Cross examination

These random jottings, vaguely connected with cross-examination, are not designed for academic analysis, or for publication in any learned journal. They will do nothing for the edification of prudent students of jurisprudence, or the estimable examiners of the elegance of equity. What you'll get, (if you stay the distance), is a series of barely connected episodes leading to a few debatable, if not positively dubious, conclusions.

Insofar as we examine cross-examination, we must first recognise the vast and expanding gap between appearance and reality. This is brought about by the modern entertainment industry. It is highly doubtful that television, the cinema or the stage could exist without doctors, detectives and lawyers, and without the breathless excitement of an emergency operation, the final unmasking of the villain by superb deduction, or a triumphant acquittal secured by the brilliant cross-examination of the famous, - famous, that is, in TV Land. I am only surprised that a profession as ingenious as ours has not found some way of getting a piece of the action, say a percentage of the take from producers who so extensively invest in court dramas.

But the result is that the man in the Clapham omnibus, or, as we should now say, the passenger in the El Cheapo Airlines, thinks of cross-examination as a constantly exciting, battle between brilliant counsel and perjured witnesses, followed by an inspired address which has a crowded courtroom exploding in applause.

Why is the courtroom always crowded in these cases? How many times have you appeared in a crowded courtroom?

And do American lawyers really stroll around the courtroom floor, pausing, now and then, to lean over the jury box and have a quick revivalist meeting before leaping into the face of a witness and thrusting some document at him demanding an immediate admission that the document proves the witness is a cheat and a liar.

The nearest I have seen this sort of behaviour in Australia was when learned counsel addressed the court while walking up and down behind the Bar table until the judge, requiring some elucidation of a particular submission said, helpfully, "I think you were on the starboard tack when you first mentioned it".

But we can't very well blame TV shows because they give an erroneous impression of normal court procedures. They are in the entertainment industry and have to jam a lot of action into a half- hour series. And, ever since Portia slipped a few smart, sharp points of statutory interpretation into Shylock we have all loved a good trial scene. The problem is that your TV-watching client is going to be very disappointed in you when you appear for him in court. Where is the bellowing bullying or the suave sarcasm or the hidden bombshell he has been led to expect? The irony is that you will be doing your job properly and

effectively, without recourse to procedures which will do you more harm than good. Cross-examination cannot always be exciting or dramatic. It usually necessitates a series of questions, none of which, individually, will sound very drastic, but which, in culmination, will strengthen and confirm the case. And it is possible that, in the process, the TV veil might drop from your client's eyes and he will appreciate what you have done. But don't bet on it.

But let us go back to the earliest recorded cross-examination, which, no doubt, comes from God's questioning Cain about Abel's whereabouts, to receive the non-responsive answer, "Am I my brother's keeper?" God is being totally unfair, since He is all-knowing and can therefore easily apply the rule that you don't ask a question in cross-examination unless you know the answer.

As to that rule, (you see how I am wandering all over the place, and will continue to do so), that excellent counsel Jeff Sher QC had this to say: -

"It's a good rule but can't always be followed";

and he gives a practical example: -

"With Judge alone there is not much justification for the rule because, if counsel doesn't ask the question, the judge probably will, and it is better to be in control."

Jeff comments further: -

"I have a number of my own rules, one of which was

'When in doubt do nothing':, so I suppose this is a variation of the rule."

Despite that sound advice, the first successful recorded non-divine cross-examination was a calculated risk. It appears in the Apocrypha in the story of "Susanna and the Elders". Two old men, whom I regret to say, in the authorised translation, are described as "judges", entertained lascivious thoughts about Susanna, a virtuous married lady. When she refused their advances they concocted a story that they had witnessed her disporting with a young man, not her husband. On these allegations she was condemned to death. Enter Daniel, (he of the lion's den) who protests that she has not had a proper trial. He insists that the witnesses be separated, and then asks each of them separately,

"Under what tree sawest thou them accompanying

together?"

When they each name a different tree, Daniel denounces them as liars and saves Susanna. It may have been a case of arboreal ignorance, but it worked.

Early English legal history does not seem to furnish much scope for cross-examination, because the verdict was decided by God, that is, you put the accused to the ordeal, and his failure or success meant that God had spoken, and he was dealt with accordingly. One suspects that even in those days, if, for example, the accused had to put his hand into boiling water, it might have been just lukewarm if he had friends at court.

And we all know the infallible test for a witch. Throw her into the water, and if she floats, then obviously the Devil is holding her up, so take her out and

burn her. If she sinks and drowns, she is triumphantly innocent, which is no doubt a great comfort to her.

Cross-examination really got going some centuries later, and it must be remembered that, until about the mid-twentieth century most civil cases as well as criminal cases were tried by juries. This led to the heyday of the great jury advocates who could appeal to the jury if the judge seemed against them, or even, sometimes when he didn't. Thus Purves QC of the Victorian bar was quoted as saying to his junior: -

"This case isn't going too well. I must have a row with the judge."

Juries were less sophisticated, and obviously enjoyed counsel who could put on a good theatrical and passionate display, particularly in ruthless cross-examination. That wonderful book "Forensic Fables" gives an example of such a counsel who, though fictitious, was obviously modelled on one of this tribe.

"(He) usually began by asking the Witness a Few Simple and Direct Questions – whether he was not a 'Dirty Dog' or a 'Swindling Scoundrel' or Something of that Sort – and then he Took the Witness through the details of his Discreditable Past. Company Promoters and Money Lenders Shook in their Shoes when the Fierce Advocate Got Going and Experienced Leading Ladies Tottered in a Fainting Condition from the Box. Only the Most Courageous of the judges Ventured to Criticise his Methods for it was Well Known that the Fierce Advocate enjoyed a Breeze with the Bench."

Mention of the Bench leads me to examine a special type of cross-examination, that is, judicial cross-examination.

This stems from a well-known phenomenon. Careful, and obviously authentic scientific studies by many respected members of the Bar have proved that it takes approximately six weeks to two months for a newly appointed judge to come to the firm conclusion that the last of the great cross-examiners vanished from the Bar on his appointment. His Honour, therefore, albeit reluctantly, but out of a proper sense of his duty to the profession feels it incumbent on him to demonstrate how it should be done. Unfortunately what he is demonstrating is partiality, or the appearance of partiality. This may also lead him into unchartered waters, when even the counsel on whose side the questions seem to be running rises up with the anguished plea, "I don't mind Your Honour taking over my case, but please don't lose it for me."

The temptation is particularly strong in a judge who comes to the bench with a well-deserved reputation for advocacy. The urge to leap into the fray will be very strong, but must be resisted for the simple reason that the art of advocacy and the art of judging are two very different things, and to practice one is to exclude the other.

Most judges, of course, clearly understand this and (usually) resist the temptation. But we can all cite cases where a Court of Appeal has felt it

necessary to reprove an over-enthusiastic judge. Nothing could be more politely said than by Denning LJ (as he then was) in delivering the unanimous judgement of the Court of Appeal in Jones v National Coal Board: -

"It appears to us that the interventions by the learned judge ... went far beyond what was required to enable the judge to follow the witness' evidence."

I am not alone in reading into that comment something more than the polite rebuke it seems to be.

In one case, however, judicial intervention stopped the case by swift cross-examination, that is, if you can call one question cross-examination. The judge was judge Mitchell of the Victorian County Court, (a somewhat unorthodox judge) and the accused was represented by Harry O'Halloran, whose early death deprived the Bar of a first class advocate. Harry had just called his client and had asked a few preliminary questions when the judge, fixing the accused with an eagle eye, said

"Look, you did this job didn't you?"

The accused gulped and said, "Yes".

The judge turned to Harry: -

"Well, Mr. O'Halloran?"

I have always admired Harry's reaction. He rose to his feet, lifted up his brief and dropped it heavily on the Bar table. He turned to the accused and said: -

"Witness, would you please tell his honour, and the learned Crown Prosecutor and the members of the jury AND ME, what our defence is NOW?"

Of course the judge should not have asked the question, but, as I have mentioned, Judge Mitchell was a somewhat unorthodox judge. But I understood from Harry that the sentence was extremely lenient, due, no doubt, to the circumstances.

A somewhat different example of judicial cross-examination is the case of a judge who retires and returns as counsel. Most do this successfully and revert to their earlier forensic skills. But an exception would be that of Justice Jackson, formerly of the Supreme Court of the United States who acted as counsel in the Nuremberg trials and had the task of cross-examining Goering. He committed the cardinal error of losing control of his witness. Goering was a clever man and was able to enlarge his answers to lecture the court on the virtues of the Nazi Party. Jackson seemed to be unable to stop him and the extent of his frustration and confusion is shown by one of his questions which is worth quoting as a rather spectacular example of how not to cross-examine.

(Question) "Now, when the leadership principle supported and adopted by you in Germany because you believed that no people are capable of self-government, or that you believed that some may be, but not the German people; or, for that matter, whether some of us are capable of using our own system, but it should not be used in Germany?"

It would be difficult enough to translate that question into basic English, and one does not know quite how the court interpreter managed to get it into German, but Goering, not surprisingly, said he did not understand it.

That great advocate and, later, Chief Justice of Victoria, John Phillips, comments,

"In the realm of cross-examination Jackson was, to put it bluntly, decidedly out of practice."

It was left to the English advocate, Sir David Maxwell-Fyfe QC, who followed Jackson, to pin the witness down and leave Goering looking decidedly uncomfortable. It is worth reading the transcript of the trial at this point to see fairly clearly the difference between two examples of cross-examination, one ineffective, and the other highly competent.

I turn now to the category of what might be called non-cross-examination, though it still comes within the general subject because its scope varies from sensible abstinence to forensic suicide.

The accepted rule, if a witness, called by the other side, says nothing contrary to the case, is to leave well alone. I mention, however, two minor exceptions.

In a case where Sir Patrick Hastings KC was counsel, the other side called a young lady as a witness, whose evidence was obviously quite irrelevant. Nevertheless Sir Patrick asked a few questions: -

(Sir P) "You come from Llanelli?"

(Witness) "Yes sir."

(Sir P) "I suppose you like Llanelli and are happy there?"

(Witness) "Yes sir."

(Sir P) "It is a very long way from Llanelli to here is it not?"

(Witness) "Yes sir, it is"

(Sir P) "And I imagine you are very anxious to get back there, are you not?"

(Witness) "Yes I am"

Sir Patrick slowly resumed his place, and, with a wave of his hand, said, "Well you run along then".

Now this may not have much effect on a judge, but, with a jury, as there was here, it may well have led them to conclude that their time was being wasted by one side making nice girls travel a long way to give irrelevant evidence.

The other exception may be even rarer but I am informed by an unimpeachable source that it has occurred on at least one occasion.

A well-known Silk was in a case where the other side called a witness who clearly posed no threat. His junior was therefore rather surprised when his leader rose to cross-examine. He just had time to whisper to him, "Why are you asking questions? He's not hurting us". His learned leader replied, "Yeah, I know, but I've got a sore bum." He asked some innocuous questions and sat down.

The alternative to asking no questions is the damage caused by asking too many. Dickens, who knew the courts well, gives an example in the celebrated trail of Bardell v Pickwick which was obviously based on his observations of inexperienced counsel falling into the trap of asking one question too many with disastrous results.

One recorded example of counsel doing just this is worth mentioning because of the counsel involved. He was asked to defend a lady who was charged with being a pickpocket and on whose person a purse was found belonging to someone else. The lady asserted that some villain must have planted it on her. She also told her counsel that she had a hymn book in her pocket.

Counsel neglected to ask her the obvious question of what else she may have had in her pocket, and when the constable gave evidence that he had found the purse in the lady's pocket, counsel thought he might get her some credit if the presence of the hymn book was revealed. Note that the constable had said nothing else about the contents of the pocket, so counsel was asking a question to which he did not know the answer, and he paid the price.

(Counsel) "You say you found the purse in the pocket, my man?"
(Constable) "Yes sir".
(Counsel) Did you find anything else?"
(Constable) "Yes sir"
(Counsel) "What?"
(Constable) "Two other purses, a watch with the bow broken, three handkerchiefs, two silver pencil cases and a hymn book."

The lady managed to throw a boot at her barrister before she departed for an eighteen month stay at Her Majesty's expense.
But this little incident did all of us a great deal of good, for the barrister was W.S. Gilbert, who, after spending four years at the Bar, and making a grand total of 75 pounds, decided he was not cut out for a barrister's life and went off to write the librettos of the Gilbert and Sullivan Operas; for which we must be forever grateful.

There are many legal anecdotes connected with cross-examination, but I don't propose to tell them, because, (a), you know them all and, (b), I am not convinced of their veracity. Too many of them bear the marks of that brilliant thing you <u>should</u> have said, but only thought of two hours later. Elderly barristers, not on oath, are prone to embellish tales of their own particular brilliance at repartee; or, if modesty or conscience gets in the way, they can always attribute it to some well-known advocate who, quite possibly, <u>could</u> have said it. No doubt many of you have heard stories, previously fastened on some prominent figure in the distant past, now moved up a generation or two to keep it more contemporary. One may become over-cynical, but, to take one example, the story of the barrister who says to the witness, "Drink a bit don't you?", and the witness replies "That's my business", to which the next question is, "Have you any other business?". This sounds too good to be true and I have found it fathered on various prominent figures, including Carson and Birkett.

Another interesting example is the very popular story of the judge who says to counsel, "I have heard your argument and I am no wiser"; to which the barrister replies, "No wiser, My Lord, but certainly better informed.". This is usually told as taking place in an English court and is usually, but not always attributed to F.E. Smith, and is certainly in character with his personality. But I have found exactly the same story in the reminiscences of Wilfred Blacket KC of the N.S.W. Bar. His book was published in 1927 and Blacket is very precise, and he specifically names the venue as Melbourne, the judge as Griffith CJ of the High Court and the Counsel as Coldham of the Victorian Bar. This sounds convincing enough to make us wonder whether the jealous Poms have plagiarised a good Aussie story.

But, really, uncertainty of origin of these stories does not matter. They are true to the spirit, and part of the heritage of the law passed on to us by generations before us and which we hold in trust to pass on to further generations.

There are, of course many authentic and brilliant cross-examinations preserved for us in those cases where transcripts are available. You will all have your favourites, and time and space prevents me from making more than a passing reference to two of the more famous.

Perhaps the best example of a short, sharp and deadly cross-examination of an alleged expert is to be found in the questions put by Birkett KC, to a witness whose technical evidence would have saved the accused if it had been accepted. Birkett started off with the dramatic question, "What is the coefficient of expansion of brass?", and, when the witness could not answer, proceeded to demolish thoroughly his qualifications and his theory. It is worth reading as a classic text.

The second example is the celebrated case of Oscar Wilde who sued the Marquess of Queensberry for criminal libel. The cross-examination by Edward Carson of Wilde is considered something of a classic, but it must be conceded that Wilde scored off Carson on several occasions. When Carson read out a passage of what he suggested was an immoral letter and asked Wilde if he considered it "beautiful", Wilde's reply was, "Not as you read it, Mr, Carson. You read it very badly." When questioned about a young man who sold newspapers, Wilde's retort was, "It is the first I have heard of his connection with literature.".

But these little victories assisted Wilde very little. Carson had the upper hand because he had a number of young men waiting to be called to give evidence that they had sexual relations with Wilde. So all Carson really had to do was what any competent junior could have done, that is, put those facts to Wilde and ask for his comment. This was duly done, Oscar denied any wrongdoing, Carson opened the case for the defence by telling the jury what these witnesses

would say and Oscar, on counsel's advice, conceded defeat; and you know of his subsequent trials and imprisonment.

Cross-examination may not be as dramatic these days, but this, in its way, makes it more difficult because cases are generally more technical and complicated. The duel, particularly between competent counsel and competent expert witnesses remains compelling to those who understand the proceedings. It is therefore disconcerting to all of us to find a spoilsport witness who will admit everything.

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