

NSW BAR ASSOCIATION CONTINUING PROFESSIONAL DEVELOPMENT PRESENTATION

DUTIES OF COUNSEL: RECENT DEVELOPMENTS

WEDNESDAY, 1 SEPTEMBER 2010

**PRESENTED BY
THE HONOURABLE JUSTICE PETER GARLING RFD**

1. In 1930, the Chief Justice of NSW, Sir Phillip Whistler Street, said this:

“I cannot impress too forcibly upon the members of the Bar the necessity for observing high standards of professional conduct, and a proper sense of responsibility in the conduct of cases. If that is not done, the whole profession will suffer in the estimation of the public.”¹

2. The Chief Justice cited with approval the remarks which had been made a few years earlier by Justice Rowlatt where his Honour said:

“It is the duty of counsel to know and observe the rules governing what they may and what they may do in the conduct of cases; they may not disregard those rules and trust to not being checked in time. In proportion, as counsel voluntarily observe those rules, so will their standing and reputation grow.”²

3. Five years after the Chief Justice of NSW expressed his views about counsel’s conduct, the Lord Chancellor, Viscount Sankey, said this:

¹ *Croll v McRae* (1930) 30 SR(NSW) 137 at 146

² *Wright v Hearson* (1916) WN 216

“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 would 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.”³

4. It may seem surprising then that, notwithstanding the passage of 80 years, various professional conduct issues continue to arise from counsel engaging in inappropriate cross-examination.
5. The purpose of this paper is to examine some recent developments in areas which relate to professional conduct and to explore the impact which the statutory definitions of professional misconduct and unsatisfactory professional conduct in the *Legal Profession Act 2004* may have on barristers in NSW.
6. In the course of this paper I will examine, two recent decisions of the Victorian Court of Appeal which suggest that where cross-examination is improper, counsel for any other party in the proceedings may bear some responsibility for what transpires if they do not object, intervene, or otherwise act to restrain the cross-examination.
7. I need however to emphasise that nothing which I say in this paper ought be taken as expressing any finally determined view as to the propriety of the conduct of the counsel in question. I do not know what matters or circumstances they might call in aid to explain or justify their conduct. Since there may be professional disciplinary proceedings against those counsel, it needs to be clearly understood that nothing which I say is intended, in any way, to refer to or have an impact upon such proceedings.

Professional Misconduct at Common Law

³ *Mechanical & General Inventions Co Ltd v Austin Motor Co Ltd* (1935) AC 346 at 359

8. At common law, professional misconduct was described as conduct which:

“... would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency.”⁴

9. Section 497 of the *Legal Profession Act 2004* defines, in an inclusive, not exclusive, manner, professional misconduct as including:

“497 Professional misconduct

- (1) For the purposes of this Act

Professional misconduct includes:

- (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence, and
- (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.”

10. The Act also defines unsatisfactory professional conduct. It says:

“496 Unsatisfactory professional conduct

For the purposes of this Act:

Unsatisfactory professional conduct includes conduct of an Australian legal practitioner carrying in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.”

11. I invite you to keep in mind the essential difference between the common law definition of professional misconduct and the statutory definition of unsatisfactory professional conduct. On the one hand, the question as to whether conduct ought be the subject of reprobation depends upon the views

⁴ *Allinson v General Council of Medical Education & Registration* [1894] 1 QB 750 at 763 per Lopes LJ; *NSW Bar Association v Cummins* (2001) 52 NSWLR 279 at [36].

expressed by one's peer group, whilst on the other, the question of professional conduct being found to be unsatisfactory, depends upon what a reasonable member of the public is reasonably entitled to expect.

Rees v Bailey Aluminium Products Pty Ltd⁵

12. I need to give you a short factual background of this case so that you might readily understand what happened.
13. Mr Gary Rees was a plumber who attended at the premises of his friend, Barry Phillips, to help him with the installation of some downpipes. Phillips, who was an inspector employed by WorkCover, had placed an extension ladder manufactured by Bailey Aluminium Products Pty Limited ("Bailey") in an over-extended position against the side of his house for the use of Rees. Rees climbed the ladder, and as he was standing on it, it collapsed and he sustained injuries. The collapse occurred because the ladder was in an over-extended position.
14. Rees sued Bailey claiming that there was a defect in the design of the ladder enabling it to be easily over-extended. Bailey claimed contribution from Phillips on the basis that Phillips had been negligent by over-extending the ladder when setting it up for use by Rees and by providing the ladder to him when it was not in a safe condition.
15. There was no dispute at the trial that it was Phillips who had set up the ladder in its over-extended position. He claimed that he done so unwittingly. Bailey attacked Phillips by alleging that he had deliberately over-extended the ladder and that he falsely claimed that he did not know that the ladder had "stops" to prevent it being over-extended.
16. Rees gave evidence that he climbed the ladder as it had been set up by Phillips. He said he did not know that the ladder had been over-extended and

⁵ *Rees v Bailey Aluminium Products Pty Ltd* (2008) 21 VR 478; [2008] VSCA 244, [2009] VSCA 96.

believed that the ladder had an inbuilt safety factor which prevented it from being over-extended.

17. Rees alleged that the ladder was negligently designed as it could be easily over-extended beyond the safety stops, and that in an over-extended position the support brackets were not strong enough to sustain his weight. He also alleged that there were no instructions or warnings as to the maximum distance to which the ladder ought be extended.
18. Bailey denied that there was any defect in design and denied that there was any need to warn users.
19. The central issue at the trial, as between Rees and Bailey, turned on the allegation that the design permitted the latter to be over-extended. Proof that there was a design defect rested upon the evidence of an expert and upon the evidence of Phillips who claimed that, from the time that he had acquired the ladder in 1986, he had often unwittingly extended the ladder to an over-extended position without any obvious resistance; and that this was what he had done again on the day of the accident.
20. It could be seen from this short review, that the evidence of Phillips was critical to the case of Rees against Bailey, and was also relevant to the third party proceeding.
21. A jury trial was conducted over 12 days. Rees and Bailey were each represented by Senior Counsel and Phillips by junior counsel.
22. Following the 12 day hearing, the jury returned a verdict, finding that there was no negligence on the part of Bailey that was a cause of the injury which Rees suffered.
23. On appeal, Rees argued that the jury verdict ought be set aside because the conduct of Senior Counsel for Bailey was such that Rees did not have a fair trial.

24. The lengthy judgment of the Victorian Court of Appeal considered in detail the conduct of Senior Counsel for Bailey and whether Rees had demonstrated that there was a real likelihood that Senior Counsel's misconduct had a prejudicial effect upon the jury, such that a miscarriage of justice should be inferred. The court unanimously concluded, although as it said "... *after considerable hesitation* ..." that the appeal ought be upheld and there be a new trial.
25. It will be necessary for me to shortly outline to you some, but not all, of the criticisms made of Senior Counsel for Bailey. As well, the significance of this case is that it considers the conduct of counsel for Rees, and ultimately for Phillips, and asks whether their conduct was a relevant factor in the consideration of whether there has been a miscarriage of justice.
26. Before examining the conduct, I need to draw your attention to the second decision of the Victorian Court of Appeal in the same matter, which was delivered on 14 May 2009⁶ and which dealt with the question of costs.
27. Bailey was ordered to pay 75% of Rees' costs of the appeal. Phillips was ordered to bear his own costs of the appeal, and importantly, each of the three parties were ordered to pay their own costs of the first trial.
28. In reaching its conclusion about the disposition of orders for costs, the Victorian Court of Appeal said this, at [11]:

"We recognise that Bailey's counsel had initiated most of the problems which were identified in our reasons for judgment and that at times this made for difficult choices by counsel for [Rees], we nonetheless concluded in those reasons that in a significant number of instances [Rees'] trial counsel did make forensic choices ... We also concluded in our reasons that the misconduct of Bailey's counsel 'could have been adequately addressed by objection and immediate direction' ...

...

⁶ (2008) 21 VR 521; [2009] VSCA 96

Whilst the predominant cause of the mistrial was the conduct of Senior Counsel for Bailey, we considered that the conduct of [Rees'] counsel was part of the reason why there was a mistrial; and that the making of forensic choices, and laxity in assessing and dealing with that misconduct, made it appropriate that [Rees] bear some part of the costs of the appeal."

29. In referring to the position of Phillips, the court said that his counsel was not entirely free from blame when considering why the trial miscarried.

30. Ultimately in describing its order for costs, the court said this at [31]:

"It underlined the responsibility which counsel bears for ensuring that, despite an opponent's misconduct, the trial is not put at risk of miscarrying. In our collective experience of jury trials, there is no forensic disadvantage in showing, by a series of well-founded objections, that opposing counsel has been conducting himself or herself in breach of rules of evidence of practice, or has been making allegations of serious wrongdoing without there being a basis for doing so. The order we made reflected the consequence of a failure to take such objections, whether it be the result of forensic choice or for other reasons."

31. On 29 May 2009, the High Court of Australia declined an application to grant special leave to appeal from the decision of the Victorian Court of Appeal.⁷

32. I now need to tell you a little about the trial.

Cross-Examination by Senior Counsel for Bailey

33. A reading of the principal decision will give you an adequate understanding of what Senior Counsel for Bailey did in the course of cross-examination, but I wish to highlight just a few of the matters which seem to me to be the most serious of those to which reference was made, by the Court of Appeal.

⁷ [2009] HCA Trans 121

34. Senior Counsel for Bailey conducted his cross-examination of both Rees and Phillips in a way which suggested that they were improperly colluding to ensure that his client was held responsible for the injuries to Rees.
35. In summary, the difficulty with the way in which Senior Counsel for Bailey went about this task was that he put only some of the matters to Rees, only some of the other matters to Phillips, had no basis for some matters, and generally in a way which the court found breached the basic obligations of counsel.

Conversation at Court

36. Phillips, who as the third party, was the last witness in the proceedings, in cross-examination by Senior Counsel for Bailey explicitly rejected a suggestion that he had had a discussion with Rees about what he would say in his evidence about the state of the ladder, when a visit to his home by Rees and his solicitor had occurred a few days before the court hearing to take some photographs of the ladder.
37. This cross-examination then occurred:

“DEFENCE COUNSEL: I'll make it perfectly clear. I'm not suggesting that for a moment. (To witness) Now did you have further discussions with Mr Rees on ...

HER HONOUR: Other discussions.

DEFENCE COUNSEL: I'm sorry?

HER HONOUR: Other discussions.

DEFENCE COUNSEL: Yes, other discussions with Mr Rees on last Tuesday outside this court, but in this very building?—Is that the first day of the court?

Yes? Yes I did—I think we did have a ...

Yes? Yes - we spoke to one another.

And in those discussions that you had which were between yourself, and Mr Rees, they were had, were they not, in the foyer, or the yard out there, the courtyard?

I can't recall. Sorry? I can't recall, no.

HER HONOUR: Do you know where the courtyard is?—Yes, I know where the court - but I can't recall that - you know, discussion there.

DEFENCE COUNSEL: In the foyer area outside the court, and inside this building, you had a discussion during what one might call the lunch hour before the court started, and in that conversation you had a discussion in relation to the angle of ladder, and the stops, is that correct?

PLAINTIFF'S COUNSEL: Your Honour, if this matter was to be raised, there was no suggestion of this in the cross-examination of my client at or nothing.

HER HONOUR: Not that I can recall.

DEFENCE COUNSEL: It's not a matter that needs to be put to the plaintiff, he's been in court.

PLAINTIFF'S COUNSEL: If this is an attack to be made on credit ...

DEFENCE COUNSEL: It's not an attack on your client's credit.

PLAINTIFF'S COUNSEL: Well whose credit's being attacked?

DEFENCE COUNSEL: His. (To witness) Now was there a discussion about the ladder and the stop on Tuesday of last week? I can't recall that conversation.
Well it's not very long ago? There's a lot happened in two weeks.

Yes? In this court.”

38. It is an inescapable conclusion that this cross-examination was intended to raise a suggestion that there had been improper discussion between Rees and Phillips, particularly outside the court at the start of the trial. The suggestion was that Phillips had given false evidence that the stops were ineffective, and that was as a consequence of collaboration with the appellant.
39. This suggestion or anything similar to it, had not been put to Rees in cross-examination, and on appeal it was accepted that whilst Senior Counsel for Bailey had seen Rees and Phillips having a discussion outside the court, that he had not heard what had been said. It was accepted that nothing had been heard which could support the contention that Rees was a party to Phillips giving false evidence.

Conversation based on a File Note

40. The second example of inappropriate conduct related to this cross-examination of Rees:

“DEFENCE COUNSEL: I just want to ask you one other thing. What I am going to put to you now is something that will be put later on but is the position this, that ... - I just want you to listen to this carefully. Mr Phillips first gave an account of what happened because he felt that he needed to support his mate and then that he said, and did he tell you that after some restless nights he had made another statement because he hadn't been completely frank about this first statement? -- Never had that conversation.

PLAINTIFF'S COUNSEL: Your Honour, this witness is being asked about statements being made by Mr Phillips.

DEFENCE COUNSEL: I am asking if he has had that conversation.

HER HONOUR: He was actually asked whether he told him

PLAINTIFF'S COUNSEL: If it is a question about a conversation with Mr Phillips as my friend says ...

HER HONOUR: It is about a conversation.

PLAINTIFF'S COUNSEL: In that case it is not objectionable, Your Honour.

HER HONOUR: Thank you.

DEFENCE COUNSEL: And did Mr Phillips tell you that after some restless nights he felt the need to make a statement to the effect that it collapsed when you were shaking it and bouncing on it to test it and that you knew that that is why the ladder collapsed. Did he tell you that?—No, no, I mean I have never had that conversation with Mr Phillips.”

41. As I said, this cross-examination was directed to Rees. It was never put to Phillips when Phillips later gave evidence. It transpired in the course of the appeal that this cross-examination arose from the terms of a file note recorded by Bailey's solicitor of a conversation which he had with the solicitor for Phillips shortly after he had been joined as a third party. The file note

recorded a 'without prejudice' discussion, in which offers were made to settle the proceedings. The file note recorded an assertion that the solicitor for Phillips had said that Phillips had told him that the ladder had collapsed and Rees was shaking and bouncing on it to test it to see if it was secure, and that Phillips also said that the appellant knew he was doing that when the ladder collapsed.

42. It is immediately apparent that the conversation which was put to Rees in cross-examination was something entirely different. What was put in cross-examination was that there was a conversation between Phillips and Rees in which Phillips had disclosed his lack of frankness to Rees. The note, of course, said no such thing. The file note contained no instruction at all that there was any conversation between Rees and Phillips let alone, one of the sort that was put to Rees.

Sworn Interrogatory

43. A third example of the inappropriate cross-examination consisted of cross-examination of Rees arising from the terms of an answer sworn by Phillips to an interrogatory administered by Bailey.
44. As can be seen from the terms of that cross-examination, but what Senior Counsel for Bailey did, without tendering the sworn answer to the interrogatory, was put to Rees, the proposition that, in short, Phillips had sworn to an account that was different from that which Rees had given in his oral evidence and in effect asked him to comment upon it. As the court said, questions which invite a witness to comment upon whether another person is truthful or lying on oath should not be pursued.

Note passing in Court

45. The fourth example of impugned conduct occurred in these circumstances. Late in cross-examination of Phillips by Senior Counsel for Bailey, the solicitor for Rees passed a note from Senior Counsel for Rees to counsel for Phillips

at the Bar table. This was seen by Senior Counsel for Bailey who was in the midst of cross-examining Phillips. He then proceeded to create “a scene” by asking the witness if he knew what had happened. The trial judge intervened and asked what that had to do with the witness. Senior Counsel for Bailey, apparently undeterred, then said he was going to ask the witness a question. He was warned in plain terms by the trial judge to be very careful. Senior Counsel then asked this:

“DEFENCE COUNSEL: Have you spoken to the plaintiff’s solicitor?

A: Only on the day he came out with Gary.

Q: Have you spoken to him since?

A. No

Q. Have you spoken to [counsel for Rees]?

A. No.

Q. Did you give your permission for your version of events to be conveyed to anyone else?

A. No.

DEFENCE COUNSEL: No further questions.”

46. Each of these four matters to which I have referred, raised a clear suggestion of collusion between Phillips and Rees, which it was implied was designed to advantage Rees in his claim against Bailey and to ensure that Bailey was found liable. The first matter to which I drew attention, namely a suggested conversation outside the court room, was only put to Phillips in cross-examination and not to Rees, although it was said to have taken place before Rees gave evidence.
47. The second matter which I described, namely the suggestion of a conversation between Rees and Phillips, in which Phillips confessed at having “restless nights”, was put to Rees but not Phillips. The third matter of cross-examination, namely that about an interrogatory sworn by Phillips, was put only to Rees and not to Phillips. The fourth matter to which I took you, namely cross-examination about the passing of a note was put only to Phillips.

48. It is immediately apparent that although intentional collusion was alleged, the cross-examiner did not follow a consistent path of ensuring that his case of such collusion was put fairly and properly to each of the participants in the alleged collusion.
49. As I have earlier said, there were a number of other matters which were the subject of criticism. I will not dwell on them now.

Response of Senior Counsel for Rees

50. As I have indicated earlier, Rees retained Senior Counsel. In the first example which I have provided you, namely the allegation of collusion taking place in the precincts of the court, plaintiff's counsel did rise to his feet at one stage during the course of that cross-examination but all he said was this:

“Your Honour, if this matter was to be raised, there was no suggestion of this in the cross-examination of my client at or nothing”.

51. The traditional politeness of the Victorian Bar may be an explanation for the absence of the words “I object”, together with a reference to the well known decision of *Browne v Dunn*⁸, but it must be said the solely by reading the transcript including the Judge's response, one gets the sense that this was a conversational interjection which without more being said would not be regarded, in this State at least, as a proper objection.
52. The appellant's Senior Counsel did not make or pursue any relevant objection to the “restless nights” allegation. He raised no objection to the manner in which Phillips' sworn answer to an interrogatory had been used to cross-examine his client Rees. He did not seek any further direction in respect to the note-passing incident, and made no objection or complaint about a number of the other matters which were raised.

⁸ (1893) 6 R 67

53. No application was made to give specific directions to the jury or else to discharge the jury as a consequence of any one or a combination of the events which I have described.

Closing Addresses

54. In terms of the orderly conduct of the trial, it seems that things went from bad to worse.

55. In the closing address, Senior Counsel for Bailey introduced personal anecdotes which the court found were inappropriate. Amongst other things, he told the jury about a dinner he had attended whilst on circuit with the Supreme Court at Warrnambool in Victoria. He asserted that whilst at dinner with some colleagues, an attorney from Los Angeles had come over and commenced chatting to them about the case in which they were appearing. He then said this to the jury:

“He [the LA attorney] said these California juries, he said, they’ve gone mad and he was telling us about a case about this fellow who had bought a Winnebago and he was driving down the Santa Barbara Highway, and he and his wife – after their retirement – ‘beautiful, come on, here we go darl, off we go, down the highway’. Picture on cruise control, walked down the back of the bus, pours a cup of tea and next minute, over the garden rail, roll, roll, roll ... completely smashed up.

He says they sue Winnebago and a Californian jury give them \$5m because there was insufficient instructions on what cruise control meant ... We said ‘that just cannot be right’ and he said ‘Yes, no its true’. He said ‘What’s worse is that Sanyo are currently appealing a decision by California jury where a lady had put a cat in the microwave and it came out frizzled and deceased. She sued Sanyo for nervous shock on the basis that there was insufficient signage on the microwave to stop her putting the cat in and got \$30,000 from a California jury.”

56. You might think that things couldn’t get worse, but within a few moments, Senior Counsel for Bailey went on to say this:

“... At his farewell, Mr Justice Beach, who gave 50 years of service to this very court, 25 years as a barrister, and 25 on this bench, at his

farewell, he said 'Its about time that the community' – by that he was talking about litigation – 'were held responsible for their own actions rather than everyone slipping in supermarkets, or people looking sideways at each other, suing each other. We say that his observations were rather apt in relation to this case.'

57. Senior Counsel went on to close his address again by a personal reference to Bill Bailey and the well-known song about Bill Bailey coming home. He said this:

"I woke up this morning, humming to myself 'wont you come home Bill Bailey, wont you come home', cause if only we had him. If only we had Bill Bailey to come along now, and I think the next line of the song is '[counsel for Rees] has been moaning all weekend long', and that is exactly what will happen as soon as I sit down ... and I will tell you why he will be complaining is this. We can't get Bill Bailey to come home and it's a pity. That Mr Bill Bailey would be turning in his grave listening to the criticisms of [counsel for Rees] and what happens, it's a bit like footy, you can't win by getting the ball, then you just attack your opponent. And what you are going to hear in a moment is just an attack on me. They'll forget about the evidence, they'll just go straight – they'll go for the man. But you look at the evidence, don't you worry about that, we can't get Bill Bailey home, and it's a pity."

58. To some extent, Senior Counsel for Bailey correctly anticipated an attack on him personally. Senior Counsel for Rees, rather than seeking any directions from the Judge about the address, or a discharge of the jury as a consequence of the inappropriate things which were said, seemed to have made a forensic decision to deal with the relevant anecdotes in his closing address. He said this in part:

"Hearing [defence counsel] ... took me back something close to 40 years in the late 1960s when [defence counsel] was a football player and he played in the ruck for a team called the Baumaris Sharks. The Baumaris Sharks, like their name suggests, had a 'take no prisoners' approach on the football field and that was an approach that was certainly a popular one back in the 1960s ... And there was a coach of the Baumaris Sharks whose face I can picture, he had a head like a bulldog, he had sort of a military crew-cut, which was popular in the 60s, he was the coach of the team, and at ¾ time huddle of the Baumaris Sharks football team, if things were going particularly bad for the team at that time, the coach would give an instruction which went along these lines 'well look fellas, we've done all we can, we are 10 goals down, we are going to the last quarter, I've made every coaching

move I can think of, but you might as well in the last quarter, you're not going to win the game, go out and start a fight'. At least you can give the opposition, a player or two, a bloody nose, and they'll come away knowing they've been playing the Baumaris Sharks even if you don't win the game'."

59. Senior Counsel for Rees went on to connect that story with what he said had occurred in court in the course of the closing address by Senior Counsel for Bailey.
60. It will be observed that both of these closing addresses, involved the giving of evidence from the Bar table by both counsel. It involved highly objectionable irrelevant stories, together with the use of entirely irrelevant material but yet both counsel seemed to accept that this was an appropriate way to approach the case.

Conduct of Senior Counsel for Bailey

61. You will no doubt have formed your own views about how the conduct of Senior Counsel for Bailey may be regarded, particularly within the context of proper professional conduct.
62. It seems to me that there would be little difficulty, in line with the extracts to which I have earlier referred, to argue that Senior Counsel for Bailey's conduct breached standards in a way which fellow counsel of good repute and competency would regard as disgraceful or dishonourable. Prima facie, and in the absence of any explanation, or justification by Senior Counsel, his conduct could be described as professional misconduct.
63. As well, if it occurred in NSW, there would likely be a contravention of the Bar Rules, and in particular, Bar Rule 37. This Rule is to be replicated as Rule 64 in the new national advocacy rules.

Senior Counsel for Rees

64. Leaving aside the closing submissions for a moment, the gravamen of the conduct of Senior Counsel for Rees was that in light of a number of objectionable instances in cross-examination, he took no objection, sought no direction from the trial judge to remedy the inappropriateness of the cross-examination and did not seek a discharge of the jury.
65. At the conclusion of the closing address by Senior Counsel for Bailey he sought no direction of the jury nor did he apply for a discharge of the jury, but rather decide to “fight fire with fire”.
66. The Victorian Court of Appeal said this about the proper role of counsel in the position of Senior Counsel for Rees:
- “Responsibility for deciding whether objections should be taken to questions put to a witness or to the conduct of opposing counsel rests primarily with counsel and not with the judge. The absence of objection to the formal content of the questions may be indicative of the degree to which the questions were in fact productive of any prejudice. But the failure of appellant’s counsel generally to object to the manner or content of counsel’s cross-examination does not deny the appellant the right to complain on appeal that counsel’s conduct was of such an order that he did not receive a fair trial.”
67. The question which arises for consideration is, so far as I am aware, novel, in terms of barristers’ disciplinary context. It is this. In the circumstances of a case such as this, can the omission of Senior Counsel for Rees to take proper objections, seek appropriate directions and/or to seek a discharge of the jury, be regarded as conduct meriting disciplinary action.
68. Of course, I must readily accept, that this question is being considered in isolation from any explanation which Senior Counsel for Rees may have. There are always more ways than one in which to approach the conduct of any trial. However, the question is, at a prima facie level, whether this conduct may be the subject of disciplinary action.

69. To start at the lowest level, a question arises as to whether the conduct of Senior Counsel for Rees would amount to unsatisfactory professional conduct. You will recall that the statutory definition is in effect that the impugned conduct:

“... falls short of the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent legal practitioner.”

70. As well, in the second judgment in this matter, the Victorian Court of Appeal said this of Senior Counsel for Rees:

“We considered that the conduct of [Rees] counsel was part of the reason why there was a mistrial and that the making of forensic choices, and laxity in assessing and dealing with that misconduct, made it appropriate that the appellant bear some part of the costs of the appeal.”

71. I would venture to suggest that if the conduct of counsel can reasonably be regarded as contributing to a mistrial, and the conduct was not inadvertent or explicable by reference to rational forensic decision-making, then the public would be entitled to expect a higher standard of competence and diligence to that shown.
72. There is every reason to think that, again looking only at one side of the equation, that the conduct of Senior Counsel for Rees might be regarded as constituting at least unsatisfactory professional conduct.
73. I have found the higher level question of whether it might be regarded as professional misconduct interesting but perhaps less intellectually challenging. I do not see in the ordinary definition of professional misconduct, much room for criticizing competence, unless the level of competence was very very low indeed such as to constitute flagrant incompetence. That was not the case here.

74. Chief Justice Gleeson said in *The Queen v Birks* (1990) 19 NSWLR 677 at 685E:

“2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.

3. However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of ‘flagrant incompetence’ of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.”

75. Conscious of the persuasive reasoning of the Chief Justice, I will therefore not attempt to define all cases in which the conduct of counsel may be criticised. As I have said, I do not think that the conduct which I have addressed here would anywhere approach the description of “flagrant incompetence”. It clearly was not that or anything like it.

76. However, I can see, at one extreme, conduct by counsel in court which carried with it a description sufficient to satisfy the definition of flagrant incompetence and, hence, professional misconduct. One example of such an extreme would probably be *Clyne’s case*⁹.

77. The message from Rees is I think tolerably clear, namely, that all counsel bear a responsibility for ensuring that by their own conduct and including the way in which they deal with the conduct of their opponents that a trial, whether before a judge alone, or else with a jury, does not miscarry.

78. The consequences of the action or inaction of a trial counsel may be, not only orders for costs against them or their client, but also being called to account in a disciplinary context.

⁹ *Clyne v NSW Bar Association* (1960) 104 CLR 186

Libke v The Queen

79. May I conclude by drawing attention to the judgment of Heydon J in *Libke v The Queen*¹⁰ where his Honour dealt with the role of a cross-examiner. His Honour was critical, in that case, of the way in which cross-examination had been conducted. He introduced his judgment by inviting the reader to keep in mind that the cross-examiner was not represented in the appeal to the High Court of Australia.
80. His Honour said that there were many respects in which the cross-examination of the appellant accused was in breach of ethical duties flowing from the position of the cross-examiner as counsel for the prosecution. His Honour drew attention to these restrictions which exist generally on a cross-examiner:
- (a) Cross-examiners are not permitted to question in an offensive manner. The cross-examination in *Libke* was, his Honour said, improper because it was calculated to humiliate, belittle and break the witness, its tone was often sarcastic, personally abusive and derisive, it amounted to bullying, intimidation, personal vilification and insult. Many of the questions were annoying, harassing, intimidating, offensive or oppressive:¹¹ *Libke* [121]-[124];
 - (b) Cross-examiners are not permitted to express personal opinions or make comments in the course of posing questions to be answered by the witness. To precede a question with some comment or to invite the witness to respond to a comment from counsel has no place in cross-examination. The personal views of counsel, whether expressed as such or conveyed by way of comment, are irrelevant at any stage of the trial process: *Libke* [37]. [125];

¹⁰ (2007) 230 CLR 559

¹¹ *S v Booij* (1964) 1 SA 224 at 227-8; *Mechanical & General Invention Co Ltd v Austin* [1935] AC 346 at 360; *R v T* [2006] 2 NZLR 577 at 588 [68]; *Randall v The Queen* [2002] 1 WLR 2237 at 2242 [10].

- (c) Questions which are not single questions but compound questions are impermissible. Firstly, because of the multiple facets and complexity of the question may be ambiguous. Secondly, any answer may be confusing because of uncertainty as to which part of the compound question the witness intends to address. It is unfair to force a witness into the position of having to choose which questions in a compound question to answer and in which order. Compound questions can be and usually are unfair: *Libke* [127];
 - (d) Counsel is not entitled to cut-off a witness's answer. It is not fair to the witness that a disparaging question should be asked of the witness who is then prevented from completing their answer: *Libke* [128];
 - (e) A question which assumes a fact in controversy, is impermissible. A leading question put in cross-examination which assumes such a fact, or assumes that the witness has in chief or earlier in cross-examination given particular evidence which has not been given, may, by implication, attribute to the witness evidence which he has not given. Equally, a further vice is that in many cases, an affirmative or a negative answer will be almost equally damaging¹²: *Libke* [129]-[130];
 - (f) Questions which are asked by counsel, not for the purpose eliciting an answer but involving an argumentative assertion, are also unacceptable. The objection to such questions rests on the need not to confuse or mislead the witness. It may also be objectionable because it conveys counsel's opinion: *Libke* [131].
81. To these one might be inclined to add that cross-examination which attacks the credit of another witness through the witness being cross-examined is also impermissible.

¹² *Fox v General Medical Council* [1960] 1 WLR 1017 at 1023; *Ebanks v The Queen* [2006] 1 WLR 1827 at 1839-1844 [26]-[31]

Conclusion

82. I commend a reading of the judgment of the High Court of Australia in *Libke v The Queen* to you all. I also commend a careful reading of *Rees v Bailey Aluminium Ladders* to you all.
83. I commend to you all to adhere to your responsibility to conduct cross-examination for the purpose for which it was intended, and in the words of Viscount Sankey, you should use it with discretion and with due regard to the assistance to be rendered by it to the court and do not forget at the same time, the burden which the witness has during such a cross-examination.