STRATEGIES FOR EFFECTIVE CROSS-EXAMINATION

Osgoode Hall Professional Development:
2nd Annual Evidence Law For the Civil Litigator

September 23, 2005

Richard M. Bogoroch
BOGOROCH & ASSOCIATES

Sun Life Financial Tower
150 King Street West
Suite 1707
Toronto, Ontario
M5H 1J9

I. INTRODUCTION

> "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.

The topic I have been asked to speak on , "Strategies for Effective Cross-Examination" 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

---

[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.

it would be useful to set out some rules to assist you to better prepare for cross-examination.

II. THE ROLE OF CROSS-EXAMINATION

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 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.

---

[2] Younger, p. 235

[3] Ibid.

[4] Ibid.

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?”

A.: “Yes.”

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

---

[5] Ibid., page 237

[6] Ibid.

[7] Ibid.

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 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

---

[8] Ibid., page 242

[9] Ibid.

[10] Ibid.

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?"

A.: "Yes."

---

[11] Ibid., page 242

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].

---

[12] Ibid.

Q.: "Isn't it 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."

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-bye."

---

[13] Ibid.

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.

III. CROSS-EXAMINING AN EXPERT

Cross-examining an expert witness is one of the great challenges of trial advocacy. It is more often done poorly than well. Why is that? Perhaps because counsel expect to take the expert head-on in his or her field and expect to turn the witness. Counsel ought not to use cross-examination as an opportunity to highlight his or her intellectual prowess against the 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 should assist you in preparation for the cross-examination of an expert witness:

IV. *THE IKARIAN REEFER* - THE ROLE OF THE EXPERT

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]

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]

---

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 Supra note 10 at 81.

17 Ibid.

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]

This is where a review of the experts curriculum vitae 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.

---

[18] Ibid.

[19] Ibid.

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 and should be focused on doing cross-examinations. Similarly, any failure of an expert to mention that necessary information was not available calls the witness' credibility into question.

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]

---

[20] Ibid., at 82.

[21] Ibid.

V. EXPERT EVIDENCE: WHEN ADMISSIBLE[22]

Four criteria known as the "Mohan test"[23] must be satisfied in order for expert opinion evidence to be admissible.

A. Necessity in assisting the trier of fact.

B. Relevance.

C. A properly qualified expert.

D. The absence of any exclusionary rule that would prohibit the admission of the opinion.

Of relevance to our discussion is the third criteria: a properly qualified expert.

Expertise is determined during the qualification phase of the examination-in-chief of the expert, and is "a modest status that is achieved when the expert possesses special knowledge and experience going beyond that of the trier of fact."[24] Although the expert may have scant experience in a particular area, this limitation will effect the weight of the evidence but not its admissibility. In this regard, R. v. Marquard[25] is highly important. In **Marquard**, doctors who had no expertise in burns were allowed to give evidence that a child's injury was caused by a contact rather than a flame burn.[26] Moreover, the "expertise"

---

22 David Paciocco and Lee Stuesser, The Law of Evidence, 3rd ed., Irwin Law, 2002, at pg. 161

23 (1994) 2 S.C.R. 9, Paciocco and Stuesser, at p. 170

24 Ibid, pg. 170

25 (1993) 4 S.C.R. 223

26 Paciocco and Stuesser, at p. 170

rule was not offended by allowing a plastic surgeon who was not an expert in child abuse cases to testify that the passivity of children to treatment is a characteristic common to abused children.[27] Marquard altered the landscape for the reception of opinion evidence of experts who testify as to matters beyond their expertise. As Mr. Justice Griffith's has noted.[28]

> "The test of expertness is the skill in the field in which the expert opinion is sought. The court will not be overly concerned with whether the skill of the witness has been derived from specific studies or by practical training. That is, it does not matter whether the expertise has been acquired through training in the field, studies or by practical observation."

R. v. Marquard:

As indicated above, important evidentiary issues arose in R. v. Marquard,[29] which involved an appeal from the Court of Appeal of Ontario. The facts are usefully summarized in the head note and are as follows:[30] Marquard was charged with aggravated assault of her three and a half year old granddaughter. It was alleged by the Crown that Debroah Marquard had put her granddaughter's face against a hot stove door in order to discipline

---

27 Ibid, pg. 170

28 Quoted in the Litigator's Guide to Expert Witnesses by Mark J. Freiman and Mark L. Berenblut, (1997) Canada Law Book, at pg. 32

29 (1993) 4 S.C.R. 223 * I have quoted liberally at times directly from the head note.

30 Ibid., at p. 223

her. "The child's unsworn testimony was that her "nanna" had put her on the stove".[31] Marquard and her husband had both testified that they discovered the child early in the morning screaming after she burned herself trying to light a cigarette with a butane lighter.

At trial, both the Crown and defence called a number of expert witnesses to corroborate their version of the events. Expert evidence relating to the function of butane lighters, the nature of the burn, whether the child was telling the truth at trial and the psychological effects of abuse were adduced.[32] The Crown witnesses were permitted to testify in areas outside the ambit of their expertise. Instead of instructing the jury to disregard the evidence where it went beyond the expertise of the expert, the trial judge told the jury to simply weigh those opinions, stating that the opinions outside the area of the expertise were to be weighed along with all the other evidence.[33] Defence counsel did not object to the witnesses giving evidence outside their area of expertise, but objected to the judge's charge that they could rely on the opinion outside their stated areas of expertise.[34]

The jury found Marquard guilty and sentenced her to 5 years imprisonment. The Ontario Court of Appeal upheld the conviction, but reduced the sentence. In allowing the appeal and ordering a new trial, the Supreme Court of Canada considered the admissibility of

---

[31] Ibid., at p. 223

[32] Ibid., p. 223

[33] Ibid.

[34] Ibid., p. 223

opinion evidence of qualified experts. Madam Justice McLachlin, who wrote the majority decision, established the parameters for the admissibility of expert evidence beyond their areas of expertise. It is submitted that the ratio of Marquard will continue to resonate in the conduct of civil trials. The head note fairly summarizes the salient features of Madam Justice McLachlin's decision. The following is quoted from the head note:[35]

1. "The only requirement for the admission of expert opinion is that the expert witness possess special knowledge and experience going beyond that of the trier of fact. Deficiencies in the expertise go to weight, not admissibility. Here the witnesses were qualified more narrowly than their areas of expertise, or in one case, not formally qualified at all. The proper practice is for counsel presenting an expert witness to qualify the expert in all the areas in which the expert is to give opinion evidence. If this is done, no question as to the admissibility of their opinions arises."[36]

2. "Important as the initial qualification of an expert witness may be, it would be overly technical to reject expert evidence simply because the witness ventures an opinion beyond the area of expertise in which he or she has been qualified. As a practical matter, it is for opposing counsel to object if the witness goes beyond the proper limits of his or her expertise. The objection to the witness's expertise may be made at the stage of initial

---

[35] Ibid., p. 224

[36] Ibid., pg. 225

qualification, or during the witness's evidence if it becomes apparent that the witness is going beyond the area in which he or she was qualified to give expert opinion. In the absence of objection, a technical failure to qualify a witness who clearly has expertise in the area will not mean that the witness's evidence should be struck. However, if the witness is not shown to have possessed the expertise to testify in the area, his or her evidence must be disregarded and the jury so instructed. Allowing the jury to consider to experts' evidence did not constitute an error of law because all of them clearly possessed expertise sufficient to permit them to testify as the did."[37] (underlining mine)

3. "The ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion. A judge or a jury which simply accepts an expert's opinion on the credibility of a witness would be abandoning its duty to itself to determine the credibility of the witness. The expert who testifies on credibility is not sworn to the heavy duty of a judge or juror. Moreover, the expert's opinion may be founded on factors which are not in the evidence upon which the judge and juror are duty bound to render a truce verdict."[38]

---

[37] Pg. 226

[38] Pg. 227

4. "While expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact."[39]

It is to be noted that the Marquard, one of the expert's who testified was a Dr. Mians, who was qualified as an expert in child abuse and paediatrics.[40] She was not an expert in burns, but her opinion was that the child had was a contact burn and not a flame burn. Dr. Mians admitted in cross-examination that she was not an expert in burns or in plastic surgery.

Another doctor who saw the child upon her arrival at the hospital was a Dr. Campbell who was not qualified at all as an expert. He testified however that his experience led him to the conclusion that the child had suffered a contact burn.[41]

---

[39] Pg. 227

[40] Pg. 242

[41] Pg. 242

Dr. Zuker, a plastic surgeon, was qualified to testify as an expert in burns. He went beyond his area of expertise to testify that passivity during a medical examination is characteristic of abused children.[42]

All this evidence was admitted by the trial judge. Although she had accepted that the witnesses had gone beyond the area of expertise as qualified, she did not instruct the jury to disregard the opinions which went beyond the witnesses area of expertise. Dr. Mians and Dr. Campbell were not specialists in burns, yet they could testify based on their experience. As Madam Justice McLachlin said: (at page 243)[43]

> "While Dr. Mians and Dr. Campbell were not medical specialists in burns, there could be no doubt that as practising physicians, they possessed an expertise on burns, which is not possessed by the ordinarily untrained person. Similarity, while Dr. Zuker was not qualified as an expert in child abuse, his long experience working with children who have been injured had no doubt, given him a degree of expertise which of expert opinion is that the "expert witness possessed special knowledge and experience going beyond that of the trier fact: R. v. Beland [1987] 2 S.C.R 398, at p. 415. Deficiencies in the expertise go to weight not admissibility." (underlining mine)

---

42 Ibid., p. 242 and Paciocco & Stuesser, pp. 242 & 171

43 Ibid., p. 243

Marquard will allow experts to proffer opinion evidence on matters outside their narrow area of expertise. Containment of the defence expert's opinion will prove difficult. The qualification phase will be crucial. If success is to be achieved in limiting the reach of the expert's opinion, a vigorous cross-examination will need to be mounted. At worst, the objection will be made and the record protected.

VI. CONTAINMENT OF THE DEFENCE EXPERTS' OPINION:

The first attack in your cross-examination of the defendant's experts begins in the qualifications phase. Before an expert can testify, he must be properly qualified. In a typical case, an orthopaedic surgeon no doubt has the qualifications of an orthopaedic surgeon, but he or she has neither the experience or the qualifications or training of a psychologist or physiatrist. Your cross-examination during the qualification phase should be geared to establish this lack of expertise.

The experts Curriculum Vitae, a copy of which will have been sent to you prior to the trial, must be carefully reviewed. You should do a computer search of all cases in which the expert testified.

Sample Cross-Examination:

Q.: Doctor, from looking at your curriculum vitae, I note that you have taken no courses in physical medicine and rehabilitation. Is that true?

Q.: Doctor, I note that you have not published articles or done original research in chronic pain and fibromyalgia. True?

Q.: Your practice is that of an orthopaedic surgeon and not of a chronic pain specialist. True?

This exercise is designed to limit the effect and the damage that the defence doctor can do to the plaintiff's case and to limit the reach of his evidence to issues involving orthopaedic surgery only. Even if the defence doctor is qualified to comment on fibromyalgia, the effect of the cross-examination will hopefully weaken the force of the expert's opinion.

VII. SOME STRATEGIES FOR CROSS-EXAMINING 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. 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.

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

4. 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*, referred to earlier in this paper about the role of an expert.

5. 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, in my opinion the door has been left open to permit cross-examination on negative judicial comments in the appropriate case.

I have listed below cases which do and do not permit cross-examination on negative judicial comments.

(a) Cases Which Prohibit Cross-Examination on Negative Judicial Comments

(i) ***Desbiens v. Mordini*** (2004), 17 C.C.L.I. (4th) 146: Although this case is not the first case wherein counsel sought to impeach an expert witness's credibility, it is the

most frequently cited case regarding admissibility of cross-examination of prior negative judicial comment. In this case, plaintiffs' counsel sought to impeach Dr. Ameis, a defence expert by cross-examining Dr. Ameis on a number of cases before the court and Financial Services Commission of Ontario (FSCO) in which negative comments had been made by the judge or arbitrator concerning Dr. Ameis' lack of objectivity and impartiality in his role as an expert. Mr. Justice Spiegel concluded in this case that this line of cross-examination is not permissible. This case finds that the fact that an expert "has been the subject of negative judicial comment respecting his conduct as an expert witness in other cases is not the proper subject of cross examination [sic] in this case." Justice Spiegel considered *R. v. Ghorvei*, described more fully below.

(ii) ***R. v. Ghorvei*** (1999), 138 C.C.C. (3d) 340: This case considers a different kind of witness: the police officer. Constable Neilsen had been found to be lying under oath in an previous case and the appellant sought to admit this evidence. Therefore, the question once again arises - can a witness be cross-examined on a prior negative judicial finding - and once again, the answer was no. This case holds that "it is not proper to cross-examine a witness on that fact that his or her testimony has been rejected or disbelieved in a prior case." The findings in the earlier case were nothing more than a rejection of the Constable's testimony and, therefore, not open to cross-examination. The reason underlying this decision is that a cross-examination of a witness on what is essentially the opinion of a third party in an unrelated case would not be useful as the triers of fact who would witness this

cross-examination would be unable to assess both the value of that third party's opinion as well as the witness's credibility in that case without also being provided with the factual foundation for that third party's opinion.

(iii) ***R. v. Karaibrahimovic*** (2002), 164 C.C.C. (3d) 431: This case sets out the general rule that "evidence is admissible if it is relevant to a fact in issue, and not subject to a rule of exclusion." The rule of exclusion that this case supports is that cross-examination of a witness on whether the witness's testimony in previous proceedings was rejected or disbelieved is irrelevant and ought not to be permitted. This case presents similar policy reasons to that of the *Ghorvei* case for rejecting this kind of evidence: "the most obvious problem is that what happened in the first trial, including the reasoning of the trier of fact in that trial, would not be known to the trier of fact in the second [trial]...The difficulty is that there is no effective way of determining with certainty the factual foundation for credibility findings in other trials." Although this case does not permit cross-examination of an expert of prior negative judicial comment, this is not to say that cross-examination cannot be severe: "this does not mean that expert witnesses are to be spared from rigorous cross-examination where counsel seeks to discredit an expert's testimony by attacking the expert's methodology, conclusions, bias or credentials. "

(iv) ***R. v. Malabre***, [1997] O.J. No. 1109: This case, as in *Ghorvei***,** concerns a police witness. This case states that a "wide latitude" must be allowed in cross-

examinations, but draws the line at conduct in prior cases. This case states that evidence of the police witness's conduct in a prior case was "of marginal relevance to the case against the appellant". This suggests if the conduct was relevant, a cross-examination on this prior conduct would be permitted. However, this case continues by saying that "even if we were to accept that the earlier findings amounted to a determination that [the police officer] had lied under oath and that cross-examination should have been allowed on that point, we are of the view that this error caused no substantial wrong or miscarriage of justice on the facts of this case. The credibility of this particular witness was not in any way central to the case against the appellant." Perhaps, then, we can read this to mean that if the facts were such that the current case turned on the credibility of a witness, including an expert witness, then a cross-examination on the prior conduct may be permitted.

(v) ***R. v. Schmidt*** (2001), 151 C.C.C. (3d) 74: This case discusses the restriction on questioning a sexual assault complainant about prior sexual assault complaints. This case makes a point of mentioning that restrictions in introducing evidence from prior cases is not restricted to sexual assault matters: "Generally, where a witness testifies at trial, his or her credibility cannot be impugned by leading evidence that he or she was disbelieved as a witness in another unrelated trial."

(vi) ***R. v. Campbell*** (2005), BCPC 147: This case concerns two charges: dangerous driving and failing to stop at the scene of an accident. This case adopts the

reasoning of the *Ghorvei* case and prohibited cross-examination regarding a witness's reputation for lying. This case also mentions that the *Karaibrahimovic* case stands for the principle "not to use a present trial to assess a witness's evidence in another unrelated trial because there is no effective fair way of determining with certainty the factual foundation for credibility in other trials." Finally, *Campbell* is further reinforced by *Schmidt*: "That case stands for the principle that generally a witness's credibility cannot be impugned by leading evidence that he was not believed as a witness in a prior unrelated trial."

(b) Case Law Supporting the Proposition that Cross-Examination of Prior Negative Judicial Comment is Permitted

The two cases that make reference to the possibility of cross-examination of prior negative judicial comment being admissible are that of *Desbiens* and *Malabre*.[44]

Although the *Desbiens* case holds that cross-examination of prior negative judicial comment was not permissible in the case at bar, the Judge continued by saying, "I do not wish to be understood to say that this line of questioning is impermissible under any circumstances. If a satisfactory evidentiary basis is laid it may become relevant." (underlining mine) This statement permits the possibility that cross-examination of prior negative judicial comment may be admissible in the appropriate case.

---

[44] It is important to note that a principle of criminal evidence law holds that a witness can be cross-examined on a prior conviction, therefore, *Ghorvei* explains "if the prior judicial finding that Constable Neilsen lied under oath had formed the basis of a conviction of perjury or of giving contradictory evidence, it is clear that he could have been subjected to cross-examination on that conviction and on its underlying facts." Further, the *Ghorvei* case reminds the reader that ordinary witnesses, unlike accused persons, would also be subject to cross-examination on relevant discreditable conduct, even if the conduct has not resulted in a charge being laid or in a conviction. These principles are upheld in *Regina v. Gonzague* (1983), 4 C.C.C. (3d) 505: "The theory upon which prior convictions are admitted in relation to credibility is that the character of the witness, as evidenced by the prior conviction or convictions, is a relevant fact in assessing the testimonial trustworthiness of the witness." And, as regarding conduct not resulting in a conviction, "...an ordinary witness...may be cross-examined with respect to misconduct on unrelated matters which has not resulted in a conviction."

Also, recall that the ***Malabre*** case left open the possibility of cross-examination of prior negative judicial comment by saying that if the facts of the case were such that it turned on the credibility of a witness, including an expert witness, then a cross-examination on the prior conduct may be permitted. Although the ***Malabre*** case does not expressly extend this possibility to include cross-examination of prior negative judicial comment, one could infer that if a case turned on the credibility of a witness and prior judicial comment spoke strongly in one direction or the other about the credibility of a witness that cross-examination on this evidence could be permitted.

> As the ***Desbiens*** reasons for judgment were released on November 17, 2004, we have found no reported decisions relying on *Desbiens* to permit cross-examination on prior negative judicial comment, nor has *Malabre* been cited to support cross-examination on prior negative judicial comment. Only time will tell whether there is, in fact, a situation where prior negative judicial comment is relevant such that cross-examination is permitted or whether the possibility has been left open only to fuel an interesting and worthwhile legal-academic debate.

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. It is my hope that this paper will help the advocate more effectively cross-examine the expert and non-expert witnesses and by so doing become a better advocate.

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*