Cross Examination

"In cross-examination, as in fishing, nothing is more ungainly than a fisherman pulled into the water by his catch" - *Louis Nizer*.

Preparation

1. Like most things in the law, preparation is the key ingredient to success. Cross examination is no different. In preparing for cross examination, it is essential to have a firm grasp on exactly what you are setting out to achieve; - this means having a plan. If you have a plan then you should prepare your cross-examination upon the basis of your plan. So, for example, having prepared for a witness and upon hearing the witness's evidence in chief, you may well come to the view that cross examination is not necessary.

2. To properly prepare for a cross, you should have a clear grasp on your case theory, the factual elements you need to prove and from which witnesses those elements will be adduced. This is best achieved by preparing your closing address first. Preparing in this order ensures your lines of questioning do not stray from your case theory. It also ensures you only cross examine on evidence that is adverse to your case theory.

3. One method is to then set out in bullet points what points you need to adduce from each witness, whether that be through evidence in chief or cross examination. These points should be expressed as single premises or propositions. These propositions become your lines of questioning. You can then prepare your questions based on these lines.

4. Whether you then go on to set out each question or limit it to themes or areas of questioning is a matter of personal preference. Mapping out each question does have the advantage of ensuring that you never go off script or ask that one question too many. It is also a lot of work and can create inflexibility in responding to the answers given by the witness. This approach is possible due to the two most important rules of cross examination:

   (a) Don't ask a question that you don't know the answer to.

   (b) Don't ask a question that can be answered other than yes or no.

(Note from authors: A skilled cross-examiner honours these rules in the breach. Circumstance may exist that not only invite you to breach the rules but may require you to do so).

Conducting Cross Examination

5. This section of the paper is concerned with the conduct of a cross examination. There are evidentiary requirements that must be satisfied during a cross examination and and others that should be done as they reflect generally agreed best practice. However, it is most important when cross-examining a witness that you listen to the answer!

What you need to do

6. Most of the obligations that a cross examiner must adhere to are contained within *The Evidence Act 2001* (Tas). Section 41 refers directly to improper questions put during the course of cross examination and has been reproduced here in full:

41. Improper questions

(1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a "disallowable question") –

(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).

(2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account –

(a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and

(b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject; and

(c) the context in which the question is put, including –

(i) the nature of the proceeding; and

(ii) in a criminal proceeding, the nature of the offence to which the proceeding relates; and

(iii) the relationship (if any) between the witness and any other party to the proceeding.

(3) A question is not a disallowable question merely because –

(a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or

(b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

(4) A party may object to a question put to a witness on the ground that it is a disallowable question.

(5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

(6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

7. During a cross, you can expect some latitude with relevance to enable you to develop your line of questioning. Section 41 sets the limit to that latitude. It is worth noting that these provisions refer to the duty imposed on the court rather than the parties. A question can be disallowed regardless of whether there is an objection or not. In this way, this section differs to other evidentiary 'breaches' that are not ruled upon unless the opponent takes issue with the breach and objects.

8. Having a question disallowed is a red flag, meaning that the line of cross examination is off track. It is unlikely a question that breaches this provision would conceivably have any probative value to your case.

Commentary

9. The cross examiner must also be careful not to provide commentary on an answer given by witness. This is because the witness can only respond to questions put to them. They don't have the opportunity to respond to any commentary made on questions. *Randall v Queen* [2002] 1 WLR 2237 is an example where a conviction was quashed due to impermissible commentary by the prosecutor.

Credit

10. Care must also be taken when cross-examining on credit. Credibility evidence is generally not admissible[1] but exceptions for cross examination are provided in sections 103 and 104 of the *Evidence Act*. Cross examination as to credibility will only be permitted if the evidence *could substantially affect the assessment of the credibility of the witness.*[2] Further

[1] S.102 *Evidence Act* 2001 (Tas)
[2] S.103 (1)

restrictions apply in criminal cases and only where the defendant has placed credit in issue.

11. Care needs to be taken to not stray into questions regarding credit unnecessarily. Cross examining on credit is always confrontational and aggressive. It is only human nature for witness to go to great lengths to uphold and protect their reputation and credit, particularly in the high pressure environment of a witness box.

12. If it has to be done, questions as to credit should be left until last. This provides an opportunity to get factual concessions from the witness before the guns are drawn and any rapport with the witness is destroyed.

Duty to Challenge-*Browne v Dunn*[3]

13. The rule has been expressed in many ways but the basic premise provides that an allegation made against a witness must be put to that witness so they can be afforded an opportunity to respond that allegation while they are giving evidence.

14. The central issue in *Browne v Dunn* itself involved a document drafted by a solicitor. It was alleged the document was a sham and created 'without any honest or legitimate object, for the purpose of annoyance and injury to Mr Browne.' This allegation was not put to any of the witnesses involved while they gave their evidence.

15. The rule in its modern form is a need not apply to every point. If it is obvious through documents that the position of the witness is challenged, that need not be put to the witness.[4] The modern approach of judges is not to permit such time consuming questioning anyway. This would depend on the seriousness and significance of the allegation. If it is central to the case, it must be put to the witness during cross.

Special Witnesses

16. The cross examiner needs to be aware of the provisions that are designed to protect particular classes of witnesses. In Tasmania, these provisions are contained in the *Evidence (Children and Special Witnesses) Act 2001*. These provisions should be perused by any counsel with carriage of a matter to which the provisions may apply.

---

[3] *Browne v Dunn* (1893) 6 R 67

[4] *Mackenzie v Albany Finance Ltd* [2003] WASC 100- where an allegation was not put during cross examination but there was no unfairness as the witness was squarely put on notice through witness statements.

Would you should do

17. Effective cross examination is about control. The cross examiner has a distinct advantage in maintaining control in that they determine what questions are asked. To maintain control, it is essential the cross examiner doesn't ask a question they don't know the answer to and each question must be asked in a way where the answer must be either yes or no.

18. Much has been written elsewhere about what tone and manner cross examiner should adopt. Perhaps the only guidance could be given on this topic is that different witnesses on scenarios may call on different approaches. The challenge is to apply the right one to the right situation. Nevertheless, most experts who have written on cross-examination technique tend to agree that a polite and friendly approach is more effective than an aggressive and confrontational one. The most effective advocate will make his/her point through the question and not through his/her tone or attitude. Being conscious of the sensibility of the trier of fact requires sensitivity nor brutality.

19. Advocates of a non-confrontational approach[5] suggest it is easier to gain concessions from witnesses once a rapport is built. Not sensing a direct threat, witnesses tend have a higher willingness to agree with propositions put to them. An ideal cross examination is on that is so subtle that the witness does not even appreciate the damage that is being done to their case.

Expert witnesses

20. Cross examining expert witnesses is one of the most difficult tasks for a counsel. The expert witness is one of the very few witnesses that knows more about the subject matter than the cross examiner. Like police officers, most expert witnesses have a lot of court experience and enjoy the intellectual gamesmanship that occurs when being crossed by opposing counsel. They are also well prepared for the encounter.

21. It is rare for a case to be won after a successful cross of an expert but there are significant risks of losing the case if the expert is not controlled and permitted to elaborate at will on their opinions and the basis for coming to that opinion.

---

[5] See *The Art of Gentle Persuasion* by Chester Porter QC

22. It is also important to bear in mind that the expert is providing opinion evidence for the benefit of the court. Their role and independence should be respected during cross examination.

23. There are 3 ways to challenge the opinion of an expert:

- Challenge experience and credentials
- Challenge opinion
- Challenge assumptions upon which the opinions are based.

24. The most difficult of these is to directly challenge the expert's opinion. There are two reasons. The first is that the expert is likely to know much more about the subject matter than you.

25. To take on an expert in such a way would require a very intimate knowledge of the subject matter. This line of cross should only be attempted when you are confident you are sufficiently across the subject matter and you know the expert is wrong.

26. Second, an expert will vigorously defend the accuracy of their opinion. For them it is a matter of professional reputation and pride. When faced with cross examination directly challenging the accuracy of their opinion and therefore their competency, an expert is going to fight back. Such adversarial jousting should be avoided unless you are certain of your facts and can deliver a swift blow.

27. Similarly, attacks on an experts' experience and credentials are unlikely to draw fruit for the same reason as above. One possible exception is where the expert agrees that there may be more suitable and/or better qualified people to give the opinion. In these circumstances, the expert may agree with you and concede they were perhaps not the most appropriate choice to provide the opinion expressed.

28. The end goal must be kept in mind when you decide to cross examine an expert. This expert has obviously expressed an opinion that is adverse to your client's interests. Your aim is to either have reduce the persuasiveness of that opinion and have the court favour the evidence supporting your client. This can be done without directly taking on the findings and opinion.

29. Most success in cross examining an expert is where you draw a division between the expert and their instructions. An expert is more likely to concede that their opinion is wrong because the instructions or the assumptions they were asked to make were wrong. The expert is much more likely to throw the solicitor's instructions and assumptions under the bus than their own findings.

J A F Twigg

Dan Coombes

25 February 2016