CROSS-EXAMINATION IN THE CROWN COURT

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As defence counsel's incisive, eloquent and (this is no time for false modesty) stunningly delivered cross-examination reached its mighty climax, the prosecution's star witness crumpled, admitting through heart-rending sobs that his testimony was nothing but a pack of lies – a deliberate, shameful attempt to divert justice from its true course, to engineer the defendant's wrongful conviction. Such was the force of counsel's arguments that he now felt compelled to apologise profusely to the jury for wasting their time and emphasise that the defendant was and always had been as pure as the driven snow. Defence counsel is carried shoulder high from court by solicitors demanding to know the name of this new young star that they might brief him in all their best cases … and then young learned counsel awoke from his dreams.

The reality is of course considerably less dramatic but nevertheless, in the right hands, cross-examination can and often does have devastating effect. In very many cases that I can recall, it was clearly the deciding factor, the difference between guilty and not guilty. To the uninitiated, it appears to be straightforward enough, but that appearance is all too deceptive. One does not have to witness too many lacklustre, mediocre performances (and, sadly, I see them all too often) to be reminded that cross-examination is a skill that many have not mastered.

Defence counsel in a criminal case has a particular advantage – and one that should be exploited: it is the part of the case that the jury come to with a sense of anticipation, the part of a criminal trial that is most familiar from films, television and so on, the part that makes high drama. As you rise to your feet to cross-examine the first witness (and, when defending, that is likely to be the most important witness for the Crown – the 'victim') you have an attentive, expectant audience. You can almost hear the drum-roll! That audience can be made yours or can be lost in a few questions.

Prosecuting counsel has his moment too, of course – as he rises to cross-examine the defendant. The trial judge sitting on high has a bird's eye view of a criminal case as it unfolds. I can see a jury's anticipation as those moments come – not, I suspect, because they want to be entertained, but because they want to see important evidence probed and tested, to help them in the task they have to perform. From my vantage point I can see, too, a jury's sense of disappointment – that they are not being given the help they wanted, that obvious points of concern for them are not explored – or plain bewilderment, simply not knowing where the cross-examination is going or why.

So often now, an advocate starts his cross-examination by dredging through the evidence already given in chief: 'and then you told the jury this, and then you told them that.' This is always, trust me, a bad idea. If the evidence is damaging to your case, why repeat it? If it is helpful to your case, why risk the chance of a witness watering it down second time around? Remember you have a speech at the end of it all during which you can remind the jury, with your own emphasis, of the favourable evidence. You will have lost that advantage you had with the jury. You will almost certainly prompt the judge to ask you what the point of the exercise is.

For a fortunate few, cross-examination seems to be a natural habitat; for the majority it takes hard work and application, but it is an art that can be learned and developed. I offer some basic rules and principles – for the most part, they are not new rules. I make no apology for that. They have stood the test of time because they are good rules.

1 Preparation, preparation, preparation

The importance of thorough preparation is emphasised to every Gray's Inn student from a very early stage – the most basic, but most important, rule of all. It is of crucial importance to your handling of the case generally. If you know the facts of your case inside out and upside down, you cannot be wrong-footed. You need to demonstrate, particularly in cross-examination, that you are in control. The best way of doing that is to show you know all there is to know about the case.

Witnesses react in different ways; some enter into the spirit of it all, seeking to give as good as they get and will respond by asking the cross-examiner a question or two. If a witness says, for example, that he cannot see the relevance of a particular question, it can be met by what nowadays seems to me to be the rather arrogant and unattractive response: 'It is not for you to ask the questions'; but how much better to be able to answer the question decisively: 'It is because you said at page 24 of your police interview that …' In all but the most basic cases a chronology and a summary of the most important points of the evidence, with page numbers, is essential.

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Q: Are you sure?
A: Yes, pretty sure.
Q: So, you didn't see anything of any significance at all?
A: Well, nothing except for …
Learn to recognise victory when it sits in your lap – or that you are getting nowhere. There is something rather satisfying about sitting down with a flourish after a good answer – finish on a high.

2 A list of essential points to cover

In any case, there will be a number of points that you are duty-bound to cover, others you have reason to believe will be worthy of exploration, some that are so fundamental that it would damage your case were you not to grasp the nettle. You cannot be expected to keep all that in your head. Jot down those essential topics you must cover – tick them off as you go along. Remember that you are under a duty to put your client's case to the witnesses – the jury has the right to see the reaction of a witness when the defence case is put to them. Whilst you may not much like doing this and it may not assist your case greatly, it has to be done. A failure to do so can lead to adverse comment.

3 Leading questions

An American handbook on cross-examination describes the question 'Why?' as 'the dumbest of them all because it opens the door for the witness to say almost anything'. Not only are you entitled to ask leading questions, I would positively encourage you to do so, at least in the early days. It keeps you in control, it tends to close down the witness and the range of answers likely to be forthcoming. That is not to say that a simple well-placed, open, non-leading question (even 'Why?') cannot on occasion be lethal – but if and only you are sure you have in advance sealed off all escape routes, all other answers than the one you want.

4 Know when to stop

I suspect most of us learn this one the hard way. There are few experienced advocates who have not, at one time or another, kicked themselves for asking one question too many. If your questions are going well, eliciting evidence favourable to your case, there is an understandable desire to go on and on, to make the case better and better. Beware! Resist the temptation. Your next question can wreck all the progress you have made. You should quit while you're ahead. One example will suffice:
Q: Did you see anything unusual that night?
A: No, not that I can remember.

5 Assess a witness

Witnesses come in all shapes and sizes. It is no good adopting the same approach for all. You need to make an assessment, as best you can, of each witness, taking into account what you know about them – and you know a fair amount about them: age, occupation, situation in life, how they behaved and reacted in the course of the incident they describe, how they have given their evidence-in-chief. Are they likely to be willing to help or keen to make things worse for your client, given the chance? Adapt your style accordingly. An aggressive, firm and confrontational style is sometimes the right way, although that is rare. I was taught at an early stage and have never forgotten that cross-examining does not mean examining crossly. It may well be that is what your client would prefer, but you are likely in most cases to achieve a great deal more by polite, quiet but logical and insistent questioning. A slightly puzzled, 'Help the jury with this would you?' can be an appealing way forward.

6 Think ahead

Don't lose sight of the bigger picture, the main objective. Always bear in mind the possible implications of the questions you are asking. Whilst you may be doing a good job of demolishing a witness, there are dangers. If your client has previous convictions, remember that these could become admissible by reason of the questions you are asking, the attack you are launching on another person's character.

Finally, I should draw attention to the rapidly changing landscape when dealing with the evidence of children and vulnerable witnesses. These changes are largely to be welcomed – they represent a sea change. Much of what I have said above has no application to such cases. The ground rules hearing in advance of the case will set the way such cases are to be conducted, when appropriate changing fundamentally the way cross-examination is conducted. ■