CROSS-EXAMINATION - EMERGE INTACT

THE ONTARIO TRIAL LAWYERS' ASSOCIATION

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PRESENTED BEFORE

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> "You will cross-examine the other side's witness only to the extent necessary to secure the information supporting the argument that you have planned in advance to make in summation about that witness. When you have secured the necessary information, what do you do? The most important word in a trial lawyer's vocabulary is four letters long: s-t-o-p, stop, stop! When things are going great - stop! When things are going not so great - stop! When you fumble or fail - stop! stop! stop! I put it to you that no trial lawyer in the history of the common-law has ever made a mistake by stopping but frequently you make a mistake by not stopping."[1]

The late, great Irving Younger who taught and wrote about advocacy, gave this sage advice 23 years ago at the first advocacy symposium held to commemorate the 150th anniversary of Osgoode Hall. His advice has, of course, stood the test of time and his words should be copied and put in every lawyer's trial notebook.

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[1] Reprinted from Irving Younger, page 234: Advocacy. A symposium presented by the Canadian Bar Association - Ontario in collaboration with the Law Society of Upper Canada celebrating the 150th Anniversary of Osgoode Hall, 1982. Throughout this paper, I have quoted liberally from the Younger article "Impeachment", pages 229-244.

The topic I have been asked to talk about, “Cross-Examination - Emerge Intact,” is simpler to write about and talk about than to actually put into practice. Cross-examination remains among the most difficult aspects of advocacy and, in my experience, is more often done poorly than well. During the limited time that I have to speak to you today, I thought it would be useful to set out some rules to assist you to better prepare for cross-examination and allow you to emerge, if not totally unscathed, than with fewer life-threatening injuries.

The role of cross-examination is to weaken or discredit the testimony of the opposing witness and to obtain from that witness testimony favourable to your case. How can this be accomplished?

Irving Younger enunciated a number of rules for effective cross-examination some of which I have reproduced below [2]:

1. “Be brief. Unless you are Clarence Darrow, your cross-examination should be a commando raid, not the invasion of Normandy.”[3] Just make two to three points. You must view the jury’s head as a particularly small cup[4], which once overfilled with information, spills its contents or “runneth-over” The goal is to persuade. A jury

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[2] Younger, p. 235

[3] Ibid.

[4] Ibid.

cannot be persuaded if there is too much information to absorb. If they cannot remember what you have told them, you are in trouble.

2. Ask short questions and use plain words.

Do not say “I suggest to you, that on the day in question, you were operating your motor vehicle without due care and attention.” Rather say, “I suggest to you that you weren’t paying attention when you were driving your car.”

3. Only ask leading questions. As Younger said, “Cross-examination is an aria sung by the lawyer interrupted only by an occasional monosyllable from the witness”.[5] You put words in people’s mouths. You make the witness say what you want him to say. Herewith a Younger melody:[6]

Q.: “Sir, did you get out of bed at nine in the morning?”[7]

A.: “Yes.”

Q.: “By 10:00, were you dressed?”

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[5] Ibid., page 237

[6] Ibid.

[7] Ibid.

A.: “Yes.”

Q.: “Did you then go down the street?”

A.: “Yes.”

Q.: “And the first place you went to was the supermarket. Isn’t that so?”

A.: “Yep.”

Q.: “And you went directly to the fresh fruit counter?”

A.: “Yes.”

Q.: “And there you selected one dozen ripe California oranges, did you not?”

A.: “Yes.”

Q.: “You put them in a bag?”

A.: “Yes.”

Q.: “And there you stood in line waiting to pay for those oranges, didn’t you?”

A.: “Yes.”

Q.: “And as you stood in line, you looked out a plate glass window at the street, didn’t you?”

A.: “Yes.”

Q.: “And there on the street you saw an octopus crawling out of a manhole?”

A.: “Yes.”

Stop and say thank you.

4. Cross-examination is not discovery. Never ask a question to which you do not know the answer.

However, like all hard and fast rules, there is an exception to this: The consensus among the legal commentators is that you can ask a question to which you do not know the answer when you do not care what the answers will be or when the

question is for rhetorical effect. For example, in a case against a long-term disability carrier which has wrongfully denied benefits to your client, you could conclude by asking “Aren’t you ashamed of yourself for the way you treated Ms. Jones?”.

5. Listen to the answers.

Do not be too quick to go on to your next point. A witness may give an answer which is helpful to your case. Listen and react to the witness’ answers and follow up if the answer is helpful.

6. Do not quarrel with the witness. Quarreling makes you look bad in front of the jury and you may, by quarreling, turn the tables on a witness by transforming an evasive witness into an underdog up against an aggressive and rude lawyer. Quarrels with witnesses generally redound to the detriment of the lawyer.

7. Never permit a witness to explain anything.

This is sometimes harder to adhere to in practice, given that the opposing side will object and say “Allow the witness to explain.” Your position must be that the witness is not permitted to explain. He is simply permitted to answer the question and, that if opposing counsel wish an explanation to be given, that is the purpose of a re-examination. Judges sometimes have to be reminded that counsel essentially have untrammelled rights to cross-examination and that, when the

question admits of a “yes” or “no” answer, the witness is not permitted to explain, leaving any explanation, as indicated earlier, for re-examination.

The difficulty in medical malpractice cases is where the expert witness will be given latitude to explain in terms of answering a question which is not necessarily a “yes” or “no” answer but which requires technical knowledge and expertise. Controlling the witness and limiting the witness is the subject matter of another topic.

8. Never, with rare exceptions, ever use “who, what, where, when, how, why, and explain” as part of your cross-examination technique. Remember, cross-examination is a controlled exercise. It is not a discovery. Do not ask a question to which you do not know the answer.

9. Knowing when and how to stop.

One of the most highly regarded trial lawyers in the United States during much of the 1950s, 60s, 70s, and early 80s was Edward Bennett Williams. He may be remembered for being the owner, at one time, of the Washington Red Skins and the Baltimore Orioles, but his name and reputation was made as one of the pre-eminent trial lawyers.

Irving Younger tells the story that when Edward Bennett Williams graduated from law school, all he wanted to do was try cases and he felt that the best experience

would be in trying cases for the Washington trolley company, as there were so many cases against them; so he started his career there. Within a few months, he was litigating soft tissue cases. A few months after that, he was arguing serious injury cases. Within a year or two, he was defending wrongful death cases.

One of the cases he was defending on behalf of the trolley company concerned a notorious drunk, who was hit by a streetcar.[8] This drunk spent his life sitting on a curb, drinking cheap wine.[9] The defence was not that he was not hit but that he was staggering drunk and entered the path of the trolley car and was, therefore, partially at fault. In those days, in certain states in the United States, before the law was changed, if a plaintiff was partially at fault, the case was lost.

The difficulty with the case was that, despite the victim being a notorious drunk and vagrant, the question remained, whether there was a liquor bottle present when the police arrived at the scene.[10] There was not and, for one reason or another, no autopsy had been conducted, which would, of course, have noted the victim's blood alcohol level. There was only a witness for the streetcar company who had been sitting a distance away but saw the streetcar hit the old drunk, dropping him to the street. He also saw another middle-aged drunk, who was the son of the old drunk, sitting at the curb, drinking wine. He was about

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[8] Ibid., page 242

[9] Ibid.

[10] Ibid.

15 feet from where his father was lying. He got up, ran over to where the father's body was, and arrived at the body before the conductor arrives. The witness stated that he could not see what the younger drunk did, but he saw him leaning over the body, doing something to the body, and walking away. What did he do? Edward Bennett Williams was convinced that he took the liquor bottle away. The young drunken son was called as a witness and Edward Bennett Williams' cross-examination went this way[11]:

Q.: "Alright Mister, you were sitting on the curb, weren't you?"

A.: "Yeah."

Q.: "15 feet from where your father was hit?"

A.: "Yeah."

Q.: "What happened when you saw your father hit?"

A.: "I went right to his body."

Q.: "Were you the first person to get to his body?"

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[11] Ibid., page 242

A.: “Yes.”

Q.: “And did you have a couple of seconds alone with his body?”

A.: “Yes.”

Now, listen to what Edward Bennett Williams asks.

“You just listen to me and answer yes or no.”

Q.: “You bent over your father’s body, didn’t you?”

A.: “Yes.”

Q.: “And you did something, didn’t you?”

A.: “Yes.”

Q.: “And then you stood up and walked away?”

A.: “Yes.”

Now, at this point, Edward Bennett Williams should have stopped, but he did not[12].

Q.: "Isn't a fact that, when you bent over your father's body, what you did was take the whiskey bottle out of his pocket?"

Now, that is a leading question, to which he did not know the answer, and, as it turned out, the answer was[13]:

A.: "No."

Then, instead of leaving well enough alone and retreating, the great Edward Bennett Williams (and this just goes to show you that even the great have committed their share of blunders) asked the following:

Q.: "Alright Mister Witness, you tell the ladies and gentlemen of the jury what you did when you leaned over the body."

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12 Ibid.

13 Ibid.

The answer came:

A.: "Well, Mr. Williams, he may have been a drunken old bum but he was my father. What I did when I leaned over his body was kiss him good-by."

As Younger says, if you violate a commandment, you pay the price.

So, know when to stop.

Only ask leading questions and rarely, if ever, ask a question to which you do not know the answer.

CROSS-EXAMINING AN EXPERT

Cross-examining an expert witness is one of the most difficult tasks. Never expect to take the expert head-on in his or her field. Never use cross-examination as an opportunity to highlight your intellectual prowess against an expert. The expert knows far more than you will ever know about the topic and you will be made to look foolish and, more importantly, you could cause irreparable damage to your case. The key to an expert cross-examination is no different from any cross-examination, that is, preparation, preparation, and more preparation. The following tips should assist you in preparation for the cross-examination of an expert witness:

1. Every opposing expert witness report should be critiqued or reviewed by your own expert. It is important for your own expert to take a careful look at the opposing report and to advise you of its strengths and weaknesses, or faulty logic or assumptions underlying the report.

2. Ensure you do a Quicklaw search for every case in which the expert has testified, noting negative judicial comment.

   Although it is a question of some debate whether you can cross-examine the expert on negative judicial comment, it is certainly worth a try if the expert is one who has testified many times in the past and whose testimony has been the subject of judicial comment. In Desbiens v Mordini, (2004) CanLII 1166 at page 75, para. 265, Mr. Justice Spiegel did not allow plaintiff's counsel to cross-examine Dr. Arthur Amies on negative judicial comment. However, the issue is far from settled and I would encourage you to consider whether you wish to bring to the fore and to the attention of the court the many cases in which the defence witness' credibility has been subject to attack.

3. It is important to check the references of your expert and review carefully his or her curriculum vitae. Ensure that the c.v., before you deliver it, is not in any way padded, self-serving, self-congratulatory, or self-aggrandizing. Professionals are obviously proud, justifiably so of their many accomplishments and awards. It is not

necessary to include in a c.v. a record of an informal speaking engagement - say a talk sponsored by a drug company at a restaurant. Before you deliver your expert's c. v., ask the expert to omit those references which are either stale, unnecessary or irrelevant.

The best approach is to simply reorganize the c. v. in a way which will make it easy for the judge or jury to follow. One does not want to have one's own expert's credibility diminished because of some stale, irrelevant or self-aggrandizing comments in the c. v.

4. You must educate yourself on the science involved. This takes time.

5. When you cross-examine the expert, you should do the following,

(a) Ask him if he has reviewed the plaintiff's expert's reports;

(b) If he has reviewed the plaintiff's expert's reports, ask why he has not commented on them in his report or delivered a supplementary report;

(c) Have him or her admit that the role of the expert is to assist the trier of fact and not to act as an advocate. No expert will dispute that.

(d) Keep in mind *The Ikarian Reefer*, a 1993 decision of Justice Creswell, in which Justice Creswell enunciates clearly and forcefully what the Court expects of an expert witness.

The Ikarian Reefer

The Ikarian Reefer[14], a 1993 British case, is an important decision on the role of the expert and outlines clearly and concisely what the Court requires of an expert witness. This case has been approved and followed in several Canadian cases.[15]

In the *Ikarian Reefer,* Justice Cresswell described the duties of an expert witness as follows:

1. **"Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form and content by the exigencies of litigation."**[16]

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[14] *The Ikarian Reefer* (1993) 2 Lloyd's Rep. 68 (Comm. Ct. Q.B. Div.) (full style *National Justice Campania S.A.* v *Prudential Assurance Co. Ltd.*)

[15] See for example *Fellows McNeil* v *Kansa General* Int'l. Insur. Co. (1999) 40 O.R. (3d) 456

[16] The Ikarian Reefer, p.81

2. **"An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of advocate."**[17]

3. **"An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion."**[18]

In order for a court to evaluate an expert's opinion and compare and contrast competing opinions, it is necessary to have knowledge of the facts and assumptions which underpin those opinions. Any failure of an opposing expert to clearly set forth the assumption relied on in reaching his conclusion, or the use of erroneous or alleged assumptions, should be brought to the attention of the trier of fact.

4. **"An expert witness should make it clear when a particular question or issue falls outside of his expertise."**[19]

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[17] Ibid.

[18] Ibid.

[19] Ibid.

This is where a review of the experts c. v. becomes critical. Cross-examining counsel should be fully aware of the experts qualification (or lack thereof) in order to ensure that testimony that goes beyond the witnesses area of expertise does not go unchallenged.

5. "If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one."[20]

It is vital that the expert convey to the judge if his testimony, or a report prepared by him, is deficient as a result of there being a paucity of information or data for him to evaluate and that he requires further information in order to provide a more comprehensive opinion. Ensure that you ask the expert what she relied upon in preparing her report and ensure that, if physical examinations (e.g. of a person or object) is required, that this was done. If an expert has failed to obtain readily available data, her opinion, based on incomplete testimony, may mislead the trier of fact. Similarly, any failure of an expert to mention that necessary information was not available calls the expert's credibility into question.

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[20] Ibid., p.82

6. **"If after the exchange of reports, an expert witness changes his view having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate, to the court."**[21]

Conclusion

Cross-examination remains the most challenging and, at times, exciting aspect of a trial. I believe Winston Churchill once said 'It is thrilling to be shot at without effect'. If his words can be applied to the advocate, it is thrilling to conduct a cross-examination and emerge unscathed. Cross-examination, particularly, cross-examination of an expert, is akin to tightrope-walking without a net. It is my hope that this paper will help the advocate emerge intact with his/her case strengthened following cross-examination.

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[21] Ibid.

APPENDIX

I have reproduced from Irving Younger's article, his selection of books about trials and trial lawyers. I have added to the list some books I believe you will also find helpful.

Bailey, *Defense Never Rests*
Bedford, *Trial of Dr. Adams*
Cooke, *Generation on Trial*
Davidson, *Jury is Still Out*
Donovan, *Strangers on a Bridge*
Erlich, *Lost Art of Cross Examination*
Fowler, *The Great Mouthpiece*
Frankfurter, *Sacco-Vanzetti Case*
Frost, *The Mooney Case*
Harbaugh, *John W. Davis: A Lawyer's Life*
Hyde, *Lord Justice* (Birkett)
Hyde, *Lord Reading*
Johnson, *On Iniquity*
Kaplan & Walz, *Trial of Jack Ruby*
Kunstler, *Minister and Choir-Singer* (Hall-Mills)
Levy, *Nan Patterson Case*
Lewis, *Gideon's Trumpet*
Lewis, *Worlds of Chippy Patterson*
Logan, *Against the Evidence*
Mayer, *Emory Buckner*
Nizer, *Implosion Conspiracy*
Nizer, *Jury Returns*
Nizer, *My Life in Court*
O'Connor, *Courtroom Warrior*
Proskauer, *Segment of my Times*
Rembar, *End of Obscenity*
Rovere, *Howe and Hummel*
St. John's, *Final Verdict*
Steuer, *Max Steuer*
Schneir, *Invitation to an Inquest*
Schrag, *Counsel for the Deceived*
Walter, *Kidnap*
Wellman, *Art of Cross Examination*
Williams, *One Man's Freedom*
Zimroth, *Perversions of Justice*

Richard M. Bogoroch's Additions:

Adair, *OnTrial*
Edwards, *FourTrials*
Holland & Reid, *Advocacy: Views From The Bench*
Pozner, Dodd, *Cross-examination: Science and Techniques*
Salhany, *Cross-examination*
Spence, *Gunning For Distance*