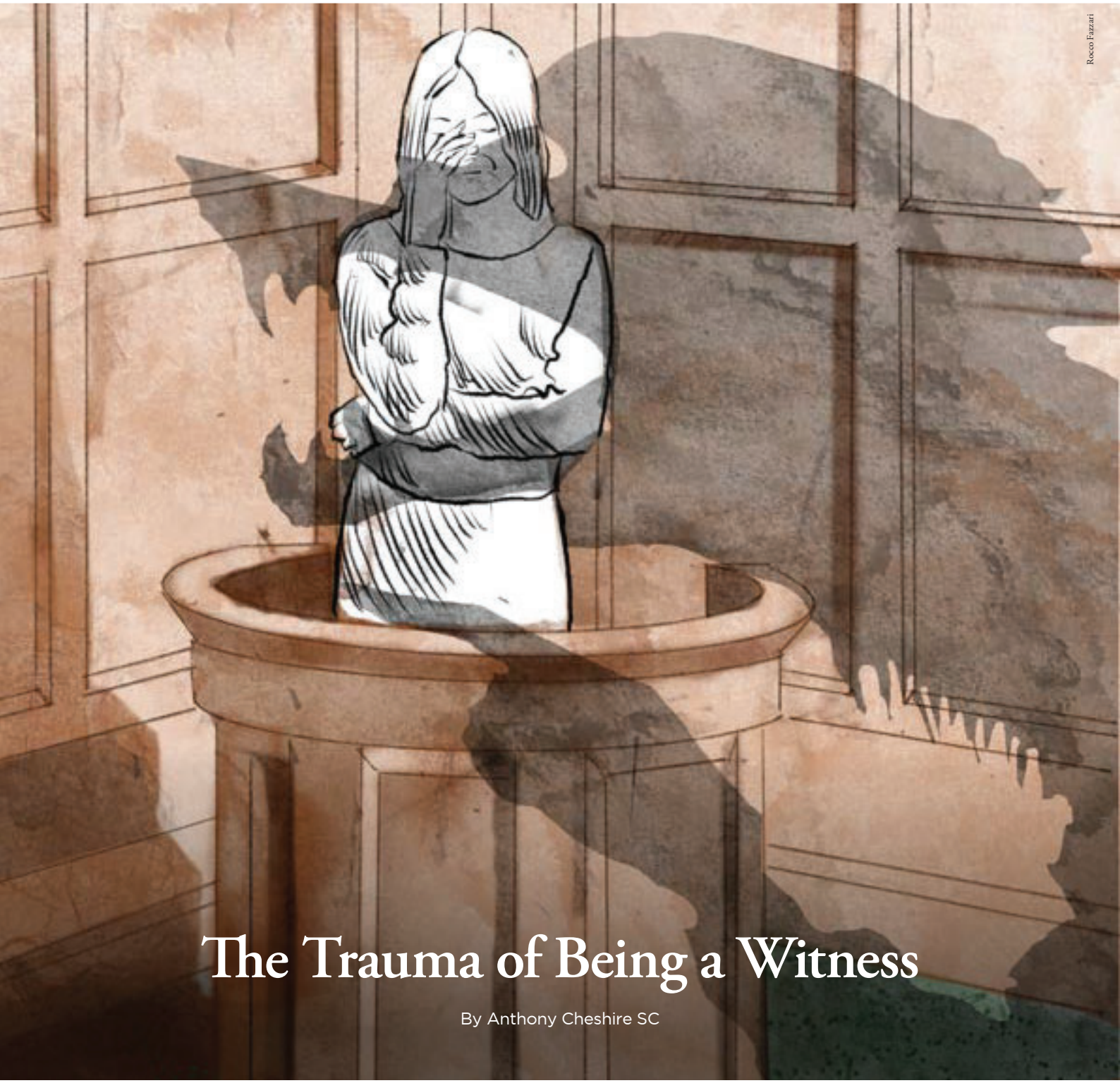


Rocco Fazzari

The Trauma of Being a Witness

By Anthony Cheshire SC

I have always been impressed and humbled by the extraordinary talents that many people have outside of their chosen profession, such as lawyers with impressive careers as composers, musicians, historical authors, novelists and artists. In the absence of any talents, I live in fear of my retirement being spent on genealogy websites.

Matthew Syed may not have lawyer among his talents, but the former table tennis professional has, since his retirement, worked as a commentator, sports journalist and sports marketer and stood for parliament. My interest in him, however, comes from his podcast 'Sideways', in which he looks at 'the ideas that shape our lives'.

In a recent episode, he recounts the story of Colin Turnbull, an anthropologist who, in his book *Mountain People*, published in 1972, described his bleak encounter with the Ik people in Uganda, labelling them a loveless people, brutal, totalling uncaring and devoid of culture and awarding them the epithet 'the most selfish people on earth'. Turnbull's book, written for a popular rather than professional audience, was influential, including being cited in Richard Dawkins' Selfish Gene.

Turnbull's account lent support to the then fashionable veneer theory, which holds that civilisation is only a thin veneer and, when in crisis, humans reveal their natural, selfish state. Recent media coverage of fights for toilet rolls in supermarkets harked back to this theory.

In 2016, anthropologist Catherine Townsend visited the Ik people and found them to be warm, welcoming, sharing, generous and empathetic. Her view, consistent with the falling out of favour of the veneer theory, is that humans have evolved to cooperate and that what Turnbull found was in fact an atypical presentation brought about by crisis in the form of an extreme famine.

This demonstrates the danger of relying upon a single experience as establishing a universal truth, particularly where there may be factors of context, environment and evolution that affect the particular findings.

As I read Louise Milligan's recent book *Witness*, I was struck by the problem that Turnbull faced of attempting to draw generalisations from specific individual experiences. On the other hand, I was also conscious that individual experiences are often indicative of general principles; and an empirical approach to forming conclusions demands that all experiences have some statistical significance. Put another way, Milligan's observations may not prove anything, but they cannot be ignored and they may in fact demonstrate a truism and a real problem that needs to be addressed.

Milligan has spoken to many complainants in sexual assault cases. Her experiences are consistent with the findings of the Royal Commission into the Institutional Responses to Child Sexual Abuse:

> Many survivors have told us how daunting they found the criminal justice system. Those survivors whose allegations proceeded to a prosecution told us that the process of giving evidence was particularly difficult. Many survivors told us that they felt that they were the ones on trial. Some survivors told us that the cross-examination process was as bad as the child sexual abuse they suffered. Many survivors told us that they found the process re-traumatising and offensive.

Milligan describes the experience of one victim who pulled out of giving evidence at the eleventh hour because he was 'due to get grilled, like I'm the fuckin' villain. I'm not the villain, mate.'

It seems obvious in this context that most witnesses would not appreciate the nuanced difference between cross examination aimed, especially by reference to previous inconsistent statements, at demonstrating that the witness is unreliable as opposed to deliberately untruthful.

There have been measures introduced to try and improve the system in sexual assault cases, such as having cross examination proceed by way of pre-recorded video and limiting cross examination on sexual history. Mark Tedeschi QC describes to Milligan 'some older barristers whose methods of aggressive cross-examination in sexual assault cases have not changed since they were young men'. Fortunately, in his view they are 'a product of a bygone era' and so dwindling in number.

Tedeschi is a supporter of complainants in sexual assault trials having a lawyer in the courtroom to intervene if they are subject to inappropriate questioning or placed at risk. Although the prosecutor can seek to intervene, it seems that this does not always occur and that there may sometimes be the thought that inappropriate questioning by defence counsel may prejudice the jury against the defendant.

I can see no easy fix by which an appropriate balance can be drawn between the rights of the defendant and complainant in sexual assault cases; and reform to the criminal justice system is outside the area of my experience and expertise.

Nevertheless, these issues feed into another key part of Milligan's book, which is her experience as a witness in Cardinal Pell's committal hearing in the Melbourne Magistrates Court.

A number of complainants had recounted their allegations to her as a journalist. She recounts how she was subject to a subpoena to produce all relevant records, many of which were in shorthand and had to be transcribed by her. She posted:

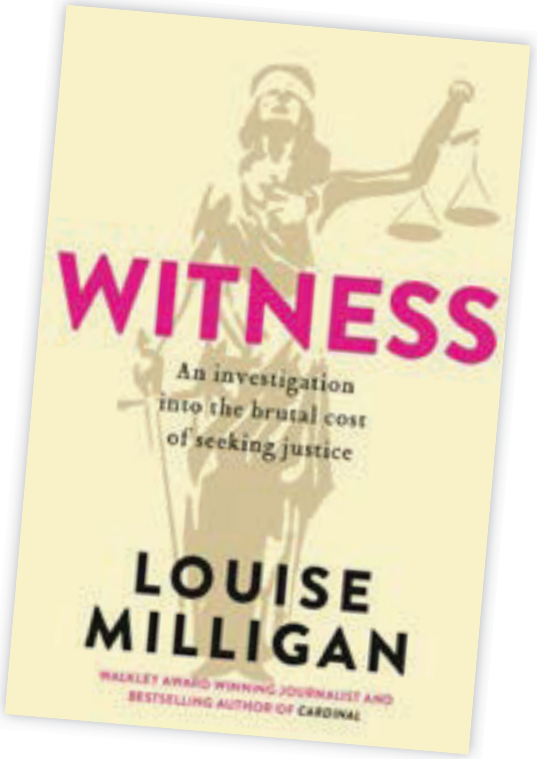
> 'I wish it to be known that I have taken weeks and weeks of my own time complying with the court subpoena…'

Milligan maintained the journalist privilege throughout, as she described in that post:

> '…I have not, at any time, given any material which would identify a confidential source to the defence or court.'

When she attended for cross examination, she had the benefit of an ABC lawyer in court to assist in protecting her journalist privilege. She also seems to have had the benefit of a magistrate, Belinda Wallington, who was prepared to intervene where appropriate.

Milligan then was cross examined as a witness rather than a complainant, with her own representation and with a magistrate prepared to intervene to prevent any impropriety. Yet in spite of those benefits, she describes the day after her cross examination as follows:



> '…the next morning, you wake to feel like a Mack Truck has powered through the walls of the room and flattened you. Every single bone in your body aches in the way it does when you have done a particularly gruelling workout for the first time in months. You lie, unable to get out of bed. Your mouth feels glued shut. Your body hums with a strange, invisible trauma…It take days to snap out of it.
>
> …I lay in my bed the next day, and I could not move, I couldn't move. I couldn't get up to get a glass of water… the only thing in my life that was as bad as that day was when my first husband died. And I had to go and identify his body in the morgue.'

It is clear that a large part of her negative experience was a result of the approach and style of Robert Richter QC, who accused her in airing the accusations on the ABC and in her subsequent book of having:

> '…distorted what went to the public … so as to poison the public's mind [against Cardinal Pell].'

As Richter further suggested:

> 'Your book was intended to pervert the course of justice.'

and:

> 'You were trying to convince the public that Cardinal Pell was guilty.'

Milligan refers to section 41 of the *Evidence Act*, which, depending upon the State and whether the witness is vulnerable, permits or requires the Court to disallow a question that:

(a) is misleading or confusing, or

(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or

(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

She describes Richter as having been sneering, sarcastic and bullying; and his tone as belittling, insulting, unduly harassing, offensive, oppressive and repetitive. Although there is clearly much personal animosity that Milligan holds towards Richter as a result (which she makes clear is to him as an advocate in court rather than as an individual), she uses her experience to emphasise the difficulties that victims face who do not 'have the ability to hold their own' within the system.

Milligan also recounts the experience of an expert witness, Kelsey Hegarty, who experienced an aggressive cross examination, which she felt was 'not trying to get at the truth'. Hegarty also described being 'belittled' by an older male barrister with 'a lot of mansplaining':

> 'I was angry that he couldn't be stopped. Yep – that he couldn't be stopped and that I just had to stand there and take it.'

It may be that the experience of Milligan was, as for Turnbull, atypical and brought about by the extraordinary nature of the proceedings against Cardinal Pell. Indeed it would be dangerous to form conclusions about the system, or indeed about white male barristers (whether of a certain age or generally), based solely upon her experience.

On the other hand, what she went through and how it affected her cannot be ignored and there is at least enough anecdotal evidence to demonstrate an issue that warrants further consideration.

It is striking how often cross examination of a witness (including a non-party) commences, often aggressively, on a peripheral matter that has no direct relevance to any of 'the real issues in the proceedings' (as described in section 56 of the *Civil Procedure* Act 2005); and once credit has been impeached on that peripheral issue, closed propositions are put on the real issues.

There is no doubt that some witnesses are generally unreliable or dishonest, but approaching cross examination on credit in this way ignores several principles of fact finding:

(a) the fact that a witness has not been accepted on one issue (whether as untruthful, unreliable or on the weight of the evidence) does not mean that other parts of that witness' evidence should also not be accepted (*Cubillo v Commonwealth (No 2)* [2000] FCA 1084; (2000) 103 FCR 1 per O'Loughlin J at [118], [121]) and therefore there are risks in making global credit findings (*Sangha v Baxter* [2009] NSWCA 78 at [155], [156] per Basten JA);

(b) disbelieving a witness on one matter does not mean that the opposite has been proven (see *Steinberg v FCT* (1975) 134 CLR 640 at 694 per Gibbs J);

(c) disbelieving a witness on one matter or indeed globally does not mean that other witnesses are necessarily untrue or unreliable and the evidence must be looked at as whole (see *Cook v Sirius International Insurance Corporation Australian Branch* [2020] NSWSC 1631 at [155] per Ward CJ in Eq).

To adapt Thomas Hobbes, being cross examined is often 'nasty' and 'brutish', although frequently not 'short'. I suspect that the reaction that Milligan suffered is not unique or indeed unusual and it should make us pause. It might be suggested that Milligan's experience and reaction were extreme, but that is to miss the point. It is the fact of the reaction rather than its severity that is instructive, although its severity emphasises the problem. The legal system serves the public and we should consider where the appropriate balance lies when members of the public become involved in it, often unwittingly and unwillingly.

Justice in the sense of truth finding cannot be an absolute. In the context of section 56 of the *Civil Liability Act*, the overriding purpose requires a 'just, quick and cheap resolution of the real issues in the proceedings'. Thus, on occasion justice may be subordinated to the requirements of 'quick and cheap'. For instance, late evidence, even if probative, may be disallowed if its admission would jeopardise a trial date and it will generally not be permitted on appeal.

While it may be difficult to justify restrictions in relation to cross examination on the 'real issues in the proceedings', it may be that in balancing the interests of the various participants, there should be less emphasis on cross examination on peripheral credit issues that go beyond the 'real issues in the proceedings'. Those sitting in judgment should perhaps be more prepared to disallow such questioning and to eschew consideration of peripheral matters from their fact finding. Such an approach might be particularly warranted in the case of non-party witnesses with no interest in the proceedings.

Milligan's book and the description of her reaction to her cross examination left me feely distinctly uneasy. It brought back to me the observations of Kitto J in *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 298, where his Honour described the bar as being engaged 'in the high task of endeavouring to make successful the service of the law to the community' and to the 'exceptional privileges and exceptional obligations' that are involved. We need to question whether in how we deal with the cross examination of witnesses, we are fulfilling that service to the community of which they form a part. BN

SHE DESCRIBES THE DAY AFTER HER CROSS-EXAMINATION:

'…the next morning, you wake to feel like a Mack Truck has powered through the walls of the room and flattened you. Every single bone in your body aches in the way it does when you have done a particularly gruelling workout for the first time in months. You lie, unable to get out of bed. Your mouth feels glued shut. Your body hums with a strange, invisible trauma…It take days to snap out of it.'