

CROSS EXAMINATION: ITS PREPARATION AND EXECUTION

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General

1. In most common law jurisdictions cross examination is employed de rigeur in the trial process, whether civil or criminal.
2. In short it can be described as the interrogation under oath or affirmation of a witness called by the opposing party. It will or should only be resorted to if a witness gives evidence contrary to the interest of the cross examiner's client. Unnecessary cross examination is not only wasteful of court time but can sometimes produce disastrous results.
3. Cross examination is usually preceded by examination in chief and is followed by re examination. Leading questions are permitted in cross examination but usually not in examination in chief nor in re examination.²
4. In many jurisdictions there are rules of court regulating the procedure to be followed during cross examination, in particular where there are multiple cross examiners. There are also professional conduct rules dealing with cross examination, which if breached may have serious consequences for the practitioner.³
5. The scope of the cross examination is generally limited to the issues in the case and hence all questions should be relevant, although some questions are permitted if intended to impugn a witnesses' credibility.⁴

A Little History

¹ Justice of the Supreme Court of New South Wales.

² *Evidence Act 1995* (NSW) s 28; *Evidence Act 1995* (Cth) s 28.

³ *Uniform Civil Procedure Rules 2005* (NSW) Pt 32 rr 1(3), 7, 11.

⁴ In the UK and Australia, the cross examiner is only limited by relevance and not strictly just to the testimony given by the witness. In the US, Federal Rule 611 has the effect of limiting cross examination to only those matters deposed to by the witness and his or her credibility.

6. The notion of confronting one's accuser in some form or other is not a novel concept. In ancient times trial by battle or ordeal was the preferred course. By comparison cross examining one's accuser, or better still having someone with immense skill do it for you, is perhaps a far better alternative. The importance of extracting the truth can be used to explain a whole range of macabre but effective techniques. Water ordeals were up there with fire and hot irons.⁵
7. The difficulty of course with some of the early methods of truth detection is that the witness may not survive the process, or falsely confess to avoid the torture only to be put to death anyway on the basis of a confession.
8. Cross examination is itself quite an ancient process. The Athenians fully appreciated its utility. However in their courts the right to cross examine was very limited. In Athens law suits could be either private or public, depending on whether the interests of the individual or those of the state were involved. Any citizen could bring a public suit, but only the parties concerned or their legal representatives could institute a private suit.
9. In 399 BCE, Socrates was tried on two charges. First, for not acknowledging "gods that the city acknowledges" (impiety) and hence creating new deities, and secondly for corrupting the youth of Athens with his teachings.
10. At his trial he complained bitterly of his inability to confront certain of his accusers. More to the point he complained some were allowed to remain anonymous.⁶ He said:

And the most unreasonable thing of all is that commonly I do not even know their name. But all the rest who have been trying to prejudice you against me sometimes from motives of spite and jealousy, and sometimes, it may be, from conviction, are the enemies whom it is hardest to meet. For I cannot call anyone of them forward in Court to cross examine him: I have, as it were,

⁵ Richard Underwood, 'Truth Verifiers: From the Hot Iron and the Lie Detector' (1995) 84 *Kentucky Law Journal* 597.

⁶ F J Church, *The Trial and Death of Socrates* (A L Burt, 1908) 37-8.

simply to fight with shadows in my defence, and put questions which there is no one to answer.⁷

11. This was a perfect example of the rationale for the rule against hearsay. However, fortunately one of his chief accusers Meletus was present and Socrates was able to cross examine him.⁸
12. Socrates cross examined most effectively and arguably trapped Meletus (in the finest traditions of the bar), not that it did Socrates much good in the end.

Socrates: Come here Meletus. Is it not a fact that you think it very important that the younger men should be as excellent as possible?

Meletus: It is.

Socrates: Come then: tell the judges, who is it who improves them? You take so much interest in the matter that of course you know that. You are accusing me, and bringing me to trial, because, as you say, you have discovered that I am the corrupter of the youth. Come now, reveal to the judges who improves them. You see, Meletus, you have nothing to say; you are silent. But don't you think that this is a scandalous thing? Is not your silence a conclusive proof of what I say, that you have never given a moment's thought to the matter? Come, tell us, my good sir, who makes the young men better citizens?

Meletus: The laws.

Socrates: My excellent sir, that is not my question. What man improves the young, who starts with a knowledge of the laws?

Meletus: The judges here, Socrates.

Socrates: What do you mean, Meletus? Can they educate the young and improve them?

Meletus: Certainly.

Socrates: All of them? Or only some of them?

Meletus: All of them.

Socrates: By here that is good news! There is a great abundance of benefactors. And do the listeners here improve them, or not?

Meletus: They do.

Socrates: And do the senators?

⁷ Ibid 39.

⁸ Ibid 47-54.

Meletus: Yes.

Socrates: Well then, Meletus; do the members of the Assembly corrupt the younger men? Or do they again all improve them?

Meletus: They too improve them.

Socrates: Then all the Athenians, apparently, make the young into fine fellows except me, and I alone corrupt them. Is that your meaning?

Meletus: Most certainly; that is my meaning.

13. The technique deployed by Socrates in his cross examination is well accepted and used to this day. It was of course a cross examination attacking the credit of Meletus using a process of *reductio ad absurdum*, which despite the Latin tag had been invented by Greek philosophers some two hundred years previously.⁹
14. However notwithstanding his skilful performance, a majority of the Athenian jurors present (comprising some 500 males) found Socrates guilty and sentenced him to death. So it may be said that a brilliant cross examination will not necessarily guarantee success, especially when it is conducted appearing as a litigant in person.
15. Unsurprisingly advocacy styles amongst Athenian lawyers varied considerably. Some favoured precision and accuracy in the use of language, while others favoured “beautiful expression”.¹⁰
16. Cross examination was also a procedure known and appreciated by the Romans. Although written evidence could be received as part of the trial process, witnesses could also be subjected to cross examination which often took the form of vituperative speeches designed to impugn the credibility of the witness.¹¹

⁹ Robert Daigle, *The Reductio Ad Absurdum Argument Prior to Aristotle* (Masters Thesis, San Jose State University, 1991). See also Aristotle, *Aristotle's Prior Analytics* (A J Jenkinson trans, University of Adelaide, 2007).

¹⁰ Robert Bonner, *Lawyers and Litigants in Ancient Athens* (University of Chicago Press, 1927).

¹¹ A H M Jones, *The Criminal Courts of the Roman Republic and Principate* (Blackwell, 1972) 71.

17. By Cicero's time the examination in chief was conducted by the party who called the witness, who then passed the witness into the hands of the other party's representative for cross examination.¹²
18. Slaves were able to be examined under torture which was intended to extract the truth from the "lowly" persons. They could be tortured not only as witnesses but also as defendants, to induce them to confess and incriminate themselves.¹³
19. There were however exceptions. Slaves could not give evidence against their owners, or their owner's guardians or guardians' mothers if they were minors, except in cases of adultery where they were often the only possible witness.
20. Despite the use of written evidence in some trial contexts, several emperors gave directions to provincial governors on how to evaluate evidence. Judges were to attach great weight to the rank and wealth of the witness, and to his or her general character and repute; but they were also to observe his or her demeanour in court, and to take account of whether all witnesses on one side told the same story or gave consistent replies under cross examination. Hadrian indeed attached such importance to the demeanour of witnesses under cross examination that he refused to accept written testimonials, as had been freely admitted in republican courts and directed his governors accordingly.¹⁴
21. The origin of cross examination as we know it today finds its source in the development of the adversarial trial process. Professor Langbein¹⁵ dates the acceptance of "institutionalising" of defence cross examination in non treason cases to the 1730s. His view is that the practice of cross examination emerged for three reasons. Firstly, the growing use of lawyers generally in trials. Secondly, the reward system that offered bounties to those who provided testimony establishing that a crime had reached the requisite

¹² A H J Greenidge, *The Legal Procedure of Cicero's Time* (Oxford University Press, 1901).

¹³ A H M Jones, *The Criminal Courts of the Roman Republic and Principate* (Blackwell, 1972) 114-5.

¹⁴ *Ibid* 114.

¹⁵ John H Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2003) 168-70.

severity (or degree of financial loss) to qualify as a felony. Thus he suggests that this invited fraudulent testimony, the corrupt motive of which required cross examination as an antidote. Thirdly, the crown witness system for obtaining accomplice evidence in gang crimes, a prosecutorial technique that created further risks of perjured testimony, again thought best exposed by cross-examination.

22. In post revolution United States, and at or about the same time in the United Kingdom, cross examination had become entrenched as an important and necessary feature of all trials both civil and for criminal. As Thomas Peake observed in 1808.¹⁶

The Law never gives credit to the bare assertion of any one, however high his rank or pure his morals, but always requires the sanction of an oath: It further requires his personal attendance in Court, that he may be examined and cross examined by the different parties: and therefore in cases depending on oral testimony of persons who are themselves cognisant of the facts they relate, must in general be produced: for the relation of one who has no other knowledge of the subject than the information which he has received from others, is not a relation upon oath; moreover, the party against whom such evidence should be permitted, would be precluded from the benefit of cross examination.

23. In the criminal arena cross examination was necessarily restricted by the rules of practice governing the conduct of criminal trials.

24. As Professor Lemmings points out:¹⁷

Langbein and Beattie have shown that before the lawyers became involved, the standard criminal trial was a rapid and somewhat chaotic affair in which prosecutor (often the victim), witnesses, and accused played untutored and largely uncensored roles, with the judge acting as principal inquisitor. In such an exchange the defendant was at a considerable disadvantage, even if there was no prosecution counsel, because there were only vague limits to the admission of evidence, and he or she was normally required to answer the prosecution, whether fully sufficient and coherent or not. Indeed, many of the reports of these trials conclude with the line, 'The Prisoner having nothing to say in his Defence, the jury found him Guilty'; a laconic phrase which is as likely to indicate helplessness and despair, as guilt. From this position the

¹⁶ Thomas Peake, *Compendium of the Law of Evidence* (Brooke and Clarke, 3rd ed, 1808) 10.

¹⁷ David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford University Press, 2000) 218-9.

intrusion of defence barristers marked a critical point of departure, which can already be discerned by the middle years of the century, and became pronounced after 1780. Although defence counsel were not allowed, before 1836, to articulate an alternative case to the jury on behalf of their clients, it was their objections to the admission of hearsay, previous confessions and convictions, and accomplice testimony, that helped to develop the exclusionary rules of evidence which are taken for granted today. Moreover, even before 1820 they had largely excluded the vulnerable defendant as the target centre of the trial, and reduced both judge and jury to interested spectators of their own carefully demarcated adversarial competition between prosecution and defence 'cases'.

25. Of course many of the lawyers who helped develop the rules and conventions of legal practice were not always operating in an altruistic environment. They were usually focussed on winning cases and not in developing the law.
26. Despite the sophistication of the Greeks and perhaps to a lesser extent the Romans the early cross examiners in the United Kingdom and the United States adopted a fairly basic technique, which too often involved a deliberately aggressive approach.
27. Indeed a Mr William Garrow began to appear at the Old Bailey from about the early 1780's. His aggressiveness in cross examination was seen as a turning point in court protocol. Indeed Rowlandson caricatured Garrow's prowess in the drawing, "Being nervous and cross examined by Mr Garrow".¹⁸
28. Garrow's skill as a cross examiner was widely acknowledged. He soon gathered a reputation, as do many great cross examiners, that their presence could affect the outcome of a trial. He became well known for his intimidation of witnesses but he was also creative when it came to evidentiary and other legal objections.¹⁹
29. Garrow's cross examination could be devastating. In 1790 he was cross examining a Mrs Sarah Sneezby, who was prosecuting two men for allegedly robbing and assaulting her one night on Blackfriars Bridge. By his pointed

¹⁸ Thomas Rowlandson, *Miseries of Human Life and Other Amusements* (London, 1808).

¹⁹ David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford University Press, 2000) 218.

questions Garrow managed to imply that she was a troublemaker whose evidence deserved no credit:

Q [Garrow]: Mrs Sneezby, I know more of your history than you are aware of; how long is it since you was at Union-Hall?

A: I cannot tell if you keep me here all night.

Q: I will not keep you there all night: but if you will not answer my question, you shall spend the night in Newgate.

A: Would you make me answer to that I cannot?

...

Q: I do not ask you because I do not know; but I want to see a little of your manner; do not hurry yourself; take your time; we have nothing else to do.

A: I believe it is three months ago.

Q: I wonder you could not have told me sooner. What were you there about?

A: It was for no harm.

Q: Now I ask you again, what did you go to Union-Hall about? Oh Lord! Oh Lord! We shall be here till tomorrow morning, if you go on at this rate!

A: Why now I cannot recollect.

Q: Do you think I am such a fool as to be satisfied with such an answer as that; or those twelve jurymen, such rogues, as to suppose you were there at Union-Hall about three months ago, and you cannot recollect what for?²⁰

30. After further questions, some which revealed she had on the night in question been out drinking with a man not her husband, the jury found his clients not guilty.²¹
31. Thomas Gisborne, an Anglican clergyman writing in 1797, thought cross examination could become a tool of intimidation and purported to lay down a series of rules which he thought should govern any cross examination.²²

[He] will not defame the witnesses of the adverse parties; nor ... Strive to rob their testimony of the credit it deserves. He will not overawe [witnesses] ... by brow beating and menaces, nor impose on their simplicity by sophistry and cunning. He will not ... insidiously labor to extract from their words a sense

²⁰ Ibid 219-20.

²¹ *R v Jones and Wix* [1790] OBSP 324-9.

²² Thomas Gisborne, *An Enquiry into the Duties of Men* (University of London, 4th ed, 1797) 371.

foreign to their intentions. He will not labor the idea of drawing those who appear against him into any seeing contradictions and perjury, when he perceives their meaning to be honest and their story is in reality consistent.

32. In 1819, John Payne Collier spoke of “the abuse of the Bar” in cross examining witnesses, which caused truthful testimony to “be defeated by those who have attained such skill in confusing what is clear, and involving [that in making complex] what is simple”.²³
33. Textbooks devoted to cross examination are virtually nonexistent in the United Kingdom, but there have been a number in the United States which have emerged since the end of the nineteenth century. These books and other publications were designed to teach and improve lawyering skills (including cross examination).²⁴ Many are however merely a showcase of innumerable examples of the finer forensic moments of the author and others, without much in the way of analysis.

The Object of Cross Examination

34. Bentham thought of cross examination uncritically as the pathway to truth in fact finding.²⁵

As against erroneous or mendacious testimony, the grand security is cross examination...

35. Of course the oath-based system presupposed the witness’s fear that God would damn a perjurer. It may be said however that instead of the vengeance of God, the court substituted its faith in the truth detecting efficacy of cross examining lawyers.

36. Edward Cox in his 1852 work said:²⁶

²³ John Payne Collier, *Criticisms of the Bar* (London, 1819).

²⁴ Robert A Mead, “Suggestions of Substantial Value”: A Selected Annotated Bibliography of American Trial Practice Guides’ (2003) 51 *Kansas Law Review* 543.

²⁵ Jeremy Bentham, *Rationale of Judicial Evidence Specially Applied to English Practice* (Hunt and Clarke, 1827).

²⁶ Edward William Cox, *The Advocate: His Training, Practice, Rights and Duties* (J Crockford, 1852).

Cross Examination, - the rarest, the most useful and the most difficult to be acquired of all accomplishments of the advocate... It has always been deemed the surest test of truth and a better security than the oath.

37. John Henry Wigmore was an American jurist and expert on the law of evidence. In 1904 he published his most famous work, *Justice on the Anglo-American System of Evidence in Trials at Common Law*, written while Dean of Northwestern Law School in Chicago. He remarked:²⁷

For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience. "You must do anything," said Wendell Phillips, "with a bayonet – except sit upon it". A lawyer can do anything with a cross examination – if he is skillful enough not to impale his own cause upon it. He may, it is true, do more than he ought to do; he may "make the worse appear the better reason, to perplex and dash mature counsels" – may make the truth appear like falsehood. But this abuse of its power is able to be remedied by proper control. The fact of this unique and irresistible power remains, and is the reason for our faith in its merits. If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.

38. Dean Wigmore, however, thought the object of cross examination was as a tool to expose dishonesty, and therefore it lacked, he thought, utility when confronting the honest but mistaken witness. That is a somewhat unsophisticated appreciation as to its utility. Indeed a successful cross examination will often be achieved by exposing the demeanour of a witness as a result of his or her obvious prevarication, obstinance, or an inability to

²⁷ James H Chadbourn (ed), *Wigmore on Evidence* (1974) [1367].

make reasonable concessions, where they are due. The witness may be mistaken and honest but unable against other objective materials to accept he or she is simply wrong. As a result, the evidence of the witness may be rejected.

39. In 1910, an English barrister, Frederic Wrottesley, unashamedly founding his work on Cox and that of an American lawyer astutely explained:²⁸

The objects of cross examination are three in number. The first is to elicit something in your favour; the second is to weaken the force of what the witness has said against you; and the third is to show that from his present demeanour or from his past life he is unworthy of belief, thus weaken or destroy the effect of his testimony.

40. A truthful witness, especially one with relevant contemporaneous documents to support his or her testimony, presents as a particularly difficult task for the most skilled cross examiner. Equally an intelligent, well prepared, dishonest and/or stubborn witness with a paucity of corroborative materials may not make appropriate concessions. At that point the cross examiner needs to move on leaving the question of the witnesses's credibility for final address. Adverse comment, especially if the judge is on side, is far better than a relentless but futile cross examination.
41. In any event, rather than extracting a dramatic concession from a witness, cross examination can be used simply to qualify or contextualise testimony, which may otherwise be adverse to the cross examiner's case so as to lessen its impact. Some cross examination therefore is merely used for this purpose and not for the purpose of attempting to expose untruthfulness.
42. Of course it should never be overlooked that the successful challenge to the credibility of a witness can be just as potent as the witness making concessions, although cross examination as to credit is often difficult to execute as it turns much more upon the creation of an unfavourable

²⁸ Frederick John Wrottesley, *The Examination of Witnesses in Court including Examination in Chief, Cross Examination and Re-Examination: Founded on 'The Art of Winning Cases' by Henry Hardwicke* (Sweet and Maxwell, 1910) 109.

impression of the witness. No less preparation is involved. It requires the skilful juxtaposition of what are the relevant objective facts and the testimony of the witness as a contrast, leading to the inescapable conclusion that the testimony is simply unbelievable. This is where fine judgment and instinct can play key roles.

Preparation

43. Francis L Wellman, a prominent and well known US trial attorney practising in New York in the latter part of the nineteenth century, has made a significant contribution to and analysis of cross examination. His “The Art of Cross Examination” was published in four editions from 1903 to 1936. Although there are many useful guidelines, the work unsurprisingly emphasises as essential thorough preparation and knowledge of the case.²⁹

44. In his book, *The Essentials of Cross Examination*, Judge Leo Friedman observed:³⁰

Effective cross examination is basically the result of hard preparatory work, keen intuition, and legal artistry peculiar to the performer. Most of the art is unteachable.

45. Cross examination in the end is really a matter of the application of hard work and common sense. However many examples a cross examiner has read of the work of others he or she should not expect to replicate someone else’s inspired moments. Although there are some basic notions, cross examination is necessarily idiosyncratic. Well prepared, a cross examiner of any style should be effective but the cross examiner is in the end constrained by the facts which are presented. Hence the cross examiner needs to be very familiar with that to which each witness has sworn. More importantly for the reasons set out below, familiarity with the relevant underlying contemporaneous documents is vital.

²⁹ Francis Wellman, *The Art of Cross Examination* (The Macmillan Company, 4th ed, 1936) 3.

³⁰ Leo Freidman, *Essentials of Cross Examination* (California Continuing Education of the Bar, 1968).

46. In the United Kingdom and Australia (unlike the deposition system in the United States which permits pre-trial examination of witnesses), whilst the cross examiner may have thoroughly prepared, he or she has not usually laid eyes on the witness and would routinely not have had the benefit of a conference with the witness, especially if the witness is a party. There is a fundamental principle that there is no property in a witness and it is theoretically possible to confer with a witness on the other side (lay or expert) but it is relatively rare in practice. It should be observed that the witness may be bound to keep confidential all manner of information and hence constrained.³¹ On the other hand it may amount to a contempt of court to attempt to thwart one party conferring with a witness the opposing party proposes to call.³²
47. In the past, access to contemporaneous materials created by a witness would be at best limited to perhaps a few original documents. Today, it is routine to have access to the ubiquitous email, the text message, Twitter, Facebook and so on, in vast quantities. There is frequently an abundance of outpourings by witnesses. The apparent recording of every thought leads to a practical problem for courts especially those which have had little success or interest in limiting the scope of the discovery. In jurisdictions where the “train of inquiry” test³³ remains, the burden on the cross examiner can be daunting. However in the United Kingdom and Australia there have been initiatives taken which are intended to curtail the time and cost of the discovery process without materially affecting the quality of the preparation or the process of a fair trial.³⁴ These have involved putting a cap on the expenditure incurred in discovery, or limiting the scope of discovery to categories, or discovery at all until evidence has been filed.

³¹ *Porton Capital Technology Funds v 3M UK Holdings Ltd* [2010] EWHC 114 (Comm).

³² *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] EWHC 581 (Comm).

³³ *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63.

³⁴ Various rules of court have been introduced aimed at limiting the scope, timing and indeed the cost of the discovery process. See the Jackson reforms in particular in the UK and the *Uniform Civil Procedure Rules* (UK) r 31.5. In NSW, see the Equity Division, Practice Note SC 11. Both initiatives are designed to limit the volume and cost of discovery.

48. It is imperative that a cross examiner develop a case theory. That is an explanation of what happened and why. Once the case theory is developed a much clearer idea of the scope of cross examination will emerge and more to the point who should be cross examined and on what. The shape and structure of a cross examination should therefore bear a close symmetrical resemblance to the cross examiner's case theory.
49. Counsel for any party should ideally treat the litigation as if on an archaeological dig. A cross examiner must be entirely respectful of the facts. The careful indeed meticulous examination of what exists in whatever form is essential. It is necessary to pay particular attention to contemporaneous materials.
50. From a judge's point of view, nothing is more potent than a contemporaneous document or communication which, far away from the gaze of litigation, records an important and relevant event by someone privy to the facts. There are many cases where a witness may say, "I now have no independent recollection of the event, but I have been shown an email from me to X and I sent that email within thirty minutes of our meeting". Absent some special circumstance such a document will usually carry great weight with a judge.
51. The photocopier was in many respects a great advancement but on occasions it can be real obstruction. For example, unless you have a colour facsimile copier you will often miss notes in different coloured pens or worse altogether miss pencil markings. There is a rather embarrassing example of a case going all the way to the High Court of Australia by way of special leave when it was belatedly discovered that a photocopy of the important document had been made which missed a question mark at the beginning of a crucial sentence which when added made all the difference to its interpretation and hence it's significance.³⁵ The case had to be remitted to the intermediate appellate court for further consideration.

Execution

³⁵ *Lithgow City Council v Jackson* (2011) 244 CLR 352, [12].

52. A number of commentators have attempted to articulate what are said to be “golden rules” or “commandments”.³⁶ As examples: conciseness, precision in the question, a logical structure and never asking a question to which the cross examiner does not know the answer.
53. It has rightly been said that cross examination is an art in itself that skilful cross examination is the result of practice rather than precept and that “many a lawyer has risen to the zenith of the legal firmament through his keen analysis, skill and ability in cross examination”.³⁷
54. These guides although helpful are only as good as the skill of the cross examiner and the issues and materials he or she has to work with. In addition the phenomenon of modern technology has arguably changed the nature and character of cross examination. The email and other forms of social media have led, as I have already observed, to an exponential increase in electronic material from putative witnesses. More than ever before the cross examiner does not have to guess as to intention, motive or state of mind. It is often laid out with a trowel on someone’s computer or phone. This does not mean less skill is required in the execution of the task, but it does mean a court may become much less dependant on the assessment of credit of a witness simply because the availability of so much relevant contemporaneous material.
55. As has always been the case there are a number of different cross examination styles.
56. The manner and tone of the cross examination is obviously much less important than the content. Although manner and style can be very effective. William Garrow for example intimidated and hence overwhelmed. Marshall Hall and Edward Carson mesmerised. Aggression is still the hallmark of many

³⁶ Nigel Pascoe QC, *The Art of Cross Examination* (2013) Barrister Blogger <<http://barristerblogger.com/advocacy-tips/the-art-of-cross-examination-by-nigel-pascoe-qc/>>; Irving Younger, *Irving Younger’s Ten Commandments* (2016) American Bar Association <https://www.americanbar.org/publications/litigation_journal/2016-17/fall/burying_ten_commandments_crossexamination.html>.

³⁷ Jules H Baer and Simon Balicer, *Cross Examination and Summation: Containing Principles and Practice of Trial Procedure* (New York City Modern Law Publishers, 1933) 58.

modern cross examiners, for example Gordon Pollock QC, a leading London silk of whom it is said “often turns the opposition’s spines to jelly”.³⁸

57. Some cross examiners cross examine by topic, others chronologically. The choice of approach will clearly be dependent on the issues at trial and the particular witness. The principal witnesses will more often than not require a chronological approach, because all aspects of the narrative will usually need to be explored with them. It is also very helpful for the judge to be taken step by step through the important historical events, with at least the party or key witnesses.
58. The less significant witnesses, if cross examination is thought necessary, can be the subject of a topic approach, again because there is simply no occasion to ask them about events to which they were not directly privy. Necessity should be the guiding principle. If a less significant witness does no real harm to the case, that witness is arguably best left alone. The cross examiner should never underestimate the potency and influence of an unfavourable answer given by a disinterested participant in the relevant events. Witnesses of this kind can sometimes win or lose a case for a party because their evidence will often be seen as highly credible and hence extremely influential.
59. In any event, the information the cross examiner has about the witness is generally limited to his instructions; that is, his client’s version of what took place during a relevant conversation, for example, and what inferences one can draw from letters and/or emails and the like and other documents the witness has created or perhaps has seen.
60. Witnesses are well advised, whenever possible, to answer yes or no, or at worst give a short response. The garrulous witness is his or her own worst enemy. There are several reasons for this. The first is that irrelevant or non-responsive answers frequently irritate judges, but more important can be the source of adverse comment and findings. However, ironically they often

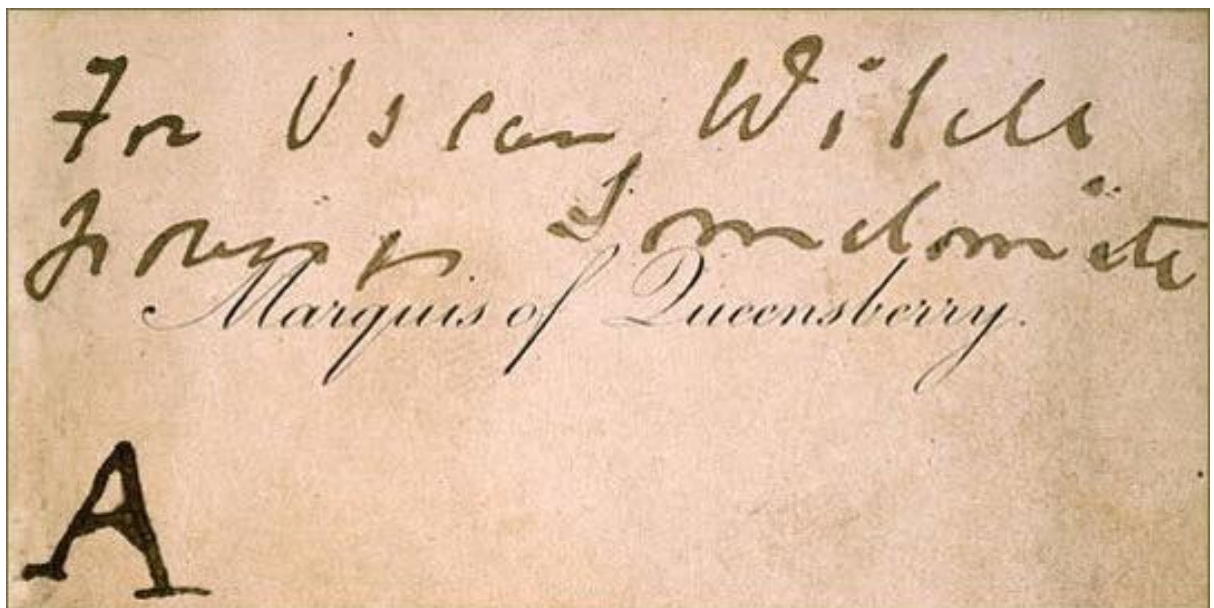
³⁸ Justice Patrick Keane, ‘Keynote Address’ (Speech delivered at the Australian Lawyers’ Alliance Queensland State Conference, Queensland, 15 February 2013).

expose a matter a witness is anxious about which in turn can be a useful insight for the cross examiner. Very often information is volunteered in the form of a non-responsive answer which the cross examiner could not otherwise have discovered and provide a line of questioning quite detrimental to that side's case.

61. In all cases witnesses' recollections (even when called by the same party) may vary widely especially in terms of the detail of conversations. With the passage of time, it should be generally assumed that a recollection will become less reliable unless aided by contemporaneous documents, which again only highlights their importance.
62. But in analysing the contemporaneous documents, the cross examiner has to consider a number of factors, depending upon the type of record and the witness' method of recording. Does the document purport to be a verbatim account of some event or merely some cryptic notation which itself requires some interpretation?
63. Was it prepared in the course of the witness undertaking some relevant activity or was it just an idle musing? Most importantly could it be seen as prepared with litigation in mind? In that case it may be of little or no utility. However in the latter case it may be relevant on credit. In other words it may be relevant if in a premeditated way it was prepared to assist a party in anticipated litigation.
64. It is also important if there are other materials from that witness or any other witness which corroborate the witness' account.
65. It will very often be the case that a contemporaneous record (letter, email, text etc) is so compelling and unqualified in its affect that any oral evidence to the contrary will seem utterly contrived.

An Example

66. Case studies abound as do anecdotes of great cross examinations. The series Notable British Trials series provides some marvellous chronicles of important trials but also some examples of extraordinary cross examinations.
67. One of the great trials of the late nineteenth century was of course the prosecution brought by Oscar Wilde for criminal libel against the Marquess of Queensberry. Apart from its pure historical interest it exposes one of the greatest cross examiners of all time, Sir Edward Carson.
68. It is necessary briefly to recreate the context. The Marquess was somewhat distressed at what appeared to him at the time to be an unhealthy relationship between his son Lord Alfred Douglas and Oscar Wilde. Incensed at the idea, the Marquess left a card at Wilde's club which read "Oscar Wilde posing as a Sodomite" (see Exhibit A, original below). Wilde took offence notwithstanding the misspelling. He consulted his solicitor who retained one of the finest counsel of his day, Sir Edward Clarke QC. Wilde charged the Marquess with criminal libel. In retrospect, although his indignation was entirely understandable, the commencement of proceedings was probably the worst decision of Wilde's life.



For Oscar Wilde
posing as a Sodomite
Marquis of Queensberry.

A

69. Counsel has an ethical obligation to inform every putative litigant what lies ahead. Someone of Sir Edward Clarke's stature and ability must have done just that. He was no doubt confronted by the rather incensed client. It is clear that Wilde had decided to lie or tell what he thought in some unrealistic way was the truth.
70. Sir Edward Carson QC was retained for the Marquess. He was one of the giants of the Irish and English bars. He had been a contemporary of Wilde's at Trinity College Dublin. He had vaguely known Wilde from those days. Later in life he was to become a Lord of Appeal in Ordinary.³⁹
71. The Marquess is otherwise best remembered as the author of the rules of boxing which bore his name. It was said of him that he was arrogant and ill-tempered who bullied his family unmercifully.⁴⁰
72. In 1891 his third son Lord Alfred Douglas, then 22, and an undergraduate of Oxford, had been introduced to Wilde. The two men immediately became warm friends. Wilde was understandably, given Douglas' dashing appearance, entirely infatuated.
73. The infatuation produced letters and sonnets which Wilde enthusiastically and lovingly composed. Two such letters had left Douglas' possession in his coat by accident. The letters found their way into the Marquess' hands. One such letter stated:
- It is a marvel that those red nose-leaf lips of yours should have been no less for music of song than for madness of kisses.
74. He was intent on breaking up the association, and went around all the restaurants and other venues frequented by Wilde and his son bristling for a fight if he could find them. He did not.

³⁹ H Montgomery Hyde, *Carson: A Biography* (William Heinemann, 1953).

⁴⁰ *Ibid.*

75. He attempted to create a scene at the opening night of Wilde's play, "The Importance of Being Earnest", but was refused admission. Frustrated, he went to the Albermarle Club, where Wilde and his wife were members, and left a visiting card with the hall porter asking that it be given to Wilde.
76. Wilde did not get to read the card for some ten days. When he did he immediately consulted his solicitor with the result that the Marquess was arrested the next morning and charged with criminal libel. He appeared later that day before a magistrate. He was released on bail.
77. A successful defence to a charge of criminal libel, depended on proof by the accused that the words written were true and that they were 'published' for the public benefit.
78. Apart from the two letters, the Marquess at that point had little else. But he had employed a private detective who ultimately uncovered material which if true would show Wilde had gone beyond mere "posing". Previously Carson had apparently advised the Marquess to plead guilty. That would now not happen.
79. The trial took place over three days, commencing on April 3 1895. Leaving the characters to one side this was for any cross examiner, even someone of Carson's standing and ability, a considerable task. This was to be a judge and jury trial which always adds to drama, but also the complexity of the trial. Further, it created uncertainty as to outcome.
80. In his opening to the jury, Clarke had to confront the fact that in the written plea of justification, the names of various young men were mentioned and it was alleged that Wilde had solicited them to commit what was described as the "gravest offence" with him and he had with each been guilty of committing indecent practices.
81. In addition, the defendant had alleged that Wilde's book "The Picture of Dorian Gray" as well as his "Phrases and Philosophies for the Use of the

Young” had been circulated to subvert morality and encourage what was said to be “unnatural vice”.

82. In his short examination in chief, Wilde emphatically and unequivocally denied wrongdoing of any sort or as alleged.
83. However the very first question put by Sir Edward Carson in cross examination caught the supremely confident Wilde totally off guard. Like many good cross examiners, Carson always attached prime importance to the opening question. Rarely of course can that first step be planned with any real certainty. The simple reason is that often it will not occur to the cross examiner that a matter is of importance perhaps, even of relevance, until the witness has said something on the topic. Even in the case of written evidence, which is by and large the norm today, witnesses can often give a surprising answer when they are asked to go off script as it were. Sometimes it will merely be the manner or tone in which the witness speaks. In any event in his evidence in chief, Wilde had lied about his age, which Carson immediately set upon with significant impact. In examination in chief he said he was thirty nine.⁴¹
84. “You stated that your age was thirty-nine. I think you are over forty? You were born on the 16th October 1854?” Carson emphasised the point of the question by holding up a copy of Wilde’s birth certificate. Wilde appeared unconcerned. “I have no wish to pose as being young,” he said to the amusement of those present. “I am thirty-nine or forty. You have my certificate and that settles the matter.” Carson however persisted, “[b]ut being born in 1854 makes you more than forty?” Wilde had to concede Carson was correct, but apparently only after some hesitation.
85. It was a small point, but at the very outset Wilde had been exposed in a stupid lie. The effect of this would not have been lost on the jury, particularly when Carson followed it up by contrasting Wilde’s true age with that of the twenty-

⁴¹ H Montgomery Hyde, *The Trials of Oscar Wilde* (William Hodge and Company, 1952) 120 (and following).

four-year-old Lord Alfred Douglas. Wilde however recovered when asked questions about his writings and unsurprisingly Carson made little headway on these topics.

86. Carson asked Wilde about an allegedly inappropriate story appearing in a magazine where Wilde had published some of his own writings. The story was entitled the “Priest and the Acolyte”

Carson: You are of the opinion I believe that there is no such thing as an immoral book?

Wilde: Yes.

Carson: May I take it you think “The Priest and the Acolyte” was not immoral?

Wilde: It was worse. It was badly written.

87. Wilde would be one of the most difficult and complex witnesses who has ever been cross examined. He was highly intelligent, witty, confident and as one might expect thoroughly familiar with his own literary works.

88. To prepare for the cross examination, obviously Carson had to make himself very familiar with all of Wilde’s relevant works. This would have required a good deal of time in preparation. It was no doubt a daunting task to cross examine in detail the works of such an author. But Carson had obviously made a forensic choice to approach the cross examination in that way. However, there was an alternative approach which would have been to have put to Wilde the various allegations in the particulars about the young men concerned. The forensic choice Carson made may well have been based on an assessment that some of his witnesses would not stand up to Clarke’s cross examination and/or get cold feet on the eve of their getting into the witness box. After all, some would have to have incriminated themselves and thereby be exposed to prosecution and possible gaol. It may also be that the Marquess had paid the young men to come to court and a jury may have taken a dim view of that fact. The choice to confront Wilde with his writings was therefore understandable but equally dangerous because of the jury. The

obvious objective was to expose Wilde as an arrogant fop who was amoral at best, which could perhaps in the jury's mind tend to corroborate the evidence of the various witnesses.

89. Carson asked Wilde about a young man called Alphonse Conway, with whom Wilde and Douglas used to go sailing. Carson enquired, "did he not sell newspapers at the kiosk on the pier?" "No," said Wilde. "It is the first I have heard of his connection with literature".
90. Carson then produced a signed photograph of Wilde, a cigarette case and a silver mounted walking stick which Wilde had given him.

Carson: Did you take the lad to Brighton?

Wilde: Yes.

Carson: And provide him with a suit of blue serge?

Wilde: Yes.

Carson: And a straw hat with a band of red and blue?

Wilde: That, I think, was his unfortunate selection.

Carson: You dressed this newsboy up to take him to Brighton?

Wilde: I did not want him to be ashamed of his shabby clothes.

Carson: In order that he might look more like an equal?

Wilde: Oh, no, he could not look like that.

91. It later emerged they had dined at a restaurant and stayed the night at the Albany Hotel, where Wilde had taken a sitting room and two bedrooms.
92. Carson referred to a number of other young men, to whom Wilde had allegedly given money or presents, and had supposedly received nothing in return except the pleasure of their company. Carson then asserted he would be calling a young man called Charles Parker, who Carson asserted would incriminate himself when he gave evidence. Unless there had been a

significant payment, or unless there was a complete failure to appreciate what was ahead, it is a little difficult to understand why any person would do such a thing. Neither Carson nor his client could offer immunity from prosecution which the Crown could choose to do. This was a high risk strategy all round.

93. The climax to what was a very effective cross examination was the following exchange about a young man called Grainger:

Carson: Do you know Walter Grainger?

Wilde: Yes.

Carson: How old is he?

Wilde: He was about sixteen when I knew him. He was a servant at certain house in High Street, Oxford, where Lord Alfred Douglas had rooms. I have stayed there several times. Grainger waited at table. I never dined with him. If it is one's duty to serve, it is one's duty to serve; and if it is one's pleasure to dine, it is one's pleasure to dine.

Carson: Did you kiss him?

For a moment, a fatal moment, Wilde was off his guard. "Oh, dear no," he replied unthinkingly. "He was a peculiarly plain boy. He was, unfortunately extremely ugly. I pitied him for it."

Quick as lightning Carson pressed home his advantage. Was that the reason Wilde had never kissed him?

Wilde: Oh, Mr Carson, you are pertinently insolent.

Carson: Did you say that in support of your statement that you never kissed him?

Wilde: No. It is a childish question.

Carson: Did you ever put that forward as a reason why you never kissed the boy?

Wilde: Not at all.

Carson: Why sir, did you mention that this boy was extremely ugly?

Wilde: For this reason. If I were asked why I did not kiss a door mat, I should say because I do not like to kiss door mats. I do not know why I mentioned that he was ugly, except that I was stung by the insolent question you put to me and the way you have insulted me throughout this hearing. Am I to be cross examined because I do not like it?

Carson: Why did you mention his ugliness?

Wilde: It is ridiculous to imagine that any such thing could have occurred under any circumstances.”

Carson: Then why did you mention his ugliness, I ask you?

Wilde: Perhaps you insulted me by an insulting question.

94. It is said Wilde became quite inarticulate and he managed to stammer out: “You sting me and insult me and try to unnerve me, and at times one says things flippantly when one ought to speak more seriously. I admit it.”⁴²
95. Almost immediately Carson sat down. Sir Edward Clarke commenced what was an anti-climactic and ineffective re examination.
96. Carson then opened for the defence. He stated he would certainly be calling a number of witnesses as to the truth.
97. Clarke had earlier left the courtroom. He had been instructed to withdraw the case and the trial ended. Wilde was ordered to pay the Marquess’ costs which in due course crippled him financially.
98. A few hours after the case ended Wilde was himself arrested at the Cadogan Hotel in Sloane Street. Of course subsequently Wilde was convicted of either committing or procuring acts of “gross indecency” and sentenced to two years in Reading prison.
99. What is somewhat remarkable is that the trial judge (Mr Justice Collins) sent a letter to Carson on 5 April 1895 stating:

I never heard a more powerful speech, or a more searching cross examination. I congratulate you on having escaped most of the filth.

100. Although Carson’s cross examination spanned almost three days, not one question was otiose, not one theme irrelevant. It is an example of a cross examiner dealing with an exceptional witness, and so familiar with and in

⁴² Ibid 150.

control of the underlying materials so as not be nonplussed at any response the witty Wilde could muster. Carson displayed obvious skill, tenacity, and boldness. In fairness to Wilde, Carson did have some good materials to work with.

The Future

101. Despite the somewhat exalted status cross examination has achieved in the common law world, it has many frailties at least in the US as Professor Epstein points out.⁴³
102. In response, some in the US argue that the 6th amendment to the United States Constitution (the Confrontation Clause) was intended to provide a constitutional guarantee for the right to cross examine in criminal cases so it is a right that cannot be diluted.⁴⁴ The provision of course applies to all state and federal courts.⁴⁵ There is some debate however that this was the true intent of the provision.⁴⁶
103. Professor Epstein however expresses the view that cross examination may have a limited future in the US for a number of reasons.
104. First, there are decisions which have said that there are no constitutional restrictions on state evidentiary rules that admit “non testimonial hearsay evidence”, which will permit states to craft any number of new hearsay exceptions and which will permit the increased admission of statements without cross examination either at their making or at the time of the trial.

⁴³ Jules Epstein, ‘Cross Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and “At Risk”’ (2008) 14, *Widener Law Review* 427.

⁴⁴ The 6th Amendment to the US : “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed which district shall have been previously asserted by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour and to have the assistance of counsel for his defence.”

⁴⁵ 14th Amendment to the US Constitution.

⁴⁶ Randolph N Jonakait, ‘The Origins of the Confrontation Clause: An Alternative History’ (1995) 27 *Rutgers Law Journal* 77, 116.

These statements would be admitted on the basis that they are “non testimonial”. He says:⁴⁷

The Davis Court left for another day “whether and when statements made to someone other than law enforcement personnel are ‘testimonial’”. However, both Crawford’s narrow definition of “witness” as a bearer of testimony and its explicit distinction that “[a]n accuser who makes a formal statement to government officers bear testimony in a sense that a person who makes a casual remark to an acquaintance does not” imply that most statements made to private citizens will be non testimonial, and thus subject solely to state hearsay rules.

105. In other respects, the US courts have admitted hearsay without cross examination:⁴⁸

The doctrine of forfeiture by wrong-doing, which admits hearsay without cross-examination if the defendant was in some way culpable in procuring the declarant’s absence, is of long standing and codified in the Federal Rules of Evidence and many state evidence codes. Viewed as an equitable principle rather than one requiring a knowing waiver of a constitutional right, its status was reinvigorated and scholars were prompted to explore (and suggest extensions to) the doctrine’s borders after Crawford, in which Justice Scalia reminded us that classifying hearsay as testimonial in no way precluded its application.

Forfeiture doctrine had been read expansively before Crawford, with courts emphasizing that the forfeiting conduct need be proved only by a preponderance of the evidence and that it need not be the defendant on trial who procured the declarant’s unavailability ... a majority of the Court believes intentionality can be found in a pattern of abuse showing that the accused “intended to dissuade a victim from resorting to outside help, and includ[ing] conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions.”

106. This notion has no equivalent outside the US.

107. Secondly, however, there is a body of learning in the US that social media and television have had and will continue to have an impact on jurors’ beliefs, which has led to trial strategies being adopted to overcome that concern and has in turn lead to special directions and/or instructions for the jury.

⁴⁷ Jules Epstein, ‘Cross Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and “At Risk”’ (2008) 14, *Widener Law Review* 427, 441.

⁴⁸ *Ibid* 445-6.

108. As Professor Epstein says:

The transformation to a visual-information, abbreviated-attention-span society (or a society in which a significant portion of adults has these attributes) does not forecast or imply that cross-examination is in an “at-risk” status. However, it does mandate study of whether these factors require that cross-examination be reconfigured. Such study may require significant adaptation of this art, an evolutionary response that re-imagines cross-examination to be cognisant of the limits of aural reception and the expectations of a visual-information-receptor fact finder. Increased brevity in presentation, incorporation of visuals, and dramatics, may prove essential in ensuring that cross-examination retains some capacity to elucidate and inform, if not to be the “great engine” in the search for truth. As one writer has cautioned,

The twenty-first century may dictate that we now structure our speeches (and perhaps our witness examinations as well) not only to place first what we want the jurors to recall, but also to open our presentations by instantly unveiling information that will cause the jurors to become sufficiently interested and refrain from pressing their mental remote control button to tune in to another “station”.

Reconfiguring the trial presentation’s organisation and content is essential not only for attentiveness but for comprehension.⁴⁹

109. If what Professor Epstein is suggesting is that a jury needs to be entertained lest it may lose interest in the process, then the casualty will have to be the jury and not justice itself. There is little doubt social media has a particular capacity to interfere with the jury’s proper function. It can be intrusive and potentially subversive. There can be no suggestion however that a trial should be as entertaining or as riveting as a television series or film. The jury is frankly not there to be entertained but to perform a public service. If juries are to be maintained then they will need protection from improper influences and that may be a more difficult task in the modern era. But any thought that social media should have an impact in and of itself on cross examination is in my view misplaced.

110. However, there are more substantial reasons closer to home which, arguably, suggest why cross examination may have a somewhat limited or restricted future.

⁴⁹ Ibid 450.

111. Financial constraints are a problem for many litigants and courts alike. It cannot be gainsaid that court resources are limited and litigation can be and often is extremely expensive. As a result, with increasing frequency, judges will be likely to impose time constraints upon cross examination. Indeed it is not impossible that judges in civil cases may refuse counsel the right to cross examine all witnesses. This approach may further involve judges directing timetables be prepared (which is already in place in some jurisdictions) so that cases finish within an allotted time without any possibility of extension and where only limited cross examination of a limited number of witnesses is permitted.
112. As against that historically of course, a trial judge's assessment of a witness has tended to carry considerable weight with an appellate court. This is unsurprising as the trial judge it is often said has been directly exposed to the witness and should know best.⁵⁰
113. In more recent times, however, some judges have expressed the view that seeking out the truth is a little more complex than a judge simply making an assessment, for example, of a witness's demeanour as a result of cross examination. The time may well have arrived for courts to have a hard look at how, or more to the point why, a judge should necessarily be best placed to discover the truth via what must in reality be seen as a very crude methodology. To say they have been doing it for years is really not to the point.
114. It must be accepted that in some cases credit may be at the forefront of the issues for determination in which case a judge may have little choice. Mrs Justice Gloster, recently commented.⁵¹

A court's assessment of the credibility of a witness is not meant to be some sort of pseudo-psychological analysis of his character. But as submitted by Mr Sumption, Mr Berezovsky's personality was one of the dominant themes

⁵⁰ *Benmax v Austin Motor Co Ltd* [1955] AC 370, 375 per Lord Reid; *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways* (1993) 177 CLR 472, 479-81 per Deane and Dawson JJ.

⁵¹ *Berezovsky v Abramovich* [2012] EWHC 2463 (Comm).

at the trial, which provided a key to his credibility as a witness, as well as an explanation for his evidence in relation to some of the critical events. For that reason it is appropriate to refer to certain aspects of his personality which were displayed in his evidence, and in his demeanour.

115. That said, some courts have cast significant doubt on the utility of credit findings, especially where these are based on demeanour. The High Court of Australia observed over a decade ago:⁵²

It is true, as McHugh J has pointed out, that for a very long time judges in appellate courts have given as a reason for appellate deference to the decision of a trial judge, the assessment of the appearance of witnesses as they give their testimony that is possible at trial and normally impossible in an appellate court. However, it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses. Thus, in 1924 Atkin LJ observed in *Societe d'Avances Commerciales (Societe Anonyme Egyptienne) v Merchants Marine Insurance Co (The Palitana)*:

“...I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.”

Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both in trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.

116. Those observations are obviously sound.
117. There is old authority still regularly applied⁵³ which requires a cross examiner as matter of fairness to put matters explicitly to a witness if the court is going to be invited to disbelieve that witness. In *Browne v Dunn*⁵⁴ the then Lord Chancellor, Lord Herschell, famously said:

Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his

⁵² *Fox v Percy* (2003) 214 CLR 118, 128-9.

⁵³ *Markem-Imaje Corp v Zipher Ltd* [2005] RPC 76, 783-6.

⁵⁴ (189) 6 R 67 (HL).

attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me as a cross examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice before hand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he had not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.

118. Currently it would be a very brave judge who denied a litigant the right to cross examine at least any other party or a principal witness. However the efficacy and utility of witness assessment for any number of reasons is clearly going to be a matter of significant debate in the context of finite resources. Add to that the overabundance of electronic material for analysis prevalent in almost every case. There will of course be cases where the cause of action is entirely dependant on conversations, as is the case with an oral contract, but in the modern commercial context that type of case is not all that common. In that context, cross-examination of the relevant participants is arguably indispensable.
119. Independently of the above considerations, if a court was to form the view that the cross examination was being used purely as a means of harassment or intimidation, it would have a duty intervene and bring the process to a halt or at the very least make an appropriate costs order. This was clearly the view of Mr Justice Tomlinson in a case in 2006, where he ordered indemnity costs

partly because he thought the cross examination had been deliberately contrived to achieve that goal.⁵⁵

120. In most jurisdictions judges have the power to curtail or restrict the time spent in cross examination even where no impropriety is suspected or alleged.⁵⁶ I consider judges in the future are likely to become much more proactive in constraining parties in the way they conduct their cases to ensure a cost effective but fair outcome, where the notion of fairness will need to be revised.
121. However with our adversarial system, I cannot envisage a situation where cross examination ceases to be part of the court process entirely. But the extent to which judges permit it to occur may, I predict, be reduced, perhaps drastically.

⁵⁵ *Three Rivers District Council and Others v The Governor and Company of the Bank of England* [2006] EWHC 816 (Comm).

⁵⁶ *Three Rivers District Council v Bank of England* [2005] EWCA 889.