LEGAL}{ EAGLES CLE

Continuing Legal Education for Criminal Lawyers

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TRENCH WARFARE and THE ART OF CROSS-EXAMINATION

TRENCH WARFARE

This is not a paper on the art of killing people but it is a paper about warfare. This is a collection of my thoughts on the matters to hold in mind when defending criminal cases run by the Crown, or by Police prosecutors.

Warfare is an apposite term for the defence of criminal trials. The consequences of losing a trial are diabolical. The consequences of winning are glorious for your client and may be life changing.

All of you know the rudiments of trench warfare. You need a shovel and a rifle. Walk out into the battlefield and drop the rifle on the ground. Dig a hole and chuck the dirt up in a heap between you and the advancing enemy. When the hole is deep enough, drop the shovel on the ground, pick up the rifle, jump in the hole and shoot at everything the moves toward you. Every shot that passes you does damage to your side of the battle, so every shot needs a reply, provided you have the ammunition. This paper is ammunition & motivation.

OPPOSE EVERYTHING WHICH IS PREJUDICIAL. The Defence role begins before the evidence in the case starts, because the battle begins before the evidence commences:

- If your client is brought into court in handcuffs, ankle cuffs or a straight jacket, nothing can commence until they are removed. In Lithgow at the circuit District court sittings in 1982 I heard Judge Tony Collins QC say to an application in chambers that the accused be brought into court in handcuffs: "A couple of burly policemen standing by the dock should be sufficient to quell the ardour of even the most adventurous defendant. I'll never have a man brought before me in manacles." I have acted for defendants brought in wearing wrist and ankle cuffs in Casino, NSW (before Magistrate Neville Pepper in 1983)[1] and in a straight jacket (before Magistrate Michael Price in the Downing Centre in 1991)[2]. All of those restraints were removed before I continued. I cannot bear to watch others who fail to object to this prejudice.

- **Interpreters.** Sometimes interpreters are supplied who are skilled in the language of a nearby country, but are not actually skilled in the language of the particular accused. Always check both with client and the interpreter when dealing with persons from small and isolated communities. IN EVERY CASE WITH

[11] "Clear the Court. Clear the Court. Lock the doors. Lock all the doors" he called out as soon as I won the argument, with the quote from Judge Collins QC.

[2] The Defendant was a famous crim named Billy Mundy, no relation to Jack.

INTERPRETERS try to have a person from the Accused's language and community near to you at the Bar Table to warn you as soon as there is any error in the translation. Every court interpreter should be NAATI Grade three, but they are sometimes Grade two, who are not up to standard for court. The Bench will want to go on, but if you have a sympathetic speaker of the interpreted language nearby, it will quickly become clear that the interpreter is inadequate. The matter cannot continue.

- A further matter with interpreters is that languages are often dominated by social taboos, particularly about sex, genitalia and anatomy. So are NSW Police, though I suspect that is for the reason that they are trying to be more graphic than the evidence actually achieves.[3] For example, in a trial of a Vietnamese man which included a count of indecent assault of a step-daughter, the Police Facts described that he (in his role as step-father), "removed the pubic hairs from her vagina." I told the Crown that he cannot open with that allegation to the jury because it is anatomically impossible. The human vagina does not have hair follicles. He understood. However, during the voir dire prior to trial, it became clear that the (female) interpreter could not interpret the evidence in any terms other than "vagina" or "vagina area". The interpreter stated that Vietnamese language does not have any words to describe the different parts of female genitalia. The point was crucial. The Accused admitted to removing hair on the top of her bikini line. He denied removing hair from the lower part of her Mons, from her labia major or the inside of her thighs. Her Honour at trial carefully guided the interpreter through the difficulties of describing parts of female anatomy for which the interpreter was previously bereft of vocabulary. The chap was acquitted.

Once the matter/trial starts, the way to stop the salvo of ordinance/munitions passing overhead and wiping out your side is to object to evidence. **CASES ARE WON OR LOST ON EVIDENCE**[4]. <u>It is the duty of the advocate to object to all of the evidence in the Crown case.</u> Do not sit there and accept that casualties are a necessary part of being in the war. It is not just a flesh wound. **OBJECT TO THE EVIDENCE IN THE CROWN CASE.** Here are some of the grounds that counsel need to have at hand to object to the evidence in the Crown case:

1. **The witness is not competent to give evidence about a fact**. See s13 of Evidence Act (NSW) 1995. Review the Act before any case involving a Crown witness with any mental, intellectual or physical disability, but the Section is NOT limited to those matters. The Section applies "… if, **for any reason** … the person does not have a capacity to understand a question about the fact; or … to give an answer that can be understood to a question about the fact; and that incapacity cannot be overcome. Sections 30 & 31 provide for assistance to witnesses by interpreters and for deaf and mute witnesses " … in any appropriate way (or) … by any appropriate means". Now, standing in your trench, ask yourself is there any

[3] I have seen a Police Facts document for an Indecent Assault allegation that alleged the offender "touched her at the top of her vagina". There was no allegation of penetration. Enough said.

[4] Bruce Miles, Solicitor, who added: "So object to the evidence and don't be such a smart-arse lawyer that you talk yourself out of objecting."

problem with a witness' ability to understand the question or give a proper answer. For a fascinating look at the legislation and the need for strict compliance with the current requirements of s13, see SH-v- Regina [2012] NSWCCA 79, where Basten JA, delivering a judgment with which the remainder of the Court (Blanch & Hall JJ) concurred, identified that strict compliance with the terms of s13(5)(a) to (c) was required and concluded with:
"… *the appropriate conclusion is that the complainant was not competent to give unsworn evidence because, it having been concluded that she did not have sufficient capacity to understand the obligation to tell the truth, she was not given the directions required by s 13(5) in full. In the words of Doyle CJ in Starrett, the trial was not conducted according to law, as was the appellant's entitlement, and accordingly the conviction should be set aside."* M. King DCJ was the trial judge.

2. Police statements rarely satisfy s33(2)(a) of the Evidence Act, 1995. Never let them in if they are not made "at the time of or soon after the occurrence of the events to which they refer". I have never heard a sentencing judge reduce a sentence because defence counsel let Police witnesses be led in evidence where it could have been prevented.

3. **It is irrelevant**. See ss55 & 56 of the Evidence Act (NSW) 1995. Relevance is the primary foundation for admissibility[5]. This covers a huge array of sins.

    - A police opinion that a surveillance video shows the accused, without further information, is irrelevant. This was settled in the High Court in 2001.It is not a lay opinion; it is not an expert opinion. It is irrelevant. That question is a matter for the tribunal of fact. See *Smith –v- The Queen (2001) 206 CLR 650.* As the majority said, at Paragraph 11: "The fact that someone else has reached a conclusion about the identity of the accused and the person in the picture does not provide any logical basis for affecting the jury's assessment of the probability of the existence of that fact when the conclusion is only based on material that is not different in any substantial way from what is available to the jury. The process of reasoning from one fact (the depiction of the man in the security photographs) taken with another fact (the observed appearance of the accused) to the conclusion (that one is the depiction of the other) is neither assisted, nor hindered, by knowing that some other person has, or has not, arrived at that conclusion." [6] This leaves open the case where the witness expressing the opinion has had a better opportunity than the tribunal of fact to achieve an identification of the person in the photograph, whether by prior contact with the accused or by reason of a change in the appearance of the accused.

    - (**Regarding Lay opinion see s78**) The Court of Criminal Appeal has pointed to the need for trial Counsel to consider this question: Is there a rational basis

[5] See s56(b) of Evidence Act, (NSW) 1995 – "Evidence that is not relevant in the proceeding is not admissible".

[6] I have found this reasoning of great assistance on many occasions in court. It has many applications to the expressions of opinion by Crown witnesses.

for the opinion expressed by the witness? In *R –v- Panetta (1997) 26 MVR 332* the CCA considered a case where a lay witness expressed the opinion that a vehicle coming from the opposite direction to the one the witness was travelling in at 70 kmph she said was travelling at "roughly 100km per hour, or more" when the observation was made at night and she only saw the headlights for a few seconds. The Court held that no rational basis for the opinion had been shown and the evidence should have been excluded as irrelevant.

- The question: 'Why would a witness lie?' is irrelevant. The High Court in *Palmer –v- The Queen (1998) 193 CLR 1* by majority concluded that "the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross-examination might be inferred is generally irrelevant." (The Court noted that the situation is different if the facts were such that the accused would know of them if they existed and his lack of knowledge could be elicited to disprove those facts.) This question touches on another important matter – the burden of proof in a criminal trial, which always rests of the prosecution, absent certain defences.

- **Gratuitous Medical comment:** Doctor's opinions may also include statements that are not relevant. It has been held by the CCA (comprising Spigelman CJ, Wood CJ at CL & Kirby J) in a single judgment that the opinion of a doctor that her observations on examination of a sexual assault victim were "consistent" with the alleged victim's account may be "entirely neutral" and thus not relevant. See *R –v- RTB [2002] NSWCCA 104.* That was a case where a 9 year old girl alleged penile penetration of her anus and she stated she did not feel anything when it happened. Medical examination of her anus three months later (presumably only a visual, external examination) was that she was normal. It was said by His Honour to the jury that "the evidence [of the complainant] could be accurate". The CCA has previously commented on proper ways to deal with neutral medical evidence. See especially the judgment of Heydon JA in *R –v- Dann (2000) NSWCCA 185.* In RTB the Court stated[7]: "where the doctor is called, it is undesirable, however, for such evidence to be given in a form which appears to bolster the credit of the complainant, rather than in a form that the absence of a physical indicator is neutral." I have recently acted in a case where an accused had a mental breakdown after allegations of sexual misconduct against a girl in his care were made. His psychiatrist reported his statements in what was a florid psychotic state to the police and provided notes to the police which included comments that he was "guilty" of sexually assaulting the girl. The trial judge rightly kept all of that irrelevant and wholly prejudicial material from the jury.

- **Experts generally:** Opinions of "experts", if they are not wholly or substantially based on the person's "training, study or experience" (s79), fail the opinion rule (s76) so are irrelevant. Horticulturalists are not land valuers.

[7] At paragraph [24].

4. **It is leading.**[8] This covers a multitude of sins by the Crown. The Crown often say at the start: "Do you mind if I lead on non-contentious matters?" Of course you don't mind. Many take the liberty of slipping in leading questions on contentious matters, often in quick-fire manner, before you get your guns loaded. Crowns I have named "Lake Eyrie", "No Holds Barred", "the Whinging Irishman" and "Richard Nixon" all engaged in repeated attempts at trial to ask leading questions on contentious matters. Both the Whinging Irishman and Richard Nixon, after my objection, replied to the Bench that they had my consent to ask leading questions … What??? Carte blanche[9]!!! This IS war.

5. **UNRELIABLE EVIDENCE -** This includes **Hearsay, Identification evidence, Evidence affected by age, ill health or injury, Evidence by a witness criminally concerned in the matter, Evidence from prison informers and Unsigned records of interview** are the matters (except one relating to evidence in contested deceased estate cases) listed in s165 of the Act. See also evidence of a child (not children generally in s165A of the Act.

   This list is NOT closed. **See s165(5)** "This section does not affect any other power of the judge to give a warning to, or to inform, the jury."

   Cast a critical eye over the evidence. Some of the most glaring matters are right in front of you. I did a matter where the photo-array was entirely in black and white except the photo of the defendant which was in colour. Further, the allegation was that the offender wore a denim jacket during the offence in a toilet in Centennial Park and the defendant was arrested in Centennial Park wearing a denim jacket, a not uncommon item of clothing in this city. His alibi was proved by a cash register docket showing that at the time of the alleged offence, he was shopping in Westfield Bondi Junction. Police had tailored their case to fit him because he had been wearing a denim jacket.

   If you cannot keep the evidence out, your second defence is the warning to the jury, or you deliver the warning to the bench.

   Remember also that objections to defeat the prosecutor's fallacy on DNA evidence may win the day but if the evidence goes in, there should be a warning to the jury about the use they put to that evidence. Crown expert witnesses do not moderate their excessive statements because of learned opinion about the errors they are fostering with statements about the billions of people who do not have the combination of genes they examine.

6. Carefully check every Notice under the Evidence Act you receive. Tendency notices (s97), Coincidence notices (s98) are often faulty. Granted that s100 of the Act allows the requirement of the notice to be waived, but it is still worth the effort. Many times,

[8] Remember always to never relax your guard. Crowns will lead at any time, especially in re-examination. This is war.

[9] Unrestricted power to act at one's own discretion.

when it appears to the Crown that there will be a pitched battle on what is a defective notice, the Crown will abandon either or both the Tendency and Coincidence arguments. Cases are won or lost on evidence and the more evidence you keep out the better your client's chances are in the trial.

The same waiver of Notice requirement does not exist for the provisions of s38 – Unfavourable witnesses. The Court, when considering the application for a direction under s38, is required to take into account: "whether the party gave notice at the earliest opportunity of his or her intention to seek leave." If they do not give advance notice, or the notice is in any way late, you have an opportunity to keep out more of the prosecution case. Remind the court that s100 does not apply.

7. **I don't like the sound of the question**. This is the best one of all. Sometimes, on this hunch, I have objected but could not put my finger immediately on the reason for my objection and before I could frame a rock-solid winning objection, which is definitely coming, but not yet surfaced, His Honour has said: "Yes, Mr Crown, how is the answer to that question going to help the jury?" Other times, before I have my objection actually formulated, but it is coming, the Crown has said: "I'll withdraw that question." or the Crown has said: "I'll put it another way."

   Maintain your position in the battlefield. If you dig a trench, you are harder to shift.

THE ART OF CROSS-EXAMINATION

I struggle to read books or articles on Cross-Examination. They are so dull and so uninformative. Thirty years ago I wanted to know: 'what do you think about when you are preparing for cross-examination' and 'what you think about when you are conducting cross-examination'. What I have learned has not come from books or articles. It has come from watching my colleagues - Kevin Coorey (now HH Judge Coorey of the District Court), John Ignatius Doris (formerly of U.K. and NSW Bar, but now retired in ill health), Bruce Miles (Solicitor, now deceased) all of whom taught me lessons. There is also the myriad of Solicitors and Barristers I have watched and decided that they did not know either.

Bruce Miles had a confronting view about Cross-examination. He said: "Don't. If you're a beginner, don't cross-examine. Generally beginners only create evidence rather than prevent evidence coming into the case. It is better that you just put your case and sit down. "

There is a lot in favour of that idea. Sometimes a courageous decision to not cross-examine wins a charge or an entire Indictment. If there is no forensic purpose to be served by cross-examination, I often do not. Some Crown witnesses are so much at a tangent to the real issue in the Indictment I regularly do not examine them.

In a very real sense, **Cross-examination is a step in the preparation of the Address (happily that is the subject of my next paper)**. You can compliment yourself in your address to the jury by reminding them that you have been "very focused and efficient in my conduct of the Defence case because what you really need to focus on in this trial is this: ….."

What I have learned is that you need three things to cross examine:

Preparation, Politeness and Perseverance.

Preparation.

Every trial is an oral examination on the evidence in the case, so that by the start of the trial you need to know what is in every statement of consequence in the trial and be able to locate it within seconds, even if it is a 10 volume Brief. I do it by colour coded flags on the top edge of the pages – police are red, customs are green, experts are purple, documents are blue, civilians are yellow.

A. The first matter to note about every Police Statement is the date difference between the witness' involvement and the date on which the statement was made. There is commonly a tactical advantage in requiring the Police to give oral evidence.

Sometimes it causes them to tell the truth.

B. You cannot effectively cross examine the first prosecution witness if you do not know what every other prosecution witness says about the events related by that witness. Similarities in the statements are as important as differences.

Similarities: (Some statements are too similar)

Note the usage of words, the spelling and the punctuation – if there are two or more identical errors or unusual uses of words you have a strong case of copying and pasting. Remember to close the doors before telling the witness and the court of your observation:

Did you prepare your statement yourself? A: Yes. Did you read anyone else's statement before preparing your statement? A: No. Did you discuss the content of your statement with anyone else before preparing your statement? A: No. Did you provide your statement to anyone else? A: No. So your evidence is that your recollection is not affected by anyone else's recollection, that's right isn't it? A: Yes. Your evidence is also that to your knowledge no-one else's recollection has been affected by your recollection. A: No.[10]

Magistrates are very familiar with the event that Police share the content of their statements and are generally very interested where one of the copiers asserts that he did not use any other officer's statement to prepare his statement.

Life is (almost) never so simple. Try those questions again:

Did you prepare your statement yourself? A: No, Sgt Smith and I prepared our statements together. [NOTE: Sgt Smith may not agree] Did you read anyone else's statement before preparing your statement? A: Yes, I read Const. Jones' statement first. [NOTE: Again, Sgt Smith may not agree.] The next question is now irrelevant: {Did you discuss the content of your statement with anyone else before preparing your statement?} Did you provide your statement to anyone else? A: Yes. [NOTE: find out the recipients, who may variously agree or disagree and the next two questions are irrelevant.] {So your evidence is that your

[10] The last two questions are illustrations of "closing the doors"

recollection is not affected by anyone else's recollection, that's right isn't it? AND Your evidence is also that to your knowledge no-one else's recollection has been affected by your recollection.} You will need to pursue the Police officer's understanding of the effect of the Jurat (the opening paragraph at the commencement of the Statement)[11] . You should question him on the content of his statement which came from the recollection of others (typically "nothing") and ask him what he omitted from his statement because others did not agree with his recollection (again, typically "nothing"). You should put to him that he followed this procedure to ensure that the accused was convicted. You also have a strong comment on the whole of the Police case and the method of preparation of evidence.

C. **Differences in Versions:** It is necessary to study every different utterance of the witness – What was told to the ambulance, the hospital admission staff, the treating doctor, the first police who spoke to the witness, what is in the statement and what was said in chief in evidence.

D. Draw yourself a chart, if it will help you to remember. I do it by flags of the same colour in the same location on the right hand edge of the pages of the Brief with the same/similar note or tag that you give to that matter. The flags are invaluable both for cross-examination and address. I think juries are impressed by the advocate quoting exactly what was said on each occasion, without looking at the Brief. You need to show you have a superior knowledge of the evidence. Show you have that Brief in your frontal lobes. Don't forget to tell the Bench which page and paragraph you are quoting from.

E. Where there are multiple counts: Invent names for the different events that identify each charge simply[12]. Use them. Teach them to the witness and the jury. People will start to refer to the charges by the Defence terminology. Some Crowns do this and you should work out the names with the Crown so they do not own them.

F. Remember the old standards: "Have you discussed your evidence with anyone before you came to court today?" and "Did you make a statement? Did you read it? Why did you read it?" Both of these can tip a witness into a worried internal conversation.

G. Remember that one aim of cross-examination is to increase the witness's internal conversation so that the witness more easily loses track of the story and worries about their credibility. While ever you give the appearance of being confidently in control you are having a beneficial effect on the witness or the tribunal of fact, or both.

[11] "This statement sets out the evidence which I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that if it is tendered in evidence, I will be liable to prosecution if I have wilfully stated in it anything which I know to be false, or do not believe to be true." The comment is available that the witness should have changed the pronouns from singular to plural.

[12] From Des Anderson QC, now retired.

H. It is valuable to tell the witness (and thereby tell the jury): "You know, don't you, that as a matter of fairness the Crown supplies the Defence with copies of the notes of any conferences that the Crown has with you before the trial starts?" The witness always agrees, but it introduces the jury to the live concept that the trial system is set up to be fair to the accused. That provides a springboard both for cross-examination on previous inconsistent statements, embellishments in the box not said earlier AND for you to include in your address the pressing need to be fair to the accused. It gives weight to the warnings on such matters as the delay in complaint or the failure to produce relevant witnesses.

I. Prepare a Chronology, especially listing dates which assist the Defence case. Occasionally Crowns do not have their chronology ready. Press yours into their hands. It took the whinging Irishman about three days to realise what a poisoned chalice it was.

J. If a prosecution witness steps out of line, asking questions back and making it a personal confrontation between us, I pull him into line. Provided you are very quick: "I'll ask the questions and you will answer them" HH will not usually comment.

Politeness

A small and easy matter, but it really counts in your favour if you are bright and polite at all times in front of the jury.

If you slip up, correct yourself with a slight self-deprecatory remark. After a pause that went too long while I looked for a part of the transcript I had not flagged but which was relevant to my next question, I said: "Pardon me ladies and gentlemen, I know this is here somewhere!" other are: "Wow; it is true I can't remember everything!" or "Phew! Won't make that mistake again!" or whatever you can say in the circumstances. Juries appreciate it if you show some humanity.

Never get annoyed with a witness. If the witness is procrastinating instead of answering, steadily continue to politely put your case to him, assuring him he doesn't have to respond at length to each matter you say, but you say you have to do your job and part of it is to put the defence case to him. Try to frame your complaints about the witness as him inconveniencing the jury. "I'm sure the jury want to know the answer."

I have said many times to witnesses who are deliberately not answering my questions: "If you don't answer my questions the jury will be here too long."

Persistence

- You are NOT required to question a witness in chronological order of the events. In fact it is a forensic tool of some repute to frame questions out of chronological order when testing witnesses. Colman in his text titled "Cross-Examination"[13] explains it thus:

[13] "Cross-Examination. A Practical Handbook" by Judge G. Colman Q.C. Supreme Court of South Africa. Juta & Company, Cape Town. 1970

- "It is not only when something appears to have been learned by heart that there is value in the device of turning, in haphazard order, from one detail to another. A fabricated story is easier to tell plausibly when the recital follows a preconceived order or plan; improbabilities, inconsistencies and other weaknesses are more likely to appear when counsel exercises his privilege of darting back and forth among the detail of the narrative."[14]

- I had a "cut dick" case where the man was untruthful about how his best friend came to be out in the sun and air when a nearby woman was holding a carving knife. He was a teacher and realised early in his evidence that I was comparing each of the five different versions he had delivered in his dealings with emergency, medical, police, Crown and then evidence in chief. He began to anticipate the questions and give self affirming speeches in answer to the orderly questions. I switched to asking questions about the events without reference to the source of the version and not in chronological order. He soon confused his explanation (lost his place in the fabricated story?) and stopped answering questions. For the next two days he gave long mindless meandering waffly explanations, always avoiding the question, such that he did not actually answer any questions in the two day period. This is where politeness and persistence come to the fore.

- Cross-examination gives the advocate the opportunity to transmit comment to the jury through the questions. Crowns do it as well. It can be the cause of complaint by the other side or by the Bench and if there was any complaint, the only course is to immediately and cheerfully withdraw the comment, but some of the most pertinent comments I have made were not subject to any objection by the Crown or the Bench. It may have been the point that everyone wanted to see made in court at that time.

    - In one trial the Crown corrected a small error my question. I immediately said: Oh yes, thank you for that Mr Crown. That is right. I do not intend to mislead the jury one jot." (The pregnant suggestion is that the witness is the one trying to mislead.)

    - In the cut dick case just referred to, at about 3:48pm on the second day of cross-examination, I asked the complainant another question pertinent to his cross-examination trying to fix him with a positive statement about the now very muddled scenario and again he started into a meandering tangential speech. I said over the top of him: "Would you just answer my question? We're running out of time!" and I gesticulated towards the clock on the wall behind me. All the jury followed my outstretched arm pointing towards the clock. He was not deterred and resumed his rambling answer-avoiding dissertation but the jury had the point.

    - In another case[15], I cross-examined a 17 year old female complainant, who had in chief told the jury how she felt pain when the accused, she

[14] Ibid p65

[15] I comment that when relating events in cross-examination from cases I have run, it is impossible to retell sufficient of the detail of the previous hours of questions so that the reader will see that the

said, had rubbed her in the crotch for about 30 minutes when she was 13 or 14 years old.

BB:Do you remember telling the jury in your evidence in chief that you felt pain when the accused put his finger in and out of your vagina for about 30 minutes?

Inf: Yes

BB:You used a particular word for that pain when you made your statement to the Police, didn't you, you described it as "stabbing" pain, that's right, isn't it?

Inf: Yes

(I knew that the Crown had not elicited that word from her in chief.)

BB:Is that how the pain that you felt was, a stabbing pain?

Inf: Yes

BB:A severe, sharp and strong pain, is that right?

Inf: Yes

BB:And you also told this jury that the use by the accused of gel on his finger made no difference to the pain you felt?

Witness: Yes

BB:And this pain continued throughout the whole of the 20 to 30 minutes he was moving his finger into and out of your vagina?

Witness: Yes

BB:Surely that's just a sign of your ignorance about these matters, isn't it?

(My question was not answered, I left the jury to think about it for a few seconds and moved on.) There was no objection from Crown or Bench and there was no answer from the witness, but the jury had the point.

- In another case my instructing solicitor Sam Macedone invented this one, which is also a comment disguised as a question. A female business manager was about to sack a female employee for flagrant disobedience of a workplace rule reported to her by a male employee when the female employee complained of a sexual assault of her by the male six weeks before, during her first week in the premises. The manager alleged she made notes of the conversation which she sent to the employee to check. Those notes were radically amended by the employee. The

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question was in a proper matrix and flowed from the circumstance where the credibility of the witness was coming undone by this time.

manager on the same day interviewed the male who instructed later that he made no admissions and only denied the allegations. However, the manager produced to Police her alleged notes of the interview with the male, which alleged that he had confessed to the intercourse but said it was consensual. It was important in the trial to undermine the credibility of the manager to undermine the alleged admission. At Sam's suggestion, I pointed out to the manager that both persons she interviewed that day had rejected her notes of the conversations she had with each of them. She warily agreed. Then I said: "You're not much of a note taker, are you?" She sat in silence **for too long** before I sat down and ended the cross-examination. There was no objection from the Crown or the Bench. The jury got the point.

- Never forget to return to the client for instructions during the trial. Even the most inarticulate and uneducated accused can suddenly realise the issues in the trial and say very important instructions vital to successful cross-examination. In a trial a mother told in chief how her daughter had become introverted and difficult to deal with in the period after the alleged abuse commenced. She said her daughter appeared to be unable to concentrate on her schoolwork and her results at school became poor. By the way, she later mentioned that her daughter had changed schools at year 10. During the morning tea break, the accused volunteered to me that the second high school was a selective government high school. Mother had to eat humble pie when I took her through how well her daughter was studying at school and that mother had been proud of her daughter's achievement.

- **Returning the witness to reality is a useful tool**:

    - I said to a female schoolteacher witness, alleging assault by her schoolteacher husband in order to get the upper hand in family court proceedings seeking control of the child and the matrimonial home and sobbing into her handkerchief while repeating the word "What? after every question I asked her, the following took place:

      Witness: (Crying) What?

      Me: Oh come off it madam. You're the Social Science mistress at (SUBURB NAME) High School!

      Magistrate Mizalski: What did you say Mr Brassil?

      BB:I put it to the witness that she was currently the Social Sciences mistress at SUBURB High School.

      MM: What has that got to do with this proceeding?

      BB:Well, my instructions are that the witness is the Social Sciences mistress at SUBURB High School and in that capacity supervises 37 teachers teaching History, Geography and several other subjects to 1,100 students and in that position she would have a high level of command of the English language but she appears to be pretending to not understand

the relatively pedestrian English vocabulary which I am using in the questions I am putting to her.

MM: (turning to the witness) Is that correct?

Witness: Yes [What exactly was she agreeing to?]

I won that case. Ensure the church of reason descends on the courtroom. Magistrates, Judges and juries appreciate you quickly ending the fantasy created by the witness.

- Remind the witness of previous statements. When a witness tells of more incriminating detail in the witness box than they said in the statement/s made previously, you have a golden opportunity to destroy credit. It is important to ask this category of witness to repeat the allegations and to identify any variations with the version told in chief. Once you have identified variations between the version told in chief and the version re-told in cross-examination, close the doors on that being the entire recollection of the witness, then the pattern of questions goes as follows:

  BB:In your evidence in chief you told the jury (distinct allegation);

  Witness: Yes

  BB:You didn't tell that to investigating police when you made your original statement to Police, did you?

  Witness: No

  BB:Your statement commences with two sentences. The first of those sentences is: "This statement made by me accurately sets out the evidence that I would be prepared if necessary to give in court as a witness", do you remember that?

  Witness: Yes.

  BB:The next sentence is: "This statement is true to the best of my knowledge and belief and I make it knowing that if it is tendered in evidence I will be liable to prosecution if I have wilfully stated in it anything that I know to be false or do not believe to be true"? That is the second sentence, isn't it?

  Witness: Yes.

  BB:So your memory of this event has improved, has it?

  Witness: Yes

  BB:If that is so, why are you unable to tell the jury today the same improved memory you have of the event today that you had on Monday?

  Witness: I don't know.

- In another case, I dealt with this matter slightly differently:

BB:You didn't tell the learned Crown in your pretrial conference with him about the idea that you would be paid to touch his penis, did you?

Witness: No.

BB:You didn't tell the learned Crown in that conference that you negotiated the time of five minutes with him, with the accused, did you?

Witness: No.

BB:The first mention by you of both of those items in your evidence was when you gave evidence before this jury last Thursday, that's right isn't it?

Witness: Yes.

BB:The reason why you added those items into your evidence was to make your story more plausible, that's right isn't it?

Witness: No.

BB:When you made your statement to Police a year ago did you deliberately withhold relevant information from them about that event?

Witness: Yes.

BB:When you spoke to the Crown in conference this year to prepare for this trial did you tell the Crown about those two events?

Witness: No.

BB:I put to you that you have deliberately added those items into your evidence in order to make your evidence sound more plausible?

Witness: No.

BB:I put to you that the reason why there is in your evidence the addition of important parts of that story is because you do not have a truthful memory to rely on to tell this jury about that event?

Witness: No.

- Another expression I use against witnesses sometimes to telling effect arises in these circumstances:

BB: I put to you that did not happen.

Witness: It did.

BB: Further, you have invented that allegation.

Witness: I did not.

BB: The reason you invented that allegation is to prejudice this court against the accused.

GET A DIAGRAM OF THE SCENE

- When you have several witnesses telling the same event, you should get each to prepare a diagram in the box showing where they were and where the players in the event were at the time of the incidents of significance. Get each witness to describe in detail the events witnessed. This often opens up impossible conflicts in the Crown case and has been a very successful procedure in defending counts arising from protests and public disturbances. In one case, as a crowd control device, Police from the Tactical Response Group (all built like footballers) attacked a woman who was screaming out about and pointing to where Police were surreptitiously punching a man they had on the ground. Several jumped onto her, one grabbed the middle finger on one of her hands and gave it a "corkscrew fracture" (for which she screamed in pain). The ferocity of the attack is designed to deter any others from becoming involved in the defence of persons being mistreated by police. Police invented an allegation that she had attacked and assaulted a female Police Superintendent and needed to be restrained. Seven Police witnesses produced seven different diagrams of the event. Each directly contradicted most if not all of the others.

- **Dangerous questions.** Opinions differ so much about this topic. Some say the golden rule is "Don't ask a question if you don't know the answer." I disagree. It is always necessary to ask questions to which the answer is unknown. The Art is to know which ones are likely to produce poor results and that decision depends on your case theory; what the witness has previously said and your assessment of the acumen of the witness. For instance, Colman in his book "Cross-Examination" cited above says the following:

  "It would be hard to think of a more useful question than: *What makes you remember that so clearly?*"[16] I think that is one of the most dangerous questions of all, because it is so obvious that every liar will work on the answer to that question and every truth teller will have a properly expressed reason. In my experience, neither will be vague about that answer. Unless you approach it from another direction, leave it alone. In a civil proceeding against me many years ago, Counsel for the Plaintiff asked me:

  Him: You seen to have a very good memory of that day, why is that?

  I: I haven't been allowed the liberty to forget. (Dangling the bait)

  Him: What do you mean by that? (Which he should never have asked)

[16] Ibid. p66

I: Because when I was served with the initiating process in this matter I knew that this day would come that one day I would be in this witness box being questioned about this so I have made a point of clearly remembering every detail of what took place on that day. I have made a point of remembering everything. (Needless to say that Plaintiff was unsuccessful)

Approaching it from another direction, a better approach is to first establish that the witness is not graphically clear about direct details of the story that it would be reasonable to expect a teller of the truth who was relying on a clear memory would recall. I think juries appreciate this one, which I have used many times to test a liar:

Counsel: So you would say you have a clear memory of the event, that is right isn't it?

Witness: Yes

Counsel: So when you shut your eyes you can see the scene in your memory, that is right, isn't it?

Witness: Yes. (I have had a couple of witnesses who have guessed what is coming. One just pretended to be unable to understand this question and another suddenly commenced to admit to a poor memory of every other detail other than the ones he had given evidence on – not a good look for both witnesses)

Counsel: All right then, shutting your eyes for a second, what is the colour of his shirt he was wearing? (or some other relevant detail which would be obvious to a person with a clear recall of the scene).

If you get a good answer, like "I don't recall" Don't stop there, you must be patient and persistent. Get half a dozen 'I don't recalls' before you commence to wrap up the witness and his incredible memory.

Try to finish cross-examination on a good point. With a late complaint child sex allegation, this is an appropriate way to finish the cross-examination:

BB: You went to school in Australia?

Witness: Yes.

BB: You went to school from kindergarten and you are now in Year 12?

Witness: Yes.

BB: You have had numerous times during your education in which you heard from teachers and from other persons in your classroom about being touched by adult persons inappropriately haven't you?

Witness: Yes.

BB: Your school records at your various schools will show that you had sex classes where you were told about these dangers of being touched by strangers and other persons haven't you?

Witness: Yes.

BB: You were told in your classes in school that you must report such misbehaviour by adults to you?

Witness: Yes.

BB: That's the end of the cross-examination your Honour.

RECOVERED MEMORY: The Cross-Examiner must have the law on Recovered Memory at the tip of his fingers when cross-examining in late complaint sexual assault matters. This arises when a witness tells that the memory of the previous misconduct arose on a day or at a particular moment and the witness agrees that they did not have the memory the day before.

Evidence of a Recovered Memory was considered by the NSW Court of Criminal Appeal in *Regina –v- Eishauer [1997] NSWSC 419.* The case was reported (by the name *"E"*) in *[1997] 96 A. Crim. R. 489.*[17] The Court was considering a matter of late complaint child sexual assault, at trial nine years after the alleged event. The trial was before a single judge of the District Court. The Supreme Court decided by majority (per Sperling J., (Smart J. agreeing, Simpson J. in dissent)) that where the evidence supporting the counts in the Indictment was from a Recovered Memory, there is necessarily a reasonable doubt about the guilt of the Accused. The stated reason for this is that it is reasonably possible that the complainant's memories were true, recovered memories. But it is also reasonably possible that they were honestly experienced, false memories. The judgment of Sperling J. concludes with the following passage: (at p 500-501)

> "In the present case, this court must proceed on the basis that MH's evidence concerning her memory of events was honestly given and that the accused's evidence does not count in the balance.
>
> A distinction is to be drawn between honest evidence and reliable evidence. There may be instances where the tribunal of fact is in a better position to assess the reliability as distinct from the honesty of a witness. The witness might, for example, give the appearance of difficulty in recalling events. In such a case and others, demeanour might indicate unreliability or, for that matter, reliability. But, in the present case, the question of reliability arises in a more abstract way, namely, the

[17] There are other references in the reports to "Recovered Memory". Where the memory was "recovered" during hypnosis or EMDR, they have been disregarded as of no assistance. See DPP (NSW) –v- JG [2010] NSWCCA 222and Tillott, Jamal & Haines (1995) 83 A.Crim. R 151. Where there was no evidence in the trial of the memory being "repressed" or "recovered", but it was raised solely on appeal, see GA NSWCCA 17-Jul-1997.

degree of reliability or unreliability to be accorded to honestly experienced memories which, according to the subject, were not experienced for a long time after the event and which came to be experienced in circumstances which are not contentious. It is difficult to see what role demeanour could have in resolving the reliability of such evidence.

Accordingly, if this court has a doubt about the reliability of MH's account of what occurred, notwithstanding an assumption that it was an account she honestly believed to be true, the convictions would have to be quashed.

Ostensible memories may be characterised as true memories, false memories and fabricated memories. By true memories, I mean memories that are correct. They would include memories which may have been lost and which have later been recovered. By false memories I mean memories which the subject believes to be correct but which are incorrect. By fabricated memories I mean purported memories which are not memories at all. They are knowingly false. Fabricated memory in this sense is not an option in the present case because findings which should not be disturbed are against it.

As to false memory, it is common experience that people remember things in ways that suit them. False memories are common knowledge. (If all the narrative accounts of motor accidents, honestly given in social discourse, were true, there would have been very few motor accidents because very few people would ever have caused one.) The corollary is that the mere fact that someone honestly experiences the memory of an event is no guarantee that the event occurred that way or even that it occurred at all. **This is particularly so when motivations for having such a memory are apparent.** (Emphasis added)

The contrast for the present case is with true memories, which (as I have said) would include a memory lost for a time and later recovered. That too is common knowledge. People may have forgotten altogether about something until the memory is triggered by a thought or an experience or by something someone says. The fact that, at one point in time, the subject would say, if asked, that they did not remember the event and, at a later point in time, would say honestly that they did, does not mean the memory is a false memory. It may be a true memory, dormant for a time and later revived.

The difficulty in the present case is the choice between a true, recovered memory and an honestly experienced, false memory. There is no compelling consideration either way.

Common experience does not enable one to say that the memory of a painful event, absent for a long time and later experienced, is more likely to be a revived, true memory than an honestly experienced, false memory. I do not accept as common knowledge that, in the case of children, memory of abuse is frequently lost and later reliably recovered. The content of the ostensible memories in this case is beyond common experience. There is no common knowledge on which to draw for guidance. To generate false memories of *this* kind is not commonplace. To lose memories of *this* kind for ten years or so and then to recover them is not commonplace. The case

is remote from common experience. There is no common knowledge which is applicable to such a case as this.

Cases such as *F* (CCA (NSW), 2 November 1995, unreported) and *C* [1993] SASC 4095; (1993) 60 SASR 467 recognise common knowledge explanations for delay by children in complaining about abuse and for serial disclosure of instances of abuse by children, notwithstanding that the child knows of and remembers the abuse. These cases do not bear on the present case. Nor do other decisions dealing with the admissibility of expert evidence as to how children behave or might plausibly behave. There is no issue concerning the admissibility of such evidence in the present case.

It is reasonably possible that MH's memories were true, recovered memories. But it is also reasonably possible that they were honestly experienced, false memories. The corollary is that there is, necessarily, a reasonable doubt concerning the appellant's guilt on a reading of the record of the proceedings.

That doubt is not capable of being explained by taking into account the advantage which the trial judge had in seeing and hearing the witnesses. I have accepted the trial judge's findings - as I believe this court should - in relation to MH's honesty, and I have put the appellant's denials out of account. But the point in the appeal then turns on the reliability of MH's evidence as distinct from her honesty. That, in the circumstances of the present case, this court is as well able to assess as the trial judge.

For these reasons, the trial judge ought to have had a reasonable doubt concerning the appellant's guilt. I would therefore uphold the third ground of appeal. It is unnecessary to consider the other two grounds.

It does not follow that a case of sexual abuse of a child can never be made out where a memory of events is absent for some time and later comes to be experienced. Every case must turn on its own facts."

- The witness should be asked "So if you had been asked about (the matter in question) on the day before you remembered it, you would have denied that you had any memory of it at all. That's right isn't it?" If you get the answer "Yes" you have a case of recovered memory and there should be a verdict by direction. I have had this exact point arise in a trial.

Bibliography:

I acknowledge assistance gained from:

"Uniform Evidence Law" , 9th Edition by S. Odgers S.C.

Butterworths "Criminal Practice & Procedure"