

PRINCIPLES OF CROSS-EXAMINATION IN CIVIL CASES

by

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Cross-examination has the following, separate, aims:

- To put your case.
- To attack the other side's case.
- To establish your case.

Please note two things: firstly, it is not the purpose of cross-examination to establish the truth. The truth is almost unknowable, particularly in civil cases where much of what is said and done is determinant upon a person's perception of what has gone before. Secondly, putting your case and establishing your case are different things.

Putting v Establishing [2006] PCCLR 1.

It is possible (although unlikely) in a criminal case to obtain an acquittal simply by making the jury unsure that the prosecution case is one on which they can rely to the necessary standard. It is not possible in a civil case for the following reasons:

- The standard of proof is different. The gap between "likely" and "sure" simply does not exist.

- Decisions are, save in very rare cases, made by the Judge. In giving a reasoned judgement s/he is required to come to a consistent view about the evidence and, almost inevitably, to decide what happened. Judges do not have to decide every fact: but, by and large, they want to be able to create, in their judgement, a version of events into which they can fit their findings on the evidence and their legal rulings.

This means that it is necessary to both put and establish one's case. The two things have different functions: putting the case means that you can make your submissions. There are terrible stories about barristers who do not put their case. Establishing your case means you might win.

Establishing your case also allows you to work to the lowest common denominator. To adopt a sporting analogy, it isn't necessary to break the world record – only to jump the bar.

How to Establish Your Case

In a civil case the two competing accounts are likely to be known and capable of being understood at a relatively early stage because all witness statements are exchanged and, save perhaps in simple liability pi cases, there are documents which go to the main issue.

It is therefore possible to know what you want to say at the end of the case before you begin it. A failure to work that out should be regarded as inexcusable. That should mean that cross-examination is both short and focussed. If it isn't then you should ask yourself why.

The exception to that rule is when a long cross-examination makes a difference to the witness's credibility. If the man is sweating and wiping

his forehead in an air conditioned court room and he isn't ill – keep going. But even then, only until the Judge has decided the witness is unreliable. Because:

That trial is by Judge alone also alters the dynamic:

- Even in the County Court you can be reasonably sure that the Judge has understood the point.
- Judges are less likely to be persuaded by your stirring advocacy than the jury.
- There will often be case law which determines the result of your case, providing that the facts can be seen as equivalent/identical.
- It is usually unnecessary to call a witness a liar, and Judges are reluctant to make such findings unless they have to.
- What the Judge thinks of your overall performance will have an effect on how s/he deals with your final submissions. Taking bad points is thus even more dangerous than in a criminal case.
- If a Judge in the Crown Court thinks you consistently take bad points there is little he can do about it save groan and gossip. In the District Registry, County Court or High Court you may find that your good points are dismissed because you are the one making them.
- The Perry Mason moment is unlikely to happen. And it is not usually necessary to totally discredit a witness. So don't try: all that is necessary is for the Judge to decide that the account is probably incorrect.

On the other hand, my own view is that falling victim to what might be uncharitably called “Chancery Division politesse” is an error. If you have a case to put and your judgement is that it needs doing firmly, or even brutally, then give it what is required.

It is an obvious corollary of what I have said so far that questions should be properly framed. You can lead. That doesn't detract from the fact that the answer to a leading question might not carry as much weight as the same answer elicited by an open question. Only ask 1 question in one question. Make sure it is a question the witness can answer (i.e. *not*: what did Mr X think?). If the proposition you are putting needs background then put the background as separate questions: "it is correct that x. Do you agree? And it is correct that Y. Is that right? Then z."

Because you are almost always suggesting that things happened differently or did not happen at all it is also important to lay the groundwork before you say so. People want to be consistent. Lay out your background assumptions and their inconsistencies are apparent to them. And make use of the "why" question. Ask "why, then, did you say x?", rather than "you said x didn't you?"

But the principle point is to work your way through the legal minefield to a position where you know what will establish/defeat liability or a sufficient damages award. Then ensure that your cross-examination brings out the points of fact you can rely upon to establish your case on the law. That's all you need to do.

Attacking the Other Side's Case

If you have followed the course set out above, this may be entirely unnecessary. Clients who want the opposition trashed “as a matter of principle” should be reminded that principle is spelt “M-O-N-E-Y”.

But, particularly when the outcome of the case depends on which of the competing accounts is accepted, it is necessary to undermine the other side's case.

It is always sensible to start from the proposition that the odds of the Judge accepting your case are 50:50. That is because s/he knows neither party and is as likely to find one version of events correct as another (remember: civil trials are not usually about people lying – whatever your client may say). How, then, can you attack the other side's case? There are 2 distinct ways and both should be pursued:

- The weaknesses in the other side's case should be explored by comparing the witnesses' accounts with the other material in the case, particularly the documentation.
- The account given by your witnesses should be directly put and urged. If you cannot do that with a straight face then it may be time for acting lessons – or time to settle.

The importance of comparing accounts to contemporaneous documentary sources is obvious. It provides a yardstick by which the accuracy of your witnesses' accounts can be judged. It is equally important to urge on the Judge the accuracy of your live evidence. If you do not then adverse conclusions may be drawn.

A word at this point about the vexed subject of rudeness in Court. The usual rule is “don’t”, and insofar as the rule is confined to deliberate unpleasantness by advocates just because they are in a position to be unpleasant I entirely agree. It is not simply that it looks bad and the Judge will hate it: it is also mean-spirited and, even in an age of moral relativism, bad for the soul. It goes without saying that rudeness to the Judge is simple stupidity.

However, there are occasions where it is necessary to be brutal to make the point. The absurdity of a proposition can sometimes best be demonstrated by a fairly unpleasant question. You may have to call a witness a bully, or a liar, or a cheat. All those things should be done with the *minimum* of nastiness – but they must be done. Don’t confuse that with rudeness. On the other hand, low key is always the most forceful way to do it. A good exercise is to write out a cross-examination or submission and then go through it and remove all unnecessary emphasis – so, for example “obviously correct” is replaced by “correct” and “absolutely impossible” by “impossible”. Your submissions will be shorter and more focussed as a result.

Courage, Judgement and Maturity

These 3 qualities are necessary for effective cross-examination. It is not impossible to win cases without all 3 of them – but that will be because your case was a winner and your opponent wasn’t particularly good.

Courage is not simply the ability to present a difficult case and to withstand a Judge in a bad temper. It is the ability to do 2 things in particular:

- Present an unpopular case. That could be the result – a new lease for the BNP. It could be that the Judge doesn't think much of your case and says so – and, for once, isn't correct but has simply missed the point. You must not back away and sacrifice your client's interests for your own ("I am instructed to make a bail application"). To do that is to betray your profession. You must present the case as if it was any case at all – nicely and fairly and politely. But you must do it.
- Present the case your way. That does not mean heedless of advice or help. If there is more than one lawyer involved then everyone's view should be sought and considered. But, ultimately, you are at the sharp end. You have to make decision on your feet and you should have a clear view about what you want to ask and why. In the end it is a democracy – and you are the one person with the one vote.

It should be apparent from the above why judgment is so important. Many people will tell you that judgment is something you are born with rather than something you learn. That is not right. It is right that some people's instant decisions are better than others. And that some people's considered decisions are better than others. And that those people are not always the same people.

But judgment can be acquired through practice. No case should end without you assessing your own performance – truthfully. Please note that what you tell your client, your partners, your partner, your parents and your drinking companions need not be what you tell yourself. If it is, you are either incredibly lucky in your family and friends or, more likely, you lack judgment. You have to be able to admit to yourself where you

went wrong. And I don't simply mean the obvious errors: the Judge might be a difficult person who took against you, but that is not analysis – that is an excuse. The analysis lies in examining your behaviour to see what might do differently next time so that the difficult Judge is not difficult at all – or at least is difficult to your opponent. And, in civil particularly, there always is a next time.

You should also, in cases where it is possible to do so, measure your reaction to events against your opponent or the advocate for the other parties. Why do they read the situation differently? If they are right, what is it that they saw which you did not see, or emphasised that you did not emphasise?

It is a natural human reaction to try and defend your own stance, even – and perhaps especially – to yourself. But you will be a better cross-examiner if you can see things objectively.

Which leads me to maturity. Not everyone would agree with what comes next – but they aren't talking. My own view is that to be a really good cross-examiner requires an ability to understand what makes people behave in particular ways. For most of us, that means an ability to analyse our own experiences and feelings. That plainly requires judgment and courage because no one ever learned anything by analysing only their successes.

With the exception of the psychopathic people are very similar. There are cultural differences and age differences about which one can learn, and for which one can make allowance. After that it is the ability to “know thyself”.

This is not a call for everyone to book some analysis. But it is my view that the ability to look objectively at your own strengths and weaknesses, to say when you are likely to be right and when you are likely to be wrong and to acknowledge what you felt/feel like when you behave badly is material that can help you cross-examine in a way which persuades both witness and Judge that you understand what was happening rather than that you are simply (and boringly) putting a series of propositions. It is more likely to be accurate; it is more likely to be interesting and it is more likely to be convincing. You all have a degrees and professional qualifications – a degree of emotional intelligence will help you.

And Finally

You are trying to establish a case before a Judge. So don't neglect the basics. Don't be late. Don't be slovenly in your appearance or your habits. Don't gesticulate wildly. Don't pretend you are Judge John Deed, or Judge Dread. Actually, don't pretend to be anyone – be yourself.

Be attentive to the Judge. Don't run too far ahead of his note taking. Don't take bad points. If s/he obviously doesn't like the line you are taking then explain it at what you judge to be an appropriate time. You can do this during the cross-examination itself – don't be frightened to tell the witness where your line of questioning is going.

And, again, know what you want to say at the end and that what you want to say will, if accepted, win the case. Make sure you have the evidence on which you can found your submission. And when you have it – even if it has only taken 5 minutes with the main witness for the other side – sit down. If you don't have it after a reasonable time then start talking – and examine your judgment.

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