmissible. In *Murdoch* the NT court held that contrary to the conclusion of Martin CJ at the trial, the prosecution had not established a sufficient scientific base to render results arrived at by that means a proper subject of expert evidence.

The evidence was clearly inadmissible as having no sufficient scientific foundation to support it. The subject was discussed at length in the NT judgment (2007) 167 ACrimR 329 at [246] to [306]. The CCA applied the proviso so in the end it did not matter.

The *Murdoch* trial was before the introduction of the *Evidence (NUL) Act.* It is difficult to see it getting in under s 79 and it certainly ran foul of *Makita v Sprowles.*

I offer you some suggestions if your opponent intends to call expert evidence:

1. You must call for production of his or her instructions and all his or her working papers and records.
2. You should enquire into the witness's history, in particular his or her evidence in other cases, and academic writings.
3. You should carefully consider the witness's expertise.
4. You should master the matters the subject of the evidence.

Prior inconsistend statements and documents

Prior inconsistent statements and cross-examination on documents can conveniently be considered together. The *Queen's case* governed the common law provision for proving a witness's inconsistent written statements. Before cross-examination could proceed, the document had to be read in its entirety upon proof of its authenticity as the witness's document.

It deprived the cross-examiner of the tactical advantage of cross-examining about the contents of the document before the witness was reminded of its contents. Also, the whole document, some of which might have been unfavourable had to go into evidence.

Walker v Walker (1937) 57 CLR 630, a High Court decision required that if a party called for a document the opponent might insist on its tender, which made such calls very risky unless one was sure what the document contained. These rules have been supplanted by the *Evidence (NUL) Act*, ss 35, 43, 44 and 45:

> Under s 35, a party is not to be required to tender a document only because it was called for or inspected, and permits cross-examination on a prior inconsistent statement without showing the document to the witness.

But by s 45 if a witness is questioned about a prior inconsistent statement recorded in a document, the court may order the document to be produced to the court and may give directions as to its tender or otherwise.

Section 44 forbids cross-examination of a witness about a previous representation by another person unless:

1. evidence of the representation has been admitted or will be admitted, or
2. if the representation is in a document not admitted it must be produced to the witness who must then be asked whether he or she stands by his or her evidence;

and the document must not be identified or its contents disclosed.

Hostile witnesses

At common law if a witness in chief manifested an unwillingness to testify truthfully, the party calling the witness could by leave cross-examine the witness about the truth of the evidence.

The *Evidence (NUL) Act* now describes such witnesses as unfavourable (s 38) and permits questions as though the party were cross-examining the party's own witness. The Act provides a lower threshold than the common law before one can cross-examine one's own witness.

Brevity

Be brief. Do not ask ten questions where one will do. Apart from irritating the judge, it could be clearly dangerous. Do not get into long debates about the propriety of questions unless it is really necessary.

When I hear some barristers banging on about nothing much I am reminded of Abraham Lincoln's address at Gettysburg on 19 November 1863. One of the most significant speeches in modern history, it involved 270 words and took three minutes to deliver.

Just as a matter of technique, another American lawyer worth close examination is the late Clarence Darrow who, unlike many contemporary American lawyers, knew how to cross-examine with a minimum of words.

You will know about the trial of Thomas Scopes at Dayton Tennessee in 1925. The General Assembly of Tennessee had made a law whereby it became unlawful for any teacher in a public school to teach any theory that denied the story of the divine creation of man as taught in the bible, instead that man has descended from a lower order of animals. Scopes, a schoolteacher, put the law to the test by teaching evolution and was duly prosecuted. The law was passed largely at the urging of the famous evangelist and lawyer William Jennings Bryan.

Darrow led for the defence. He could see the danger to a free society in what has now emerged in the USA and to a lesser extent Australia, that is the activities of the fundamental evangelical religious right and their effect on the decisions of politicians.

The Tennessee Act has only to be read to see its childish absurdity. At all events there was much argument about the admissibility of expert witnesses. The judge refused to admit evidence

from defence experts about evolution. But Bryan decided he should give expert evidence abut biblical writings and was permitted to do so. He seems to have been treated as a defence witness. It was an unusual course of events because what by our rules would have been examination in chief was in fact a highly damaging cross-examination.

Bryan maintained modern civilisation dated from the flood which occurred exactly 4,262 years before 1928.

This is some of Darrow's long cross-examination of Bryan:

B: According to the Bible, there was a civilization before that, destroyed by the flood.

D: Let me make this definite. You believe that every civilization on the earth and every living thing, except possibly fishes, that came out of the ark were wiped out by the flood?

B: At that time.

D: At that time. And then, whatever human beings, including all the tribes, that inhabited the world, and have inhabited the world, and who run their pedigree straight back, and all the animals, have come onto the earth since the flood?

B: Yes.

D: Within 4,200 years. Do you know a scientific man on the face of the earth that believes any such thing?

B: I cannot say, but I know some scientific men who dispute entirely the antiquity of man as testified to by other scientific men.

D: Oh, that does not answer the question. Do you know of a single scientific man on the face of the earth that believes any such thing as you stated, about the antiquity of man?

B: I don't think I have ever asked one the direct question.

D: Mr. Bryan, do you believe that the first woman was Eve?

B: Yes.

D: Do you believe she was literally made out of Adam's rib?

B: I do.

D: Did you ever discover where Cain got his wife?

B: No sir; I leave the agnostics to hunt for her.

D: You have never found out?

B: I have never tried to find out.

D: Do you believe the story of the temptation of Eve by the serpent?

B: I do.

D: Do you believe that after Eve ate the apple, or gave it to Adam, whichever way it was, that God cursed Eve, and at that time decreed that all womankind thenceforth and forever should suffer the pains of childbirth in the reproduction of the earth?

B: I believe that it says, and I believe the fact as fully-

D: That is what it says, doesn't it?

B: Yes.

D: And for that reason, every woman born of woman, who has to carry on the race, has childbirth pains because Eve tempted Adam in the Garden of Eden?

B: I will believe just what the Bible says. I ask to put that in the language of the Bible, for I prefer that to your language. Read the Bible and I will answer.

D: All right, I will do that: And I will put enmity between thee and the woman: - that is referring to the serpent?

B: The serpent?

D: (Reading) . . . and between thy seed and her seed; it shall bruise thy head, and thou shalt bruise his heel. Unto the woman he said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee. That is right, is it?

B: I accept it as it is.

D: And you believe that came about because Eve tempted Adam to eat the fruit?

B: Just as it says.

D: And you believe that is the reason that God made the serpent to go on his belly after he tempted Eve?

B: I believe the Bible as it is, and I do not permit you to put your language in the place of the language of the Almighty. You read the Bible and ask me questions, and I will answer them. I will not answer your questions in your language.

D: I will read it to you from the Bible – in your language. And the Lord God said unto the serpent, because thou hast done this, thou art cursed above all cattle, and above every beast of the fired; upon they belly shalt thou go and dust shalt thou eat all the days of thy life.

B: I believe that.

D: Have you any idea how the snake went before that time.

B: No sir.

D: Do you know whether he walked on his tail or not?

B: No sir. I have no way to know. (Laughter)

The trial judge himself a religious man finally ordered the evidence to be stricken from the record. Scopes was convicted and fined $100.

The conviction was overturned by the Supreme Court of Tennessee on the ground that the judge and not the jury had imposed the fine. I include part of the evidence here merely as an example of good cross-examination. It is recounted in *Attorney for the Damned* (Weinberg).

Credibility

The *Evidence (NUL) Act* says a lot about evidence as to credibility:

> s 102: evidence relevant only to a witness's credibility is not admissible.

But s 103 provides an exception: s 102 doesn't apply if the evidence has substantial probative value. So the question is whether the evidence could rationally affect the credit of a witness where testimony is important to the outcome of the proceedings.

Always bear in mind that the Act defines *probative value* as the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (dictionary Part 1).

Before the *Evidence (NUL) Act*, there were in practice very few restrictions on what could be asked of a witness as going to his or her credit, even if the matters questioned about had little or no bearing on the issues before the court. The questions could be destructive of the witness's reputation without adding anything material to the facts in issue.

The cross-examiner in some criminal cases must be careful of *Evidence (NUL) Act* s.108(3)(b) which excludes the credibility rule from evidence adduced in re-examination and also excludes it from evidence of a prior consistent statement if:

1. evidence of a prior inconsistent statement has been led; or
2. it is suggested that evidence given by the witness has been fabricated;

and the court gives leave.

The section therefore has the capacity to let in evidence which would be otherwise inadmissible if the cross-examiner unwittingly lays the ground.

Section 108(3) in practice has replaced the old law of recent invention, which held that it was sufficient to render admissible in re-examination a prior statement consistent with the witness's testimony, if the cross-examination suggested recent invention by the witness.

I was once led into a trap, I suspect by a police officer who took a statement from a witness and deleted part in the copy given to me. Relying on the statement as accurate, I lurched into dangerous territory by cross-examining on a subject unknown to me but potentially dangerous to my client. I should have checked with the prosecutor that I had the whole of the statement. The missing bit emerged in the prosecutor's re-examination. It was about a previous complaint. Fortunately the judge took pity on me and disallowed the evidence. But you cannot take anything for granted.

Section 108(3)(b) has narrowed the grounds upon which a witness may be asked about a prior consistent statement, but it remains a land mine. Although leave is required under s 104(2) to cross-examine an accused as to credibility, leave is not required if the accused has given evidence impugning the credibility of a prosecution witness: s 104(4). The evidence must still have substantial probative value (s 103) but s 104(4) remains a danger to an accused who gives evidence. It may sometimes be tactically sound to ask the prosecutor if there is any matter known to the prosecution which could adversely affect the accused's credit. Certainly, you would ask that question anyway, if you were contemplating calling the accused.

In spite of all this, the practise of law can sometimes be fun. But not as much now as it once was.