Controlling Unreasonable Cross-Examination

A Paper for the Annual Conference of the Industrial Relations Commission of New South Wales, 26 September 2008

By Justice Peter Johnson, Supreme Court of New South Wales

(An edited version of this paper was published in (2009) 21 Judicial Officers' Bulletin 29)

Introduction

1 The right of cross-examination has been extolled as the greatest implement in the search for truth.[1] The High Court has stated that *"confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial"*.[2] It has been said that:[3]

> *"Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed upon the witness."*

Common Law Principles Concerning Control of Unreasonable Cross-Examination

2 Common law principles operated to control unreasonable cross-examination.[4]

---

[1] Stone and Wells, Evidence - Its History and Policies, Butterworths 1991, page 113. Recent statements, however, have emphasised the need for care in making demeanour findings: *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186 at 189-191 [16]-[27]; the Hon Justice McClellan, Who is Telling the Truth? Psychologists, Common Sense and the Law, 2-4 August 2006, page 3ff.

[2] *Lee v The Queen* [1998] 195 CLR 594 at 602 [32].

[3] Viscount Sankey LC, quoting Lord Hanworth MR with approval, in *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346 at 359, approved in *Wakeley v The Queen* (1990) 93 ALR 79 at 86; *Libke v The Queen* [2007] 230 CLR 559 at 598 [120].

[4] *Libke v The Queen* at 598-599 [122]-[124]; NSW Law Reform Commission Report 101 (2003), Questioning of Complainants by Unrepresented Accused in Sexual Offence

3 In *Libke v The Queen*, Heydon J elaborated upon the common law rules with respect to the control of unreasonable cross-examination. The summary of common law principles set out hereunder is drawn principally from the judgment of Heydon J.

Offensive Questioning

4 Cross-examination is improper at common law if it was *"calculated to humiliate, belittle and break the witness"*, its tone *"was often sarcastic, personally abusive and derisive"* and where it resorted to remarks *"in the nature of a taunt"* and amounted to *"bullying, intimidation, personal vilification or insult"*, none of which is permissible.[5]

5 One reason for the rule prohibiting harassing and badgering cross-examination was explained by Wigmore upon the basis that an intimidating manner in putting questions may coerce or disconcert the witness or cause embarrassment, shame or anger in the witness so as to *"unfairly lead him to such demeanour and utterance that the impression produced by his statements does not do justice to his real testimonial value"*. [6]

Comments by the Cross-Examiner

6 Cross-examination may also contravene the rules of evidence where things said by the cross-examiner were not questions at all, such as where the cross-examiner *"regularly injected his personal views and editorial comments into the questions he was asking".*[7] Another vice is that a jury may regard counsel as a person of special knowledge and status, and therefore pay particular regard to the comments.[8] Statements of counsel's

---

Trials, paragraph 3.31; Pattenden, Judicial Discretion and Criminal Litigation, Clarendon Press, 1990, pages 92-102.

5 Heydon J in *Libke v The Queen* at 599 [123].

6 Evidence in Trials at Common Law, Chadbourn Ed (1970), Vol 3, page 173 [781]; Heydon J in *Libke v The Queen* at 598-599 [122].

7 Heydon J in *Libke v The Queen* at 600 [125].

8 Heydon J in *Libke v The Queen* at 600 [125].

personal opinion have no place in cross-examination. In particular, the role of prosecution counsel in the administration of justice should not be personalised with the prosecutor's own beliefs being injected into the case.[9]

7 Comments are particularly objectionable when they are sarcastic or insulting. They are even more objectionable when they are statements indicating the personal belief of prosecution counsel in the credibility or guilt of the accused. This is not something to be said in address, and, a fortiori, is not something to be said during questioning.[10]

Compound Questions

8 A compound question simultaneously poses more than one inquiry and calls for more than one answer. Such a question presents two problems. First, the question may be ambiguous because of its multiple facets and complexities. Secondly, any answer may be confusing because of uncertainty as to which part of the compound question the witness intended to address. However, Heydon J observed that compound questions have additional vices. It is unfair to force a witness into the position of having to choose which questions in a compound to answer, and in which order. To place a witness in the position of having to reformulate a compound question, and answer its component parts bit by bit, is unfair in the sense that it prevents the witness from doing justice to him or herself.[11]

Cutting Off Answers Before They Were Completed

9 Evidence should ordinarily be given without interruption by counsel.[12] A cutting off of an answer by a further question, though always to be avoided as far as possible, can happen innocently when a questioner is pursuing a

---

9 Heydon J in *Libke v The Queen* at 600 [125].
10 Heydon J in *Libke v The Queen* at 601 [126].
11 Heydon J in *Libke v The Queen* at 601 [127].

witness vigorously and the witness pauses in such a fashion as to suggest that the answer is complete. It can happen legitimately if a witness' answer is non-responsive.

10 The rule against the cutting off of a witness' answer follows from the encouragement which the law gives to short, precise and single questions. It is not fair to ask a question which is disparaging of, or otherwise damaging to a witness, and to cut off an answer which the cross-examiner does not like. The right of a cross-examiner to control a witness does not entail a power to prevent the witness from giving any evidence other than that which favours the cross-examiner's client.[13]

Questions Resting on Controversial Assumptions

11 A question put in chief which assumes a fact in controversy is leading and objectionable because it affords the willing witness a suggestion of a fact which he or she might otherwise not have stated to the same effect. While leading questions in the cross-examination of non-favourable witnesses are not intrinsically objectionable, witnesses should not be cross-examined on the assumption that they have testified to facts regarding which they have given no testimony.

12 Such questions have a tendency to irritate, confuse and mislead the witness, the parties and their counsel, the jury and the presiding judge, and they embarrass the administration of justice. This is because a leading question put in cross-examination which assumes a fact in controversy, or assumes that the witness has in chief or earlier in cross-examination given particular evidence which has not been given, may by implication put into the mouth of an unwilling witness, a statement which he or she never intended to make, and thus incorrectly attribute to him or her testimony which he or she does not give. A further vice in this type of questioning is that an affirmative and a negative answer may be almost

---

[12] *Randall v The Queen* [2002] 1 WLR 2237; [2002] UKPC 19 at [10].

[13] Heydon J in *Libke v The Queen* at 601-602 [128].

equally damaging, and a perfectly honest witness may give a bad impression because he or she cannot answer directly, but has to enter on an explanation. Questions of this character are misleading and confusing, within the meaning of both the statutory and common law rules.[14]

Argumentative Questions

13 Another vice in cross-examination arises where some questions of counsel do not seek to elicit factual information, but rather provide an invitation to argument. The rule against argumentative questioning rests on the need not to mislead or confuse witnesses.[15] It has been said that it should be remembered that the witness in the box is an amateur and the counsel is, as a rule, a professional conductor of argument and that *"it is not right that the wits of the one should be pitted against the wits of the other in the field of suggestion and controversy"* when *"what is wanted from the witness is answers to questions of fact"*.[16]

The Effect of the Rules of Evidence on the Value of Testimony

14 Heydon J observes[17] that it is not unique, in the law of evidence, to find that the more closely the rules for admissibility are complied with, the greater the utility of the testimony from the point of view of the party eliciting it. The rules of cross-examination *"permit a steady, methodical destruction of the case advanced by the party calling the witness, and compliance with them prevents undue sympathy for the witness developing"*.[18] His Honour concludes:[19]

---

14 Heydon J in *Libke v The Queen* at 602-603 [130]. The statutory provision in *Libke v The Queen* was s.21 *Evidence Act 1977 (Qld)*, which is broadly similar to s.41 *Evidence Act 1995* in its present form.
15 Heydon J in *Libke v The Queen* at 603-604 [131].
16 *R v Baldwin* (1925) 18 Cr App R 175 at 178-179.
17 Heydon J in *Libke v The Queen* at 604 [132].
18 Heydon J in *Libke v The Queen* at 604 [132].
19 Heydon J in *Libke v The Queen* at 604 [132].

"It is perfectly possible to conduct a rigorous, testing, thorough, aggressive and determined cross-examination while preserving the most scrupulous courtesy and calmness. From the point of view of cross-examiners, it is much more efficient to comply with the rules than not to do so."

Role of the Judge

15 Both the common law and statutes impact upon the role of the trial judge in the control of unreasonable cross-examination.

16 In a 2007 paper, Gleeson CJ observed:[20]

> *"Controlling witnesses and counsel is one of the trial judge's responsibilities - a responsibility which varies in difficulty from case to case. There is room for difference in judicial style. As advocates, we have all seen some judges who were models of firmness, tact and fairness; and some judges who were not. It is important, however, that everybody in court should understand that one of the judge's duties is to preside, and that the judge has the ultimate power and responsibility of ensuring that there is a fair trial. Undisciplined conduct by counsel, witnesses or parties should attract a firm judicial response. Beyond that; it is not possible to state rules that will apply to all cases. The judge must be, and be seen to be, in charge of the proceedings."*

17 It is the duty of the judge in a criminal trial to make appropriate interventions, in the case of impermissible or unacceptable questions or conduct on the part of the cross-examiner which are capable of jeopardising a fair trial. The duty of the trial judge is *"the highest duty of all"* and *"is a transcendent duty to ensure a fair trial"*.[21] In the adversary system, the judge's role is to hold the balance between the contending parties without himself or herself taking part in their disputations.[22]

---

20 The Role of a Judge in a Criminal Trial, 6 June 2007, pages 6-7.

21 Kirby and Callinan JJ in *Libke v The Queen* at 577 [35]; *Randall v The Queen* [2002] 1 WLR 2237; [2002] UKPC 19 at [10].

22 Dawson J in *Whitehorn v The Queen* (1983) 152 CLR 657 at 682.

18 In *Libke v The Queen*, Hayne J observed that, as it is for the judge to hold the balance between the contending parties, it is for the judge to ensure that the trial is conducted fairly. Often what is unfair will constitute a departure from the ordinary rules that ensure the orderly conduct of a trial.[23]

19 Hayne J observed that counsel for an accused person may well hesitate before objecting to a line of questioning put in cross-examination of the accused, lest it appear to the jury that counsel feels a need to protect the witness. Nevertheless, his Honour observed that responsibility for deciding whether objection should be taken to the way in which a question is put to a witness, or to the conduct of opposing counsel, is a responsibility which rests primarily with counsel, not the judge.[24] His Honour observed, however, that (in the circumstances in *Libke v The Queen*), it would have been both possible and desirable for the trial judge, at an early stage of the prosecutor's cross-examination to have said something requiring him to desist from making comments on the evidence that was being given. This could have been done briefly. If, for some reason, it had become necessary to engage in some sustained reproof or extended criticism of counsel, that should have been done in the absence of the jury.[25]

20 Hayne J said:[26]

> *"Trial judges are rightly reluctant to intervene in the course of counsel's cross-examination of a witness. That reluctance stems in large part from the fact that the trial judge will usually not know how counsel intends to set about the forensic task that is presented. Counsel's choices about the order, content and tone of cross-examination will usually be moulded by information that the trial judge does not know. Nothing that is said here should be read as denying the desirability of a trial judge avoiding such interventions as far as possible. But the obligation to ensure a fair trial will*

23 Hayne J in *Libke v The Queen* at 587 [72]-[73].
24 Hayne J in *Libke v The Queen* at 588 [76].
25 Hayne J in *Libke v The Queen* at 590 [84].
26 *Libke v The Queen* at 590 [85].

sometimes best be met by a timely reminder to counsel of the need to observe the rules that regulate the orderly conduct of a trial."

21 Heydon J said with respect to the role of the judge (excluding footnotes):[27]

> *"It was open to counsel for the accused to object to the questions criticised above, but there was no objection. He could well have judged that it was prudent not to do so. However, the permissibility of questioning of the type criticised in this case does not depend solely on whether there are objections from counsel representing the party calling the witness. 'The failure of counsel to object does not … give Crown counsel carte blanche …'. Trial judges have a responsibility independently of objections to prevent this type of questioning being employed. 'If counsel begin to misbehave [the trial judge] must at once exert his authority to require the observance of accepted standards of conduct'. Here the trial judge occasionally intervened to control the witness's answers, but never to control counsel's questions."*

The Duties of Counsel Relating to Cross-Examination

22 It is the duty of counsel to ensure that the discretion to cross-examine is not misused.[28] In certain circumstances, cross-examination may be conducted in such a manner as to constitute a breach of ethical duties including the ethical duties of a prosecutor.[29] This reflects the fact that the powers given to cross-examiners are given on conditions, and among the relevant conditions are those which underlie the rules of evidence.[30]

23 In *Libke v The Queen*, Kirby and Callinan JJ observed that the role of the prosecuting counsel is not to be passive, that he or she may be robust and be required to conduct the prosecution conscientiously and firmly. Given the adversarial nature of a criminal trial, there is at least the same expectation of defence counsel. The obligation of counsel extends also to

---

27 *Libke v The Queen* at 604-605 [133].

28 *Wakeley v The Queen* (1990) 93 ALR 79 at 86. The distinction between robust and improper cross-examination has been emphasised: *R v Thompson* [2006] 2 NZLR 677 at 587-588 [66]-[69].

29 Heydon J in *Libke v The Queen* at 597-598 [118]-[120].

30 Heydon J in *Libke v The Queen* at 598 [120].

the making of timely objections to impermissible or unacceptable questions and conduct.[31]

24 In *R v MSK and MAK*,[32] Wood CJ at CL said:

> *"Where the cross-examination is conducted by counsel, there are constraints which are built upon the professionalism of those who are trained as advocates, who are bound by an ethical code, who are subject to peer assessment as to their fairness and competence, and who are essentially independent in that they lack a personal interest in the outcome of the prosecution. Moreover, if they stray, they are far more amenable to control by judges who are able to exercise the power reserved to them under s 41 of the Evidence Act 1995."*

25 Clauses 35-39 of the New South Wales Barristers' Rules provide for responsible use of court process and privilege, including cross-examination:

> *"Responsible use of court process and privilege*
>
> *35. A barrister must, when exercising the forensic judgments called for throughout the case, take care to ensure that decisions by the barrister or on the barrister's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:*
>
> *(a) are reasonably justified by the material already available to the barrister;*
>
> *(b) are appropriate for the robust advancement of the client's case on its merits;*
>
> *(c) are not made principally in order to harass or embarrass the person; and*
>
> *(d) are not made principally in order to gain some collateral advantage for the client or the barrister or the instructing solicitor out of court* [cf. Clyne v. New South Wales Bar Association

---

31 Kirby and Callinan JJ in *Libke v The Queen* at 577 [35].

32 (2004) 61 NSWLR 204 at 218 [67].

(1960) 104 CLR 186 per Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ. at 200-1.]

[Amended Gazette No. 66 of 20 June 1997 p 4554]

35A. Without limiting the generality of Rule 35, in proceedings in which an allegation of sexual assault is made and in which the person who is alleged to have been assaulted gives evidence:

(a) A barrister must not ask that witness a question or pursue a line of questioning of that witness which is intended:

(i) to mislead or confuse the witness; or

(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive.

(b) A barrister must take into account any particular vulnerability of the witness in the manner and tone of the questions he or she asks.

[Inserted Gazette No.61, 30 May 2008, p.4083]

35B. A barrister will not infringe Rule 35A merely because:

(a) the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or (b) the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.

[Inserted Gazette No.61, 30 May 2008, p.4083]

36. A barrister must not allege any matter of fact in:

(a) any court document settled by the barrister;

(b) any submission during any hearing;

(c) the course of an opening address; or

(d) the course of a closing address or submission on the evidence; unless the barrister believes on reasonable grounds that the factual material

already available provides a proper basis to do so.

[Substituted Gazette No.7 of 21 January 2000, p.348]

37. A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:

(a) available material by which the allegation could be supported provides a proper basis for it; and

(b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

[Substituted Gazette No.7 of 21 January 2000, p.348]

38. A barrister must not make a suggestion in cross-examination on credit unless the barrister believes on reasonable grounds that acceptance of the suggestion would diminish the witness's credibility.

[Substituted Gazette No.7 of 21 January 2000, p.348]

39. A barrister may regard the opinion of the instructing solicitor that material which is available to the solicitor is credible, being material which appears to the barrister from its nature to support an allegation to which Rules 36 and 37 apply, as a reasonable ground for holding the belief required by those rules (except in the case of a closing address or submission on the evidence).

[Substituted Gazette No.7 of 21 January 2000, p.348]."

26 It will be observed that Rule 35A bears some resemblance to s.275A *Criminal Procedure Act 1986*, although Rule 35A is confined to sexual assault proceedings. The effect of this appears to be that a relevant breach of s.275A is capable of being a disciplinary matter, if the conduct falls within Rule 35A and is not excluded by Rule 35B of the Barristers' Rules.

27 Disciplinary proceedings have been taken against a barrister for the breach of ethical standards in cross-examination.[33] The Administrative Decisions Tribunal emphasised that the position of barristers is a privileged one and that whilst it is clear that barristers have a duty (from which they should not waiver) to put their client's case fearlessly and with vigour and determination, they have an overriding duty to the court to the standards of the profession and to the public.[34] Even if a witness, under cross-examination, is being non-responsive, evasive or argumentative in his or her answers, it is neither necessary nor appropriate for a barrister to make an offensive comment concerning the witness.[35]

Statutory Provisions in New South Wales

28 In New South Wales, s.275A *Criminal Procedure Act 1986* relates to improper cross-examination in criminal proceedings. Section 275A was enacted in 2005. Its origin may be explained, in part, by what was seen as judicial reluctance to interfere under s.41 *Evidence Act 1995*, in particular in the absence of an objection.[36] Section 275A provides:

> *"275A Improper questions*
>
> *(1) In any criminal proceedings, 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*

33 *New South Wales Bar Association v Caffrey (No. 3)* [2008] NSWADT 85.
34 Ibid at [71]-[72].
35 Ibid at [84]ff.
36 The Hon Justice Wood, Child Witnesses: The New South Wales Experience, 30 July 2004, page 4; Australian Law Reform Commission Report 102 (2005), Uniform Evidence Law, paragraph 5.85ff.

(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 sexist, racial, cultural or ethnic stereotype.

(2) Without limiting the matters that 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, including age, education, ethnic and cultural background, language background and skills, level of maturity and understanding and personality, and

(b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

(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 statements made by the witness, or

(b) the question requires the witness to discuss a subject that could be considered to be distasteful or private.

(4) A party to criminal proceedings 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.

(7) Section 41 of the Evidence Act 1995 does not apply to criminal proceedings to which this section applies.

> (8) *A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section.*
>
> *Maximum penalty: 60 penalty units.*
>
> (9) *In this section:*
>
> *criminal proceedings means proceedings against a person for an offence (whether summary or indictable), and includes the following:*
>
> *(a) committal proceedings,*
>
> *(b) proceedings relating to bail,*
>
> *(c) proceedings relating to sentencing,*
>
> *(d) proceedings on an appeal against conviction or sentence."*

29 In proceedings other than criminal proceedings, s.41 *Evidence Act 1995* applies to improper cross-examination. It has been said that the provisions of the uniform Evidence Acts that concern the rules for cross-examination (including s.41) substantially mirror practices under the common law.[37] Section 41 is in the following terms:

> *"41 Improper questions*
>
> *(1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:*
>
> *(a) misleading, or*
>
> *(b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.*
>
> *(2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:*

[37] Australian Law Reform Commission Report 102 (2005), Uniform Evidence Law, paragraph 5.37.

(a) any relevant condition or characteristic of the witness, including age, personality and education, and

(b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

Note. This section does not apply to criminal proceedings to which section 275A of the Criminal Procedure Act 1986 applies."

30 Upon the commencement of the *Evidence Amendment Act 2007 No. 46*[38], the existing s.41 will be omitted and replaced by a new provision in the following terms:

"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

[38] Assented to on 1 November 2007.

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.

Note. A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section - see section 195."

31 It will be observed that the new s.41 will bring the statutory control of improper cross-examination in civil proceedings into line with s.275A *Criminal Procedure Act 1986*. This was the recommendation of the Australian Law Reform Commission, supported by the New South Wales Law Reform Commission, in 2005.[39]

Restriction on Cross-Examination of Complainant by Self-Represented Accused in Sexual Offence Proceedings

32 Although it is not a provision designed expressly to control improper cross-examination, reference should be made to s.294A *Criminal Procedure Act 1986*. This provision prohibits cross-examination of the complainant by a self-represented accused in sexual offence proceedings. Section 294A, introduced in 2003, has been held to be constitutionally valid.[40]

33 The purpose of the restriction brought about by s.294A is to spare the complainant, in the trial of a person accused of a prescribed sexual offence, the need to answer questions directly asked of him of her by the person said to have committed the offence. It reflected the fact that, cross-examination conducted by the accused is undertaken by a person with an immediate self-interest in the outcome, who is not bound by any ethical restrictions and who does not have any training in relation to admissible evidence or permissible cross-examination. The use by that person of the opportunity to confront and to challenge the alleged victim personally and directly, risks diverting the integrity of the judicial process, insofar as it is likely to intimidate the complainant to the point where he or she is unable to give a coherent and rational account of what truthfully occurred.[41] The manner in which s.294A is to be complied with has received consideration.[42]

---

39 Australian Law Reform Commission Report 102 (2005), Uniform Evidence Law, paragraphs 5.106-5.118 and Recommendation 5-2.

40 *R v MSK and MAK* (2004) 61 NSWLR 204; *MAK v The Queen; MSK The Queen* [2005] HCA Trans 22 (special leave refused).

41 *R v MSK and MAK* (2004) 61 NSWLR 204 at 218 [68]-[69].

42 *Clark v R* [2008] NSWCCA 122 at [40], [47].

Some Observations Concerning the Practical Operation of s.41 *Evidence Act 1995* and s.275A *Criminal Procedure Act 1986*

34 Sections 41 *Evidence Act 1995* and 275A *Criminal Procedure Act 1986* operate on the assumption that there is an element of relevance in the line of questioning.[43] If the question is objectionable on the ground of relevance under s.55 *Evidence Act 1995*, it ought be rejected on that basis and s.41 or s.275A do not arise.

35 It will be observed that s.275A(1) places an obligation upon the court to disallow a disallowable question. The duty imposed on the court under the section applies whether or not an objection is raised to a particular question.[44] The obligation on the judge extends beyond that recognised at common law and under the existing form of s.41 *Evidence Act 1995.*[45]

36 It is noteworthy that both s.41(1)(b) and s.275A(1)(b) refer to a question that is *"unduly annoying, harassing, intimidating, offensive …"*. The insertion of the word *"unduly"* suggests that some element of these characteristics may be permissible, with impropriety only arising when the point is reached where it is unduly so. According to The Macquarie Dictionary, the word *"unduly"* means *"excessively"* or *"inappropriately; improperly, unjustifiably"*. The use of the word *"unduly"* assumes that questions of this type may be *"duly"* undertaken to a certain point.[46]

---

43 *R v TA* (2003) NSWLR 444 at 446 [12].

44 Section 275A(5).

45 As noted earlier, the decision in *Libke v The Queen* considered common law principles and the application of s.21 *Evidence Act 1977 (Qld)* which is broadly similar to s.41 *Evidence Act 1995* in its present form.

46 *R v Bacon* (1973) 1 NSWLR 87 at 103E. In *R v TA* (2003) 57 NSWLR 444 at 446 [12], Spigelman CJ observed that, even if there was some relevance in the line of questioning, *"its probative force was so slight that even a small element of harassment, offence or oppression would be enough for the court to exercise its discretion under s.41(1)(b)"*.

Conclusion

37 Enactment of s.275A *Criminal Procedure Act 1986* requires a trial judge to be more interventionist in a criminal trial. When the 2007 amendments to the *Evidence Act 1995* commence and a new s.41 is substituted, a similar interventionist obligation will be cast upon judges in civil proceedings. A foundation for greater interventionism on the part of civil trial judges already exists.[47]

[47] Part 6 of the *Civil Procedure Act 2005* (ss.56-89) already require or permit the court to have regard to the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings (s.56), the elimination of delay (s.59) and the giving of directions limiting the time that may be taken in examination, cross-examination or re-examination of witnesses (s.62(3)(a)).