

PRINCIPLES OF CROSS-EXAMINATION IN CRIMINAL CASES

by

ROBERT SMITH, Q.C.

One of England's greatest advocates once said:

"The issue of a cause rarely depends upon a speech and is but seldom even affected by it. But there is never a cause contested, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination."

Those words were written more than one hundred and fifty years ago at a time when oratory in public trials was at its height. I suggest that the same applies even today – speeches seldom serve to win or turn a case but cross-examination can certainly do so.

Every person attending this lecture has the ability to become, if they are not already, an outstanding advocate and to excel at cross-examination.

Cross-examination is generally considered to be the most difficult branch of advocacy. It requires careful preparation, patience and self-control, an ability to some extent to read the minds of the witnesses who are giving evidence, to assess them by their appearance and their mannerisms, and most of all an ability to discover the weaknesses in the evidence of the witness who is being cross-examined. Subconsciously all of us ask a number of important questions when we hear the evidence-in-chief from the opposing side:

- Has the witness given evidence that is materially damaging against one's case?
- Are there weaknesses in the witness's evidence which can be exposed by cross examination?
- More important still, has the witness made an impression on the jury in favour of one's opponent?
- Depending on the answer to these questions, which have to be assessed quickly at the time cross-examination will be influenced in its form and construction – e.g. is it necessary to cross-examine the witness at all? Will more damage be done than good by asking unnecessary questions? If the witness has damaged one's client's case, how is this particular witness to be tackled and dealt with?
- Is it desirable, necessary or possible to discredit the testimony of the witness and if this cannot be done directly can it be achieved by discrediting the witness?

Let us begin with an obvious proposition – we are all wasting our time in this day and age in thinking that a witness who has given clear and positive evidence about certain facts will easily be persuaded in cross-examination to change his mind and admit either that he is wrong or has given untruthful evidence. This is the stuff that television drama is made of and is rarely rehearsed or repeated in the court room. It follows that the only way in which an advocate can, by cross-examination, persuade the tribunal of fact, be it district judge or jury, that the witness is wrong or should be discredited is by careful application of the principles of cross-examination.

I hope that what I have to say in the course of the limited time we have available for this lecture – much of it common sense and well-known to

everybody here – will allow us all to remember that cross-examination proceeds by rules and principles – once applied to the issue in the case, all of us can begin to influence the litigation in hand.

Cross-examination is not just an "art" but - like every other aspect of advocacy - a "discipline". It is a discipline which every member of the legal profession should adopt in relation to the presentation of their cases and it involves, primarily, preparation. Only with proper preparation will the presentation follow.

The discipline of preparation and the ability thereby to present your cases effectively will permit you:

1. to have a sense of professional satisfaction;
2. to know that regardless of the result you have executed some real influence on the case as a result of your own input.

This discipline begins when we first open the papers. In the early stages of our careers every line of every page needs to be read, digested, understood and, more important than anything, thought about. Later still, our experience allows us to highlight the important features of the case more quickly.

Many new members of the profession make the mistake of presenting the case as it stands on paper or in the light of instructions without more. In other words, without giving real thought to the issues arising - both legally and factually - to the implications which flow from the legal and factual issues and how best to achieve the result you are asked to achieve.

It follows that new qualified practitioners must remember to think about the case before you get to court. Once you do that, you will find that when you come to cross-examine a witness on the other side you have already prepared

the groundwork for achieving what you wanted to achieve – that is, eliciting answers which assist your case, putting the case for your client and discrediting the testimony of the witness or discrediting the witness himself.

As a result there are some important basic principles which might properly be described as "ground rules".

Important Ground Rules

The first ground rule is that you cannot win a case unless you have a case capable of being won. Let us all just think about this for a moment. We all know the truly hopeless case and the client who insists on a set of instructions which are utterly hopeless. However we all know that if we do not have a case capable of being won, we can nevertheless influence and shape the case into one that by the process of careful cross-examination becomes capable of being improved, if not respectable.

If you do not have a case capable of being won but you nevertheless have instructions to fight the case, you are never going to win but you're going to have to present the case fully and well. In such an instance cross-examination is of the utmost importance. You can genuinely bring to bear a degree of respectability to the case by careful cross-examination that attracts the tribunal of fact to some issues in the client's favour. What better praise can be given to any of us than that we presented a hopeless case well?

Making the case respectable not only eases the pain for us all professionally but will lessen the impact for the client even if only to a small degree.

This does not mean that you ask in cross-examination irrelevant or pointless questions that are not going to advance your case. It involves combining the efficient presentation of your case with a vigour that is expected of you but by recognising where to draw the line in presentation. This comes with experience but preparation of the issues in the case before the hearing will help us all to be able to present that hopeless case well.

If you are fortunate to have a good or strong case, you must remember that just like the hopeless case that cannot be won, the good case can be lost if you do not prepare and present it properly. The important basic ground rule, therefore, is not only can you not win a case which is incapable of being won but you can lose a case capable of being won if you do not prepare and present it properly. Presentation and preparation is therefore the key and part of the basic ground rules.

There will of course also be many times when you will have cases in respect of which it is impossible to predict the outcome. These cases are critical in terms of cross-examination because the outcome may and probably will turn on preparation and presentation by you and the skill of your cross-examination whether you discredit the testimony of the witness or discredit the witness himself – or both.

The second ground rule is this:

The key to any successful cross-examination is this simple question:

"What do I want this witness to say?"

It is a very simple question but it represents the object of cross-examination. If we think about this for just one moment, this is the key to successful cross-examination of an opposing witness. The means by which the witness is to be

persuaded or required to say what we want him/her to say depends on careful preparation of cross-examination and the application of its principles.

Now with these two basic ground rules in mind, it is perhaps helpful to remember that advocacy cannot be learned from books. David Napley, John Monkman and others have all written books on the art of advocacy. These books often cite so-called "famous cross-examination of witnesses in notable trials". You can learn little or nothing from them. As an advocate you must develop your own skills and your own style by listening to and observing others. Books and manuals on cross-examination will not get you very far. What will get you a long way is watching the successes and mistakes of others and learning by one's own.

Thus, you will develop your skills and abilities as a cross-examiner by:

- mastering the facts;
- preparing the case;
- imposing your personality on the case;
- applying the two ground rules to which I have referred as a starting point; and
- following twelve basic principles which we will come to next.

THE RULES

1. COURT MANNER

Your Court manner during cross-examination is vital.

In civil litigation you will attract the interest of the judge in your case by your manner and presentation - as a result, if it is good, he will listen more readily. In a jury trial, if the jury are impressed with you, they will listen more readily and are more likely to accept your case. Juries and

even district judges are to some extent influenced by their perception of the lawyer in front of them – circuit and high court judges are as well.

Never be discourteous to a witness, sneering or rude. If necessary, be firm and, if necessary, be destructive. Judge the situation and if you need to and can do so then by all means courteously crush the witness who deserves no sympathy from the tribunal. If you need to destroy the credit of a witness with whom the judge/jury have basic sympathy (a child, a victim, a disabled or infirm person), this is achieved only by very careful handling, by firmness coupled with patience and with courtesy.

Never turn away from a witness and, for example, look at the District Judge or the jury when you ask a question. It is a style which some adopt but never does them any good and is often seen for what it is.

Remain dignified. Cause your tone and questions to remain tempered and be courteous to your colleagues if you are interrupted by them during your questions.

Do not be seen as a bully even when you have the upper hand. Never put a gratuitously insulting question to any witness. In other words, the only time it should ever be necessary to be insulting is when the issue you are cross-examining upon requires it (such cases will be few).

2. AIMLESS CROSS-EXAMINATION

Never cross-examine aimlessly.

Do not cross-examine on a point unless you have the object of doing so firmly and clearly in your mind. Your duty is to:

- (i) put your case in cross-examination. (This duty is paramount and do not avoid the need to put something which you know will be rejected out of hand by a confident witness; the temptation to do that is always there because in the rejection will come a weakening of your case in the eyes of the tribunal. Nevertheless you must put your case. Newly qualified lawyers will learn and develop ways of doing so which will minimise the impact of the witness rejecting the proposition);
- (ii) cross-examine to:
- obtain information needed for your case - both to prove facts to support evidence you will later rely upon and going to the issues generally;
 - obtain concessions as to inaccuracies, inconsistencies and weaknesses;
 - obtain agreement/admissions as to relevant facts;
 - weaken your opponent's case and strengthen you own.

Live in fear of these words from the Judge:

"Where is this getting us?"

"To what issue are these questions directed?"

In fact, they may well be directed to an important issue in the case. If they are, we know we must stick to our guns. If they are not, we all need to recognise that we have been cross-examining aimlessly without focussing on the issue.

The purpose of all this is to present your case through cross-examination and to weaken your opponent's case. If you cross-examine aimlessly, you will have strayed from the purpose of your questions.

3. OBSERVE THE WITNESS

Observe the witness and his/her reaction to your question.

The witness may show nervousness (more so than usual) or hesitation and will thereby indicate that the area which he/she is being questioned about can be exploited to your advantage.

Likewise, the witness may show strength and confidence - such as to tell you immediately that you are unlikely to make progress. That confidence could vanish once you touch upon a point which renders the witness vulnerable.

It follows that you cannot judge the reaction of your witness unless you are making eye contact with the witness. You therefore need to balance the ability to follow your notes/the papers with the need to observe the witness. The need for notes is paramount – none of us need feel that it demonstrates a weakness in our abilities.

Once again do not, in a criminal trial, spend time observing the District Judge or jury while engaged upon cross-examination. It is a pointless exercise and is capable of being misconstrued – and in doing so you are taking your eye “off the ball.”

4. THE ANSWER YOU WANT IS A SIMPLE ONE

Your question may sometimes have to be complex and involved. Nevertheless, the answer you want is a simple one and simple questions are often the best means of achieving the result.

To many of your important questions in the case the answer you most want will be "Yes" "No" or "I did" "I did not".

Many such answers can be obtained by prefacing your important questions with the words:

"Do you agree that"

"On the 7th February last year at about 9.35 p.m. were you"

"When you told X that was not true, was it?"

These questions and the answer to them will of course lead to other questions by way of developing the issue which arises from them. However, this type of question is designed to prevent the witness from evading the point being raised and this is the main reason for posing a simple question requiring a simple answer.

Thus, if you have framed questions in this way, it is very difficult for a witness to evade it and the tribunal of fact (be it judge or jury) will follow with ease the line you are taking.

5. THERE MUST BE A STARTING POINT AND AN END

Every cross-examination should have a planned starting point - to try to achieve maximum advantage and the attention of the tribunal in the opening stages.

The cross-examination of any witness should flow. Sometimes it will be helpful to follow the issues chronologically; sometimes in a sequence involving the seriousness of the allegations. This is the middle ground of the cross-examination and you should always try to plan it so that the flow will be designed to best advance your case. Before this, however, do try to have a good starting point. This will not necessarily involve giving away your best point at the beginning but bear in mind that the first few minutes can transform the whole atmosphere created by the evidence in chief of the witness. You may and often will need to discredit the witness. Again, a starting point which weakens or renders vulnerable that witness is already achieving this end for you.

A good guide is to try to select questions which go to the heart of the case (without necessarily giving away your best point) in the opening stages which will also serve to undermine or weaken the evidence of the witness. Then move to your middle and main ground before, finally, coming to the end.

The end is just as important as the beginning and also needs to be planned. However, with experience, you will or may have to adjust the beginning and the end in your mind as the evidence develops. This only comes with experience and confidence. However, always try to end on a note that is a good one for your case. This means that if at all possible save until the end questions which also go to the heart of your case but which you are confident will have to be answered in your favour.

Do bear in mind ground rule 1 that you cannot achieve results if you do not have a case and cannot therefore achieve the impossible!

Bear these simple rules in mind: never begin with a weak point: this will only serve to demonstrate to the tribunal that your case is weak and, in turn, give the witness confidence. Likewise, try never to end on a weak note, since this will detract from what you have achieved.

Under this heading one of the important skills of the cross-examiner is "setting up" the witness to discredit his testimony or to discredit the witness himself. The "setting up" involves asking the witness to agree certain propositions particularly in the early stages of the cross-examination which one is confident he will agree with and in respect of which you know that you hold material which can demonstrate that he is either inaccurate or untruthful. The "setting up" can be done at the beginning or at some early stage and the material used to demonstrate that the witness's testimony is discredited or to discredit the witness himself can be brought in with maximum effect towards the end of the cross-examination – if necessary the witness can be reminded of his earlier answers. If you can "set up" a witness in this way in the early stages of his or her evidence and obtain the answers by which you know that he/she is "set up", you are then in a position to hold in reserve the material that will demonstrate that the witness is wrong or untruthful until the appropriate stage in cross-examination where you can bring it out. This is always a strong note to end on, particular if it's likely to shake the witness in the presence of the tribunal of fact. You can often sit down after you have asked the questions which follow a successful "setting-up" of the witness.

6. ONCE YOU HAVE THE ANSWER YOU WANT, LEAVE IT

This is easier said than done and, it is fair to say, it is often possible to improve on an answer. However, the basic rule to follow is that when you have the answer you want from the witness, unless you are 100% sure you can improve on it, leave it there. Do not give the witness a second chance. This does not mean that you should not ensure that the answer is clear and unequivocal - you should, otherwise it will be reversed in re-examination. Judge when you have the answer you need

and only if you are on very sure ground should you go on to increase your advantage.

7. NEVER ASK A QUESTION TO WHICH YOU CANNOT PREDICT THE ANSWER

This rule is often quoted but needs to be clarified. It is not as simple as it appears.

- You still have the duty to put your case.
- There are many questions to which you will not be able to predict the answer but which need to be asked.

The rule really amounts to this: do not ask a question which it is not necessary to ask, the answer to which cannot be predicted but which may damage your case.

Sometimes risks have to be taken. Sometimes they are serious risks (which it would often be as well to discuss with your client) in the sense that the case could turn upon the answer. In those circumstances make sure that you have weighed the risks and advantages. If in doubt and the question is not necessary, do not ask it.

A simple example: A criminal case of alleged mistaken identity turning upon the witness's claim to have recognised the accused. Explore, as you must, the circumstances, distances, lighting (R v Turnbull) and put it to the witness that he/she is mistaken but do not ask:

"What makes you sure it was him?"

or

"How do you know it was him?"

Once you do that, if you do not know the answer and you cannot prove by other evidence in the case that the witness is wrong, you are exposed to any answer the witness wishes to give. You have effectively given the witness "free rein" to justify the accuracy of the identification. Far better is to assert in positive terms that the witness is mistaken in the identification. These are subtle differences but they are important ones because they prevent the witness from utilising the opportunity provided by the question to strengthen the opponent's case.

8. RE-EXAMINATION FOLLOWS CROSS-EXAMINATION

Only with experience will you be able to judge whether your line of cross-examination is unnecessarily exposing you to damaging re-examination. Again, it is a case of whether or not you should ask questions which are not strictly necessary.

An example: In a criminal case you are aware that no complaint was made to the police for six months after the event. It is simple to make that point in cross-examination but the reason why no such complaint was made for that period could be very damaging to the accused and could be raised in re-examination. Thus issues such as this require very careful thought. It may seem a good point and the client may think it is but there may be very good reasons why no early complaint was made which justify leaving the point alone completely.

9. NEVER ARGUE WITH A WITNESS

You must never argue with a witness or be drawn into answering a question from the witness. Your function does not involve this and such a course must invariably be avoided. It weakens your authority

because it gives the witness a chance to assert himself. The Judge should always protect you – they don't always do so.

10. NEVER WRONGLY MISLEAD A WITNESS

You must never mislead or trick a witness. To do such a thing would also involve misleading the Court. Thus, you must never present or appear to have information, documents or evidence which you do not in fact have in order to obtain favourable answers in cross-examination.

11. CROSS-EXAMINE AT THE LEVEL OF THE WITNESS

Always cross-examine the witness at a level consistent with his/her intellectual function. If you think about it, this is a simple and obvious rule. A child needs to be cross-examined differently in terms of manner and composition of questions to say an expert witness or an intelligent, mature adult. This rule is not simply for the benefit of the witness. The rule is for the convenient and proper presentation of your case since the witness will better understand and answer your questions if you follow this rule, which will in turn convey your case that much more clearly to the tribunal.

12. MAINTAIN A SENSE OF BALANCE AND PROPORTION COMMENSURATE TO THE CASE

All good advocates know/can judge when to sit down; equally, they know what questions are necessary and which ones should be avoided. Do not, for example, put damaging and embarrassing matters to a witness unless it is necessary to do so and if it is necessary to do so (as it often is), consider carefully the extent to which and how they need to be put. There are ways in which such material can be put which allows the tribunal of fact to recognise the point you are making but to respect

the fact that you are dealing with it sympathetically – this “rubs off” on your client as well!

A clear example: Is it really necessary to put to a witness, the credibility of which is in issue, a sole conviction for minor dishonesty 20 years ago - or will such a point operate adversely to your cause and alienate the sympathy of the jury? This rule of course is governed now by the provisions of the Criminal Justice Act 2003 and the "bad character" provisions and so one would have to persuade the judge in the first instance to agree that this material is admissible in any event under Section 101 of the Act but it serves as an example of the point being made.

Always ask yourself: Have I achieved the aim of my cross-examination - in which event, do I need to continue? Have I created the atmosphere and obtained the answers I require (or the best that I can achieve) from this witness?

Thus, always keep a sense of balance and proportion in the manner in which you deal with a particular witness and the way you handle the points in the case. This will obviously vary from case to case and will only come with experience.

In summary, what will you have achieved or tried to achieve by the application of the above?

- (1) You will have secured the interest of the tribunal in your case. Their minds will have been directed to the issues. They will respect your approach no matter how strong or weak your case is.

- (2) Hopefully you will have weakened, damaged or even destroyed, by skilful questioning, the effect of the evidence in chief or even perhaps have changed its emphasis to a subtle but important degree.
- (3) You will have advanced your own case during the opposite party's case and laid the ground for the evidence you intend to call or rely upon and for your final submissions.

You must realise that the approach to cross-examination differs depending upon whether you are appearing before a judge alone, lay magistrates or before a jury. The basic rules remain the same however. The composition of the tribunal will only affect the style, content and manner of your cross-examination. Adapt it accordingly, bearing in mind that you always need to remember what you are trying to achieve as a result of the answer of the witness.

In civil litigation the judge will often be ahead of you, will have read the papers and will probably need to concentrate on much fewer issues than the criminal trial jury. Therefore, think in advance about the issues which the judge will have to consider and direct your cross-examination to them, e.g. proof that a car driver was going too fast for the conditions or that he/she could not have been keeping a proper look-out; establishing that a particular piece of machinery was unsafe/unsuitable for its purpose.

In a criminal trial the Judge (in summary trials) or the jury may have little understanding of the case in the early stages. Credibility is much more important because the credibility of a witness can often be established/destroyed in civil litigation (if it even arises) with one or two questions whereas in a criminal trial the point you are making often arises in isolation and then needs to be clearly established so that you can be confident the court had grasped it.

These principles apply as general rules to cross-examination. There are of course special rules to be applied to certain other aspects of cross-examination. These are for example:

(i) The cross-examination of Experts.

The basic principles remain the same but is largely impossible to discredit an expert. What one seeks to do is to identify

- Errors in the expert's approach and work so as to weaken the opinion offered.
- To persuade the expert that your own expert's opinion is a reasonable alternative hypothesis – if you can achieve this alone you will have done well.

There is little more you can achieve with expert witnesses – what you need to remember is that by skillful and careful questioning you may be able to cause the tribunal of fact to either doubt the accuracy of your opponent's expert or to prefer your expert's evidence in due course (if you dare call him!).

(ii) Cross-Examination as to Character

This is now governed by the Criminal Justice Act 2003. This is not the place to deal with the detailed provisions of the Act but we need to bear in mind Section 101(1)(g) – whereby “bad character” evidence against a defendant may be admitted if an attack is made on “another person's character” in cross-examination. This is defined by Section 106(2) and includes an allegation that a person has behave or is disposed to behave in a “reprehensible way.”

These are very wide words. It is to be hoped that judges will not interpret the section to include allegations of “lying” but such cases are bound to arise. More important you may have excluded evidence of “bad character” which the prosecution have already tried to get in under Section 101(1)(d) (relevant issue/propensity) and yet be faced with the risk that your cross-examination will nevertheless bring your client’s character in.

Cross-Examination will have to be geared accordingly. I can do no more than give this advice: in putting your case – as you must – it may be necessary to temper or lessen the attack on the witness – even by the choice of words – just to reduce the risk. We will discuss with the audience the ways in which this can be done as the final stage of the lecture.

ROBERT SMITH, Q.C.