FROM THE EDITOR

Cross-examination: The endangered art

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Let us take a trip to an imaginary courthouse. In Courtroom A, we see a lawyer on his feet examining a witness. He is asking long, open-ended questions. We assume that he is engaged in direct examination, but a bystander tells us he is "cross-examining."

We move to Courtroom B. The lawyer there asks similar questions, but she is belligerent and raises her voice as she asks them. We can only assume that she thinks she is "cross-examining."

In Courtroom C, a lawyer asks short leading questions designed to elicit yes or no answers. This is more like it. But a bystander tells us the lawyer has been cross-examining for a day and a half. Although he has made a number of points, they have been lost in the sheer volume of questions, and the witness, getting the knack of the game, has begun to score points of his own.

Finally, we turn to Courtroom D. There, after direct examination, the lawyer rises to her feet and asks a number of probing questions that destroy or weaken points against her case and bring out points in her favour.

Why is it that only the lawyer in Courtroom D actually understands the technique of cross-examination? I suspect the answer is the same one that we have explored in these pages before: few lawyers get enough time on their feet, and few young lawyers are mentored by counsel with experience.

There is no easy answer to this problem. A visit to Garry Watson's "Intensive Trial Advocacy Workshop" is a good substitute for actual trial work. (It our firm's practice to ensure

that all the young lawyers who join the firm go through the course;[1] the boost in skills and confidence is amazing.) I am also convinced that there would be an advance in the ability to cross-examine if more lawyers read John Munkman's *The Technique of Advocacy*.[2] This little book was first published over half a century ago, but the basic principles have not changed. Most books on cross-examination are purely anecdotal. Many of the anecdotes are entertaining, but not particularly instructive. Munkman uses anecdotes, but only to illustrate the technique of cross-examination. I will respectfully adopt his terminology and analysis. My summary, however, is no substitute for the original.

Munkman introduces the subject of cross-examination in the following way:

> If we compare the evidence-in-chief to a rope – quite strong to all appearances – cross-examination may be compared to the testing of the rope, inch by inch and strand by strand. If the rope is really strong, it will stand the tests: if it is weak it will give way at one point or another. It follows that cross-examination ought not to be expected to shake a story which is substantially true … [However,] the rope may be stretched out in a new direction; or it may weaken and become slack under the strain applied to it, without actually breaking; or, finally, the supports which hold it up may give way, with the result that the rope falls to the ground.

The aims of cross-examination

Munkman sets out four specific aims of cross-examination:

1. To *destroy* material parts of the examination-in-chief.

2. To *weaken* the evidence, when it cannot be destroyed.

3. To *elicit* new evidence, helpful to the cross-examiner.

4. To *undermine* the witness by showing that he or she is untrustworthy or mistaken.

It is rare to destroy adverse evidence. Those who have watched *Perry Mason* may dream of the witness who collapses in the stand and shouts "I confess," but this happens rarely, if at all. If a cross-examination weakens evidence, it generally can be considered a success. Eliciting new evidence helpful to your case is, in my view, something that should be done only if that evidence

cannot be elicited from a friendly witness. Undermining is the most difficult of all, because it is an attack on the witness rather than on his or her evidence.

The techniques of cross-examination

How are these four aims achieved? Munkman sets out four main techniques:

1. *Confrontation:* confronting the witness with evidence that he or she cannot deny and that is inconsistent with his or her evidence.

2. *Probing:* inquiring into the details of the story to discover flaws.

3. *Insinuation:* building up a different version of the evidence-in-chief by bringing out new facts and possibilities; that is, painting a picture that establishes a case in your favour and weakens the evidence against it.

4. *Undermining:* using other techniques not to break down the evidence but, as discussed above, to show that the witness is untruthful or mistaken.

The fundamentals

With Munkman's analysis in mind, one can turn to the preparation and execution of cross-examination.

The first question to ask is whether there is a need to cross-examine the witness. Subject to the points set out below, it may not be necessary to cross-examine a witness who has been helpful or neutral, particularly if that witness is sympathetic, such as a grieving widow in a wrongful death case. It is essential to cross-examine a witness on disputed facts and to put to the witness any contrary evidence that you intend to lead.[3] It is also necessary to cross-examine if the witness is the only source of an essential point to be made in your case.

In cross-examination every question should be relevant; that is, it should be directed to the very point that you wish to establish or be a necessary step in getting to that point.

Questions should also be short and leading. The transcript of the answers of an ideal cross-examination would read as follows: “Yes. Yes. No. Yes. No. No. Yes. No.”

It is generally a good idea to keep cross-examination short. This is particularly true with dangerous witnesses, who should be off the stand as soon as possible – before they can inflict a mortal blow. I remember a comment by Alan Lenczner in an advocacy course some years ago. He likened cross-examination to a guerrilla raid. He said that you throw three grenades, you hope that one hits, and you hope that they do not blow up in your hands.

It follows that you should also avoid the dangerous question, the question that will blow your case to smithereens. The general rule is that you should not ask a question unless you know the answer. There are some occasions when you have to ask a dangerous question, but if you must, approach it carefully.

You should also avoid the extra question. Advocates are generally perfectionists; there is a desire to wrap it all up with a bow. But if you are 90 per cent on the way to obtaining the answer you want, do not ask one more question, which may undermine all of your good work.

The style of a cross-examination may vary, but the aggressive cross-examiner runs a twofold risk. First, it is more difficult to obtain answers from a witness you have antagonized. Second, a belligerent approach is likely to antagonize the trier of fact. Many years ago, Arthur Martin said:

> Since the purpose of advocacy is to persuade, I have never understood why so many people consider abrasiveness to be essential to advocacy.

Juries certainly dislike aggressive cross-examiners.[4] Judges may be slightly more tolerant, but an informal canvass suggests that they too are antagonized by an aggressive

approach. This is not to say that a cross-examiner should be shy; a cross-examination should be polite but firm.

Indeed, none of these points are intended to suggest that cross-examination should be tentative. Often it is essential to press home your point. The matter was put in the following colourful way by Peter Temple:

> What set great cross-examiners apart was that they listened to witnesses' answers, never got ahead of themselves, stayed with the topic until it was flat as a bunny ironed by several roadtrains. That was the way you nudged the witness beyond the rehearsed answers, edged into the ad-lib zone.[5]

Preparing a sharply honed cross-examination requires hard work, but hard work alone is not enough. To be effective, you must follow the basic principles summarized in this editorial. Without these fundamentals, cross-examination can be a waste of time or, worse still, a disaster. With them, cross-examination can be the most valuable weapon in your arsenal.

Notes

1. The course is held at Osgoode Hall each July.

2. Toronto: Butterworths, 1991.

3. See Geoffrey Adair, *On Trial*, 2nd ed. (Markham: LexisNexis, 2004), for a useful explanation of the practical issues, particularly the rule in *Brown* v. *Dunn*.

4. See Steven Brill's *Trial by Jury* (New York: Touchstone, 1989), in which interviews with jurors in a number of famous trials show that the jurors almost always disliked one or both of the lawyers involved, and that this dislike often centred on an aggressive approach during cross-examination.

5. *White Dog* (Melbourne: Text Publishing, 2003).