The limits of cross-examination

By Anthony Cheshire SC

I began my career at the Bar in the early 1990s appearing in many small claim motor vehicle accident trials across England and Wales. Often all that was at stake was the client's excess and no-claims bonus with maybe a few travel expenses. The early temptation was to see the adversarial process as requiring a confrontational approach to every issue, even if the amount at stake was a matter of only a few pence. A similar approach permeated directions hearings, where a request for four weeks would, as a matter of course, be met with a counter of two weeks.

After a few initial frustrating attempts to agree small quantum figures with other fresh-faced and similarly aggressive junior barristers, I came to a rapid realisation – not only that making the court determine every issue did not really assist the court in determining 'the real issues in the case' – but it was often not in the client's best interests since it irritated the court and often distracted it from my best points.

Fortunately, the hostility and rudeness that can characterise some practitioners' conduct is still the exception rather than the rule and, where it does occur, it rarely spills over outside the courtroom. There are at least four reasons for this: the ordinary obligations of the practitioner to the court; the more recent statutory obligations to similar effect; the fact that such an approach is often counterproductive in advancing the client's case; and the fact that this job is hard enough even with professional detachment and objectivity and without the introduction of personal attacks and unpleasantness. Further, the profession is at least to some extent self-regulating, and a good reputation, with both other practitioners and judicial officers, is hard-earned and valuable.

Thus professional obligations override a short term forensic gain (*Day v Rogers* [2011] NSWCA 124) and, whatever the effect upon the particular case, preferring the latter can cause long term damage to a practitioner's standing and reputation.

A useful starting point is the statement of Kitto J in *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 298 (cited together with other useful authorities in *Body Corporate Repairers Pty Ltd v Oakley Thompson & Co Pty Ltd* [2017] VSC 435; 322 FLR 355 at [119] and following):

> It has been said before, and in this case the chief justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. [The barrister] is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with … fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations.

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To similar effect are the observations of McHugh J in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 41:

> Despite being in a relationship of confidence with a lay client, the first duty of the barrister is not to the client but to the court in which the barrister appears. The duty to the instructing solicitor or the lay client is secondary. Where the respective duties conflict, the duty to the court is paramount. That duty to the court imposes obligations on the barrister with which the barrister must comply even though to do so is contrary to the interests or wishes of the client. Thus, the barrister can do nothing that would obstruct the administration of justice by: deceiving the court; withholding information or documents that are required to be disclosed or produced under the rules concerned with discovery, interrogatories and subpoenas; abusing the process of the court by preparing or arguing unmeritorious applications; wasting the court's time by prolix or irrelevant arguments; coaching clients or their witnesses as to the evidence they should give; using dishonest or unfair means or tactics to hinder an opponent in the conduct of his or her case.

Thus Pembroke J wrote in *James v Phillips* [2017] NSWSC 148 of the need of practitioners 'to restrain the enthusiasms, and sometimes the vindictiveness, of their clients; and to correct the misapprehensions and wrong-headed notions from which they sometimes suffer'; and in *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 of the need to temper 'a strictly adversarial approach to the presentation of a party's case and, where necessary, to restrain the enthusiasms of the client and to confine their evidence to what is legally necessary, whatever misapprehensions the client may have about the utility or the relevance of that evidence'.

As the Court of Appeal noted in *The Owners – Strata Plan 21702 v Krimbogiannis (No 2)* [2015] NSWCA 39, the use of the words 'we are instructed to seek an order' does not exonerate a legal representative from his or her obligations to the court.

The duties and obligations that impose upon practitioners an obligation to be more than a 'mere mouthpiece' in their dealings with their own clients extend to dealings in court and with opponents. Thus, courts expect 'civility and professional comity' with 'a rational and non-combative approach to resolving the issues raised' (*Nair-Smith v Perisher Blue Pty Ltd* [2011] NSWSC 878).

That includes not making baseless allegations of professional misconduct (such as an allegation of 'cunning and deception' made in the absence of 'reasonably compelling evidence' (*Bale v Mills* [2011] NSWCA 226 at [91])). Still less should practitioners make threats of

professional reporting or wasted costs orders as part of an attempt to gain an advantage in the litigation (*Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [194]).

As Palmer put the matter in *Arena Management Pty Ltd v Campbell Street Theatre Pty Ltd (No2)* [2010] NSWSC 1230: 'Robust advocacy, which is commendable, does not license rudeness, which is not' and thus one should not describe the submissions of one's opponent as 'arrant nonsense'.

Many of the rules governing cross examination derive from the same principles. In *Lets Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243, the trial judge had made adverse credit findings that were based, at least in part, on the fact that a witness' demeanour changed at a particular point in cross examination, which was when it was put to him that he was lying. The Court of Appeal held that there had been no factual basis so to accuse him and further that counsel's questions and comments, many of which had been 'gratuitous and supercilious' and accompanied by 'inappropriate rebukes' made the witness' response understandable.

Apart from the breach of professional obligations in accusing the witness of lying in the absence of a reasonable evidentiary justification, the court put the matter thus at [123]:

> Procedural fairness requires more than merely giving each party an opportunity to be heard. It also requires that each witness be permitted to answer questions without being abused in the process. This is not to say that cross-examination cannot be robust, but it must be fair. The latitude commonly afforded to cross-examiners does not amount to a licence to offend, ridicule or vilify. Fairness requires that no proposition, particularly one which is damaging to the witness, be put without a basis. It also requires that questions be asked one at a time and that cross-examination not be peppered with gratuitous and, as in the present case, insulting, commentary to the witness. It requires that the witness be permitted to finish his or her answer and not be cut off or needlessly interrupted.

Similar observations were made as to counsel's obligations not to allege in court or in a pleading (or indeed otherwise) 'criminal conduct or some lesser but serious discreditable misconduct against a witness or party without a proper foundation to do so' in *Rees v Bailey Aluminium Products Pty Ltd (2008)* 21 VR 478 at [32]:

> …counsel must exercise an independent discretion or judgment to ensure that the conduct of their client's case is in accordance with the dictates of the administration of justice.

"Forget you're a lawyer, Fred, you're cross examining me again."

One of the often breached rules is to confront a witness with the testimony of other persons in order to suggest that the witness is incorrect. This 'technique has elsewhere been described as 'a form of bullying — using unfair means to persuade a person to retract his or her evidence'' (see *Rees v Bailey* at [57]). The prohibition extends to a witness 'being asked to provide an explanation as to why the first witness considers that the evidence of the second witness differs from the evidence of the first witness' (*Chahal Group Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] NSWCA 58). Counsel is, however, 'entitled to ask the witness whether he would agree with other evidence if it were given' (*Rees v Bailey* at [57]).

Earlier in this article, I noted that compliance with the various professional obligations can make a practitioner a more effective advocate. I return to that issue with the comments of Pembroke J in *McLaughlin v Dungowan Manly Pty Ltd (No 3)* [2011] NSWSC 717:

> It needs to be emphasised that the efficient conduct of commercial litigation, indeed all litigation, can only be assisted by restraint, moderation, sensible co-operation and sound judgment by counsel. Indeed the due administration of justice demands it.

His Honour then referred to the wider duty to the court and the more recent statutory duties, before quoting the words attributed to Lord Bingham of Cornhill:

> The effective advocate is not usually he or she who stigmatises conduct as disgraceful, outrageous, or monstrous, but the advocate who describes it as surprising, regrettable or disappointing.

Finally, in *Birketu Pty Ltd v Westpac Banking Corporation* [2018] NSWSC 879, McDougall J considered an interlocutory matter that had been marked by 'discourtesy' and 'pugnacity', where each party had 'been keen to throw epistolary grenades at the other', albeit not rising to the level of the 'offensive, vituperative and gratuitously insulting' correspondence in *McGuirk v The University of New South Wales* [2009] NSWSC 253.

His Honour concluded as follows:

> If it were possible, I would consider giving a direction that each side take a step back and a cold shower and then resume the civilised preparation of the litigation. But that is an order for which no precedent exists, and which I perceive to be beyond even the wide powers conferred by [UCPR] r 2.1.

The Rules Committee might wish to consider introducing an express power to that effect or alternatively a guiding principle for all practitioners as I prefer to express it: don't be a goat.