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TRIAL STRATEGIES…DEFENCE OPENING, CROSS AND CLOSING

This paper has been prepared in the hope of assisting generally with defence strategies – however it references New South Wales legislation as my practice of criminal law is in NSW. The Evidence Act (NSW) is in the same terms as the Commonwealth Act and generally applicable across Australia.

Opening addresses to a jury

In NSW the Crown Prosecutor, in trial matters, will as a matter of course make an opening statement to the jury outlining the Crown case against an accused.

Some defence advocates shy away from making an address to a jury immediately after the Crown has made theirs.

I remember being advised by the inspirational Tom Molomby SC, upon first coming to the Bar, that I MUST make an opening address. Tom emphasised that it is imperative that defence counsel introduce themselves to the jury, that the jury must hear from defence counsel at the beginning of the trial so as to have the client's version of events and the defence challenges to the Crown case ringing in theirs ears as they listen to the Crown case.

By introducing yourself to them you make it plain that you are there to assist them in their task - that there is an alternative to the version of events as presented by the Crown, and that such an alternative must be considered whilst sitting through the evidence of the Crown witnesses.

The burden of proof is never upon the defence (except in certain circumstances), it always rests with the Crown. The judge will tell the jury of the very high standard of proof borne by the Crown. In light of that, it makes sense doesn't it, that the jury know of the alternative version of events whilst assessing the Crown case – to have them start thinking straight away about reasonable doubt.

In a paper delivered by Ian McClintock SC, prior to his becoming a District Court judge, he noted that an American study found that 70% of jurors did not change their minds after the prosecution's opening statement.

Juries are told that submissions by counsel are not evidence but such a study may tend to suggest juries do not necessarily accept that. It is therefore a good idea – assuming that Australian jurors are nor dissimilar to American, that a defence opening address should be made, as an "opening may well stop this process from solidifying into a conviction."[1]

There may be though good reasons for not opening immediately after the Crown's opening address, some common reasons are;

- defence counsel doesn't know what their defence is just yet but will come to know it later
- defence counsel doesn't know their client's version is but will come to know it later
- defence counsel doesn't know whether the Crown witnesses and/or defence witnesses will come up to proof and may lose a tactical advantage thereby
- the case is one which the jury will and should discover the defence for themselves[2]

It must be noted that not making an opening address will mean that the Crown case narrative remains virtually unchallenged for the majority of the trial.

In NSW defence openings are governed by section 159 of the Criminal Procedure Act;

159 Opening address to jury by accused person

(1) An accused person or his or her Australian legal practitioner may address the jury immediately after the opening address of the prosecutor.

(2) Any such opening address is to be limited generally to an address on:
(a) the matters disclosed in the prosecutor's opening address, including those that are in dispute and those that are not in dispute, and
(b) the matters to be raised by the accused person.

(3) If the accused person intends to give evidence or to call any witness in support of the defence, the accused person or his or her Australian legal practitioner is entitled to open the case for the defence before calling evidence, whether or not an address has been made to the jury.

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[1] 'Addressing a Jury' Ian McClintock SC – Public Defenders conference 2009
[2] ibid

This section has been fairly narrowly interpreted;

> "The purpose of the defence opening address under s 159(2), therefore, is to define, for the jury's benefit, the real issues in the trial and what the accused might say in answer to the Crown's allegation. It is not an opportunity for defence counsel to embark upon a dissertation on the onus and standard of proof, or the functions of judge and jury, or to anticipate the directions or warnings to be given by the trial judge, or to urge upon the jury the way that they should assess the evidence of a witness to be called in the Crown case. It behoves trial judges to ensure that the addresses of counsel are not open to abuse, particularly in a case where the contents of the address is circumscribed by a provision of an Act. To permit counsel to ignore such a limitation is not in the interests of justice, either generally or in the particular case. It may be appropriate for a trial judge to ensure, before the defence opens and in the absence of the jury, that defence counsel is aware of the limited basis of an opening under s 159 and that the address will comply with it.[3]

One must refrain – as noted, from addressing the jury on onus and standard of proof. Although, I do say to a jury in my opening address that the accused is called the accused because the Crown case is an accusation only – that is all it is, until proved beyond reasonable doubt.

A defence opening is better made as a positive story based upon the defence's realistic alternative theory focussing on the facts that support it.

It is useful to bring out the good character of the accused (if you have that available) in the opening address to the jury - to have then thinking straight away about the unlikelihood of this person having committed any crime at all.

The opening may include a brief summary of the defence position in relation to issues of the case – such as whether the defence does not contest one of the elements of the offence.[4]

As Tom Molomby SC told Malcolm Knox, in 'Secrets of the Jury Room';

> "I try to give a clear outline of our case, and make sure to mention new points I'm confident we can prove early. If you show the jurors you have something to say and can deliver on it, they're more likely to stay open-minded…I try to explain the fundamentals at the start. Cases are lost because the defence hasn't been able to show that it has a case, before little doors have shut in the jurors' minds."[5]

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[3] Regina v MM (2004)145 A Crim R 148 at paragraph 139
[4] Advocacy Manual, Australian Advocacy Institute, p.66-7
[5] Knox, Malcolm (2005). Secrets of the Jury Room. Sydney:Random House, p.90-93

It may seem daunting to make an opening address to a jury when you are not confident about where the trial is going to go. However, there is always something positive to say – if only "Mr X is telling you, by his plea of Not Guilty, that he did not commit this crime".

Cross-examination

The nature of cross-examination allows a questioner to ask leading questions of the witness. It is imperative that only leading questions be asked.

A leading question is one that has the answer suggested in the question and is capable of a yes or no answer.

Cross-examination is curtailed by Sections 41 and 42 of the Evidence Act (hereinafter 'the Act');

41 Improper questions

(1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a
"disallowable question" *):*
(a) is misleading or confusing, or
(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or

(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

(2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:
(a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and
(b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and

(c) the context in which the question is put, including:
(i) the nature of the proceeding, and
(ii) in a criminal proceeding-the nature of the offence to which the proceeding relates, and

(iii) the relationship (if any) between the witness and any other party to the proceeding.

(3) A question is not a disallowable question merely because:

(a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness, or
(b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

(4) A party may object to a question put to a witness on the ground that it is a disallowable question.

(5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

(6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

42 Leading questions

(1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.

(2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:
(a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness, and
(b) the witness has an interest consistent with an interest of the cross-examiner, and

(c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter, and

(d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.

(3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used.

(4) This section does not limit the court's power to control leading questions.

Section 41 enshrines in legislation what all good legal scholars will tell you about how to cross-examine.

Section 42 in my experience is not often invoked.

As to the conduct of cross-examination, the advice of the distinguished Tom Hughes QC is akin to gospel;

> "To my mind, the best effect can be achieved only if the cross-examiner does his work with style. I do not intend this word to denote a fixed technique from which the advocate never permits himself to depart…Method or technique must be moulded to the exigencies of a particular situation or witness. Adaptability is necessary. The essentials of 'style' in cross-examination are, first, a capacity to ask questions that

> are clear in their meaning and incisive in their thrust. Brevity begets clarity. The best questions are usually 'one-liners' or 'two-liners', if measured by the space they occupy in a transcript. Second, neither loudness of voice or an overtly hostile mien will do. Third, it is usually better to bury a witness with kindness that to conduct a public execution. Modern tribunals do not, generally speaking, react kindly to harsh treatment of witnesses. Cross-examination designed to expose misconduct is generally more telling if conducted in politely conversational tones. Sometimes, when the scent is strong and the advocate thinks he is moving in for the kill, it may be difficult, but it is always advisable, to adopt a low key approach. "[6] *(emphasis added)*

I have seen Tom Hughes QC cross-examine a witness. There was never a raised voice but there was a firm but conversational tone. The questions were models of brevity. Mr Hughes would often pause after an answer to a question for almost a minute, not looking through papers or anything of that nature – but would just be still or turn and rest his gaze on his junior or upon someone in the public gallery, looking straight through them – and the gaze of everyone else, including that of the judge, followed his. I found it fascinating! In this way he controlled the courtroom. I do not suggest you attempt this, but a calm controlled manner is compelling. The aim in cross-examination is control of the witness. If you lose control of a witness you are in peril of having a totally ineffectual cross-examination. Mr Hughes QC had control, it seemed to me, of the not only the witness but the entire courtroom, and he achieved this with a calm, courteous, straight-backed (he's famous for his posture) dignified and authoritative presence.

Further, on the importance of courtesy and calm command in cross-examination, Murray Gleeson AC, QC, who started out as a junior to Tom Hughes QC and later became the 11th Chief Justice of the High Court of Australia notes ;

> "In dealing with witnesses, it is important to remember that if an advocate attacks a witness the chances are that the tribunal's initial sympathies will lie with the witness and not with the advocate. If it is necessary to make an attack upon a witness then it has to be carefully timed, and should never be done before the advocate has taken steps to engage the sympathy of the tribunal for the client.
>
> Unprovoked and unsuccessful attacks on witnesses can often lead to extreme reactions against the attacker. The most lethal cross examinations are those which are conducted in a measured and deliberate fashion without shouting or excitement and in which the

[6] The Art of Advocacy by Tom Hughes QC date unknown

cross examiner is in command of him or herself and the situation" [7] *(emphasis added)*

So the consensus among 'the greats' appears to be – adhere to the dictates of section 41, or suffer the consequences.

Other sections of the Act pertinent to the governance of cross-examination are:

43 Prior inconsistent statements of witnesses

(1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not:
(a) complete particulars of the statement have been given to the witness, or
(b) a document containing a record of the statement has been shown to the witness.

(2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner:
(a) informed the witness of enough of the circumstances of the making of the statement to enable the witness to identify the statement, and
(b) drew the witness's attention to so much of the statement as is inconsistent with the witness's evidence.

(3) For the purpose of adducing evidence of the statement, a party may re-open the party's case.

The section is plain in its terms. If a witness gives evidence that is inconsistent with a previous written statement you would put to the witness in plain terms that he or she said something else at an earlier point in time. If the inconsistency is with something said in examination-in-chief (that was favourable to the defence) then you are on solid ground – particularly with the benefit of ongoing transcript, in proving the earlier inconsistent statement. If however the earlier statement does not come from examination-in-chief, and the witness does not admit the earlier statement then *ss 43(2)* must be strictly adhered to.

If the witness continues to deny the statement then if you wish to rely upon the inconsistency you will have to prove it – which could be difficult.

If the prior inconsistent statement was oral you will have to call direct evidence of the statement, if in written form you will have to prove the document.

The most common example of this situation is when the inconsistency is with something said to police and contained in a statement forming part of the Crown brief.

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[7] NSW Bar Association Reading Program. Advocacy, The Honourable A.M.Gleeson AC, Chief Justice of NSW *(at that time)*(prepared whilst the Chief Justice was a member of the Bar)

You should ask the witness a series of questions as to the patience the police took with them in taking the statement, the care they took in telling the police everything they knew about a matter, the fact that they read the statement carefully (or had it read to them) before signing it as true and correct. Then you take them to the inconsistency.

Do not ask for an explanation – that is too dangerous (never give a witness in cross-examination an opportunity to explain anything). Direct them to the fact that they have said something different in the past, asking them to agree with you. If you have sufficiently proved the inconsistency then they will have to agree with you.

If they continue to disagree – move on, you have made your point – save it for your closing address.

You may wish to suggest to the witness a reason for the inconsistency – but this is very dangerous as it could give them an opportunity to explain the inconsistency.

If the witness gives evidence of something not mentioned before examination-in-chief, make sure you close off all opportunities for the witness to explain why they did not tell the police this information at the time their statement was taken by police.

Again, ask the series of questions about the care and patience the police took with them in the taking of their statement. If the witness tells you that it is something that came to them after the statement was taken ask questions highlighting the ease with which they could have contacted the Officer-in-Charge of the investigation to provide another statement.

If the witness says "I did contact the Officer-in–Charge and they said this or that…." just move on to the next topic.

If you do not shut such an exchange down you risk falling into a situation that borders on, if not spills into, arguing with the witness – which must never be done. If you start arguing with a witness you not only risk being chastised by the judge but you are losing control of the witness and your cross-examination.

Be confident that you have made your point – that is, extracted the fact that this material is new and save it for your closing address.

You may wish to cross-examine a witness about a previous representation made by another person. In doing so you must strictly adhere to section 44 of the Act;

44 Previous representations of other persons

(1) Except as provided by this section, a cross-examiner must not question a witness about a previous representation alleged to have been made by a person other than the witness.

(2) A cross-examiner may question a witness about the representation and its contents if:

(a) evidence of the representation has been admitted, or
(b) the court is satisfied that it will be admitted.

(3) If subsection (2) does not apply and the representation is contained in a document, the document may only be used to question a witness as follows:
(a) the document must be produced to the witness,
(b) if the document is a tape recording, or any other kind of document from which sounds are reproduced-the witness must be provided with the means (for example, headphones) to listen to the contents of the document without other persons present at the cross-examination hearing those contents,

(c) the witness must be asked whether, having examined (or heard) the contents of the document, the witness stands by the evidence that he or she has given,

(d) neither the cross-examiner nor the witness is to identify the document or disclose any of its contents.

(4) A document that is so used may be marked for identification.

If the evidence of the representation of another has been admitted or the court is satisfied that it will be admitted, then you may cross-examine a witness about that representation.

You cannot however invite the witness to comment about their opinion of the veracity of that previous representation of another.

If the representation has not been admitted produce the document containing the representation of another WITHOUT identifying it at all, place it before the witness, ask them to read the relevant portion of the document and then ask them whether they adhere to their previous evidence on that issue. Regardless of whether the witness adheres to his or her testimony, have the document marked for identification – it could be that during the course of the trial you will have an opportunity to prove the document and have it admitted as an exhibit.

Cross-examining your own witness

It is extremely rare for defence barristers to seek to cross-examine their own witnesses – it would be ill advised, a very bad look before the jury. By that I mean, it is highly unlikely to be persuasive and would be very damaging to the position of the defence. It is most often a tactic used by the Crown and permitted by section 38 of the Act;

38 Unfavourable witnesses

(1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
(a) evidence given by the witness that is unfavourable to the party, or
(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence, or

(c) whether the witness has, at any time, made a prior inconsistent statement.

(2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).

(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.
(4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

(5) If the court so directs, the order in which the parties question the witness is to be as the court directs.

(6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account:
(a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave, and
(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

(7) A party is subject to the same liability to be cross-examined under this section as any other witness if:
(a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person, and
(b) the party is a witness in the proceeding.

If the memory of a witness appears to be failing them then an application to cross-examine a witness pursuant to section 38 (1)(b) is usually preceded by an attempt to refresh the memory of that witness pursuant to section 32 of the Act;

32 Attempts to revive memory in court

(1) A witness must not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion unless the court gives leave.

(2) Without limiting the matters that the court may take into account in deciding whether to give leave, it is to take into account:
(a) whether the witness will be able to recall the fact or opinion adequately without using the document, and
(b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that:
(i) was written or made by the witness when the events recorded in it were fresh in his or her memory, or
(ii) was, at such a time, found by the witness to be accurate.

(3) If a witness has, while giving evidence, used a document to try to revive his or her memory about a fact or opinion, the witness may, with the leave of the court, read aloud, as part of his or her evidence, so much of the document as relates to that fact or opinion.

(4) The court is, on the request of a party, to give such directions as the court thinks fit to ensure that so much of the document as relates to the proceeding is produced to that party.

If a witness maintains that he or she cannot remember their version of events on an issue, despite having the opportunity to read their statement regarding that issue, then an application pursuant to section 38 (1)(a),(b) and/or (c) can be made.

When a party is making an application pursuant to section 38, the Court hearing the application must consider section 192 of the Act. A failure to look to the section may indicate that the judge or magistrates discretion has miscarried for failure to take into account section 192 considerations.[8]

The terms of section 192 are;

192 Leave, permission or direction may be given on terms

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:
(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and
(b) the extent to which to do so would be unfair to a party or to a witness, and

(c) the importance of the evidence in relation to which the leave, permission or direction is sought, and

(d) the nature of the proceeding, and

(e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

It is often very hard to resist an application made pursuant to section 38, given the broad definition of 'unfavourable'.

The word "unfavourable" in s.38(1)(a) does not mean "adverse". It means "not favourable".[9]

A more effective method of resistance would be relying upon and highlighting the factors raised in section 192 of the Act on the question of leave.

<u>Cross-examining on Credit</u>

Section 102 of the Act notes that;

> *Credibilty evidence about a witness is not admissible*

Credibility evidence is defined in the Act by section 101A;

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[8] R v Hogan [2001] NSWCCA 292
[9] <u>Souleyman (1996) 40 NSWLR 712</u> at 715

101A Credibility evidence

Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:

(a) is relevant only because it affects the assessment of the credibility of the witness or person, or

(b) is relevant:
(i) because it affects the assessment of the credibility of the witness or person, and
(ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

There are however exceptions to the rule stated in 102, when it comes to cross-examination, the most important of which from the defence perspective are sections 103 and 106;

103 Exception: cross-examination as to credibility

(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:
(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and
(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

Section 103 permits evidence going to the credibility of a witness being adduced in cross-examination but only if the evidence could substantially affect the assessment of the credibility of the witness.

Evidence going to the general discredit of a witness which had little impact on the question of whether the witness out to be relied upon would probably not satisfy s103(1). It has been suggested that where evidence goes to having a real and persuasive bearing upon the reliability of a witness or the reliability of a particular testimony, the test should be regarded as satisfied.[10]

106 Exception: rebutting denials by other evidence

(1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if:
(a) in cross-examination of the witness:
(i) the substance of the evidence was put to the witness, and
(ii) the witness denied, or did not admit or agree to, the substance of the evidence, and

(b) the court gives leave to adduce the evidence.

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[10] Odgers, Stephen (2016). Uniform Evidence Law. 12th ed. Sydney:Lawbook Co p.787

(2) Leave under subsection (1) (b) is not required if the evidence tends to prove that the witness:
(a) is biased or has a motive for being untruthful, or
(b) has been convicted of an offence, including an offence against the law of a foreign country, or

(c) has made a prior inconsistent statement, or

(d) is, or was, unable to be aware of matters to which his or her evidence relates, or

(e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

Section 106 permits evidence being led going to rebutting a denial or denials of a witness during an earlier cross-examination, by other evidence – that is; not evidence adduced in cross-examination, which is what section 103 goes to. The substance of the evidence must have been put to the witness when that witness was cross-examined, pursuant to section 103. If cross-examination had not been permitted on a matter relevant to the witness's credibility (pursuant to section 103) then the requirements of section 106 (1)(a) have not been met and the evidence cannot be led.

If section 103 has been met (that is, cross-examination on credit was permitted and the substance of the evidence was put to the witness in cross-examination), and the court grants leave pursuant to sections 106 (1)(b) and 192, the evidence rebutting the earlier denial can be led.

If however the evidence sought to be led to rebut the earlier denials tends to prove the matters noted in section 106(2)(a)-(e) then leave is not required to lead the evidence.

Cross-examining Experts

This can be a daunting prospect. It is helpful if you can retain your own expert and have them tutor you, first of all, on technical terms and then the substance of the opposing report and where it can be attacked.

It is a luxury, but worth exploring, if your expert can be present in court when the Crown expert is giving evidence in order to assist your cross-examination – obviously you would seek the permission of the Court to follow that course if it is likely that your expert will be giving evidence. Also, you may want to let the Court know that you will be seeking an adjournment after the examination-in–chief of the Crown expert to confer with your own.

Make sure you are very solid and well researched ground if you are going to attack the expertise of an expert.

Wherever possible conference with the Crown expert prior to cross-examining them – but not in order to be educated, that is what your expert is for – the aim is to explore topics prior to cross-examination and to build a rapport with the witness prior to that cross.

It is important to bear in mind the following when cross-examining an expert;

- there is a field of specialised knowledge
- the witness has become an expert in (an identified aspect of) that field of specialised knowledge by reason training, study or experience
- the opinion proferred is based wholly or substantially on the witness's expert knowledge
- the facts about which the opinion is based must be identified and proved
- there is a demonstrable scientific basis to show how the specialised knowledge applies to the facts to produce the opinion propounded.[11]

This above summary is based upon helpful commentary in Makita(Australia)Pty Ltd –v- Sprowles [12];

> 85 In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v R* (1999) 197 CLR 414, on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise" (at [41]).

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[11] Cross-examination by John Stratton QC, 1 August 2007, Public Defenders Office : Lawlink NSW at p 21

[12] [2001]NSWCA305;52 NSWLR 705

Generally the cross-examination of an expert is aimed at extracting one or two important concessions which shed doubt or create ambiguity or uncertainty on the opinion of the expert, and open up the possibility of another explanation of what may have happened. Each case is different – you may seek to create doubt by shaking up the factual foundation upon which the expert bases their opinion, did they have all the material available at the time of trial when preparing their report – or, if feeling very confident and you have been very soundly tutored you may wish to attack the approach or methodology that the expert has taken.

The Rule in Brown v Dunne

The principle of fair conduct on the part of an advocate, stated in *Browne v Dunn*[13], is an important aspect of the adversarial system of justice. The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit. [14]

Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness, the ground of the challenge be put to the witness in cross-examination. This requirement is accepted, and applied day by day, in criminal trials.[15]

It is essential that the cross-examiner puts to his opponent's witnesses as much of his case as concerns that witness.

The rule means that the essential parts of the defence case contradicting a witness should be put to that witness, but it is not necessary to put every detail to a witness. If the essential parts of the defence case are not put to the appropriate witness there is a risk that the witness previously cross-examined will have to be re-called, that is not desirable. There is also a risk that, if the witness is not recalled and the part of the defence case relied upon is highlighted in closing address, there is every likelihood the judge in his or her closing will to disregard that submission noting that it was not put to the relevant witness – very embarrassing and damaging to the defence position, don't let it happen.

Irving Younger's Ten Commandments

Irving Younger was an American lawyer – a Harvard and New York Law School graduate who practised in criminal law both as a prosecutor and defence lawyer, then as a judge and academic.

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[13] (1893) 6 R 67
[14] MWJ v R [2005] HCA 74
[15] ibid

You may have seen his highly entertaining and video on Youtube, of his lecture on cross-examination, at the University of California, Hastings College of Law in the late 1970's – if you have not it is imperative that you do!

The excerpt available goes for around 43 minutes and is required viewing. In the excerpt Mr Younger details in his highly entertaining way the essentials a successful cross-examiner must adhere to so as not to be a "buffoon" in the courtroom.

1. Be brief.

As a result of extensive preparation and thorough knowledge of your brief you should know exactly what you need from a witness. Obviously, if they do not harm your position or have given evidence that is favourable to your case you should give very serious consideration to not asking them any questions at all. If however you have to cross-examine a witness be brief – as brief as you can be. The impact of cross-examination upon the tribunal of fact, whether it be judge, jury or magistrate will be lost if the cross-examination is not focussed, is meandering and lengthy. As Younger indicates – if the cross goes on for 90 minutes the jury will not remember the "first two minutes and forget the next 88 – they are going to remember nothing when your done. But if you cross-examine for 2 minutes they will remember every single question and that is half-way toward their being persuaded".

2. Short questions, plain words.

Younger entertainingly indicates that for 5 years whilst presiding over a civil list in New York City regarding automobile accident cases, "not once, NOT ONCE did I ever hear a lawyer use the word – car."

Speaking plainly using simple words is essential. There must only be one proposition in a question and it must be in simple terms. If you ask questions with more than one proposition you risk having your question objected to or extracting an answer that doesn't make any sense anyway as you don't know which proposition the witness has responded to. If the question is not in simple terms you risk having the witness complain about not understanding the question – if this happens you may lose momentum in your cross-examination and importantly you lose control of the witness. It is essential to have control of the witness – more on this below.

3. Always ask leading questions.

Younger is emphatic on this, shouting as he says "you will never, never, never ask anything but a leading question! You put words in the witnesses mouth! That's the whole idea on cross-examination. That's how you control a witness. That's how you make it go where you want it to go."

With humour, but eloquently– Younger notes "the melody of a cross-examination should be sung by the lawyer – with an occasional mumbled mono-syllable from the witness."

As Younger and other experienced jurist have noted, it is essential to control the witness in cross-examination – and the primary tool for doing that is asking leading questions. Do not ask a question of a witness, in cross-examination beginning with "why". A question beginning with "why" gives the witness an opportunity to explain – if you give a witness that opportunity you have lost control of a witness, which is generally fatal. Do not give a witness a platform to make a speech, do not ask a witness for example "why did you do that?" or "how did you feel about that?" In cross-examination you tell a witness why they did something "you did that because you were the robber, correct?" or on how they felt about an issue "you felt unhappy about that situation, correct?". It is all about control.

4. Don't ask a question to which you do not know the answer.

As noted earlier – you will have/must have a thorough knowledge and understanding of your brief and a solid and clear understanding of your case theory. All cross-examination and every other aspect of the trial works toward and for that case theory. Cross-examination is the time to extract points that support your case theory – the points you will be relying upon in your final address to the tribunal of fact. It is not the time to explore and discover what the case against your client is.

You will know which points you want to highlight in the Crown brief that assist your position – hence knowing, or having a fair idea about the answers you are going to extract from a witness.

An exception to not asking a question that you do not know the answer to is what Younger refers to as "escalating to that question." It may be a question that you deem important but that you do not know the answer to. This technique involves you asking a series of fairly innocuous questions that you do know the answers to, educating you in the courtroom about what the answer to the ultimate question is going to be. If you reach the point that you are 100% confident that you know what the answer will be AND that the answer will be favourable, ask the question. If you do not have that confidence and it is too dangerous to ask – leave the topic alone and move on.

5. Listen to the witness's answers.

We all have various ways of preparing our cross-examination. Some write the questions down and have follow-up questions depending upon the answer given, like a flow chart of sorts; others write down just the topics or points they wish to extract. You should at least have a list of the topics upon which

you need to cross-examine and have a very clear idea as to what you want to extract from a witness.

However, it is important that you don't get bogged down or engrossed in your pursuit of the ultimate point and fail to listen to the answers given by a witness. You may get the most "marvellous" answer, as Younger describes it, blowing the opposing case out of the water and you sail right past it, miss the significance of it, because you have not taken the time to listen to and digest the answers of the witness. Do not be afraid of silence in the courtroom – allow yourself an opportunity to pause. If the answer is a surprise answer that is fantastic for your case, pausing will increase the impact of it, and a thorough knowledge of your brief will allow you to go in for the kill – noting however you do not have to go in for the kill everytime. Remembering the advice of Tom Hughes QC, sometimes the scent (of blood) is strong but it is advisable to adopt a low key approach. The aim of cross-examination to establish facts not conclusions.

Listening to the answers given by a witness and building on those answers makes for a persuasive and powerful cross-examination. It will capture the attention of the witness, the judge and or jury and will tighten your control of the witness and the courtroom.

6. Don't quarrel with the witness.

As Younger emphasises, some may tempted to ignore the sixth commandment due to that fact that a successful trial lawyer has to have to have a certain streak of belligerence – "this is combat!". You are a trial lawyer, so "you like to fight" Younger exclaims.

If you get an answer that is ridiculous or remarkable – do not take the witness on. Sit down or move on to the next issue. If you begin arguing with the witness you risk losing the trust and respect of the tribunal of fact by being seen as a bully. Of course there may occasions when you have to be firm with a witness. For example if a witness is not answering the question simply say – "my question was this – [repeat the question] please Mr X or Sgt Y respond to my question". If the witness exclaims "I have answered your question !" don't respond "No you haven't!..". My suggestion is to simply, calmly repeat the question in exactly the same terms without responding at all to the impertinence of the witness.

If they continue to be non-responsive, move on – the fact that a witness is avoiding answering a question will not be lost on the judge or jury (hopefully).

As Tom Hughes QC notes;

> "a resort to non-responsive replies is often a tell-tale sign of a devious or dishonest witness on the run"[16]

7. Don't allow the witness to repeat his evidence-in-chief.

If a witness has given damaging evidence in examination-in-chief do not give them any opportunity to repeat that damaging evidence. The more a tribunal of fact hears a particular version of events the more believable it becomes, the more likely it will be accepted as truthful and accurate.

8. Don't permit the witness to explain his answers.

A witness in answering a leading question might say "yes, but…". You must do you best to interject, without getting into trouble, perhaps by saying "thankyou Mr X and then you did this and this didn't you?". You must do your very best to control the witness and not allow them the opportunity to explain and expand upon a point that could be damaging.

9 Don't ask the "one question too many."

It is very easy to recognise the 'one question too many' asked - after it has been asked.

The best way to avoid asking the one question too may which damages your position, is to always have at the forefront of your mind what you want to say in your closing address - get what you need for your closing and sit down. This comes back to the concept of cross-examination being about gathering facts and not conclusions. Younger gives an example of an allegation of assault where the nose of the victim was bitten off by the alleged assailant. The only witness was a bird watcher who happened to be in the area at the time who asserted in examination-in-chief that the accused had bitten off the victim's nose. It was established in fruitful cross-examination that the bird watcher was looking up at the birds and also had his back to the incident where the nose was bitten off and had only turned around upon hearing the victim scream. The cross-examiner upon establishing this much should have sat down. If he/she had done so the submission that this witness did not and could not have seen what actually happened would have been available. However, the cross-examiner asked the one question too many, that was also non-leading and argumentative AND gave the witness an opportunity to explain; "Well how come, if your back was to them, looking at the birds in the

[16] The Art of Advocacy Op.Cit

trees, how come you know, as you told us in examination in chief that the accused bit off the victims nose??"

The answer "oh well, I saw him spit it out."

10. Save the ultimate point of your cross for your closing address.

Don't give in to the temptation to extend your cross-examination to really drive home the points you consider you have scored or made in cross. Don't worry if you think that the jury does not understand the reasons behind the questions asked in cross-examination.

It is important to keep the tribunal of fact interested and wondering why you asked certain questions. Remember that cross-examination is about establishing facts only – once established, those facts are to be used to assist the tribunal of fact to come to the conclusion that you urge upon.

Closing Address

In preparing a matter for trial the brief of evidence has to be thoroughly read and studied. In reading the brief the areas of legal research will present themselves and obviously they must be thoroughly examined. Once the brief is read instructions need to be obtained and a case theory developed. The **case theory** will dictate how you conduct the case and **be the basis of the final address** to the jury. Everything you do during the trial (the facts you seek to establish in particular) must be working to and for the case theory – that is, your closing address. The case theory is really a set of conclusions or propositions about what happened or might have happened.

A good case theory has the following characteristics;

- is consistent with your instructions
- a positive construct
- is simple
- balanced – taking into account the strengths and weaknesses of your case
- be logical
- be credible and realistic – it makes sense; is realistic and not fanciful; is consistent with as much evidence as possible; has an appropriate emotional quality and is empathetic
- is directed to the desired outcome.

Once the case theory is developed all preparation for the trial goes toward the ultimate presentation of that theory to the tribunal of fact.

The order of preparation for trial matters should be as follows;

- final address – set out all available arguments supporting your case and identify all facts supporting each argument.
- Evidence in chief to support your arguments

- Cross-examination – to elicit further facts or add emphasis to support your arguments; to discredit evidence that contradicts your case and argument.
- An opening that will persuasively introduce your case, limit the scope of the disputed issues and defuse the opponent's case
- Argument about evidentiary issues.[17]

Section 160 Criminal Procedure Act permits a defence closing address to a jury;

160 Closing address to jury by accused person

(1) An accused person or his or her Australian legal practitioner may address the jury after the close of the evidence for the defence and any evidence in reply by the Crown and after the prosecutor has made a closing address to the jury or declined to make a closing address to the jury.

(2) If, in the accused person's closing address, relevant facts are asserted that are not supported by any evidence that is before the jury, the court may grant leave for the Crown to make a supplementary address to the jury replying to any such assertion.

What can't be said in a closing address?

- there can be no reference to penalty of a finding of guilt
- should be no request for mercy
- do not talk of proof beyond *any* reasonable doubt or proof beyond *a* doubt – the burden is proof beyond reasonable doubt
- counsel should not read opinions from text books or extracts from judgments.
- Counsel should not define 'beyond reasonable doubt'
- Do not misstate the evidence
- Do not refer to the possibility of an appeal
- Do not call upon bigotry, prejudice or bias
- Do not proffer your own opinion - it is irrelevant.[18]

What can be said in the closing address;

- can refer to anything arising out of logic, reason or experience of everyday life or common sense
- anything that arise by judicial notice
- anything from a body of well known literature , films [*although I once referred to a Jedi mind trick in addressing a jury only to have the*

[17] Advocacy Manual, Australian Advocacy Institute, at page 37
[18] McClintock Op.Cit

rather aged judge ask me "what on earth is that?! – perhaps it was ill-advised].

- Human nature and psychology so long as it is relevant to the argument being advanced and not restricted by other

Do not to read your address.

It is a good idea – if you have time, to write a closing address and then distill it right down to essential points.

It is very important to maintain eye contact with the tribunal of fact – whether a judge sitting alone or a jury.

If a jury, then do your best to 'distribute' your eye-contact equally amongst the jury members. You don't want the jury to feel uncomfortable, so don't dwell too long in eye-balling any one juror. You want the jury to trust you and to feel comfortable in accepting what you have to say to them.

Speak slowly and clearly.

Attempt to explain the process of the address to the jury.

McClintock noted in his 2009 paper that he would often say to a jury "unfortunately I can't enter into a discussion with you and for example find out what are the matters of concern for you". He notes he did this in order to emphasise that the address was not a debate or discussion.

Some advocates use charts and diagrams, even software presentations. I like to stick strictly to exhibits and transcript.

I am always grateful when a matter has gone so well that I am able to quote the Crown witnesses evidence-in-chief to illustrate a favourable point for the defence. I think this effectively creates doubt from the very core of the Crown case. Inviting the jury to have a doubt about the Crown case before they even consider favourable matters highlighted in cross-examination.

As to structure, Chester Porter QC recommends adhering to simple propositions and in repeating the message again and again. He recommends having a structure to your address;

- introduction
- stating, development and illustration of the theme, AND
- the conclusion

He also emphasises the importance of identifying the 'trump card' argument and when identified playing it early.

In the context of a trial this involves, after the reading of the brief, time spent on "cogitation". That is, time spent on just thinking about the matter, talking about it with colleagues, coming up with the best argument.

The best argument will be the one that is realistic, makes sense (juries will reject it otherwise) and is the most consistent with the evidence.

It is advisable to have distilled your case sufficiently enough that you have one argument to put to them in your closing address – the trump card. It is

not advisable to present several weak arguments to a jury, saving what you consider to be the strongest until last.

Porter notes;

> "it is a grave mistake to create a poor impression by opening with a weak argument. The listener, having dismissed that argument, may well get into a dismissal habit and dismiss the trump card when it is played last."[19]

Remember that juries take their task very seriously. They expend a lot of energy and they like to think.

I employ something I derived from reading the 'Secrets of the Jury Room' by Malcolm Knox. Knox speaks of his reading of a book by Alan Dershowitz, 'Letters to a Young Lawyer' where Dershowitz speaks of the "Aha" moment. That is, being careful not to tell a jury what to think, but let them feel as if they are discovering the truth themselves.

In my closing addresses I always submit on various issues of fact and then pose a question to the jury that I hope is basically rhetorical given all that has come before it. I do not answer the question – I pause (nothing wrong with a bit of theatre – trying to emulate the great Tom Hughes QC), look at them, they are waiting for an answer to the question I have posed but I do not give them one. I then move on to the next topic.

Malcolm Knox notes, "most good barristers will refrain from belting you over the head or begging you to see things their way." [20]

Certainly, I remember one trial I ran where the Crown concluded her closing address by stating, "…for all these reasons I want you to convict".

The jury were back within 20 minutes, with a Not Guilty verdict.

It is a good idea to humanise your client – no doubt effort was made to do that throughout the trial, but remember to do so in your closing address. One simple way of doing so is to refer to your client, in front of the jury, by name, not as "my client".

Some say that another negative effect of referring to your client as "my client" suggests a pecuniary relationship between you and he or she, thereby robbing you of impartiality in the collective mind of the jury. The aim is to appear impartial, which may seem counterintuitive – but you want the jury to see you as their helper or assistant – in coming to the conclusion you want!

In another effort to humanise your client – he or she is being judged by their peers after all - emphasise that the very high burden of proof borne by the Crown is protective of us all if ever accused of serious wrongdoing. In addressing the jury on this aspect I include myself, the judge and every person in the courtroom. I do this in order to have the jury appreciate the gravity of the burden of proof by placing themselves in the shoes of the accused.

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[19] Porter QC, Chester (2005). The Gentle Art of Persuasion. Sydney:Random House, p.166-7
[20] Knox, Malcolm (2005). Secrets of the Jury Room. Sydney:Random House, p. 240

Care needs to be given to the final line of your closing address - and, do not read it, deliver it with gravity, looking at the jury.

It is very hard to advise on how one should structure a closing address to the jury. McClintock[21] suggests that a conventional structure for a closing address is;

- a dramatic and short summary of what the case is about – perhaps with a 'grab line'
- you might like to give the jury an outline of topics and an estimate of time
- an attack on the Crown's closing in particular upon any misstatements, factual errors and defects in logic and reasoning.
- A summary of the applicable legal principles
- Reference and discussion of particular issues and particular parts of the evidence and witnesses (transcript references to hand)
- Repetition of the main points
- An indication you are about to conclude and a strong ending requesting acquittal *[without 'belting over the head' or 'begging' – see above*]

I have noted earlier that juries like to think and I add to that they, in my view, take their task very seriously – they want to come to a conclusion. An illustration of this comes from a colleague, who in his first trial forgot to effectively apply *Browne-v-Dunn* and his trial aborted just before closing addresses. A juror made a formal complaint – noting that they and the rest of the jury members had been robbed of their chance to finalise *their* hard work in the trial.

Bearing that in mind I say to a jury in my closing address, that it could be that, after having listened to all the evidence and having heard all the arguments they may say to and amongst themselves "I just cannot work out what happened here!" I tell them "don't beat yourselves up about that members of the jury. This trial, the Crown case, is not a mystery that needs to be solved – if you cant work out what happened that is the beginning, the excitement of a doubt."

This is a derivation on a theme – of what the late and highly regarded Public Defender Tony Parker once said to me many years ago when I sought some advice on how to be a decent criminal trial advocate – he said "all you a have to do is excite a doubt, if can excite a doubt you're half way there".

Good Luck!

[21] ibid