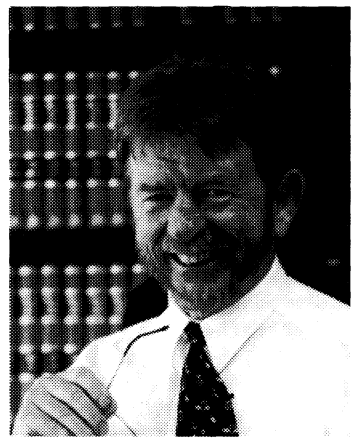
ADVOCACY
Some Limitations on Cross-examination



Hon Justice Riley

Cross-examination is "the greatest legal engine ever invented for the discovery of truth."

Wigmore on Evidence

(Vol. V, Para. 1367)

Strictly speaking there is no "right" of cross-examination. The only actual "right" is the right to have a fair trial[1]. In practice the right to a fair trial almost always ensures that a party is permitted to cross-examine witnesses who have provided evidence for another party.

Where cross-examination is permitted, and this is in almost every case, the exercise of that right is not unfettered. The *Evidence Act* is but one source of limitations upon the scope of cross-examination. By reference to the *Evidence Act* you will find that:

(a) a witness is not compellable to answer any question tending to incriminate himself (s10);

(b) the Court may disallow questions that are or appear to be vexatious and not relevant to any matter proper to be enquired into (s13);

(c) where a question is not relevant to the proceedings but may affect the credit of the witness it is for the Court to determine whether or not the witness shall be compelled to answer it and the Court may inform the witness that he is not obliged to answer it (s14);

(d) the Court may disallow a question that is indecent or scandalous unless the question relates to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed (s16);

(e) the Court may also disallow questions intended to insult or annoy the witness or be needlessly offensive in form to the witness (s16); and

(f) subject to certain exceptions a party producing a witness shall not be allowed to impeach the credit of that witness by general evidence of bad character (s18).

Other limitations are to be found in the rules of evidence, in the special obligations imposed upon prosecutors and in legislation such as that dealing with sexual offences.

Of course cross-examination is not limited to matters addressed in evidence in chief. However, by virtue of the *Evidence Act*, the scope of cross-examination is limited by reference to the requirement that it deal with matters that are relevant or concerned with credit. What is or is not relevant may not be readily apparent at the commencement of a cross-examination or when a new topic is raised. As a matter of practice the Court will allow significant leeway to counsel to develop the cross-examination in an area which, at first, may seem to be irrelevant.[2] This will particularly be so if counsel assures the Court that the matter will be made relevant in due course. Some of the more famous cross-examinations in history have originated from a series of questions dealing with matters apparently not in issue. It will only be where counsel's discretion is not being properly exercised that a Judge will intervene.

The Court has the power to prevent cross-examination being used for a collateral purpose. To use cross-examination for such a purpose may amount to an abuse of process of the Court. In *Raymond v Tapson* (1882) 22 Ch D 430 it was said that the "Court has a right to protect Her Majesty's subjects from the practice and process of this Court being simply used to torture them and not for the purpose of justice".

You should bear in mind that the Court is entitled to assume that questions asked of a witness in cross-examination are asked in accordance with instructions. What those instructions are may be inferred from the questions asked. Any misconduct on your part in the process of cross-examination may, therefore, be visited upon your client. You may also find that, in addresses, your opponent draws upon the questions you have asked to invite the Court to act upon the basis that they were your instructions[3].

In cases where there is a number of parties with the same interests then, ordinarily, the Judge will not permit any more than one counsel to cross-examine the same witness. Of course in most cases the interests of the various parties will be sufficiently different to enable the counsel for each party to cross-examine. The normal situation is that each counsel will be provided the opportunity to cross-examine each witness. Where there is an overlap of interests then the Judge may interfere to prevent any unfairness arising.

In reading about advocacy you will have been informed that it is desirable for you to ask leading questions in cross-examination. Whilst that me be so, you should not assume that there is an absolute right to ask such questions. Again the concern centres upon the need for fairness. If it is the view of the Judge that a witness is merely agreeing to propositions put to him or her by way of leading questions, then the asking of those questions and the receipt of the answers may not help the Court. They may be of no probative value. This can be a particular problem in the Northern Territory when dealing with some Aboriginal witnesses. In *Anunga* (1976) 11 ALR 412 at 415 it was observed, in

relation to the Police questioning of Aboriginal suspects, that great care should be taken in formulating questions so that as far as possible "the answer which is wanted or expected is not suggested in any way". The Court said that "anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value." The same observations may be made when such an Aboriginal witness is cross-examined in the course of a trial. In a paper published in the Criminal Law Journal[4] Mildren J discussed the problem of what he termed "gratuitous concurrence" and highlighted the need to "warn counsel for the accused about the need for leave before putting leading questions in cross-examination".

A further limitation on cross-examination centres upon how one approaches the witness who gives evidence which is contrary to that of another witness. It is clear that a witness ought not to be asked whether another witness is telling lies or has invented something[5]. The witness can be asked if he knows any reason why the other witness should be hostile to him, or should tell a false story about him, but he should not be asked to enter into the other witness' mind to express an opinion as to whether he thinks "the inaccuracy is due to invention, malice, mistake or any other cause."

It can be seen that the right of cross-examination is far from unfettered. The restrictions on what can be done in cross-examination are not limited and the matters I have discussed above are simply examples of some of the restrictions applicable. In preparing your cross-examination you will need to bear in mind that restrictions apply and to structure your cross-examination accordingly.

1 *GPI Leisure v Herdsman Investments (No.3)* (1990) 20 NSWLR 15 at 22; *NMFM Property Pty Ltd v Citibank Ltd* (1999) 161 ALR 581.

2 *Wakeley v The Queen* (1990) 64 ALJR 321 at 325.

3 *R v Sadaraka* (1981) 4 A Crim R 221 at 226-227; see also *R v Christopher Roy Bean* (1999) (25 May 1999 CCA Qld).

4 Redressing the Imbalance Against Aboriginal in the Criminal Justice System (1997) at 21 CLJ at 7.

5 *The Queen v Leak* (1969) SASR 172.

CASE NOTES

Mark Hunter

Jackson v Hales

Supreme Court No. JA90 of 1999

Judgment of Angel J delivered 7 March 2000

CRIMINAL LAW - MANDATORY SENTENCING - S.61 SUMMARY OFFENCES ACT

The appellant pleaded not guilty to having in his possession a car trailer reasonably suspected of having been stolen or otherwise obtained unlawfully, contrary to s 61 of the *Summary Offences Act*. This offence is included in a list of property offences for the purposes of the mandatory sentencing provisions of the *Sentencing Act* ("the Act").

In the course of the police investigation the appellant participated in an electronically recorded interview in which he explained how he came into possession of the trailer. He also gave sworn evidence.

The magistrate stated that under the *Summary Offences Act* the onus was on the appellant to "...persuade the court of his innocence...". Mr Wallace SM found that he could not be satisfied that the appellant had been truthful with the police. His Worship held that by virtue of this determination he was unable to give the appellant the benefit of s78A(6B) of the Act and decline to impose the specified mandatory sentence of 14 days imprisonment. This was because the appellant had failed to prove that he had "...co-operated with law enforcement agencies in the investigation of the offence" (s78(6C)(d) of the Act).

Mr Wallace SM accepted that the appellant had satisfied the three other pre-conditions specified in s78(6C) of the Act.

The appellant was convicted and thus sentenced. He appealed the 14 day mandatory sentence on the ground that he *had* co-operated with the police.

HELD

1. The appeal is dismissed and the sentence confirmed.

Angel J observed that the magistrate had not held that the appellant's answers to police were untruthful. His Honour interpreted the magistrate's remarks on sentence as meaning that the appellant's answers were "simply useless". His Honour commented:

"...Co-operation means at least working together for a common end, and to give answers, as found by the learned magistrate, the onus being on the appellant, that were not made out as *truthful and useful*, it seems to me, cannot constitute co-operation" (emphasis added).

Appearances

Appellant - Cox/Legal Aid Commission

Respondent - Austin/DPP

Commentary

Query whether the test now enunciated by the Supreme Court for the application of s78(6C) requires the interviewee's answers to be *actually* or only *potentially* "useful" to law enforcement agencies; and whether this test is limited in its application to s61 offences.

Case Notes is supplied by Mark Hunter, a barrister in Darwin.