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The Art of Advocacy – Cross Examination

A panel discussion with: Justice Winteringham, Bill Smart, Q.C. and Richard Peck, Q.C.

Outline

1. Introduction
2. Having a workable theory of your case
3. Preparing your cross-examination
4. Legal principles
5. Conducting the cross-examination
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7. Questions with unknown answers
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Introductory comments

The importance of professionalism.

Cross-examination, perhaps the most difficult art of the advocate to master.

Having a workable theory of your case

When you walk into a courtroom you ought to have a theory of your case, you ought to have an idea of the closing argument, you ought to have a clear idea of what to get out of each witness in order to get the building blocks for your final argument and you ought to have the confidence that comes from a level of preparation that will put [the case] in your head and keep it there. Justice Ian Binnie - Focus: The Key to Winning Cases, The Lawyers Weekly July 31, 2000.

A helpful discussion on developing your theory of the case is found in a piece written by Austin Cooper, Q.C., Susan Nelles: the Defence of Innocence, Counsel for the Defence: The Bernard Cohn Memorial Lectures in Criminal Law.

Preparing Your Cross-Examination – Preparation is key

"The separation is in the preparation": Russell Wilson – Quarterback, Seattle Seahawks

The core of cross-examination is to assist in developing the workable theory by getting out facts that support it or diminishing a witness's testimony that harms it.

Preparing Your Cross-Examination – What is your purpose?

Assessing the value of the witness to the case.

What is your purpose and how do you intend to accomplish it?

Preparing Your Cross-Examination – Identifying the Basis for Challenging the Testimony of the Witness

Use the Credibility Factors that Judges Use to Guide Your Preparation:

Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately: (i) observe; (ii) recall; and (iii) recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: R. v. Morrissey (1995), 22 O.R. (3d) 514, at 526 (C.A.).

R. v. H.C., 2009 ONCA 56 at para. 41 (Justice Watt)

Preparing Your Cross-Examination – Identifying the Basis for Challenging the Testimony of the Witness

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (Raymond v. Bosanquet (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (Wallace v. Davis (1926), 31 O.W.N. 202 (Ont. H.C.); Faryna v. Chorny (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) [Faryna]; R. v. S. (R.D.), [1997] 3 S.C.R. 484 (S.C.C.) at para. 128). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Faryna at para. 356).

Bradshaw v. Stenner, 2010 BCSC 1398 at para.186, aff'd 2012 BCCA 296

Preparing Your Cross-Examination – Factors to Focus On

i. Consistency—internal and external.

ii. Probability.

iii. Powers of observation –Physical (eg. eyesight, hearing, etc.) and

iv. Environment (line of sight, lighting, etc.).

v. Bias.

vi. Character.

vii. Demeanour.

Some Applicable Legal Principles – The Rule in *Browne v. Dunn*

The rule in Browne v. Dunn (1893), 1893 CanLII 65 (FOREP), 6 R. 67 (H.L.), requires a party who intends to impeach a witness to provide the witness with an opportunity to explain or address the point on which their evidence is to be challenged later in the trial. The rule is referred to more generally as "the confrontation principle". It is rooted in fairness. Its object is to prevent the "ambush" of a witness on an essential matter. The rule does not "require counsel to ask contradicting questions about straightforward matters of fact on which the witness has already given evidence that he or she is very unlikely to change": R. v. Khuc, 2000 BCCA 20 (CanLII) at para. 44. Nor does it compel counsel to cross-examine on insignificant details: R. v. Verney (1993), 87 C.C.C. (3d) 363 at 376 (Ont. C.A.).

When the rule is breached, the judge may remedy the deficiency by permitting the unchallenged witness to be recalled, or by instructing the jury as to the manner in which it should approach the evidence in issue: R. v. Werkman, 2007 ABCA 130 (CanLII) at paras. 9-11; R. v. Paris (2000), 2000 CanLII 17031 (ONCA), 150 C.C.C. (3d) 162 at para. 22 (Ont. C.A.)

R v. Podolski, 2018 BCCA 96 at paras. 145 - 146

Some Applicable Legal Principles – Professionalism and Fairness

The right of cross-examination must therefore be jealously protected and broadly construed. But it must not be abused. Counsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value.

R. v. Lyttle, [2004] 1 S.C.R. 193 at para. 44

Some Applicable Legal Principles – Good Faith Basis for Cross-Examination

... a question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question.

In this context, a "good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used. Information falling short of admissible evidence may be put to the witness. In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.

R. v. Lyttle, [2004] 1 S.C.R. 193 at paras. 47 – 48

Some Applicable Legal Principles – Cross-Examination of Non-Accused Witness on Discreditable Conduct

A non-accused witness may be cross-examined on discreditable conduct, irrespective of whether that conduct amounts to an offence or has resulted in a conviction. By this cross-examination, counsel endeavours to evidence the character of the witness, which, in its turn, is a relevant factor for the trier of fact to consider in assessing the credibility of the witness and the reliability of his or her testimony: R. v. Bradbury (1973), 14 C.C.C. (2d) 139 (Ont. C.A.), at pp. 141-142.

Two further points arise from the nature of the issue to which cross-examination on the facts underlying outstanding charges relate. Although these facts may have some relevance to the credibility of the witness, greater or lesser depending on the circumstances of each case, they are generally irrelevant to any other issue at trial. As a result, a trial judge has the discretion to curtail cross-examination so that it remains within reasonable limits and does not become more distracting than informative.

R. v. Johns, 2017 ONCA 622 paras. 55 and 60 per Watt J.A.

Use of Statements – *R. v. Fliss*, 2002 SCC 16

[43] There is no doubt that the jury was entitled to hear from the undercover police officer about his conversation with the appellant on January 29, 1997. The officer had at the time a present recollection of the "gist" of all of the important elements of the conversation.

[44] As the officer pointed out, rather convincingly:

> Well, it's not every day that someone comes to you in a hotel room and sits down and has a one-on-one conversation with you explaining how they killed someone, disposed of their bike in the bush, hit them with a crowbar while they were still alive, drove down a road with the deceased in the truck, dragged her into the bush, took her spandex shorts off to make it look as though it might be a rape, purposely throw those spandex shorts across the road behind some logs and then go home. It's not every day someone will sit down and tell you that.

Use of Statements – *R. v. Fliss*, 2002 SCC 16

[45] There is also no doubt that the officer was entitled to refresh his memory by any means that would rekindle his recollection, whether or not the stimulus itself constituted admissible evidence. This is because it is his recollection, not the stimulus, that becomes evidence. The stimulus may be hearsay, it may itself be largely inaccurate, it may be nothing more than the sight of someone who had been present or hearing some music that had played in the background. If the recollection here had been stimulated by hearing a tape of his conversation with the accused, even if the tape was made without valid authorization, the officer's recollection – not the tape – would be admissible.

[46] The problem in this case is that what was given in evidence went beyond what the officer could recall – aided or not – either at the time of trial or at the time he proofread the transcript on January 30, 1997. The *Charter* problem arises with respect to those parts of the testimony that the officer could not recall *either* at trial *or* during the earlier "proofreading" exercise he undertook on January 30, 1997, but which he was nevertheless permitted to read into the record verbatim from the excluded transcript. The result was to allow the prosecution to put into evidence indirectly what the exclusion order forbade it from doing directly.

Conducting the Cross-Examination

Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.

R. v. Lyttle para. 1

Conducting the Cross-Examination

a) Listen and observe

b) Your questions must be fair, accurately state the evidence, and be clear.

c) Adjust your manner according to the witness
   - One style or approach does not fit all.

d) Persistence

e) Keep an eye on the Judge
   - Notetaking pause to let judge to catch up

f) Don’t lose a good answer by repeating the question

g) Control and confidence
   - Always present to the witness that you are in control.
   - Be stoic in the face of a bad answer and move on.

h) Do not cross examine if you don’t need to

i) Asking a question when you do not know the answer

Expert Witnesses

a) Preparing for cross-examination of highly qualified expert;

b) Confronting expert with their previous writings;

c) Use of own expert to inform cross-examination.

Dealing with Objections and Interventions