

PROPRIETY AND IMPROPRIETY IN CROSS-EXAMINATION

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PART I – INTRODUCTION

“I think that the kind of skill by which the cross-examiner succeeds in alarming, misleading or bewildering an honest witness may be characterised as the most, or one of the most, base and depraved of all possible employments of intellectual power.”¹

“What we are seeing and what is the basis of the angst, is a determined attempt by the Government to wrest control of the criminal trial process away from the barristers and give it back to the judges. A line has been drawn. There will be no surrender. After all, barristers have had control of the trial process since the first decade of the 19th century and that commanding position has proved to be a magnificent engine for generating power and money.”²

“It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well-established principle that is closely linked to the presumption of innocence.”³

1. The genesis of this paper was the introduction of the new section 41 of the *Evidence Act*, 1995 by the *Evidence Amendment Act*, 2007 and the debate that followed proposed amendments to the Bar Rules earlier this year. Those amendments would have, in effect, applied the provisions of the new section 41 as disciplinary rules controlling cross-examination.
2. There were and are, of course, other rules which impose a fetter or limit on the cross-examiner’s power to ask particular questions or to make certain allegations. However, the first amendments proposed in 2008 (to Rule 35 and the introduction of Rule 35A) concentrated the Bar’s collective mind on what is improper cross-examination and, if

only by illustrating the negative, what is the proper ambit and content of cross-examination. The initial proposal met with considerable opposition and amended rules were proposed and promulgated in May 2008.

3. This paper sets out to address the issue of what is proper and improper in cross-examination in the context of the new rules, statutory provisions and the general law.

The emergence of cross-examination

4. Cross-examination in trials is a relatively late development of the Common Law. It was only in the sixteenth century that the practice of taking oral evidence before a jury developed.⁴ It was this development, in turn, which required rules, primarily exclusionary rules, in order that juries not be misled by unsound or irrelevant evidence. Thus the law of evidence was born. *Holdsworth* makes the point that the accurate definition of the rules of evidence and how they applied was “the work of the eighteenth and nineteenth centuries.”⁵ As with so many areas of the Common Law, substantive law was secreted in the interstices of procedure.
5. As oral evidence supplanted mediaeval conceptions of proof there arose a need to consider how the Courts would control the process of the delivery of such testimony.⁶ Whilst such control dealt mainly with rules relating to matters such as the receipt of documents into evidence, inevitably the same extended to the permissible manner in which witnesses could be questioned by advocates appearing before the Court.
6. The right of an accused to be represented by counsel in a trial, other than on a question of law arising on the indictment, came to be permitted only after the 1730s.⁷ As had been pointed out in a case in 1602, if counsel were allowed, everyone would want it.⁸ Such

proved to be the case, but only in 1898 were defendants given the right to give sworn evidence.⁹

7. It was therefore the general law that embodied the rules relating to the cross-examination of witnesses, although it was recognised that the same had a professional or ethical dimension. The formulation of rules for the Bar, backed with the threat of sanction for breach, added another dimension to the cross-examination universe. Finally, statutory rules relating to the conduct and content of cross-examination have put a further layer onto the regulation of our task when we rise to cross-examine a witness. Each of these sources of control will be examined in turn.

PART II – THE GENERAL LAW

The “rules” of cross-examination

8. There are many books on cross-examination and many lists of the “rules” relating to such cross-examination. Some are familiar to us, such as “never ask a question the answer to which you do not already know” and “never ask why’?” Some are a little more esoteric, such as a rule in a text on advocacy that “while conducting a cross-examination do not put your questions with your eyes fixed on the ceiling.” To be fair to the author, this was rule 85 out of 93 listed.¹⁰ Most barristers are lucky if they can remember Irving Younger’s “Ten Commandments of Cross-Examination.”¹¹
9. The problem is that all such rules are made to be broken. Whilst they often embody a common sense approach to the task, they cannot be the master. Theorists may blanch at the suggestion that one would ever ask “why?” in cross-examination, but whom of us has not seen it done by experienced counsel to good effect?
10. The purpose of this paper, however, is not to revisit the strategic or tactical “rules” that should guide the barrister in achieving his or her aims in cross-examination. This paper will concentrate only on those rules that contain an ethical obligation or prevent impropriety.

The barrister’s duty in relation to cross-examination

11. The barrister’s duty can be stated in deceptively simple terms. Barristers are accepted by the Court as having discretion as to the conduct and subject-matter of cross-examination. This flows, in part, from the very nature of the adversarial trial and the vesting of forensic decisions in the parties’ legal advisers. Simply put, therefore, it is the duty of counsel to ensure that such discretion is not misused”.¹²

12. In *Wakeley* the High Court dealt with a complaint that a trial judge had not permitted a certain line of cross-examination about the manner of death of a police officer. The Court held that the judge had erred in preventing such cross-examination. After stating the duty of counsel just referred to, the Court continued:

“That duty is the more onerous because counsel’s discretion cannot be fully supervised by the presiding judge. Of course, there may come a stage when it is clear that the discretion is not being properly exercised. It is at that stage that the judge should intervene to prevent both an undue strain being imposed on the witness and an undue prolongation of the expensive procedure of hearing and determining a case. But until that stage is reached – and it is for the judge to ensure that the stage is not passed – the court is, to an extent, in the hands of cross-examining counsel.”¹³

13. The duty is not, of course, one that exists merely to ensure good manners in the abstract. Rather it is based ultimately upon the need to ensure that reliable evidence is led from witnesses that really reflects what they know and can say. The Courts have long since recognised the difficulties faced by witnesses in any trial, let alone one in which an unbridled and improper cross-examination takes place. As the Master of the Rolls, Lord Langdale, stated in *Johnston v Todd* (1843) 49 ER 710:¹⁴

“The novelty of the situation, the agitation and hurry which accompanies it, the cajolery or intimidation to which the witness may be subjected, the want of questions calculated to excite those recollections which might clear up every difficulty, and the confusion occasioned by cross-examination as it is too often conducted, may give rise to important errors and omissions...”¹⁵

14. Although this remains the primary basis for the rules, there is also the issue that a witness should not be tormented merely because he or she is giving evidence. The

trend, evidenced by the rule changes, is arguably towards a politer and more civilised type of cross-examination than may have been the case in the past.

15. What is also clear is that the duties on barristers in relation to cross-examination are, and always have been, ethical duties, not merely duties in relation to the application of rules of evidence.¹⁶
16. At the same time, of course, it is the barrister's duty to be fearless in the conduct of the client's case. This often requires that unpleasant things are put to witnesses. It requires that those accused of crimes, including heinous crimes, are properly defended. This is often not understood. The recent article in the *Daily Telegraph*, "Lawyers to Fight Victims' Rights" (16 April 2008)¹⁷, in relation to the debate about the proposed rule changes shows that there can be confusion about our duties. The media sees an imbalance in the role of defence counsel and cross-examination of an accused: "surely there is something skew-whiff in a system that currently permits full-bore assault on every nook and cranny of a victim's life while the truth of the accused's remains mostly hidden".¹⁸
17. Notwithstanding such views, it would obviously be highly undesirable for the administration of justice in this State if there were to be a fetter on the robust performance of the barrister's role, including cross-examining witnesses for the other side or the Crown. It remains counsel's duty to be fearless.

PART II.I - ISSUES OF FORM

Tone and manner

18. Older texts on cross-examination often praise, rather than condemn, what may now be a questionable tone or manner. References, for example, are made to the desirability, at the right moment, of the “archly taunting tone of voice”¹⁹.
19. The new section 41 involves proscriptions against an impermissible tone and manner. In so far as both are involved with the “performative” elements of a barrister’s cross-examination it may be very difficult to judge what the relevant tone or manner actually was. One can imagine debate as to what the tone was. No doubt shouting for no good reason would risk infringement of the proscription. However, we should not have to be too concerned about matters such as stance or facial expression. One hopes that the new section 41 will be applied with common sense. Monotonous questioning by an immobile and dead-pan automaton does not seem to fit the bill as the highest achievement of the advocate’s art.
20. There is no doubt that an “intimidating manner” is not permitted in cross-examination.²⁰ Similarly, whatever may have been the view in the past, there is no room for cross-examination “in the nature of a taunt”, or including remarks that amount to taunts.²¹

Language

21. This is at the heart of the issues facing barristers in cross-examination. It is a given that violent or abusive language should never be used in cross-examination, nor should the cross-examiner “browbeat or bulldoze” the witness.²² This involves, amongst other things, a choice not only as to tone and manner, but the actual language to be used in cross-examination. An unpleasant proposition can be put firmly but in unemotional

language or it can be put in words, whether hyperbolic or otherwise, that contain an insult. On the other hand, as in *People v Goetz* 73 N Y 2d 751, 532 N E 2d, 536 N Y S 2d 45 (1988) defence counsel, in cross-examining the young black muggers shot by Mr Goetz on the subway, thought it proper to refer to them as “savages” and “vicious predators”.²³

22. Perhaps we can gain something from literature in relation to the question of how a difficult question should be put. In A P Herbert’s treatise on how to cross-examine an expert he included an exchange between counsel and the bench on etiquette in cross-examination.²⁴

Sir Ethelred: “...milord, I have rather a delicate question to put to the witness. Perhaps your lordship would prefer me to commit it to writing?”

The Judge: “By ‘delicate’, Sir Ethelred, I take it that you mean ‘indelicate’?”
(*Laughter*)

Sir Ethelred: “Yes, milord.”

The Judge: “Then I am afraid that we must have the question.”

Sir Ethelred: “Milord, there is a woman on the jury, and in view of the delicate character of the question I propose, with your permission, to write it down in invisible ink and hand it to the witness in a sealed box.”

23. If a barrister does have a momentary lapse with respect to language used it is best to withdraw and start again. Ego, however, can intrude, as it perhaps did with Serjeant Taddy in *Thirtell v Beams* when he inquired about an event that had occurred since “the plaintiff had disappeared” from that neighbourhood. Justice Parke observed that this was

“a very improper question and ought not to have been asked”. The following edifying exchange then took place:

Counsel: “That is an imputation to which I shall not submit. *I am incapable of putting an improper question to a witness.*”

Judge: “...I say that the question was not properly put, for the expression ‘disappear’ means ‘to leave clandestinely’.”

Counsel: “I say that it means no such thing.”

Judge: “I hope that I have some understanding left, and, as far as that goes, the word certainly bore that interpretation, and therefore was improper.”

Counsel: “I will never submit to a rebuke of this kind.”

Judge: “That is a very improper manner, Sir, for a counsel to address the Court in.”

Counsel: “And that is a very improper manner, Sir, for a Judge to address a counsel in.”²⁵

24. And so it went on. The point is, of course, that whilst this is great theatre and great fun, it is a complete distraction from counsel’s only task, to advance his client’s case. The language used here completely subverted that aim.
25. The language used by a barrister should be appropriate for the type of case and, in particular, for the witness being cross-examined. It seems self-evident that the language used in cross-examining a banker in a commercial suit should not be the same as that used to cross-examine a child in a criminal case. Yet research into the conduct of criminal trials suggests that “the language and interrogative techniques used in cross-

examination make little reference to the development characteristics and linguistic capacity of the witness under examination”²⁶

26. Similarly, research has shown that “few, if any, modifications to the format and language of cross-examination are made when the witness is a child”.²⁷ It may be surprising, but such research shows that it is common for “age-inappropriate” devices to be used in cross-examining children, such as questions containing multiple propositions, double negatives, embedded clauses and complex negative constructions. Various studies also show that inappropriate vocabulary is also commonly used with children or people with intellectual impairment.²⁸
27. The existence of this problem may be generally confined to vulnerable witnesses, by definition ones who need protection from inappropriate language and verbal techniques but, as further discussed below; the plight of such witnesses has become a lightning rod for broader changes to the cross-examination regime.

Sarcasm

28. There is one linguistic device, sarcasm, which has been deprecated in relation to all witnesses, not just those who are recognised as vulnerable. Here the danger is that life will mirror art:

“Hollywood dramas portray cross-examinations as exercises in pyrotechnics: the lawyer asks hostile and sarcastic questions mixed with clever asides to the jury, and the witness gives evasive answers. Cross-examination causes Captain Queeg to reveal his mental instability in *The Caine Mutiny*; it wrings a confession from the defendant’s wife in *Witness for the Prosecution* that she has been lying to frame her husband.”²⁹

29. But in reality, of course, the Court frowns on sarcasm. In *R v Robinson* (2001) 153 CCC (3rd) 398 the Ontario Court of Appeal considered the propriety of cross-examination by the Crown of a person accused of sexual offences in relation to his former girlfriend. In finding that the cross-examination was highly improper the Court observed:

“From start to finish, it was designed to demean and denigrate the appellant and portray him as a fraudsman, a freeloader and a sexual pervert. Many of the questions were laced with sarcasm and framed in a manner that made it apparent that Crown counsel personally held the appellant in utter contempt. In many respects this was not a cross-examination but an attempt at character assassination.”³⁰

30. The Court clearly regarded sarcasm as a serious breach of counsel’s duty, since in its discussion of the relevant principles it referred to earlier authority in which the use of sarcasm and editorial “commentary” were deprecated.³¹ In condemning the questioning that took place in *Libke v R Heydon J* described it, based upon many of the authorities discussed in this paper, as “often sarcastic, personally abusive and derisive” in tone. This was not permissible.³²

31. Again, times have perhaps changed. Wellman, in his famous 1930s book *The Art of Cross-Examination*³³ quotes a description of the approach of one of the famous cross-examiners at the Irish Bar, Serjeant Armstrong, with apparent approval:

“His great weapon was ridicule. He laughed at the witness and made everyone else laugh. The witness got confused and lost his temper, and then Armstrong pounded him like a champion in the ring.”³⁴

32. In the United States there is authority for the proposition that persistent use of sarcasm amounts to contempt of court.³⁵ In any event, unless the jury or court is “with you” the tactic can backfire, creating “negative persuasion”.³⁶
33. Sarcasm is commonly cited as improper by appeal courts as being totally unacceptable, particularly in criminal trials. It is a tempting weapon to use against a witness, particularly one who is giving evidence that strikes counsel as being nonsense, but it should be resisted. It is a vice in itself, but it can also involve another impermissible technique, editorial comment.

Reaction to inappropriate language issues

34. There have been three responses to the problem:
 - 34.1. The introduction of an “intermediary” between counsel and the witness for vulnerable witnesses.
 - 34.2. The introduction of legislation disallowing inappropriate language.
 - 34.3. Revision of the professional rules regulating cross-examination by counsel.
35. In the United Kingdom the Home Office set up a working group to deal with the problems faced by young people and learning-disabled witnesses.³⁷ The subsequent report led to the *Youth Justice and Criminal Evidence Act, 1999* (UK). This Act permits the Court to allow an approved intermediary to help the witness to communicate with the parties and the Court, including during cross-examination. The intermediary’s task is to explain both questions and answers. A similar provision can be found in the South African *Criminal Procedure Act, 1997*.³⁸

36. The UK and SA models have not been adopted in NSW. Rather, as discussed below, the “language” issue for vulnerable witnesses has been addressed by statutory proscription on improper questions. As has been pointed out, such statutory proscriptions “duplicate powers already held by the courts” under the general law.³⁹ However, the existence of a judicial power under the general law does not mean that it has been used.
37. The third response has, in part, been adopted in NSW, although in a more limited way than originally propounded. Here, as well, there is a widespread academic concern, based upon research in the UK, that such rules are ineffective in curbing “the excesses of counsel, because the relevant provisions conflict with the standard conception of trial advocacy to which defence lawyers subscribe”.⁴⁰ This has been described as a “Broughamesque” ideal, based upon Lord Brougham’s view, following *Queen Caroline’s Case* that the advocate “owes a sacred duty” to his or her client. Interviews of barristers in a study of the social world of the Crown Court in the UK elicited the following responses to the question of how witnesses were and should be treated:⁴¹
- 37.1. “to become overly nice about a witness’s feelings would impair performance and betray a client”;
- 37.2. “it’s a dreadful business. We do have to be brutal”;
- 37.3. in rape trials the approach was “robust to the point of ruthlessness”.
- 37.4. defending an accused was a “no holds barred” exercise;
- 37.5. “if you are asking if I take account of the sensitivity of the complainant, the blunt answer is no because it’s not my brief”.

38. Faced with this type of culture, born in turn of the nature of adversarial proceedings, there seems to be a view, in academia at least, that that broadening rules of ethical conduct may have limited effect:

“Defence counsel will continue to use metaphoric word choice, rapid-fire questioning, unsupportable innuendo, known objectionable matter, insult and confusion. No matter what the change in evidence codes or the high-minded calls for civility, defence counsel will zealously do whatever works.”⁴²

39. This gloomy and cynical prognosis is surely at the *götterdämmerung* end of the spectrum (and does not purport to apply, of course, to equity “whisperers” in any event). Nevertheless, the Bar has to be aware that such views are being put forward in serious academic writing about cross-examination. Notwithstanding any Broughamesque *realpolitik* the days of inappropriate language and verbal techniques are over. A proper cross-examination must not use confusing or inappropriate language.

PART II.2 - THE ROLE OF AGGRESSION

Go for the jugular or turn the other cheek?

40. Ehrlich, in *The Art of Cross-Examination*,⁴³ helpfully reduces the available styles to two:

“The savage, slashing, hammer-and-tongs method of going after a witness to make him tell the truth; and the smiling, soft-spoken, ingratiating method, directed to lulling the witness into a sense of security and gaining his confidence. Neither style can be adopted to the exclusion of the other.”

41. Unfortunately, we are not then given an example of a cross-examination nimbly deploying the two styles. But Ehrlich adds the useful point that the “savage, vehement

style” is ordinarily counter-productive. This, indeed, is the message of many authorities and texts on advocacy and cross-examination.

42. In *Mechanical and General Inventions Co Ltd and Lehwiss v Austin and the Austin Motor Co Ltd* [1935] AC 346⁴⁴ the Lord Chancellor spoke of the “measure of courtesy” that should be shown to a witness, which was said to be “by no means inconsistent with a skilful, yet powerful, cross-examination”. This is not merely a question of manners. Rather, experience shows that “generally, counsel find it politic to conduct cross-examination” with that “measure of courtesy”.⁴⁵ In short you normally get more from a witness if you do not attack him or her “hip and thigh”.

43. In 1856 a member of the Boston Bar, David Brown, published his nine “golden rules for the examination of witnesses”. Rule number 3 dealt, in more Biblical terms, with the appropriate approach to cross-examination:

“Be mild with the mild – shrewd with the crafty – confiding with the honest – merciful to the young, the frail or the fearful – rough to the ruffian, and a thunderbolt to the liar.”⁴⁶

44. Brown’s thesis has been, in substance, the precept of many successful cross-examiners. Sir James Scarlett (later Lord Abingdon), a famous cross-examiner, had the following technique:

“His brow is never clothed with terror, and his hand never aims to grasp the thunderbolt, but the gentlemanly ease, the polished courtesy, and the Christian urbanity and affection, with which he proceeds to the task, do definitely more mischief to the testimony of witnesses who are trying to deceive...Seldom has he discouraged a witness by harshness, and never by insult...Hence he takes those he has to examine, as it were, by the hand, makes them his friends, enters into

familiar conversation with them, [and] encourages them to tell what will best answer his purpose...”⁴⁷

45. Of course the difficulty comes when it is necessary to be rough with the ruffian and necessary to transform oneself into the “thunderbolt” that will strike the liar in the witness box.
46. Wellman, generally supports the “New Testament” approach, although every now and then he expresses admiration for an “Old Testament” style. In particular, Wellman correctly deprecated the tendency to treat all witness for the other side as dishonest:

“One is constantly brought face to face with lawyers who act as if they thought that every one who testifies against their side is committing willful perjury. No wonder they accomplish so little with their *cross-examination*! By their shouting, browbeating style they often confuse the wits of the witness, it is true; but they fail to discredit him with the jury...and little realize that their ‘vigorous cross-examination’, at the end of which they sit down with evident self-satisfaction, has only served to close effectually the mind of at least one fair minded jurymen against their side of the case.”⁴⁸ (emphasis in the original)

47. It is not proper, in cross-examination, to lose one’s temper and become cross with the witness. Self-control is the aim. For this reason, there is no warrant for cross-examination that is merely a series of angry exchanges with a difficult witness.
48. Part of the problem is the pervasive mythology that attaches to cross-examination, with texts and memoirs painting “a romantic portrait of the trial lawyer as a scientific (almost Sherlock Holmesian) observer, a psychologist and a holy terror all rolled into one”.⁴⁹ The

role model held up, particularly in older works, stresses the “holy terror” aspect of cross-examination, but there is a limit.

Robust cross-examination

49. There is a middle ground between an impermissibly savage verbal assault and trying to become the witness’ new best friend. The authorities recognise that counsel must be accorded a wide discretion in cross-examination and “robust cross-examination is one of the many options open to counsel”; *R v Thompson* [2006] 2 NZLR 577. The Court in *Thompson* noted that there is, however, a price for such an approach, which might be somewhat cynically described as “tit for tat”. The Court noted that “in an adversarial contest a party who elects to play hard cannot complain at a vehement response”.⁵⁰ The Court accepted that cross-examination could be aggressive and at the same time proper.

50. The Court referred to the “limits of aggressive cross-examination” being “suggested” by section 14 of the *Evidence Act*, 1908 (NZ). This section was similar to the former section 41 of the *Evidence Act*, 1995 (NSW). The New Zealand section instructed the Court to “forbid” any question which was indecent or scandalous or which was intended to insult or annoy. The Court continued that:

“Aggressive cross-examination will become improper when it is *calculated* to humiliate, belittle and break the witness.” (emphasis added)

51. Reference was made to Peter Brauti’s very useful and comprehensive article, *Improper Cross-Examination*⁵¹ and to the decision of Ontario Court of Appeal in *R v Bouhsass*.⁵² In *Bouhsass* the Crown went too far, even in relation to matters that had some probative

value (other thefts and the appellant's heroin addiction), because counsel overstepped the mark. The Court criticised the Crown for:

- 51.1.1. Employing a sarcastic tone.
 - 51.1.2. Engaging in a cross-examination that was “personally abusive and derisive”.
 - 51.1.3. Using emotive language.
 - 51.1.4. Holding the appellant “against a severe moralistic standard”.
 - 51.1.5. Attacking the appellant's lifestyle including sexual activities.
52. Thus, whilst counsel can be “aggressive” he or she runs the risk that if the cross-examination becomes “overly aggressive” then either the bounds of propriety will be exceeded or the sympathy of the jury attracted to the witness.⁵³ Interestingly, the NZ Court of Appeal expressly did not equate an “overly aggressive” cross-examination with impropriety *per se*.

Badgering

53. A common complaint is heard, that counsel is “badgering” the witness. Indeed, it has been said that witnesses actually anticipate “badgering”.⁵⁴ But what exactly is badgering? The badger, being “the nocturnal burrowing Eurasian mammal, *Meles meles*”⁵⁵ should not be blamed. It is the transitive verb that describes the mischief, i.e. “bait or pester as a dog does a badger, torment, tease, nag”.⁵⁶
54. We are told we must not subject witnesses to “harassing or badgering cross-examination”.⁵⁷ As a working rule, this means counsel cannot torment, tease or nag a

witness. But the concept of “nagging” brings its own difficulties in the modern age. Torment and teasing are no doubt forbidden, but most barristers cannot recall an occasion where a “badgering” objection, *stricto sensu*, has been upheld.

55. An element of not pestering or badgering witnesses involves letting them give (responsive) answers without interruption or comment.

“Threatening questions”

56. Brauti makes the reasonable point that “it is completely improper for counsel to threaten a witness during the course of cross-examination”.⁵⁸ He cites Canadian authority for the proposition that a cross-examination should not contain threats of prosecution for perjury.⁵⁹ Brauti then deals with a common enough technique:

“Similarly, it is improper to remind a witness in the middle of cross-examination that they are still under oath. This is especially true when such ‘reminders’ are repeated numerous times before a jury. Witnesses should not be subject to such blatant intimidation...It is only the unskilled and floundering advocate who is left to resort to the improper tactics of a bully and approach witnesses in a threatening manner.”⁶⁰

57. Whilst numerous repetitions may make it improper, there is in Australia nothing improper in asking a witness whether they appreciate that they are giving evidence on oath. It is a proper way to challenge the witness and to give him or her both a reminder of their duty to give honest evidence and an opportunity to withdraw evidence that it will be suggested is untrue; *Bellemore v Tasmania* [2006] TASSC 111; (2006) 170 A Crim R 1 at [231] and [236]. The prosecutor had put to the Appellant “You’re on oath Mr Bellemore”?

58. The Court observed:

“Counsel for the appellant submitted that the reference to the oath was not a question, and that it was an improper signal to the jury that the prosecutor thought the witness was lying. I disagree. I think it is proper for a cross-examiner to state a proposition in such a way as to invite a response to that proposition. It is not compulsory to use what grammarians might call the interrogative mood. *It is also proper, in testing the evidence of a witness, to remind the witness of his or her oath or affirmation, in such a way as to invite a response, with a view to the jury seeing the reaction of the witness.*” (at [231]) (emphasis added)

59. Nonetheless, whilst not improper, it is open to debate how useful such a reminder may be.

60. In *Orley Farm* Trollope has the redoubtable Mr Chaffenbrass threaten a witness: “As sure as you’re a living woman, you shall be placed there and tried for the same offence – perjury – if you tell me a falsehood respecting this matter”.⁶¹ If there was a golden age when counsel could blithely threaten witnesses in this way, it is now gone.

PART II.3 - OTHER POTENTIAL PROBLEMS

Length

61. Length *per se* is not an indication of propriety or impropriety. Lengthy cross-examination can become improper. Obviously, counsel is not confined going directly and briefly to the key issues, but there comes a time when unnecessarily prolonged cross-examination runs the risk of infringing both the present and new sub-paragraph 41(1)(b) (unduly annoying or repetitive). In turn, this reflects the fact that cross-examination should be as brief as possible, in the interests of all “stakeholders” in the process. Unless the witness

is “broken down” the effect of a long cross-examination can be counter-productive on the tribunal, as there is a risk, according to one commentator, that unnecessarily long cross-examination exaggerates the importance of the witness’ testimony.⁶²

Repetition and prolixity

62. G K Chesterton’s Father Brown once asked rhetorically, where do you hide a leaf? The answer is, of course, in a forest. It has been one of the techniques of cross-examination that ten unimportant questions are asked, with the most important put as if it was the most unimportant of them all.⁶³ This remains a legitimate means of cross-examining. The prohibition on prolix or repetitive cross examination does not mean that counsel has to work out the bare minimum of critical questions and brusquely put them to the witness. Nevertheless, both the present and new section 41 proscribe unduly repetitive questions.

Controlling a witness

63. It has been said of cross-examination that all ‘rules’ can be boiled down to one – control the witness. The ideal is the fenced-in witness, all gates closed, forced to answer yes or no, rebuked when non-responsive and guided relentlessly to the facts sought by the cross-examiner. Yet one of the common complaints heard is that counsel “is cutting the witness off” and not allowing the witness to give such answer to the question as the witness thinks appropriate. It is also quite common for judges to give witnesses reasonable latitude in their answers. There is an immediate tension between principles here. Obviously the witness should be permitted to give a responsive answer to a question and some room to decide how long the answer should be. However, the other relevant principle is that notwithstanding the new rules and statutory provisions the

cross-examiner is entitled not only to “insist” that there be an answer fully responding to each question, but also that there be no more than an answer.⁶⁴

64. We have all encountered the witness who desires to give a long and rambling speech to every question, however closed. In *Libke* Heydon J stated that a cross-examiner does not have to tolerate non-responsive answers being thrust upon him or her.⁶⁵ His Honour noted:

“To this end a cross-examiner is given considerable power to limit the witness’s answers and to control the witness in many other ways.”

65. Often, however, such “control” involves a cutting short or interruption of the garrulous witness. The aim is to do so politely yet firmly, avoiding inflammatory or insulting editorial comment. An alternative recommended by some commentators (although as a last resort) is to appeal to the judge for assistance. This, however, can be regarded as a sign of weakness by hard-hearted colleagues.

Editorial comment

66. Notwithstanding the general discipline exercised by the Bar, sometimes the temptation to pass a comment on the evidence that has just been given, or as an entrée for a question proves irresistible. We have all heard such remarks. They generally go unremarked, unless persisted in, but they are improper and should be avoided.
67. Some examples of impermissible comment were considered by the Privy Council, on an appeal from the Court of Appeal of the Cayman Islands, in *Randall v The Queen* [2002] 1 WLR 2237.⁶⁶ The appellant’s conviction for fraud was quashed due to impermissible cross-examination by the prosecutor, which included impermissible comment. The short

point is that any disparaging comments on a witness should be reserved for closing address.⁶⁷ Contrary to this principle the prosecutor had frequently interjected prejudicial comments in cross-examination. Four examples of this type of impropriety identified by the Privy Council sufficiently illustrate this point:

(First example) “I didn’t ask you if it was a journal article, Mr Randall. Answer my question. It’s also a piece of paper, it is also an oblong shape, it also has writing on it. I didn’t ask you that. Answer my question...”⁶⁸

(Second example) *Mr Small*: “I am suggesting to you that your dishonesty is only matched by your brazenness?”

The court: “Answer?”

The appellant: “I would suggest that you are very wrong.”

Mr Small: “Which is it? You are more dishonest than you are brazen or you are more brazen than you are dishonest?”

(Third example) *Mr Small*: “You see that is an example of your smartness. You think you are smart. Are you now challenging Mr Tan’s evidence that such a conversation between you and he took place?”

(Fourth example - after stating that an answer by the appellant was “smoke”)

Mr Collins: “It is not necessary to shout.”

Mr Small: “It is necessary because the witness has been behaving in this way all along and has been encouraged in it by your observations.”

68. The particular vice of the editorial comment is that the witness has no opportunity to respond to the comment, it not being a question seeking to elicit factual evidence, and thus is unable to deal “with the sting in the comments”.⁶⁹

69. Some of the most famous examples of editorial comment come from a case that, whilst famous, is fictional. In *Bardell v Pickwick*.⁷⁰ Serjeant Buzfuz's junior, Mr Skimpin, cross-examined Mr Pickwick's friend, Mr Winkle. Dickens described the cross-examination as "edifying brow-beating, customary on such points".⁷¹

70. Serjeant Buzfuz himself cross-examined Mr Pickwick's manservant, Sam Weller. Not doing very well with the witness and after one of his attorney (of Messrs Dodson and Fogg) whispered in his ear, the following occurred:

"You are quite right," said Serjeant Buzfuz aloud, with affected composure. "It's perfectly useless, my lord, attempting to get at any evidence through the impenetrable stupidity of this witness. I will not trouble the court by asking him any more questions. Stand down, Sir."⁷²

71. Wellman's chapter on "silent cross-examination" illustrates the impermissible nature of comment, including an implied comment.⁷³ Wellman's point, which in itself is a good one, was that sometimes it is better to ask no questions at all. However, the examples that he gave were ones that show that times have changed, for the better:

"If the witness happens to be a woman, and at the close of her testimony-in-chief it seems that she will be more than a match for the cross-examiner, it often works like a charm with the jury to practise upon her what may be styled the silent cross-examination. Rise suddenly, as if you intend to cross-examine...hesitate a moment. Look her over good-naturedly and as if you were in doubt whether it would be worthwhile to question her – and sit down. It can be done by a good actor in such a manner as to be the equivalent of saying to the jury, 'What's the use? She is only a woman'.⁷⁴

72. Wellman's other example was a decision by John Curran, a leading British advocate of the 19th century not to cross-examine. Curran felt it appropriate, however, to add the comment "There is no use asking you questions, for I see the villain in your face".⁷⁵
73. To similar effect, Trollope's famous Mr Chaffinbrass, Old Bailey practitioner *par excellence*, thought it appropriate, having got an accountant to confess to errors in books of a trust, to conclude his cross-examination by saying "Go down, Sir, and hide your ignominy".⁷⁶ Indeed, the great jurist's questions were "rife with running comments on the evidence: ... 'You believe you are not a stock jobber...You are as much a stock jobber, Sir, as that man is a policeman, or his lordship is a judge'".⁷⁷
74. It goes without saying that insulting and demeaning remarks should not be passed to or about opposing counsel during cross-examination, notwithstanding any view you might have about specious objections. Sledging should be left to its proper arena, the cricket pitch.

Arguing with the witness

75. There is a risk that cross-examination can change from an interrogation designed to elicit facts into an argument. In 1925 the Lord Chief Justice, made the following *obiter dicta* remarks in *R v Baldwin* (1925) 18 CR App R 175:

"One so often hears questions put to witnesses by counsel which are really of the nature of an invitation to an argument. You have, for instance, such questions as this: 'I suggest to you that...' or 'is your evidence to be taken as suggesting that...' If the witness were a prudent person he would say, with the highest degree of politeness: 'What you suggest is no business of mine. I am not here to make suggestions at all. I am here only to answer relevant questions. What the conclusions to be drawn from my answers is not for me, and as for suggestions, I venture to leave those to others'...It is right to remember in all such cases that

the witness in the box is an amateur and the counsel who is asking questions is, as a rule, a professional conductor of argument, and it is not right that the wits of the one should be pitted against the wits of the other in the field of suggestion and commentary.”⁷⁸

76. The first part of this statement does not perhaps accord with cross-examination practice in this State⁷⁹ and it would be interesting to see the modern judge’s reaction to such a speech by a witness. It is also quite common, and quite permissible, for a witness to be asked “are you suggesting...” in appropriate circumstances, where evidence needs to be clarified, rather than simply arguing with a witness about the effect of his evidence. Nevertheless, the core concept of the Lord Chief Justice, that cross-examination is not a mere argumentative discourse, should be borne in mind.

Knowingly inadmissible questions

77. It is improper for counsel to ask a question which is known to be inadmissible.⁸⁰ In *Hyndman v Stephens* (1909) 19 Man R 187; 12 WLR 46 (CA) the Court observed that “the practice of asking a question that counsel must be assumed to know cannot be answered is highly reprehensible”. As Brauti has pointed out, the mere asking of the question can cause damage. This view has an important interaction with the terms of the new section 41, discussed below.

Cross-examination as to credit

78. There is a significant ethical dimension to the decision to cross-examine a witness on matters of credit, in the sense of the credibility of the witness. In 1941 the Kansas Supreme Court upheld a ruling by a trial judge who permitted a witness to be cross-examined to reveal that he was a German citizen, on the basis that the same was a

proper subject for such a cross-examination.⁸¹ Protections of witnesses from cross-examination on grounds of race, nationality or ethnicity are not, clearly, far-fetched or unnecessary.

79. Cross-examination on collateral matters is often defended on the basis that it goes to credit. But there is an ethical dimension. Not every “discreditable” act or event is relevant to the question of the witness’s credit at trial. Only those matters that properly show that a witness ought not to be believed on his or her oath should be the subject of cross-examination on the “credit” basis; *R v Slack* [2003] NSWCCA 93 at [31]; *Wren v Emmett Contractors Pty Ltd* (1969) 43 ALJR 213 at 220–221. Except in so far as cross examination can be justified on that basis it may properly be disallowed; *Mutch v Sleeman* (1928) 46 WN (NSW) 52; 29 SR (NSW) 125 , at 135; *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 474 at 494; *Wentworth v Rogers (No 10)* (1987) 8 NSWLR 398 at 408.⁸² Cross-examination on “credit” which does not meet this test can be rejected by a trial judge even where there is no objection.
80. Section 103 of the *Evidence Act*, 1995 (NSW) only permits cross-examination on credit if it has substantial probative value. This additional requirement, from the common law position, provides further power to the court’s control of cross-examination; *R v Beattie* (1996) 40 NSWLR 155 at 163. It also highlights the obligation of counsel, before launching an attack upon a witness’s credit, to form the view that affirmative answers to such questions would meet the statutory threshold for admissibility.
81. Cross-examination on matters going only to credit creates some fine decisions for advocates, involving them “walking the line between proper prejudice and unethical conduct”.⁸³ Questioning that has no true purpose other than “degradation and humiliation of the witness” has crossed that line.⁸⁴ But as Corboy notes, sometimes

proper impeachment must encompass witness humiliation, but “the initial decision to embark upon a degrading cross-examination requires careful scrutiny of the target”.⁸⁵ That scrutiny involves a significant ethical duty on the cross-examiner.

Tricks

82. The pulling of “tricks” in cross-examination is incompatible with counsel’s duty to the court. An example is given in Wellman, in admiring terms, of such a trick.⁸⁶ The Irish Barrister, Daniel O’Connell, was cross-examining in a murder trial where the key piece of circumstantial evidence against his client was the presence of a hat at the murder scene, said by the witness to be the accused’s:

O’Connell: “Did you examine it carefully before you swore in your information that it was the property of the prisoner?”

Witness: “I did.”

O’Connell: (taking up the hat and examining the inside carefully), “Now, let me see – J-A-M-E-S – do you mean to say those letters were in the hat when *you* found it?”

Witness: “I do.”

O’Connell: (holding up the hat to the bench) “Now my lord, I submit that this is an end of this case. There is no name whatever inscribed in this hat!”

83. If a question or line of questioning can fairly be called “tricky” then it should be avoided. A discussion of the “standard dirty tricks of advocacy” can be found in Underwood, R H “The Limits of Cross-Examination”.⁸⁷

PART II.4 - THE DUTY TO CHALLENGE

The rule in *Browne v Dunn*

84. It has been said that “every trial lawyer knows of the rule in *Browne v Dunn* (1893) 6 R 67; many fewer understand it”.⁸⁸ The rule is squarely based upon a propriety requirement in cross-examination. The case concerned a document drawn by a solicitor. In submissions it was put that the document was a sham and created “without any honest or legitimate object, for the purpose of annoyance and injury to Mr Browne” (at 69).

85. On appeal, Lord Herschell LC noted (at 70) that none of the witnesses who had subscribed to the document was cross-examined to the effect that the document was a sham. This led to the famous dictum by the Lord Chancellor to the following effect:

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

86. The basal rule is, therefore, that if it is intended to “impeach a witness” counsel is bound, whilst the witness is in the box, to give the witness an opportunity of making any explanation that is open to him. The case established this “rule” as a rule of professional practice and essential to fair play and fair dealing with witnesses (at 70-71).

87. Directly relevant to the present discussion, the Lord Chancellor dealt with the suggestion that the rule of practice could lead to excessive cross-examination. His Lordship observed that a cross-examination “which errs in the direction of excess” may be more fair to the witness than to leave him without cross-examination. However, importantly, the Lord Chancellor added that he meant cross-examination on “a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling”. Thus *Browne v Dunn* itself recognised that there would be cases in which notice had been “so distinctly and unmistakably given” and the point upon which the witness was to be impeached was so manifest that it was “not necessary to waste time in putting questions to him upon it”.
88. Accordingly, proper cross-examination requires that a witness be given an opportunity to give an explanation in relation to a matter where it is to be suggested that his or her story is not to be accepted, unless the point is already “manifest”.

Restatement of the rule in *Allied Pastoral*

89. Hunt J reviewed the “rule” as it had developed up to 1983 in *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1, at 16. *Allied Pastoral* is regarded as the modern *locus classicus* in relation to the rule; although see also *Bulstrode v Trimble* [1970] VR 840 at 849; *Karidis v General Motors-Holdens Pty Ltd* [1971] SASR 422 at 425–6; *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 29 ACSR 21. In *Allied Pastoral*, the Commissioner failed to put a theory, called the “staged development” theory, in relation to the alleged profit-making nature of the scheme in question, to the directors who were called to give evidence.
90. The summary of the rule provided by Hunt J was as follows:

“It has in my experience, always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner’s intention to rely on such matters, it is necessary to put to an opponent’s witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inference to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.”

91. Observance of the rule therefore guarantees that there will be a square challenge to testimony that may well cause offence or annoyance to a witness. Nevertheless it is of course counsel’s right and duty to put such matters in order to comply with the rule. It is instructive that the justification for the questioning sought to be put to the complainant in *R v Ta* was the perception that the rule in *Browne v Dunn* required it.

Where cross-examination may not be necessary

92. The rule is aimed at avoiding unfairness to a witness. Unfairness can be avoided if it is clear, before trial that, for example, a plaintiff is exaggerating his medical condition in certain respects; *Laurendi v Boral Contracting Pty Ltd* [2002] WASCA 297 at [28] – [30]. In that case, the Court took the view that the challenge was apparent from the medical reports, brought into existence before trial.
93. Thus the substance of the rule can be met by other than direct cross-examination of a witness. For example, in *Mackenzie v Albany Finance Limited* [2003] WASC 100, the plaintiff was not cross-examined about a matter, but the trial judge held that the plaintiffs, through their advisers, were put on notice of the evidence the witness was to give by that

witness' "responsive witness statement". There was no unfairness which necessitated the exclusion or rejection of the evidence, even though it is was not put to the plaintiffs in cross-examination.

94. Similarly, where there are affidavits, the first aspect of the rule (notice of intention to impeach) may not be applicable. But even then, the second aspect to the rule, which relates to the weight or cogency of evidence that has not been challenged by cross-examination, must be borne in mind. In my view it is more desirable to challenge a witness than engage in an arid debate later about whether there was notice of the challenge.

The treatment of particular classes of witness

95. There are classes or types of witnesses who require special consideration. The existence of particularly vulnerable witnesses is the basis upon which section 275A was introduced and the rationale for its extension to civil trials. Such classes include witnesses with cognitive disorders, children and alleged victims of sexual assault.
96. There are also cultural and linguistic issues involved in the cross-examination of Indigenous children, including what is termed "gratuitous concurrence", the role of silence in Aboriginal culture and the cultural practice of avoiding eye contact.⁸⁹ Issues relating to Aboriginal witnesses were discussed by the Western Australian Court of Criminal Appeal in *Stack v Western Australia* [2004] WASCA 300; (2004) 29 WAR 526; (2004) 151 A Crim R 112. The Court, by a majority allowed an appeal where the defence was not permitted to ask leading questions in cross-examination of the principal crown witness who was an Aboriginal youth. The trial judge had given directions dealing with issues of Aboriginal culture that could impact on how a witness gave evidence. The trial judge's directions were similar to the "Mildren directions" formulated by Mildren J in the

Supreme Court of the Northern Territory.⁹⁰ The issue is obviously a contentious one. One critic has written of *Stack* that it appears “to suggest underlying, but untested, cultural assumptions about urban Aboriginality which are at odds with the professional literature”.⁹¹

97. There are also particular issues involved in cross-examining children. These are compounded when the child is alleged to have been the victim of sexual assault. Whilst the *Criminal Procedure Act, 1986* (NSW) has a number of provisions that provide certain protections for vulnerable witnesses (being defined in section 306 as a child or intellectually impaired person) the content of such cross-examination is largely left to counsel.
98. This is not the place for a detailed discussion of all of the issues raised in such cases. However, it is important to emphasise that cross-examination of vulnerable witnesses is the most delicate task a barrister has to undertake. It is the widespread perception, or fact, that the bar has not always conducted such cross-examination properly and with appropriate care and restraint that has led to the push to reform the law as to evidence and the Bar Rules. The ALRC and HREOC conducted an inquiry into children and the legal system, in the course of which they heard “significant and distressing evidence that child witnesses, particularly in child sexual assault cases, are often berated and harassed to the point of breakdown during cross-examination”.⁹²
99. The duty of counsel extends to assisting the court to perform its task of insuring a fair trial. The general law requires that cross-examination be properly tailored to the nature and ability of the witness and that any disability be recognised and accommodated as far as possible. This position has now been put beyond doubt by the new section 41.

PART III - THE ROLE OF THE COURT

100. This too has changed. The introduction of the new section 41 has brought criminal and civil procedure into line and put a statutory duty upon the Court itself to ensure that no breaches of the section occur. However, the Court has always had the authority to control the proceedings and to enforce proper standards of behaviour.⁹³ Although seemingly obvious, the acceptance and rejection of evidence is one of the essential tasks of a judge.⁹⁴ Failure to exercise that control jeopardises a fair trial, whether it be a civil suit or a criminal trial.
101. The Privy Council in *Randall v The Queen* [2002] 1 WLR 2237⁹⁵ stated that the responsibility of the judge is to ensure that the proceedings are conducted in an orderly and proper manner and to that end “if counsel begin to misbehave he must at once exert his authority to require the observance of accepted standards of conduct”. In this respect, it is the duty of the trial judge, under the general law, to prevent cross-examination that goes beyond permissible limits and this is so even if it is not objected to by counsel for an accused.⁹⁶
102. Notwithstanding the existence of the Court’s inherent power, observations such as those in *Randall*, and the powers given by sections such as sections 11, 26(a) and (d) and 41 of the *Evidence Act*, there have been papers which record the view that such powers have proved to be ineffective.⁹⁷ Particularly in the area of complainants in sexual offences cases it has been thought that trial judges had adequate powers to control cross-examination, but that judicial controls of such cross-examination were inadequate.⁹⁸ This, the LRC recorded in 2003, was “a recurring theme in the literature on sexual assault”.⁹⁹ This, too, appears to be the popular version of the problem with the old

section 41: “A discretion is not good enough because judges feel constrained from cutting in too much for fear of generating appeal points”.¹⁰⁰

103. Difficulties such as these led to the introduction of section 275A of the *Criminal Procedure Act*, 1986, the model for the present section 41, which puts a positive duty on the trial judge to prevent such cross-examination.

104. There is nothing new in the idea that it is the failure by the courts to regulate cross-examination that has allowed improper cross-examination to occur. Wigmore, after referring to the satire of cross-examination in *The Pickwick Papers* and Trollope’s *The Three Clerks* blamed such abuses on the judges:

“The remedy for such an abuse is in the hands of the Judges. The disgrace of these occurrences is even more theirs than that of the offending counsel.”¹⁰¹

105. Put simply, research shows that the judges have generally shown “a marked reluctance to intervene or simply do not intervene to assist or protect vulnerable witnesses during cross-examination”.¹⁰² One judge defended this reluctance on the basis that it was very important for evidence to be properly tested “and if that means, as it inevitably does, that the child has to be distressed, I’m afraid it’s part of the system”.¹⁰³

106. Similarly, the Courts are viewed as not having used the old section 41 as much as they should have. The section was discussed by the NSW Court of Criminal Appeal in *R v Ta* (2003) 57 NSWLR 444.¹⁰⁴ The accused was convicted of having sexual intercourse without consent and of administering a stupefying drug to achieve the same. The accused videotaped the acts said to constitute the sexual assault. The trial judge refused to allow defence counsel to show parts of the video to the complainant with a view to

asking her opinion as to whether the video showed that she consented. In addition to the evidence being irrelevant, Spigelman CJ found that the judge was entitled:

“...to reject the line of cross-examination by applying section 41 of the Act. The difficulties encountered by complainants in sexual assault cases in the criminal justice system has been a focus of concern for several decades. Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused.”¹⁰⁵

107. The Chief Justice found that even if the questions had been relevant they should have been rejected as unduly harassing, offensive and oppressive within section 41 (old version).¹⁰⁶ Here, however, the apparent clarity of the issue becomes murkier. As Spigelman CJ pointed out, the section operates “on the assumption that there is an element of relevance in the line of questioning” that can be disallowed.¹⁰⁷ His Honour found that, in *Ta*, the probative force of any evidence elicited by the objectionable questioning was so slight that “even a small element of harassment, offence or oppression, would be enough for the Court to exercise its discretion under section 41(1)(b)”.¹⁰⁸
108. These views throw into sharp relief the dilemma facing counsel in determining, in advance of a question or line of questioning, that it should not be asked because of its offensive or oppressive etc potential. Further, how does counsel perform, pre-trial, the exercise of determining that the probative value of an offensive question is such that, although relevant, the question should not be asked, lest it offend against sections 275A/41 and, indeed, expose the barrister to the suggestion that he or she has breached the new Bar Rules?

109. What counsel must do in the “balancing” act involved in such a determination, is assess the effect of questioning upon the actual witness to be cross-examined. As the Chief Justice concluded in *Ta*:

“The words of section 41 direct attention to the effect of questioning upon the witness. In a sexual assault matter, it is appropriate for the court to consider the effect of cross-examination and of the trial experience upon a complainant when dealing with cross-examination is unduly harassing, offensive or oppressive.”¹⁰⁹

110. The problem for the defence is acute. A topic may be relevant but questioning about it may be disallowed by the Court. Asking a disallowable question, however, may put the barrister in jeopardy under the new bar rule. The principle that a person is entitled to a fair trial has its limits, sometimes the truth can cost too much.¹¹⁰ But it puts counsel in an invidious position to have to decide when his or her client's right to a fair trial does not include asking a relevant question or pursuing a relevant topic.

111. Control of cross-examination is ultimately best left to the Court. The reluctance of the Courts, or the perceived reluctance, to use their powers under the general law or discretionary powers under statute has caused the present position whereby more responsibility has been shifted to the Bar and the Courts have been ordered to reject “disallowable questions” under the new section 41.

PART IV – THE NEW STATUTORY REGIME

Section 275A

112. The predecessor of the new section 41 was section 275A of the *Criminal Procedure Act, 1986*, (CPA) which is headed “Improper Questions”. On the coming into force of the new section 41 section 275A will be omitted from the CPA. The two sections are materially identical, although section 275A was confined to “criminal proceedings” as defined, and the old section 41 was made inapplicable to such proceedings. Additionally, section 275A had a self-contained prohibition on the publication of questions disallowed by the Court. The new section 41 does not contain this prohibition, but section 195 will be to the same effect.

113. Section 275A was inserted into the CPA by the *Criminal Procedure Further Amendment (Evidence) Act (NSW) 2005*.¹¹¹ The explanatory notes to the Bill explained that:

“At present, section 41 of the Evidence Act 1995 gives a court power to disallow a question put to a witness in cross-examination, or to inform the witness that the question need not be answered, if the question is misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. *The amendments set a new standard for the cross-examination of witnesses in criminal proceedings.*” (emphasis added)

114. This theme was developed in the Second Reading Speech:

“The application of section 41 is inconsistent. Some counsel are reluctant to object each time they think a question is improper because they believe it may place them at a forensic disadvantage, such as appearing to be trying to hide something; *and although judicial officers have the power to intervene, some judges are reluctant to take this up.* The amendment in relation to improper

questions sets a new standard for the cross-examination of witnesses in criminal proceedings, including by referring, for the first time, to the manner or tone in which a question is asked. *It is an important amendment because improper questions asked of them in cross-examination are one of the most distressing aspects of the court process for sexual assault complainants. This amendment will also apply to our most vulnerable witnesses—child complainants...* This amendment places a positive duty on judges to act to prevent improper questions, thereby ensuring that witnesses are able to give their evidence free from intimidation and fear.” (emphasis added)

115. As stated above, it is a concern for especially vulnerable witnesses that has been the catalyst for a change in the law of evidence. The Judicial Commission website has an interesting paper on it addressing the issues raised by section 275A for the judiciary.¹¹²

Background to the amendment to section 41

116. The 2007 amendments to section 41 of the *Evidence Act* were based upon the NSW LRC “Report 112 (2005) - Uniform Evidence Law”, which was a joint report prepared with the Australian Law Reform Commission (Report 102) and the Victorian Law Reform Commission (Final Report).¹¹³ The amendments gave effect to recommendation 5-2 in that report. That recommendation was that:

“The ALRC and NSWLRC recommend that section 41 of the uniform Evidence Acts should be amended to adopt the terms of s 275A of the *Criminal Procedure Act 1986* (NSW). This section should apply both to civil and criminal proceedings.”

117. It is interesting that the VLRC did not join in the recommendation. Its views were recorded in the Report.¹¹⁴ The VLRC took the view that:

- 117.1. It was important for the discretion of trial judges to be retained, whilst at the same time introducing mandatory protection for vulnerable witnesses.
- 117.2. The introduction of a duty in relation to all witness could compel a judge to interfere inappropriately in questioning when this was contrary to the legitimate interests of the party questioning the witness.
- 117.3. The general provision should be designed to prevent cross-examination that was improper because it was unfair to the witness while not unduly hampering the “trial techniques of advocates”.
- 117.4. A specific duty in relation to vulnerable witnesses offered the best prospects of “changing the culture of judicial non-intervention”.
- 117.5. The VLRC model would define a vulnerable witness to include persons under 18 and persons with a cognitive impairment. In addition the protection would apply to other persons found to be vulnerable by the trial judge in relation to factors that would include (a) the age and cultural background of the witness (b) the mental, physical or intellectual capacity of the witness (c) the relationship between the witness and any party to the proceedings and (d) the nature of the offence.
118. Notwithstanding these views, the VLRC did conclude that general provisions such as section 41, in its old form, had proved insufficient to ensure the protection of child witnesses against inappropriate questioning. The focus of the VLRC was, however, to try and draw up specific protections for vulnerable witness that would be binding upon trial judges. This model was not adopted in NSW, the legislature adopting general protections for witnesses, albeit informed by the existence of some identified disabilities.

Extension of the regime to civil suits

119. The joint report recommended that the protections afforded by section 275A should be extended to civil trials. It did so, however, almost by way of an aside:

“The Commissions believe that the protections offered to witnesses in criminal matters should be no more comprehensive than in civil matters. As noted in DP69, a witness in a negligence or a civil assault matter may be as vulnerable to attack in cross-examination as a victim of crime. Any amendment to section 41 should apply to both civil and criminal matters.”

120. This view was accepted by the NSW Parliament.

The new section 41

121. A new section 41, materially identical to section 275A, was introduced by the *Evidence Amendment Act, 2007*, although at the time of writing the amendments had not come into force.

122. The most significant change, of course, is that a positive duty is put upon the Court to reject “disallowable questions” (although a party’s right to object is preserved; sub-section 41(4). Whether or not a question is disallowable depends on the Court forming a view that the question suffers from one or more of the defects set out in sub-paragraphs 41(1)(a)-(d). Questions that are:

122.1. misleading or confusing (formerly section 41 only covered “misleading” questions);

122.2. “unduly” annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;

- 122.3. put in a “manner or tone” that is belittling, insulting “or otherwise inappropriate”
- 122.4. without any basis other than a stereotype (based on sex, race, culture, ethnicity, age or mental, intellectual or physical disability

are to be disallowed or need not be answered.

- 123. In determining if a question is disallowable, the Court “may” take into account any relevant characteristic of the witness of which it is “or is made, aware”. This would appear to contemplate an objection to a question which itself identified such a characteristic, or even the taking of evidence on the *voir dire* on such a characteristic.
- 124. The relevant list of characteristics (which is not exclusive) ranges from age and education through to gender, language skills and maturity; section 41(2)(a). Additionally, the Court may take into account any mental, intellectual or physical disability; section 41(2)(b).
- 125. Finally, the context in which the question is asked is relevant to the determination, including whether the proceedings are civil or criminal, the nature of the offence and “the relationship (if any) between the witness and any other party to the proceedings”.
- 126. There are two important protections in sub-paragraphs 41(3)(a) and (b). These provide that a question is not “disallowable” merely because it involves a challenge to the honesty of a witness or the accuracy of any statement and merely because a question raises a distasteful or private subject.
- 127. As can be seen from the discussion of the general law above, there is little here that is revolutionary. In many ways the new section is simply a codification of certain traditional “rules” relating to cross-examination. Whilst the section, for example, deals with “tone

and manner”, the same has always been relevant under the general law. The only really significant change is the imposition of a duty on the Court to identify and reject offending questions.

128. The theme running through the new section 41 is that propriety is very much in context and direct and necessary challenges, however unpleasant, do not offend. The identified criteria for determining propriety or impropriety again focus upon characteristics of witnesses more than processes or techniques of cross-examination in the abstract and continue the aim of protecting the vulnerable from abuse of the cross-examiner’s position.

The ethical dimension of the new section 41

129. As discussed below, the initial proposal that the Bar Rules be amended to reflect directly the terms of the new section 41 was jettisoned in May 2008 and a more confined rule promulgated. Nevertheless, the terms of the new section 41 cannot, of course, be ignored in considering the ethical duties of barristers in cross-examination. Whilst a barrister can form a *bona fide* view that a question is not a ‘disallowable question’ and be proved wrong in such a judgment, a barrister must still consider the terms of section 41 as an ethical constraint on the content and form of cross-examination and faithfully obey its terms.
130. It is accepted that it is improper in cross-examination to ask a question that the barrister knows is inadmissible. Thus, barristers will be constrained, in asking questions in cross-examination, by the terms of the new section 41.

PART V – THE NEW BAR RULES

The first proposed amendments

131. On Friday 29 February 2008 the Bar Council gave notice of proposed amendments to Rule 35 and the introduction of a new Rule 35A. When the Bar Council called for submissions about the proposed amendments there was considerable opposition from the Bar.

The proposed amendment to Rule 35

132. The proposed amendment involved the important deletion of the word “principally” from Sub-rule 35(c) and the introduction of five additional categories of the effect of an allegation or suggestion “against any person”.

133. Rule 35 is, of course, concerned with purpose, a concept that is notoriously wide in its reach. As Dixon J said, in *Mills v Mills* (1938) 60 CLR 150 at 185:

“When the law makes the object, view or purpose of a man, or of a body of men, the test of the validity of their acts, it necessarily opens up the possibility of an almost infinite analysis of the fears and desires, proximate and remote, which, in truth, form the compound motives usually animating human conduct.”

134. In Rule 35, the word “principally” performs an important role in this context. The rule will be applied when a challenge is made to a barrister’s conduct on the basis of an inference as to the barrister’s purpose in asking questions. The complexity and width of the notion of purpose may make it relatively easy to infer that a purpose of the barrister was to annoy etc. Yet it may be entirely consistent with such an inference to conclude that the barrister’s *principal* purpose was to obtain a legitimate forensic outcome.

135. There was also opposition to the proposed amendment based upon on the proposition that it is extremely important, in connection with the complex and spontaneous process of cross-examination, that barristers not be constrained in performing their duty for fear that the nature of their questions may give rise to an inference that “a” purpose in asking the questions was, (for example), to “annoy” a witness.
136. On 2 May 2008 the Bar Council announced new proposed amendments to the Bar Rules to replace those put forward in February. Under the new proposal, Rule 35 will stay as it is.
137. Maintaining Rule 35 in its present form leaves the rule in a form that is reflected in the UK and Victorian rules. The *Code of Conduct* regulating the work of practising barristers in England and Wales, in Rule 708, provides that barristers “must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify or insult or annoy either a witness or some other person”. Similarly, the Victorian Bar Rules, in Rule 31, after introductory words substantially reflecting the introductory words of our Rule 35, provide that the relevant allegations or suggestions are not to be made “principally in order to harass or embarrass” the person.

Proposed new rule 35A – February 2008 version

138. The February 2008 version of the proposed new Rule 35A mirrored the “disallowable question” regime in section 275A and the new section 41. There was considerable opposition to the inclusion of such a rule. It is, in the view of its critics, overly complicated; put a significant and unwarranted burden on cross-examining counsel; and lacked utility.

139. If the February version of the new rule had been adopted it would have been a ground for complaint against counsel by an aggrieved person who had been cross-examined that the questions he or she was asked were “misleading or confusing”. Equally, it would be a proper subject-matter for disciplinary regulation that questioning was “unduly” repetitive.
140. In opposing the February draft no one suggested that witnesses should be insulted or belittled, shouted at, confused or misled. But the issue was whether a new Bar Rule, with its attendant consequences, was either necessary or desirable. Opponents pointed out that, as stated above, the common law and the *Evidence Act* provide the Court with an armoury of weapons with which to deal with cross-examination that is offensive and unjustified. When the new section 41 comes into force it will put a positive duty on the Court to disallow such questions. Such action is the proper subject-matter of the Court’s powers, not (at least not automatically) a disciplinary matter.

Rule 35A as promulgated

141. On 22 May 2008 the Bar Council promulgated new Rules 35A and 35B in the form distributed on 2 May 2008. Rule 35A now provides for a special regime for the cross-examination of a person in proceedings where an allegation of sexual assault has been made by such person (whether the proceedings be civil or criminal).
142. The gravamen of the prohibition is that a barrister must not ask questions of such a witness which are *intended*:
- 142.1. To mislead or confuse (Rule 35(a)(i)).
- 142.2. To be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive (Rule 35(a)(ii)).

143. The vulnerability of such witnesses is covered by Sub-rule 35A(b). Barristers must take into account “any particular vulnerability” in the manner and tone of the questions he or she asks. There is no definition of such vulnerability, but it would clearly encompass child witnesses and the intellectually impaired. The better view is that any evidence of disability amounts to such vulnerability and must not be exploited.

New Rule 35B

144. The scope of Rule 35A is clarified by Rule 35B. It will not be a breach of Rule 35A merely to question the truthfulness of the witness or to challenge the accuracy of their evidence. Nor will it infringe Rule 35A merely because otherwise proper questioning deals with matters that the witness regards as private or finds offensive.

Disciplinary aspects

145. A breach of the new Rule 35A will be capable of being unsatisfactory professional conduct or professional misconduct as provided for by section 498 of the *Legal Profession Act, 2004* (NSW). In sexual assault cases a failure to adhere to the standard set down in the rule will expose barristers to the risk of complaints of unsatisfactory professional conduct or professional misconduct.

Rules 35, 35A and 35B do not ‘cover the field’

146. In making the forensic choices that are involved in cross-examination, barristers must bear in mind that the three rules referred to do not purport to be a code of the ethical duties on barristers in such circumstances. Bar Rule 9, of course, warns barristers not to treat the Bar Rules as if they were a definitive code. Impropriety can be found under the general law and punished under the inherent power of the Court.

147. There are rules both in particular (Rule 33(b)(ii) – which prohibits cross-examination that suggests that another person committed the offence charged, where the client has confessed guilt to the barrister) and general that impact on cross-examination and its propriety (Rules 36 and 37 – allegations or suggestions against a person; Rule 38 – a matter cannot be suggested in cross-examination as to credit unless the barrister believes on reasonable grounds that acceptance of the suggestion would diminish the witness' credibility).
148. Equally, there are specific duties placed on Prosecutors by the rules (Rules 62, 63 and 64) that apply to the content of cross-examination.

PART VI – CONCLUSIONS

149. There is a gloomy view that legislation disallowing certain types of questioning and changes to ethical rules will have little or no effect in critical areas, such as sexual assault trials or cases where children are the complainants.¹¹⁵ This is too pessimistic. Things have changed and the culture of the bar has accommodated such changes.
150. Any cross-examination regime that may have permitted sarcastic, bullying questioning, redolent with vituperative comments, sly asides, eye-rolling and the like is long since dead in this State. Any temptation to revert to such tactics should be resisted. Discipline and self-control are paramount virtues in cross-examination.
151. Many of the general law rules discussed above seem to be simply common sense, but obeying them can create a tension between a mythic notion about what cross-examination is and a belief in the Broughamesque duty owed to the client. The myths about cross-examination should be put away and the simple rules obeyed.
152. The regime in the new section 41 provides an ethical background to decisions taken about the form and content of questions asked in cross-examination and the legislature's proscription of certain forms and types of questions must be obeyed. The new Bar Rules specifically recognise one category of vulnerable witnesses, but the general law protects other vulnerable witnesses.
153. The developments referred to above require barristers to spend more time, in planning and conducting a cross-examination, thinking about the ethical and substantive restraints imposed or emphasised by such changes. Barristers must still fearlessly advance the client's interests, but the controls and limits on the great engine must be understood and applied.

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- ¹ Archbishop Whately, *Elements of Rhetoric - Quoted in Stone, Cross-Examination in Criminal Trials*, (Butterworths, London, 1988) p.3
- ² Ackland, R, "Things become very heated at the Bar 'n' Grill", Sydney Morning Herald, 25 April 2008
- ³ *R v Osolin* (1993) 86 CCC (3d) 481 at 516-517 per Cory J
- ⁴ Sir William Holdsworth, *A History of English Law*, (London, Sweet & Maxwell, 1966 Reprint, Volume IX), p.126
- ⁵ Holdsworth, n 4, p.127
- ⁶ Holdsworth, n 4, p.131
- ⁷ Baker, JH, *An Introduction to English Legal History* (London, Butterworths, 3rd Ed, 1990) p.583
- ⁸ *R v Boothe* (1602) BL MS Add 25203, fo.569v, cited in Baker, n.7, p.582
- ⁹ Baker, n.7 – such a right was conferred by the *Criminal Evidence Act*, 1898, 61 & 62 Vic, c.36
- ¹⁰ Soonavala, RK, *Advocacy – Its Principles and Practice, dealing with the art of advocacy, examination-in-chief, cross-examination, re-examination/methods of preparing briefs, the art of persuasion, trial strategy and trial tactics, the art of winning cases, with extensive quotations from well known trials and notable cross-examinations*, (N M Tripathi Law Publishers, Bombay, 1953), p.90, rule 85 – another rule of practice identified by the author at is more attractive (at least to some barristers), namely that "no junior should do anything which will prejudice his senior in the estimation of the client".
- ¹¹ See the discussion thereof in Terracini, W, SC, "Cross Examination", a paper presented at the Public Defenders Criminal Law Conference, 15-16 March 2008, available from the Lawlink website http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_crossexaminationterracini (Accessed 2 April 2008). The commandments come from a speech by Irving Younger at the ABA Annual Meeting in Montreal Canada August 1975 (Litigation Monograph Series, No. 1, American Bar Association Section on Litigation) The commandments are: (a) be brief (b) use plain words (c) ask only leading questions (d) be prepared (e) listen carefully (f) don't argue with the witness (g) avoid repetition (h) limit witness explanations (i) limit questioning and (j) save the main point for closing address.
- ¹² *Wakely v R* (1990) 93 ALR 79, at 86; (1990) 64 ALJR 321
- ¹³ *Wakely v R* (1990) 93 ALR 79 at 86
- ¹⁴ *Johnston v Todd* (1843) 49 ER 710, (1843) 5 Beav. 597;
- ¹⁵ *Johnston v Todd* (1843) 49 ER 710 at 712
- ¹⁶ *Libke v R* (2007) 235 ALR 517 at [118]; (2007) 81 ALJR 1309; [2007] HCA 30
- ¹⁷ Fife-Yeomans, J, 'Lawyers fight for Victims' Rights' (Daily Telegraph, Sydney Australia 16 April 2008). An edited version of the President's response was printed on 17 April making the point that "No one condones the intimidation or harassment of rape victims, least of all the NSW Bar".
- ¹⁸ Ackland R, n 2.
- ¹⁹ Ehrlich JW, *The Lost Art of Cross-Examination, or Perjury Anyone?* (GP Putnam's Sons, New York, 1970), p.7 (foreword)
- ²⁰ J H Wigmore, *Evidence in Trials at Common Law (Chadbourne revision)*, (Little, Brown & Co., Boston, 1970), vol 3, p.173 [781], cited with approval by Heydon J in *Libke v R* (2007) 235 ALR 517 at [122].
- ²¹ *Randall v The Queen* [2002] 1 WLR 2237 at [10]
- ²² Ehrlich JW, n19, p.28

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- ²³ See the discussion in Yaroshefsky E, “Balancing Victim’s Rights and Vigorous Advocacy for the Defendant” (1989) *Ann Surv Am L* 135, at 149 – as the author points out, this questioning was not probative of any issue in the case, was inflammatory and based upon racial stereotypes and should not have been allowed.
- ²⁴ Herbert AP, *‘Uncommon Law’*, (Methuen, London, 1935) p.103
- ²⁵ Soonavala RK, n 10, p.270
- ²⁶ Ellison L, “The mosaic art? Cross-examination and the vulnerable witness” (2001) 21 *Legal Stud* 353, at 354
- ²⁷ Ellison L, n 26, p.355
- ²⁸ Zajac R, Gross J and Hayne H, “Asked and Answered: Questioning Children in the Courtroom” (2003) 10 *Psychiatry, Psychology and the Law* 199, at 200
- ²⁹ Tanford JA *‘The Trial Process: Law, Tactics and Ethics’* – Chapter 7 Cross-Examination, p.277; based upon Tanford JA, “Keeping Cross-Examination Under Control” (1994) 18 *Am j Trial Adv* 245
- ³⁰ *R v Robinson* (2001) 153 CCC (3rd) 398 at 416, paragraph [35]
- ³¹ *R v Robinson* (2001) 153 CCC (3rd) 398 at 417, paragraph [43], quoting from *R v R (AJ)* (1994) 94 CCC (3rd) 168
- ³² *Libke v R* (2007) 235 ALR 517 at [123]
- ³³ Wellman FL, n 33
- ³⁴ Wellman FL, *‘The Art of Cross-Examination’*, (The MacMillan Company, 1931), p.54
- ³⁵ *Hawk v Superior Court* 42 Cal App 3d 127, 116 Cal Rptr 713 (1974)
- ³⁶ Abelson R & Miller J, “Negative Persuasion Via Personal Insult” 3 *J Experimental Social Psychology* 321 (1967); cited in Tanford JA, n 40, p.329
- ³⁷ Ellison L, n 25, p.362
- ³⁸ Ellison L, n 25, p.363
- ³⁹ Ellison L, n 25, p.370
- ⁴⁰ Temkin J, “Prosecuting and defending rape: perspectives from the Bar” (2000) 27(2) *J L & Society* 219 at 229, cited in Ellison L, n 26. One of the comments blamed “male barristers of advanced middle age. They can be very unpleasant”.
- ⁴¹ Rock P, *‘The Social World of the English Crown Court’* (Oxford, Clarendon Press, 1993) at p.174, and Temkin P, n 31 ,p.230
- ⁴² Taslitz A, *‘Rape and the Culture of the Courtroom’* (New York University Press, 1999) p.118, quoted in Ellison L, n 25, p.373
- ⁴³ Soonavala RK, n 10, p.31
- ⁴⁴ *Mechanical and General Inventions Co Ltd and Lehwess v Austin and the Austin Motor Co Ltd* [1935] AC 346 at 359
- ⁴⁵ *R v Thompson* [2006] 2 NZLR 577 at [69]
- ⁴⁶ Soonavala RK, n 6, p.63
- ⁴⁷ Wrottesley, FJ, *‘The Examination of Witnesses in Court Including Examination in Chief, Cross-Examination and Re-Examination’* (London & Toronto, Sweet & Maxwell, Ltd 1910). Quoted in Soonavala, n 10, p.92
- ⁴⁸ Wellman FL, n 33, p.11
- ⁴⁹ Underwood RH, “The Limits of Cross-Examination” (1997-1998) 21 *Am J Trial Advoc* 113, at 117

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- ⁵⁰ *R v Thompson* [2006] 2 NZLR 577 at [64]
- ⁵¹ Brauti P, 'Improper Cross-Examination' (1998) 40 Criminal Law Quarterly 69, at p.95
- ⁵² *R v Bouhsass* (2002) 169 CCC (3rd) 444
- ⁵³ *R v Thompson* [2006] 2 NZLR 577 at [69]
- ⁵⁴ Soonavala RK, n 10, p.71
- ⁵⁵ Brown L (Ed), '*The New Shorter Oxford English Dictionary on Historical Principles*' (Clarendon Press, Oxford, 1993), Volume II p.168
- ⁵⁶ Brown L, n 55, 168
- ⁵⁷ *S v Booie* 1964 (1) SA 224 at 227-8, cited in *Libke* at [122]
- ⁵⁸ Brauti, n 51, p.93
- ⁵⁹ *R v Provencher* (1955) 114 CCC 100, 22 CR 407; [1956] SCR 95
- ⁶⁰ Brauti, n 51, p.93
- ⁶¹ Robinson C F, 'Trollope's Jury Trials' (1952) 6 Nineteenth-Century Fiction 247, p.263
- ⁶² Wellman, n 33, p.63
- ⁶³ Soonavala RK, n 10, p.72
- ⁶⁴ *Libke v R* (2007) 235 ALR 517. at [119]
- ⁶⁵ *Libke v R* (2007) 235 ALR 517. at [119]
- ⁶⁶ *Randall v The Queen* [2002] 1 WLR 2237; [2002] UKPC 19
- ⁶⁷ *Randall v The Queen* [2002] 1 WLR 2237 at 2242
- ⁶⁸ *Randall v The Queen* [2002] 1 WLR 2237 at [15]
- ⁶⁹ *Libke v R* (2007) 235 ALR 517 at [125]
- ⁷⁰ Dickens C, 'Posthumous Papers of the Pickwick Club, Chapter XXXIV: *Bardell v. Pickwick; the trial for breach of promise of marriage held at the Guildhall Sittings, on April 1, 1828, before Mr. Justice Stareleigh and a special jury of the city of London*', (London: E Stock 1902)
- ⁷¹ Dickens C, n 70, p. 410
- ⁷² Dickens C, n 70, p.416
- ⁷³ Wellman FL, n 33, pp. 122-123
- ⁷⁴ Wellman FL, n 33, p.123
- ⁷⁵ Wellman FL, n 33, p.123
- ⁷⁶ Robinson C F, "n 61, p.253
- ⁷⁷ Robinson C F, n61, p.255
- ⁷⁸ *R v Baldwin* (1925) 18 Cr App R 175 at 178-179
- ⁷⁹ Although see the remarks of Murphy J in *Alister v The Queen* (1984) 154 CLR 404, at 429 approving Lord Chief Justice Hewart's observations and adding that, leaving aside experts, "the function of a witness is to answer questions of fact, not to be invited to argue or speculate nor to become the vehicle for counsel's assertions of fact or falsity".
- ⁸⁰ Brauti, n 51, p.89

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- ⁸¹ *Atkinson v Wiard* (Kan Jan 25, 1941) 109 P. (2d) 160, discussed in “Evidence: Propriety of Evidence of Nationality to Impeach Witness”, (1941) 29 California Law Review, pp.529-531. No authorities had been cited in support of the ruling and this was because, according to the case note, there were no such authorities.
- ⁸² See *Cross on Evidence*, 3rd Australian ed at [17510]
- ⁸³ Corboy P H, “Cross-examination: Walking the Line Between Proper Prejudice and Unethical Conduct” (1986-1987) 10 Am J Trial Advoc 1
- ⁸⁴ Corboy P H, n 83, p.2
- ⁸⁵ Corboy P H, n 83, p.2
- ⁸⁶ Wellman FL, n 33, pp.160-161
- ⁸⁷ (1997-1998) 21 Am J Trial Advoc 113. Underwood wrote two monographs on the subject, but came to believe that “the few lawyers that have actually consulted such works seem to have done so with evil in their hearts” – the 5 copies in his firm’s library having been *stolen*.
- ⁸⁸ Justice PLG Brereton, “Aspects of Advocacy: The Effective Presentation of Evidence”, Speech to the College of Law, 12-13 August 2006
- ⁸⁹ Eades D, “Cross Examination of Aboriginal Children – *The Pinkenba Case*” [1995] AboriginalLB 46; 3 (75) p11
- ⁹⁰ Justice D Mildren, “Redressing the Imbalance Against Aboriginals in the Criminal Justice System” (1997) Crim L J 246
- ⁹¹ S Fryer-Smith, Case note, (2006) 30 Crim L J 246
- ⁹² ALRC Report 102, NSWLRC Report 112, VLRC Final Report – Uniform Evidence Law 2007 par 5.74
- ⁹³ *Randall v The Queen* [2002] 1 WLR 2237 at [28]
- ⁹⁴ *Moxham v Kaal* [2004] NSWCA 298 at [47]
- ⁹⁵ *Randall v The Queen* [2002] 1 WLR 2237 at [10]
- ⁹⁶ *R v W (RS)* (1990) 55 CCC (3d) 149 63 Man R (2d) 26 (CA)
- ⁹⁷ See Law Reform Commission of NSW Report 101 (2003) ‘*Questioning of complainants by unrepresented accused in sexual offence trials*’, paragraphs 3.51-3.57
- ⁹⁸ Temkin J, n 39, p.246
- ⁹⁹ LRC NSW, n 91, paragraph 3.55
- ¹⁰⁰ Ackland R, n 2.
- ¹⁰¹ Wigmore, n 20, Sec. 781
- ¹⁰² Cashmore J, “Child Witnesses: the Judicial Role” (2007) 8(2) Judicial Review 281
- ¹⁰³ Cashmore J, n 102
- ¹⁰⁴ *R v TA* (2003) 57 NSWLR 444; [2003]NSWCCA 191
- ¹⁰⁵ *R v TA* (2003) 57 NSWLR 444 at [8]
- ¹⁰⁶ *R v TA* (2003) 57 NSWLR 444 at [11]
- ¹⁰⁷ *R v TA* (2003) 57 NSWLR 444 at [12]
- ¹⁰⁸ *R v TA* (2003) 57 NSWLR 444 at [12]
- ¹⁰⁹ *R v TA* (2003) 57 NSWLR 444 at [14]

¹¹⁰ Spigelman JJ, Chief Justice of NSW, “The truth can cost too much: The principle of a fair trial”, (2004) 78 *Australian Law Journal* 29

¹¹¹ *Criminal Procedure Further Amendment (Evidence) Act (NSW) 2005*; Act No. 25 of 2005, Schedule 1.

¹¹² “What does s 275A of the Criminal Procedure Act mean to you as a judicial officer?”
http://www.judcom.nsw.gov.au/benchbks/sexual_assault/internet_main.html (accessed 27 May 2008)

¹¹³ NSW LRC “Report 112 (2005), ‘Uniform Evidence Law’”. The report can be accessed via the ALRC’s website:
<http://www.austlii.edu.au/au/other/alrc/publications/reports/102/> (date accessed: 1 March 2008)

¹¹⁴ NSW LRC, n 91, Chapter 5, paragraphs 5.119-5.128

¹¹⁵ Yaroshefsky E, n 23, p.154; Temkin J, n 31, p.246