



CROSS-EXAMINATION – A SCIENCE NOT AN ART

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In 1904, Francis Wellman published what is regarded as the seminal work on cross-examination, entitled *The Art of Cross-Examination*.

During your careers, you will see very few brilliant cross-examinations but you will experience many ineffective ones. You will, I suggest, come to accept, as I have, that cross-examination is a science and not an art.

Wellman himself had cross-examined some 15,000 witnesses over 25 years when he styled his book *The Art of Cross-Examination*. He may not have appreciated that his thoughtful and surgical approach to the subject was drawn from that very experience. This is really my point, that cross-examination is less an art gifted only to some individuals, than a skill that can be acquired by anyone and used effectively through careful planning and preparation.

It is useful at the outset to keep in mind the reason why we cross-examine witnesses. The object is either, or both, of the following:

1. to obtain from the other side's witnesses admissions favorable to your own client's case;
2. to discredit the evidence of the other side's witnesses.

I have said that Wellman's seminal work on cross-examination is well over 100 years old, but it is still available and it still bears reading if you can get your hands on a copy.

Wellman is also drawn upon quite heavily by Gary Foster in his chapter on cross-examination in *The Advocacy Book*, which was published several years ago by the College of Law in NSW and which I think can still be obtained.

I acknowledge reliance on both Wellman and Foster's work in preparing this paper. Foster for his part draws on the great Irving Younger, whose *Ten Commandments of Cross-Examination*

are replicated in the chapter in the *Advocacy Book*.

In fact it is perhaps to Younger that we can trace the modern dissemination and development of Wellman's philosophy.

Wellman divides the subject of cross-examination into the manner of cross-examination, and the matter of cross-examination. Foster uses the same nomenclature.

Before I turn to Wellman's observations about the manner of cross-examination, I repeat what I said a moment ago.

You will, in your career, see very few brilliant cross-examinations, but you will see many which are indifferent or ineffective at best and, at worst, downright damaging to the cross-examiner's own case.

The lesson to be drawn from this is that the very first question that needs to be asked, in every case, at the end of every witness's evidence-in-chief, is whether you should cross-examine him or her at all.

As to that, Wellman has this to say:

"In discussing the methods to employ when cross-examining a witness, let us imagine ourselves at work in the trial of a cause, and at the close of the direct examination of a witness called by our adversary. The first inquiry would naturally be, has the witness testified to anything that is material against us? Has his testimony injured our side of the case? Has he made an impression with the jury against us? Is it necessary for us to cross-examine him at all?"

On the subject of the manner of cross-examination, at a high level of abstraction, Wellman has this to say:

"The counsel who has a pleasant personality; who speaks with apparent frankness; who appears to be an earnest searcher after truth; who is courteous to those who testify against him; who avoids delaying constantly the progress of the trial by innumerable objections and exceptions to perhaps incompetent but harmless evidence; who seems

to know what he is about and sits down when he has accomplished it, exhibiting a spirit of fair play on all occasions – he it is who creates an atmosphere in favour of the side which he represents.

On the other hand, the lawyer who wearies the court and the jury with endless and pointless cross-examinations; who is constantly losing his temper and showing his teeth to the witnesses; who wears a sour, anxious expression; who possesses a monotonous, rasping, penetrating voice; who presents a slovenly, unkempt personal appearance; who is prone to take unfair advantage of witness or counsel, and seems determined to win at all hazards – soon prejudices a jury against himself and the client he represents."

More specifically as to the manner of cross-examination, one can distil from Wellman's observations a number of propositions which in fact form the basis of Younger's Ten Commandments. They are:

1. You should be brief and succinct. Go in like a surgeon to achieve your purpose and when you have achieved your purpose, sit down.
2. Use short questions and plain words – "car" not "vehicle" – "saw" not "observed" – "go" not "proceed" – "ask" not "inquire". That is to say – be conversational not prosaic. Pretend you are asking questions of a friend at the pub.
3. All your questions in cross-examination should be closed, leading questions. Wherever possible use interrogative statements so that you may better control the witness – "You were in the car when you saw the accused go to ask directions?", for example, where the question mark is in the rising inflection in your voice, not, "Were you in the vehicle on the night in question?", or, "Did you observe the accused proceed across the roadway to inquire about the location?" Worse still, not, "I put it to you that you were in the vehicle".

Don't give the witness room for unnecessary choice of an answer, and don't give the witness a reason to feel that you are unsure about what you are asking.

4. As far as critical questions are concerned, you should ask only those to which, in general terms, you can anticipate the answer. It is silly to say that as an absolute rule you must never ask a question to which you don't know the answer. Just be aware that you don't want to be, and if you have prepared properly you shouldn't be, exploring unknown territory with a witness for the first time in cross-examination.
5. Don't argue with the witness. If he or she gives a stupid or rude answer it will tell against them without you quarrelling about it or challenging it argumentatively. *"How can you possibly say such a thing?"* as well as being unnecessary and irrelevant, may be an indignant question to which you don't want the answer.
6. You must always listen to the witness's answers. Very often, looking at a transcript at the end of a day in court you will see that you did not actually get the answer you thought you had been given. *"Wishful hearing"* comes back to haunt you when it comes time to address. Worse, if you are too busy composing your next question to listen to the answer to your last one, you will lose your way and risk looking very foolish.
7. Don't argue your case through the witness. When cross-examining you are eliciting information or discrediting the witness's evidence. You are not making submissions. Don't say, *"Well don't you agree that if you were 100 metres away you couldn't have seen the accused without your glasses on?"* Limit your questions to, *"How far away were you?"* and *"You were not wearing your glasses?"* Leave your submissions until your closing address.
8. Don't allow the witness to repeat his or her evidence-in-chief. *"Interviewing"* a witness in cross-examination, as noted so colourfully by Wellman, as I will relate in a moment, is only going to allow the witness to reinforce what he or she has already said in evidence-in-chief. The practice of what I call *"interviewing"*, that is, taking a witness moment by moment or line by line through their evidence or through their statement, is the most common, the most ineffective, the most annoying and the most dangerous practice I have seen over the years.
9. Don't let the witness explain an answer. If you have an answer and the witness seeks to embellish it, point out that his or her counsel will clarify any matters in re-examination, but your

question has been answered, thank you. Be polite but firm.

10. Don't ask further questions once you have got the answer that you want. If you do, you merely provide the witness with an opportunity to change his or her mind, or to qualify the answer already given.

As to the matter of cross-examination, Wellman had this to say. The first of his observations picks up on what I call *"interviewing"*:

"What shall be our first mode of attack? Shall we adopt the fatal method of those we see around us daily in the courts, and proceed to take the witness over the same story that he has already given our adversary, in the absurd hope that he is going to change it in the repetition, and not retell it with double effect upon the jury? Or shall we rather avoid carefully his original story, except insofar as is necessary to refer to it in order to point out its weak spots?"

Wellman then identifies some key areas for fruitful cross-examination:

"All through the direct testimony of our imaginary witness, it will be remembered; we were watching his every movement and expression. Did we find an opening for our cross-examination? Did we detect the weak spot in his narrative? If so, let us waste no time, but go direct to the point. It may be that the witness's situation in respect to the parties or the subject-matter of the suit should be disclosed to the jury, as one reason why his testimony has been shaded somewhat in favour of the side on which he testifies. It may be that he has a direct interest in the result of the litigation, or is to receive some indirect benefit therefrom. Or he may have some other tangible motive which he can gently be made to disclose. It

may even be that, if the jury only knew the scanty means the witness has had for obtaining a correct and certain knowledge of the very facts to which he has sworn so glibly, aided by the adroit questioning of the opposing counsel, this in itself would go far toward weakening the effect of his testimony. It may appear, on the other hand that the witness had the best possible opportunity to observe the facts he speaks of, but had not the intelligence to observe these facts correctly."

When you analyse what Wellman is saying there you can break his comments down into a check list for cross-examination divided under the two key areas he has identified, namely, competence and credibility. The checklist, as Foster points out, in summary, would be as follows:

Competence

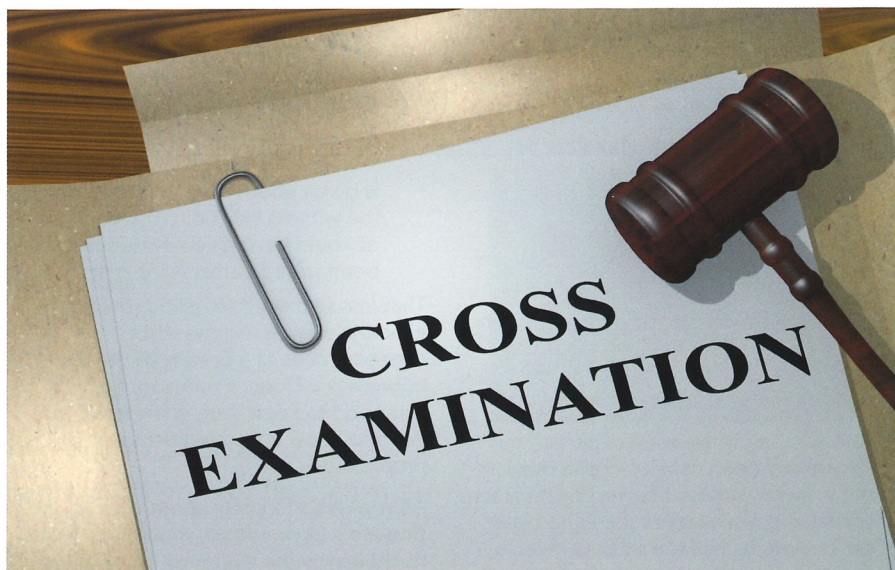
- Lack of perception – capacity to perceive – opportunity to perceive – quality of recall of the perception.
- Lack of accurate recall.
- Lack of narrative ability.

Credibility

- Bias, interest, prejudice.
- Prior convictions.
- Moral character, disposition and mental condition.
- Previous inconsistent statements.

Lack of perception involves questions going to the capacity of the witness to observe the matters in respect of which he or she has given evidence. That is to say, whether there is anything about the five senses used to perceive those matters upon which the witness can be impeached.

This rubric also includes a lack of



opportunity for the witness to perceive properly that which he or she has given evidence about and would involve questions related to aspects such as position, visibility, time, date, day, distance, speed and so on.

Thirdly, under this heading there is the question of the quality of the witnesses' recall. How clear is the recollection, is there any reason to recall well, etc?

Lack of accurate recall involves not so much the quality of the recall but objective considerations which reflect on accuracy, such as how long ago it was, whether the witness is relying solely on memory, or has notes or diagrams or photographs.

Lack of narrative ability is whether the witness is giving his or her own evidence, or has been coached or has rehearsed his or her evidence, or is relying on a statement largely prepared by someone else. You might even see the witness consulting his or her statement in the witness box.

After competence, credibility is the second key area in which a witness might be impeached.

There are two important rules to be remembered in this area.

The first is that s41 of the *Evidence Act 2001* prevents counsel from asking improper questions, which include questions which are unduly annoying, harassing, intimidating or offensive.

The second is that counsel is bound by an answer given by a witness in cross-examination in respect of credit and must take the answer for better or for worse. Credit is a collateral issue and the answer cannot be contradicted by other evidence.

There are some exceptions to that general rule as to the finality of answers to questions on collateral issues, however. That rule, as concerns credit, does not apply where:

- the witness can be shown to be biased, self-interested or prejudiced;
- the witness has been convicted of a crime;
- the witness's moral character or physical condition is such that it is unlikely that the evidence given is true;
- the witness has previously made an inconsistent statement.

You can in fact use these four exceptions to the collateral issue rule (as Foster points out), as a check list for cross-examining a witness as to credibility.

That is to say, is the witness partial, has the witness been convicted of a relevant crime, is the witness affected by disgrace or disability which gives the lie to his or her version, or, has the witness given a contrary answer on an earlier occasion?

You should also of course remember not to put character in issue in a criminal trial unless you mean to!

Be aware too, that there are provisions, other than s 41, in Division 5 of Part 1 of the *Evidence Act 2001* that deal with specific aspects of cross-examination.

Briefly they are:

- A party cannot cross-examine a witness who has been called in error by another party and who has not been questioned about a relevant matter (s40).
- Misleading questions may not be asked (s41).
- Leading questions may be used in cross-examination unless the court directs otherwise, for example on the basis that the witness is completely sympathetic to the cross-examiner's cause and unfavorable to the party calling the witness (s42).
- Prior inconsistent statements can be cross-examined upon whether or not complete particulars of the statement have been given to the witness, so long as the witness is informed of enough of the circumstances of the making of the statement to enable its identification (s43).
- A cross-examiner must not question a witness about a previous representation made by another person unless the representation of that other person has been admitted into evidence, or the court is satisfied it will be admitted. But a witness may be cross-examined about a document, asked not to identify or disclose its contents and asked if he or she nonetheless stands by his or her evidence. The document so used may be marked for identification (s44).
- If you cross-examine on the contents of a document dealing with a prior inconsistent statement or a previous representation by another person, you may be required to produce it and it may go into evidence unless you have merely shown it to the witness (s45).
- Any witness may be recalled with the leave of the court if later evidence is given about a matter upon which the witness was not cross-examined or could have given evidence had it been raised earlier (s46).

That last section, s 46, also provides a means of avoiding the strict consequences of a breach of the rule in *Browne v Dunn*, a rule about which you need to know, but, in my view, you need to know only the most basic of propositions.

All you need to know about the rule in *Browne v Dunn* is that, should you wish to challenge the evidence of a witness on any material aspect, by calling other

evidence or by making submissions, you must ensure that your contrary allegation is put to that witness while he or she is in the witness box.

If you fail at that time to take issue with a witness on a point which is important to your case, you may be prevented from later making submissions about it or calling other evidence. At the very least the witness may be recalled on your opponent's application under s 46.

In *Browne v Dunn* (1894) 6 R.67 (H.L.) Lord Herschell said, at 70-71;

"... it seems to me to be absolutely essential to the proper conduct of the cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit ... My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him, and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses... Of course I do not deny for a moment that there are cases in which [notice of intention to impeach credibility] has so distinctly and unmistakably been given, and the point on which he is being impeached, and is to be impeached, is so manifest that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do not to impeach the credibility of a witness upon which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story has not been accepted."

The many cases and articles that have discussed the rule in *Browne v Dunn*, or what is often called counsel's "puttage" obligation, do nothing more than elaborately reframe and restate what Lord Herschell said in his speech to the House of Lords in that passage.

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