The Hon Justice Michael Pembroke

New South Wales Bar Association
New Barristers Committee

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CROSS EXAMINATION OF EXPERTS

1. I would like to talk to you about six separate matters relating to the cross examination of experts. They are drawn from my own experience at the Bar and from my brief experience thus far on the Bench.

Respect

2. First, you must be respectful of the expert witness – at least initially. Do not be high handed or condescending. Do not be rude. Do not ridicule the expert witness and do not engage in unnecessary aggression.

3. If you do so, you will get the judge offside. The judge's starting premise will be that the expert knows more than you know. Nearly always that will be the case.

4. For that reason alone, you should be even more polite than you would usually be. You may, in fact, lull the witness into a false sense of security and his guard might slip.

Correct Approach

5. Second, you must be clear what you are endeavouring to do. The orthodox approach is to try to demonstrate, by careful questions, based on a logical and rational strategy, either that:

(a) the expert's opinion is based on an incorrect premise because a step in the reasoning process is wrong, in which case there is no foundation for the opinion; or

(b) the opinion, although based on logical reasoning, is so improbable having regard to competing opinions and other considerations, that it should not be accepted.

6. The expert's factual assumptions are in a different category. You will often hear a judge say that "the witness' opinion is only as good as the assumptions of fact on which it depends". You do not need to attack the factual assumptions through the expert witness. He does not prove them and attacking him cannot disprove them.

7. In that respect, beware of hypotheticals. As a general rule, it is probably safer not to put alternative factual assumptions to the expert witness. However, if the opportunity arises, and you are on safe ground, you might sometimes clinch the case by asking the witness whether if the fact were B rather than A, his opinion would be different. If you get the right answer and you subsequently prove B, you have made your case.

Preparation

8. I cannot emphasise enough the need for thorough preparation before cross-examining an expert witness. Many, many hours of preparation will go into each half hour of cross-examination. There are two aspects to preparation – the subject and the person:

The Subject

(a) The first aspect is your own study of the subject. You must learn and understand, to a considerable degree, an area of intellectual discipline which, for most of you, will be outside your particular expertise or interest. Whether you like it or not, it can be a fascinating intellectual challenge. It is also one of the wonderful things about the job of the barrister. In a short space of time, you can learn so much about, and become an overnight expert on, different areas of science, engineering, commerce, technology, reinsurance, accounting and valuation – whether of shares or other property. That is not even to mention medicine about which I know nothing. But there is still more. For most of the last 25 years, the majority of my cases involved disputes arising in

commerce. But in my early years at the Bar different expert issues arose. Now in my early months as a judge, I am seeing those same issues again – handwriting and forgery, and dementia and testamentary capacity, are two such issues;

The Person

(b) The second aspect is the person. Experienced solicitors will often do this for you anyway, but you must investigate, or cause to be investigated, the witness. This may involve a number of stages – (1) enquiries from industry colleagues of the witness; (2) subpoenas to third parties; (3) a notice to produce to the party calling a witness. It can be useful to seek the production of instructions given to the expert but this will often lead to disputation. It is however often worth a try. You want to know who the witness really is and what is his standing among his peers;

(c) You will occasionally get lucky. I can give you several examples. In 2007 in a reinsurance arbitration before a panel of which Tony Fitzgerald QC was the Chairman, I was given material that showed that an expert witness had been approached previously by one of the parties. He had responded to that approach by saying that he did not think he had sufficient expertise to enable him to provide a worthwhile opinion on the issue. This honest response was recorded in the solicitor's file notes. Subsequently, for reasons that one can only guess at, he agreed to a request from another party, to give the same evidence that he previously said he was unqualified to give. The party that then called him having no idea that he had previously stated that he was unqualified to express the relevant opinion. We obtained the solicitor's file notes. Naturally it was a source of significant embarrassment to the witness when they were put to him. His evidence was discredited;

(d) In the Ingot case, which related to an investment in a company called Newcap Reinsurance, and which lasted for about 15 months before McDougall J, it was necessary for Tom Bathurst's client to rebut or discredit the evidence of an accounting expert. Tom's solicitor was very experienced. She pushed hard on subpoenas and notices to produce and unearthed a quantity of material

showing that the witness had on a number of prior occasions expressed views that were inconsistent with the opinion which he was espousing at the hearing. He was discredited. What is more, he made his position much worse by seeking aggressively to defend his position by denying the obvious. It was a good example of the truth of the aphorism that "when you are in a hole – stop digging";

(e) I have a third story to tell. It is not necessarily the result of research into the witness, but I will mention it anyway. Tom Hughes was (and still is) an extraordinarily powerful cross-examiner who could literally frighten a weak or timorous witness into recanting. This will never happen to you, but in a case in Melbourne in the early 1990s, Tom forced the witness to concede that he was "a worthless expert witness whose opinion was not worth the paper it was written on and that he was ashamed of ever venturing an opinion on the issue in dispute".

Non-Adversarial

9. The next matter I would like to mention is the importance of expert witnesses not being adversarial. This came home to me some years ago when I was involved in a significant case involving alleged professional negligence by a large firm of Perth solicitors. Ultimately the judge found that the solicitors made a mistake but they were not negligent, which was the result for which we contended. I spent a lot of time with a very senior valuer in the City of Sydney. He was very well credentialed and quite distinguished. But it was obvious to me from our conferences that he was just not getting it. He would harangue me in conference and could not wait to go to court and harangue the judge and cross-examining counsel. Eventually we had a quiet discussion about technique and the role of the expert witness. I said to him that he should regard himself as an elder statesman who was above the fray and who was not interested in the result. I told him that his sole purpose should be to assist the court and that he should display no interest in the outcome of the case. When that attitude sank in, he was transformed. And because he transformed his approach, he was immeasurably more persuasive than he would otherwise have been.

10. I cannot stress enough that the moment an expert witness starts to behave in an adversarial manner, he will have taken a significant step towards ensuring that his opinion will not receive the weight that it might otherwise deserve.

11. My own experience is that some of the accountants with the big firms are the worst offenders. They often seem to think that the whole case depends on them getting the best of the opposing expert and getting the best of the cross-examiner. Giving expert evidence is not a jousting match. This is a completely wrong headed approach. I think it is often the result of unrestrained ego and a failure properly to prepare and educate the putative witness so that he understands his proper role.

12. Expert witnesses are usually intelligent. They will therefore usually respond to re-training and re-thinking their role, whatever preconceptions and misconceptions they might have formed in their private lives.

Containing Costs & Focus

13. This leads me to my fifth point. I have often found it a very great waste of client's money for experts, particularly accounting experts, to be let loose to review documents and to prepare a draft report before you, as the one who will present the case, have formed a very clear view of what expert evidence you really need and whether the proposed witness will be suitable to the task. Additionally, before you can decide what expert evidence you need, you usually need to know what facts you will be likely to prove.

14. Accounting experts can be so expensive that I used to like to keep them on a short leash. That meant that, before allowing the proposed expert witness to become too advanced in his reading or thinking, there needed to be:

    (a) a conference with counsel before preparing any draft report; and
    (b) a clearly formulated question for the expert's opinion; and
    (c) a reasonable understanding of what the facts were likely to be.

15. There are multiple reasons for having a conference with counsel before spending money on a draft report. The first is to make sure that the expert is on the same

metaphorical page as you. Some go off on a tangent, even into orbit, if left to their own devices. The second is that by having a preliminary discussion about the issues with the proposed expert, you can sometimes form a view, before any money is spent, that that particular witness is too inexperienced to be plausible or valuable; or that his opinion, for other reasons, is likely to be unconvincing; or that he is assuming facts that you will not be able to prove; or that you need to go back to square one and re-examine your options.

16. I have seen a lot of wasted expenditure on accountant's and solicitor's fees for reports that would have been differently structured, or more narrowly focused, or not used at all, if counsel had been involved earlier in advising on the evidence and formulating the issue.

Know the Answer

17. At the Bar, I usually avoided open-ended questions where I did not know what answer to expect from the witness. I think it is a good rule of thumb for cross-examining expert witnesses, although a little less important for witnesses of fact. The danger of not knowing the answer when cross examining an expert witness can be profound. You are going down an uncertain path in an area where the witness knows far more than you do.

18. This is illustrated by the following transcript extracted in Francis Wellman's classic book *The Art of Cross Examination*. It was first published in 1903 and I have the fourth edition. The advocate was young and started his cross examination by addressing the witness in a rather flippant and disrespectful manner. This naturally irritated the witness. The exchange went along these lines:

Q. Doctor, you seem very certain about your findings. Is this the first autopsy you have ever made? I do not find your name anywhere in our local Medical Directory.

A. No, I can say that I have made a previous autopsy.

Q. Well could you honestly say that you have made two autopsies, not counting this one?

A. (Hesitating and counting his figures, apparently reminiscing) Yes, I think I can truthfully say that I have made two prior autopsies.

Q. (Encouraged) Well can you go so far as to say that you have made five autopsies?

A. (Touching the tip of each finger) Yes, yes. I think I can say that I have made as many as five autopsies.

Q. (Exultant and scornful) Well sir, why beat about the bush. Let's put it this way. Can you say you have made 10,000 previous autopsies?

A. (With a broad smile) Well, I can think I can truthfully say that I probably have. You see I was the Coroner for the City of Berlin for 40 years before I came to this country.

Rules

19. Finally I would like to mention an aspect of the Rules that I would urge you all to consider. Overriding everything that I have said is that the Rules relating to expert evidence have now changed significantly. They are designed to remove experts, as far as possible, from the adversarial arena. The practice has not yet caught up with the Rules as much as it should have. We, namely the judges, really do not want to see competing experts if it can be avoided. There are now important rules dealing with:

(a) single experts for multiple parties;
(b) court appointed experts;
(c) advisers to the court.

20. As far as I know, the metes and bounds of Part 31 Rule 54 dealing with the extent to which a court can obtain assistance from a specially qualified adviser are far from clear. But in the right case, this particular rule will be a significant temptation for a judge faced with any issue involving technical complexity. I would encourage all of you to seek to invoke these Rules whenever you have an appropriate opportunity to do so.

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