Chapter 1

Cross-examination: preliminary

The purpose of this chapter is to introduce a realistic and balanced overview of the role of cross-examination in the whole context of criminal trials. The dramatic spectacle of confrontations between the parties tends to focus attention on cross-examination as if it were an isolated technique. It is not. It is vitally important, but its significance must be understood in relation to the other elements of a criminal trial which are referred to here. This comprehensive view is essential for effective cross-examination in practice. All aspects of criminal advocacy are involved.

I WHAT IS CROSS-EXAMINATION?

The word 'cross-examination' is used throughout this book to denote the stage of a procedure in a criminal trial in which one advocate questions a witness called by another. The two advocates may either appear for the prosecution or the defence respectively or else they may each represent different accused persons. It is this procedural situation which constitutes cross-examination, not the method of questioning. A cross-examiner may use a variety of approaches.

Commonly, of course, cross-examiners challenge adverse evidence with the aim of weakening or destroying it, but this destructive approach is only one form of cross-examination, albeit the main one in practice. An advocate may cross-examine very gently without challenge in an attempt to elicit helpful testimony from a co-operative or even an unco-operative witness called by another advocate. For example, this is often the situation in the cross-examination of expert witnesses. However, the legal duty of any witness is to testify truthfully in a non-partisan manner wherever this may lead. Accordingly, it is not the case that the evidence of every witness called by another advocate must be attacked. A competent cross-examiner must be skilled in whatever approach the courtroom situation requires.

II THE RULES OF EVIDENCE

Cross-examination must comply with the rules which govern the admissibility and relevancy of evidence. Advocates on their feet must know, instantly, which way the law will permit them to go in questioning a witness. Similarly, advocates who are seated must be instantly aware of what kind of evidence is inadmissible so that they can object before any harm is done. However, this is not a book on the law of evidence. It is designed for all English-speaking countries and it assumes that advocates have mastered the law of evidence in the jurisdictions where they practice.

Knowledge of the law of evidence is only a precondition of an advocate's skill, not the skill itself. Cross-examination as a persuasive art uses techniques and tactics which are based on human nature and common sense. That is why the same skills in cross-examination can be exercised in courts founded on the adversarial system, from Aberdeen to Alabama.

III PROFESSIONAL ETHICS

Cross-examination is governed by ethics derived from law, professional codes, judicial dicta, tradition and practice. The principles are similar in English-speaking courts. Unethical cross-examination may provoke all kinds of unfortunate results such as objections, criticisms, rebukes by a judge, exclusion of evidence or a jury's antagonism.

An advocate's duty is to present his case as forcefully as he can without becoming personally identified with it or forming or expressing any

opinion about it. Nevertheless, he is entitled to conduct a case in a way which *suggests* that he believes in it. This is part of his persuasive role.

An advocate's main ethical problem concerns the presentation of false evidence or attacks on truthful evidence. Inevitably, at least one party will lead evidence which the court rejects. There may be several reasons for this, but commonly it means that some witnesses have been lying. What is the responsibility of the advocate who called these witnesses?

The test is whether or not he has acted in good faith. He is not at fault if he conducts his case on the basis of information which he was told was genuine. He is entitled to accept that information without evaluating it. Judgment is a matter for the court. The fundamental principle, from which others flow, is that an advocate must not *knowingly* mislead or deceive the court. This is the limit of his accountability for the accuracy of his case or the evidence which he leads or the justification for his attacks on evidence which may be truthful.

Therefore, advocates should only assert facts responsibly on the basis of the information given to them and must not invent facts. Again, advocates must not challenge, or try to disprove, facts which they know are accurate.

These duties apply strictly to prosecutors. They should disclose any material evidence which may help the defence. They should present their cases with the aim of helping the court to reach a just verdict rather than to secure a conviction. They should cross-examine the accused in a fair and reasonable way without exaggeration or distortion. When a prosecutor can competently attack an accused person's character, he should only do this if it is necessary and not just to create prejudice.

The defence need not disclose adverse evidence in order to help the prosecution. In cross-examination, the defence advocate must not suggest facts without grounds. He may test prosecution evidence for accuracy or reliability, but he must not challenge it as inaccurate, for example, by denying the crime, unless this is based on his information. Obviously, an advocate must not devise a defence. His duty depends on what he is told.

What about confessions by an accused person to his advocate? Normally, defence advocates are not given any conclusive incriminating information. Presumably, guilty clients prefer to keep this to themselves. The advocate is therefore free to contest anything which differs from what he was told.

However, if an advocate is placed in a position of professional embarrassment by what an accused person discloses to him, he may withdraw from the case or, in some situations, he may still, ethically, conduct a 'legal' type of defence independently of the facts. For example, the defence advocate would be entitled to object to the admissibility of crucial evidence if there are legal grounds for doing so or he could submit that in law there is no case to answer, either of which might lead to an acquittal.

IV EXAMINATION-IN-CHIEF

The relationship between examination-in-chief where an advocate leads evidence from his own witnesses and his cross-examination of other witnesses requires clarification. It is to be expected that examination-in-chief is the procedure which is more likely to *prove the facts* which the advocate seeks to establish than his cross-examinations of other witnesses which may *disprove contrary facts*. There are obvious reasons for this. A challenge to a witness's evidence in cross-examination will probably be resisted and express concessions are less likely here. A witness who said something once when he was examined by the advocate who called him will generally adhere to that evidence. The witness may believe that his evidence is accurate and truthful. He may not wish to look foolish to the court. He may fear the consequences of changing his evidence. If the original evidence had a partisan motive, this will still be influencing the testimony.

The more reasonable expectation is that cross-examination may so weaken the evidence under challenge that contradictory evidence-in-chief led by the cross-examiner will prevail. It is less realistic for an advocate to hope that he can destroy the adverse evidence by cross-examination alone, although, of course, this sometimes happens. The topic of the relationship between examination-in-chief and cross-examination will be developed later.

V RE-EXAMINATION

Re-examination should only be undertaken when it is really necessary. It is best to regard it as a corrective to cross-examination. If, as a result of cross-examination, the evidence of a witness called by an advocate has

been impaired or weakened or has become unclear, that advocate may re-examine in order to repair the damage.

This obvious link between re-examination and cross-examination will be explored in the appropriate chapters.

VI FINAL SPEECHES

Final speeches summarise the effects of *all* the evidence, including that obtained under cross-examination, but there are specific links between final speeches and cross-examination.

A cross-examiner may refrain from asking a witness a final and conclusive question after extracting helpful concessions from him. This prevents the witness from changing his mind or retracting or qualifying what he has already said. However, there is no such risk in a final speech in which the advocate who cross-examined the witness can state the obvious conclusion to be drawn from that line of evidence.

Similarly, where inconsistencies have emerged in the evidence of a single witness or more than one witness on the same side, a cross-examiner may refrain from pointing them out expressly. This deprives witnesses of the chance to explain or remove the inconsistencies. In a final speech, it is then open to the cross-examiner to develop and exploit these inconsistencies in an opponent's case without fear of contradiction by witnesses.

In his final speech, an advocate has an opportunity to comment adversely on every aspect of the evidence of witnesses which emerged during his cross-examination, including their demeanour, hesitancies and weaknesses. Another productive area for attack could be the similarities of evidence which emerges on later comparison where the language and patterns of testimony suggest collusion and coaching. The great advantage of doing this in the course of a final speech and not in the course of cross-examination is that contradiction can only come from an opponent's speech, but not from witnesses. The finality of a speech for the defence gives it special potency.

Naturally, such comments in final speeches should be seen to be based on what was audible or visible in the course of the evidence and reasonable inferences from that testimony. It should not consist of

exaggerated conclusions or speculations which are unsupported by the evidence.

The practical value of this discussion concerns the tactics which an advocate decides to employ in cross-examination, namely, whether the best stage at which to make a point is then or later in his speech. Notwithstanding what has been said above about restricting questions for exploitation in a final speech, an advocate must bear in mind during cross-examination that he is expected to challenge adverse facts known to any witness. Failure to do so may have the effect that the advocate is deemed to accept the adverse facts. So these and other factors must be balanced in deciding what to ask in cross-examination and what to omit. Good judgment is needed.

VII THE REALITY UNDERLYING THE TRIAL

A criminal trial takes place within the context of the real underlying situation which the court tries to reconstruct. Despite contentious advocacy, what actually happened will have an effect on the trial. Usually, the reality will be at least significant and sometimes it may be crucial, although occasionally there may be a miscarriage of justice.

Unlike some jurisdictions in Continental Europe, the adversarial system is not a free judge-directed enquiry into the facts. The parties, not the judge or jury, decide what evidence should be heard by the court or omitted and how that should be presented. The parties' decisions control the information which the court can consider.

The important point is that a criminal trial should not be regarded as a game of skill where the best performer wins. The real facts, albeit in the past, impose limits on what can be alleged. For example, where a victim is dead and buried, is it likely that a defence advocate in a murder trial will suggest that he is still alive?

A good cross-examiner will realise that his skill, powerful though it may be, is not magic and should not be expected to prevail against the truth. Cross-examination is part of a trial process which is designed to discover the truth, not destroy it. This realisation will curb excesses of cross-examination which is unnecessarily protracted and unproductive.

Examples of incorrect images of advocacy have persisted down the ages. For the Sophists, who taught rhetoric in the classical age of Greece, the real facts were regarded as almost irrelevant. The advocates' task was to

create some kind of make-believe theatre which would persuade the forum to accept the views which they represented. What was then decided was deemed to be the truth.

Even more recently, some eminent jurists have held rather unbalanced views about the significance of cross-examination. Wigmore was so enthusiastic about cross-examination that one might think that it was all that mattered in a criminal trial, as the following description shows:

> '... it is beyond any doubt the greatest legal engine ever invented for the discovery of truth ... The fact of this unique and irresistible power remains and is the reason for our faith in its merits ... cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.' (John Henry Wigmore, *Evidence* (3rd edn) para 1367)

Archbishop Whately was not so impressed by the value of cross-examination:

> '... 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, debased and depraved of all possible employments of intellectual power.' (Archbishop Whately, *Elements of Rhetoric*, p 165)

Obviously, while these two jurists express different views of cross-examination, they agree in ascribing formidable power to the process, according to one, in discovering the truth and, according to the other, in distorting it.

In modern times, popular mythology is also responsible for exaggerated views about the role of cross-examination. Courtroom battles have always fascinated the public. The spectacle of intellectual combat with a dramatic outcome is fully catered for by literary fiction, films and television. Typically, they focus on and exaggerate the importance of cross-examination to the exclusion of other aspects of advocacy and they emphasise the significance of personal ability.

Are some advocates perhaps influenced by such elitist portrayals?

Such approaches do not help. They do not appear to be based on any analysis of the function of cross-examination in relation to other processes in a criminal trial.

VIII PRESENTING A STORY

Success in advocacy is often based on persuading a bench of magistrates or a jury to accept a coherent human narrative about what happened. A story holds interest and connects facts which, individually, might be forgotten, misunderstood or ignored. A story encourages visualisation which creates images and the big picture of what happened. It also helps the court to develop views about the motivations of the persons involved. A story makes the alleged situation real and vivid.

This again is a consideration for the cross-examiner to bear in mind. It will not be enough to score on isolated points the meaning or importance of which may be puzzling to the court. The cross-examiner should always take care to relate individual points to the whole story on which he is basing his case.

The defence, of course, need not call the accused person or any witnesses to testify and prosecutors cannot comment on failure to do so. The defence can simply challenge the account put forward by the prosecutor who has the burden of proof. In this situation, it is not so easy for the defence to present a story out of the mouths of adverse witnesses.

Frequently, the defence do in fact call the accused person and other witnesses so that a positive story can be put forward to counteract the prosecution case.

IX THE ROLE OF CROSS-EXAMINATION

This chapter may be summed up briefly.

Cross-examination is a stage of procedure, not a method of questioning witnesses. There is a variety of ways of cross-examining which will be studied in this book.

Cross-examinations must of course comply with rules of evidence and the requirements of professional ethics.

Most of the substantive evidence in a criminal trial will be provided by the examination-in-chief of the prosecution and defence witnesses. Cross-examination alone is not usually a substitute for this. Its dominant role is that it allows the representatives of each side to confront witnesses whom they did not call so that they can test and challenge their evidence.

Adverse evidence may sometimes be destroyed by cross-examination, but a more realistic expectation is that it may simply be weakened so that the evidence-in-chief led by the cross-examiner will be preferred.

Cross-examiners should have regard to the ways in which, sometimes, it is better to restrict cross-examination on points which can be better developed in a final speech.

The reality underlying the trial should be kept in mind. It imposes limits on advocacy which should be appreciated.

and after the crime, forensic evidence of personal traces which he left on a victim or at the locus of the offence or traces of the victim or the locus which he carried away on his person, possession of incriminating articles, real evidence or admissions made to the police.

Circumstantial evidence often includes fragmentary and neutral facts here and there spoken to by honest and independent witnesses. Evidence of such facts may well be difficult to challenge in cross-examination as untruthful since this would have required a deliberate plot to incriminate the defendant on the part of unconnected witnesses. It is easier to challenge such evidence as mistaken or unreliable since this would not involve any collusion between the witnesses.

The more facts there are and the more they vary, all pointing in one direction, the less likely it may seem that a number of them is incorrect. However, they can still be questioned by methods already discussed.

The inference to be drawn from these facts may be the real issue, but it is not the function of prosecution witnesses to go beyond the bare facts to which they speak and to draw inferences. That is the function of the court. The defence may therefore be prevented from attacking these inferences about the defendant's involvement directly in cross-examination, although they can, of course, do so in their final speech. Moreover, the defence may put their case forward in other ways, including direct evidence which contradicts the defendant's implication to which the circumstantial evidence points. The most common example would be evidence from the defendant denying his involvement and this might be supported by eyewitnesses. Again, the defence may be one of alibi.

When police witnesses testify to admissions and confessions made to them by the accused person, they are not giving direct evidence of the commission of the crime by him. Such police evidence is best regarded as a form of circumstantial evidence. The scope for exposure of error or unreliability in such police evidence, by cross-examination, has already been discussed.

IV EXPOSING ERRORS OR UNRELIABLE EVIDENCE

A Rapport with witness

Before trying to expose errors or unreliability in evidence, a cross-examiner must first decide that he will treat the witness as an honest person whose aim is to tell the truth as he understands it, but who is or may be mistaken in some way. Everything in this section is based on this evaluation of the witness. If, in the course of his cross-examination, an advocate develops significant doubts about a witness's good faith, for example, if strong partisanship emerges in his testimony, the challenge may develop into an attack on credibility using methods described elsewhere in this book.

It is essential that advocates should make his acceptance of the witness's honesty clear to him so that he can create a rapport between them and obtain his co-operation.

The cross-examiner should also try to develop the witness's confidence in the new testimony which he is being invited to give at this stage. Many witnesses who are asked to correct their earlier evidence are anxious about this and are glad to receive this kind of reassurance. They may be concerned about deviating from what they said in their examination-in-chief or statements taken by the police or lawyers. If such witnesses have doubts about their testimony, they will welcome the chance to express them frankly in a situation which is friendly and supportive. Accordingly, it is of great importance that a cross-examiner who intends to question the reliability of a witness's testimony should start by creating a good relationship with the witness.

It is not difficult for a cross-examiner to establish a good rapport with a witness. He would do this by his manner, his tone of voice and the way in which he frames his questions.

Since this is cross-examination, an advocate would be entitled to put leading questions to the witness. It would be simple to use these to form the desired bond. For example, an advocate might say in considerate tones, 'Mrs Simpson, I think that what happened on the night which we are enquiring about must have been very disturbing for you – is that not so?'

A friendly and courteous approach should be maintained throughout with no suggestion of distrust. Questions should be tactful and should avoid or minimise any suggestion that the witness's powers of observation or recall are being criticised. So far as possible, the witness should be allowed to save face.

Alternatively, a cross-examiner may be faced with a witness who is unco-operative. There could be several reasons for this.

The witness may be convinced that the evidence which he gave in his examination-in-chief is accurate and is not prepared to change it in any way.

Another witness may have been motivated by bias or partisanship in his examination-in-chief and because of his motives he will resist any attempt to weaken his evidence.

Other witnesses may be so anxious, for several reasons, about changing their evidence that they will resist any attempt to lead them into doing so.

These unco-operative types of witnesses provide sufficient examples of the difficulties which may face a cross-examiner who wishes to challenge evidence on the ground that it is mistaken or unreliable.

With these and other kinds of reluctant witnesses, a cross-examiner cannot expect to develop a rapport. They are more likely to be suspicious of and wary about him, fearing that he is trying to trip them up or expose them as foolish or incompetent observers.

If this is the case, a cross-examiner would need to treat such witnesses with firmness.

However, even where he cannot hope to form a bond with some witnesses, it is only sensible that an advocate should try to avoid making things worse by developing hostility in the witness toward himself which would only increase the difficulties of his task.

Accordingly, the above comments and recommendations about how to approach a co-operative witness whose evidence is alleged to be mistaken or unreliable should also be borne in mind in dealing with unco-operative witnesses.

B Professional detachment

Whether they are challenging the reliability of testimony given by co-operative or unco-operative witnesses, cross-examiners should maintain a professional attitude towards them. Advocates should never comment on the evidence, state their own opinions or appear to be giving evidence themselves. They should not argue with the witness and they should be courteous and scrupulously fair. What a witness has said should not be misrepresented. A cross-examiner should show no concern if he receives an unwanted answer.

Any helpful concessions about mistakes or uncertainties in the evidence under enquiry will impress the court more favourably if it is obtained in these ways. The desired effect is to convey to the court that the opponent's witnesses have made concessions voluntarily and without pressure.

C Control of witness

Witnesses under cross-examination about the reliability of their evidence should be controlled, albeit in a pleasant way. This can be done by asking leading questions, and not open ones, in a sequence. An exception would be when the advocate can confidently expect a desired answer and it would have more weight if it were not elicited by leading.

A typical way of controlling a witness is to put a question in the form of a statement with which he is invited to agree or disagree.

If a witness tries to evade an unwanted or forceful question by not answering it directly, circumlocutions or changing the subject, a quiet but firm insistence and repetition of the question can put the evidence back on track.

D Questions

Sections II and III of this chapter contain abundant material for the substance of questions which probe evidence for errors of observation, memory and identity.

Almost any evidence which witnesses might give in their examination-in-chief could be explored by the comprehensive lines of enquiry which have been recommended there.

It is suggested that such questions should follow a pattern. The first step would be to probe the facts and circumstances which could have led to error or made the testimony doubtful. For example, if the cross-examiner is trying to show that the witness's observation was faulty or unreliable, he should not plunge in with a suggestion to that effect which the witness will simply deny. No progress would be made in this way. It is of course appropriate to make such a suggestion for comment by the witness, but there is little point in doing this until a foundation for it has been laid by highlighting facts which support this allegation. For example, the witness might be asked about features of the event which could have impaired his observation like a menacing crowd, poor lighting or the fact that he had just left a pub where he had drunk quite a lot.

If the reliability of the witness's memory is to be challenged, questions about discussions which he may have had with other witnesses and the police might be productive. Again, if visual identification is to be challenged, the surrounding circumstances which could have affected it should be examined. Moreover, the nature of the visual identification itself should be carefully scrutinised with, perhaps, the aim of showing that the witness is only testifying about resemblance and not recognition, which is of crucial significance if it is accepted.

Enough has been said here to show that mere suggestions that testimony is mistaken, incomplete or unreliable will have little or no effect unless a basis of fact for these contentions has first been established for them.

In challenging the reliability of evidence, witnesses may also be confronted by the cross-examiner with other conflicting evidence such as inconsistent statements made by other witnesses who support their own story or contradictory evidence given by the cross-examiner's witness.

An attack on the reliability of evidence must be patiently built up, step by step, in this detailed way and should be founded on objective facts so far as possible. It should never degenerate into an argument between the advocate and the witness or assertions by one which are denied by the other.

Questions in this area should be framed in simple, short, lay terms and should be put in an informal manner. Each question should have a single point to which the advocate can predict the answer – unless there is a sound reason for departing from this advice. The essential requirement

is that a question should be so clear that the witness cannot claim to have misunderstood it and cannot answer it in an ambiguous or confusing way.

It may be necessary sometimes to approach a desired answer by a progressive series of questions.

If questions elicit unwanted or unhelpful answers, they should not be repeated in the same or a similar form – if at all. It is better in this situation to approach the topic from another angle.

Cross-examiners should avoid 'fishing' or open questions to which the answers are unknown, although sometimes, exceptionally, they may think that the possible gain is worth the risk.

A jury may not be impressed by attempts to bully a witness into giving an unqualified 'yes' or 'no' answer.

Where a witness gave harmful evidence-in-chief, a cross-examiner should not question him in the same way since this will merely lead to a repetition of the adverse testimony. Instead, using the material provided earlier in this chapter, the cross-examiner should try to undermine the harmful evidence by probing and weakening its foundations in observation, which may have been faulty, or in memory, which may have faded or become tainted.

Naturally, a cross-examiner should, if possible, also lead positive evidence-in-chief in order to contradict the adverse testimony which he is challenging.

E Defined aims

An advocate should cross-examine with specific aims which he has clearly formulated in his mind. He may or may not conceal these aims from the witness for tactical reasons. If he conceals his aims, the court, as well as the witness, may not grasp them initially, but at some point, if the cross-examination is effective, these aims will become clear to everyone. Before this happens, a line of cross-examination may be the subject of objection by the opponent on the ground of relevancy. If so, a cross-examiner may prefer to explain his objectives to the court outwith the presence of the witness.

The credibility of evidence will be examined in the next chapter. In the present chapter, it is assumed that the cross-examiners will in no way

challenge the sincerity and truthfulness of witnesses. Their aims will either be to show positively that testimony is mistaken or at least to weaken it by showing that it is unreliable.

If the objective is to show positively that a mistake has been made by a witness who gave firm evidence about some facts in his examination-in-chief, he will probably resist any challenge. If so, the attack should include two components.

The first is that a cross-examiner must always put his case to witnesses who are in a position to know the facts. So in addition to trying to undermine confidence in the witness's observations and memory, a cross-examiner should also ask the witness explicitly to accept or deny that alternative account. This presents the cross-examiner's overall case to the court.

The other step which a cross-examiner must take in order to replace mistaken evidence with the version which he seeks to prove is to lead positive evidence-in-chief to that effect – providing that such evidence is available of course.

These steps are necessary since undermining a witness's testimony by showing that it is mistaken or unreliable does not usually, per se, establish the contrary.

The defence, of course, having no obligation to lead evidence or prove anything, may elect not to do so. In that situation, however, the defence may still gain an acquittal simply by undermining confidence in the reliability of prosecution evidence so that the court is left with a reasonable doubt about essential issues of fact.

The situation is similar where an advocate suggests in cross-examination that while the evidence of the witness is accurate, it has significant omissions. To succeed in this contention, the cross-examiner would require to put the omitted facts to the witness and lead positive evidence in support of them. To prove facts, positive testimony must come from somewhere.

Cross-examination to undermine the reliability of evidence is more forceful to the extent that the sources of error which can be indicated are *specific*. For example, it is more effective to probe the nature and extent of a police witness's discussions of the evidence with his colleagues than merely to suggest that his memory may be faulty.

F When to stop

Knowing when to stop cross-examining is important for a particular topic, as well as for the whole cross-examination of a particular witness. Usually, the best advocacy practice is to stop at once when the desired result has been attained. This brings the process to an end on a favourable note which will be the court's final impression of that witness.

If, on the other hand, an advocate tries to gild the lily by asking further questions in the hope of additional gains, he will often regret having done so. Given this chance, the witness may modify his concessions in an unwanted way or even retract them.

Sometimes, indeed, provided that a cross-examiner has not failed to put his case to a witness who is in a position to know the facts, it can be effective to stop the cross-examination even before a desired result has been obtained. For example, if a witness testifies in a way which is inconsistent with a previous witness, the comparison need not be put to him. This may leave a glaring inconsistency in the evidence of a party without explanation. The witness has no opportunity of reconciling the inconsistencies or diminishing their effect. This will give the cross-examiner a decided advantage in attacking the evidence of both witnesses in his final speech.

Other similar flaws which emerge under cross-examination may likewise be left without further enquiry and can be exploited more effectively in final argument. To handle this type of situation requires care and good judgment.

Chapter 4

The credibility of evidence

I INTRODUCTION

The term 'credibility' in this book, and in the courts generally, is concerned with an assessment of the extent to which *evidence* may be accepted as truthful. This is a matter of judgment which may be right or wrong. Evidence may be judged to be true, whereas it is actually false. Equally, accurate evidence may be disbelieved.

It is better not to apply the term 'credibility' to *witnesses*, although this is often done and may cause confusion. In a subtle way, this usage displaces the focus of attention from the testimony, which is the real issue, to the character of the person who is giving it. While the character of a witness may be a factor in evaluating the credibility of what he says, it should not be the sole determinant of the decision. An habitual liar may be telling the truth about a particular incident or else a paragon of virtue may lie if the motivation is sufficient in a given situation.

Assessing the credibility of evidence, strictly speaking, is not concerned with unintended inaccuracy, namely, errors; this was the subject of the previous chapter. Credibility refers to lies, that is intentional and

motivated attempts to deceive. A judgment about credibility may not fall into an all or nothing category. The assessment should be discriminating and may be a matter of degree, although it is unquantifiable.

Credibility is treated here as a question of the court's *view of evidence*, rather than of *witnesses*, although these matters are related. Statements are the object of belief or disbelief; witnesses are the objects of trust or distrust.

To impute credibility to a witness implies that the person has a specific quality, a fixed characteristic of veracity, which settles the question. It stems from a bygone division of people into truthful and untruthful categories, so that some are credible persons and some are not, independently of the context.

Modern views are more complex and more discriminating. It would be generally accepted that whether or not the witness will tell the truth is not determined by a specific trait which inclines him in either direction. It depends rather on the whole individual, his motivations and his relationship with, and his reaction to, the particular situation. Persons of impeccable character will lie in some situations, perhaps for laudable motives. On the other hand, persons of the most dubious character may be telling the truth in a particular context.

Lying is rife in criminal trials. It is a more serious problem for the courts than mistaken evidence, although some errors may be crucial. The prevalence of lying is seen every day in conflicts of testimony where witnesses must know the truth.

The trial process depends on belief in the testimony of those witnesses who are trusted. Misjudgments about this involve a variety of risks. Believing lies or disbelieving or doubting the truth may lead to miscarriages of justice.

Cross-examination by each party, whether or not it succeeds, can contribute powerfully to a proper decision. The value of destroying an opponent's evidence is obvious, but intensive cross-examination which makes no impact on evidence may enhance its credibility and is equally valuable to the court, although not to the cross-examiner. It is tactically better to refrain from cross-examination than to do it badly.

Sometimes, however, an advocate has no choice about whether to cross-examine where he is bound to put his case to an opponent's witnesses who know the relevant facts.

If the cross-examiner foresees an adverse response, it is best to put his case in the form of one comprehensive leading question which anticipates and weakens the form of adverse answers without giving the witness an opening to develop or repeat them.

An example would be 'despite all the evidence to the contrary, I suppose that you still insist that my client was the driver of the car?'

Since an advocate assists the court whether he succeeds or fails, he can cross-examine as forcefully as he wishes, unrestrained by personal doubts. However, he must only challenge the truthfulness of evidence responsibly, on the basis of information contained in his instructions, which it is not his duty to assess.

The law cannot eliminate lying evidence totally, but it tries to discourage and expose it in various ways.

To some extent, the adversarial system, in itself, diminishes lying or belief in lies. The rules of procedure, evidence and penalties provide a context in which evidence may be led, tested, contradicted and evaluated.

However, this has its limits. Daily conflicts of sworn testimony signify that, for many witnesses, the oath or affirmation are mere formalities. Except for a few who take them seriously, they are feeble as deterrents to lying and of no help in cross-examination or assessing evidence. Some witnesses may tell the truth because of the religious sanction and others from a sense of duty or fear of penalties. The oath is unlikely to deter witnesses with strong motives for lying.

Penalties for contempt of court or perjury may even have an unintended effect in reinforcing falsehood. In the first instance, witnesses must have strong motives to risk committing perjury. If they have overcome their fear of the consequences and have lied in their evidence, their motives for lying may be strengthened by fear of the penalties which may follow from exposure. This double motivation could discourage retraction of lies, even under forceful cross-examination.

Open misconduct in testifying, such as evasiveness or fencing with questions, can be dealt with at once by warnings or penalties, but most lying evidence is more covert. Perjury may only become apparent in a later trial. Some forms of false testimony do not constitute perjury in law or else are undetectable, for example, omitting material facts or giving evidence a twist in a false direction. Perjury is hard to prove.

Most trials could easily be duplicated by later trials for perjury. Only a small fraction of false evidence becomes the subject of prosecution.

The attempts of the law to deter interference with witnesses are often ineffective. Intimidation by threats to witnesses or their families or fear of reprisals even without threats are substantial causes of lying. Threats may be verbal and hard to detect even if witnesses are not too afraid to report them. Police resources are limited. The protection available to threatened persons is often inadequate. Some have been known to move to other homes.

Intimidated witnesses, who are usually called by the prosecution, are common figures in criminal courts. Typically anxious and subdued, they often give evasive, inconsistent or improbable evidence in barely audible tones because of their dilemma of being caught between fear of threats and fear of the law.

Under pressure, depending on the persons and circumstances, such witnesses may persist in their falsehoods. These often include fabricated 'amnesia' for facts or inability to identify a suspect. Such claims may be unconvincing, but they are very hard to demolish.

Intimidated witnesses sometimes reverse the truth in court, although they gave genuine evidence to the police at an earlier stage. However, a useful provision allows a cross-examiner to refer the witness to any previous inconsistent statement which he made on a specified occasion.

If the witness denies that previous statement, it may be proved by other witnesses. If he admits the statement or it is proved by other means, in cross-examination it can be compared with, and used to discredit, his present evidence. The previous statement is only admissible for this limited purpose, but not as evidence on the issues. It will not per se prove the contrary of his evidence in court.

The oath, penalties for testifying falsely or for interfering with witnesses and the admissibility of previous inconsistent statements have a direct bearing on credibility, but cross-examiners should be familiar with many other areas of the law which are also important in this connection.

These include regulation by statutes and codes of practice of evidence of confessions and admissions in order to minimise possible lying by witnesses on either side. The various discretions conferred on judges to exclude evidence which was improperly obtained, or which is unfair or prejudicial, should be known. The rules relating to pre-trial identification procedures were discussed in the previous chapter.

The requirements for proof include safeguards against the acceptance of lies in the form of judicial warnings to juries or magistrates' self-direction about the risks of convicting on the basis of some kind of evidence and, where appropriate, the need for corroboration. Above all, placing the burden of proof on the prosecution and requiring a standard of proof beyond reasonable doubt for guilt is the overall protection against wrongly giving effect to lies. Of course, these legal provisions, however valuable they may be, cannot guarantee that any tribunal of fact will evaluate evidence correctly.

Lying and its exposure are psychological processes, but psychology as a formal academic subject offers no help to the cross-examiner at this time. Psychological research into testimony since the early twentieth century has focused on errors of perception and memory.

Many psychologists claim that their findings can contribute to court processes, but in the present state of their subject, this is unfounded. The methodology of psychological research is experimental and statistical and is confined to the laboratory or artificial situations. The findings obtained by these methods are often controversial and, in any event, they add nothing significant to common sense.

This methodology cannot cope with the motivational processes, the real-life events and the court situation in which lying occurs; hence, psychologists have in general ignored the study of lying. No current body of psychological knowledge has any practical value for application to the problem of credibility in the courts. If it were otherwise, presumably the legal profession would have seized on it long ago.

There is no known psychological technique or test which in isolation can penetrate the mind of an individual to ascertain if he is lying.

This insight can certainly not be derived from so-called 'body language'. Such sound psychological research as has been carried out has destroyed the popular mythology about this and casts doubts on the reliance by the courts on the demeanour of witnesses as a guide to veracity. Moreover, even if lie detection in this way were possible, it would not reveal the truth, which is not necessarily the contrary of a lie. By psychological criteria alone, it is not possible to detect lies or discover the truth.

For attaining the truth about human events, the best method developed so far, although it is not infallible, is the holistic comparison of various reports about a common reality after they have been tested or challenged by adversarial methods, namely, a criminal trial. This highlights the

function and importance of cross-examination. On comparing the experience and insight of the two professions, clearly, at the present time, it is the psychologist who can learn about lying from lawyers and not the converse.

A decision to lie in court must, of course, be the outcome of a complex motivational process, but it is unnecessary and impracticable to go into that psychologically. An understanding of lying must be practical, based on common sense, experience of life and the courts and free from psychological jargon or theorising.

II ANALYSIS OF LYING

The subject of lying is approached here on the basis of practical questions which arise in court. These are:

- who lies?
- what do they lie about?
- what are the forms of lying?
- how should lying be detected and exposed?

The subject falls naturally into these divisions.

A Witnesses who lie

The first question, 'who lies?', cannot be answered by suggesting that any category of witnesses is more likely to lie than another. Witnesses cannot be classified in this way.

To expect any class of witnesses to be either wholly honest or wholly deceitful, irrespective of the diversity of individuals or of circumstances, would now be regarded as naive and simplistic. As a result of many factors, including cultural changes, the spread of popular psychology, the development of the media and the experience of the courts, people are more aware of the variety and reality of human nature than they used to be.

It is now less surprising than it used to be when persons who may be expected to have integrity are found to have lied. They include presidents threatened with impeachment, politicians, millionaires who resort to prohibited company practices, sweet old ladies who smuggle or clergymen, protesting innocence, who are convicted of unpleasant sexual offences.

It is a common experience in summary criminal courts to see 'respectable' persons trying to bend the truth, for example, offending motorists, otherwise of good character, who will go to any lengths to retain their driving licences.

In the above examples, lying may be explained by the strong motivation of persons accused of some offence, but witnesses other than the defendant may also be highly motivated, such as relatives or friends of an accused, or prosecution witnesses, such as accomplices, who try to divert guilt away from themselves or who are acting out of malice.

Every day, in courts throughout the land, police witnesses, from whom impeccable standards of conduct are demanded, face attacks on their truthfulness. Even where these attacks may be unfounded, such challenges raise live issues which must be evaluated fairly and without pre-judgment.

Whether or not that will happen will be determined by the interaction of the individual, his motives and the situation. The law does not regard any witness as being above scrutiny.

Lying is always the result of a complex process depending on the particular person in the specific situation. People of the highest character will lie if the situation requires it. In deciding to do so, they will give expression to their own values, whether or not they coincide with general social values. Any other view is unrealistic.

The variety and complexity of individual responses to particular situations must be stressed. A court should never entertain fixed views about the truthfulness of any class of witness. To do so would be a prejudgment or a prejudice. However, it will be helpful to indicate some common patterns.

The defence may hope that an accusation of falsehood will derive support from the partiality implied by the police duty to trace and apprehend suspects and assemble incriminating evidence, although that is a radically different matter.

On the other hand, it may be suggested that false police evidence is given irresponsibly or maliciously.

1 Prosecution witnesses

Police are the most common prosecution witnesses. They testify in most criminal trials, but without special status. Nowadays, police evidence is

attacked constantly, but the attacks are usually directed against the veracity of the individual police witnesses, not the policy, traditions or integrity of the police as a body.

The mildest charge may be that the witness, convinced of the suspect's guilt and misconceiving the public interest, has wilfully exaggerated or identified him as one of a group of wrongdoers, although there is little or no basis for this or it is said unfairly that he resisted arrest.

A common accusation is that a confession or admission has been falsely imputed to the defendant, perhaps by two officers, and entered in their notebooks. Such evidence, if accepted, though false, could overcome any weakness in the prosecution case.

The worst allegation would be that of a criminal conspiracy by a number of officers to convict a person known to be innocent, perhaps aggravated by 'planting' false exhibits or intimidating civilian witnesses.

A common weakness of such challenges is that the defence often cannot suggest, let alone prove, sufficient motivation for such illegal conduct, despite the risks of detection, loss of career and pension and imprisonment which such police witnesses would incur.

Sometimes the ranks, numbers of officers and activities involved create such a danger of exposure that falsehood seems unlikely.

Moreover, even if lying in court seems safe, police officers know that unforeseen evidence might emerge later. This could occur if a genuine confession were to be made by the real wrongdoer or if a public inquiry were to be held, which would expose the perjury.

Obvious reluctance and outright perjury do not go well together. A perjurer will wish to be seen as a plausible witness, not a hesitant one.

Accusations of falsehood against the police may simply be the desperate inventions of an accused, but it has certainly been established that such deceit does occur sometimes. Every case must be investigated and decided on its merits.

A defence advocate is entitled to attack police evidence as false if this accusation is based on information given to him and instructions which require him to do so. However, unless extreme attacks are supported by positive defence evidence, this line of cross-examination may be vulnerable to criticism.

The defence may contend that the evidence of accomplices who are prosecution witnesses is untruthful. This may derive support from the admitted bad character of such witnesses and their potential motives for lying. It may also be derived from a 'cut-throat' defence where defendants blame each other for the crime.

Accomplices may minimise their own blame and add to the blame of others in the hope of gaining immunity or receiving a lighter sentence. The evidence of accomplices has always been regarded with caution and as requiring judicial warnings.

Complainants in sexual offences may be accused of lying. It may be suggested that a female who consented to sexual intercourse now denies it for personal reasons or that the charge is the result of hysterical fantasy or malice. This sometimes occurs where a woman has been under an anaesthetic for medical or dental purposes.

In charges of sexual offences, a jury must be warned of the danger of convicting on the uncorroborated testimony of the complainant. Thus the issue of credibility is often acute.

The rules relating to the evidence of children, however they give it, and the requirements as to warnings and corroboration apply to situations where truthfulness is a very live issue.

A crime of violence may have involved a struggle between several persons and perhaps issues of self-defence. Complainants and their associates may continue this battle in the courtroom, implicating persons falsely out of animosity.

2 Defence witnesses

Defendants are generally treated as untruthful by the prosecutor who cross-examines them. Presumably, they know the truth of the prosecutor's assertion which they deny. It would be highly exceptional, although possible, for an accused to be mistaken when he denies guilt, for example, if he was unaware that the car which killed a child was the one which he was driving.

Defendants are accused of lying more than any other class of witness and are probably the most motivated. However, a defendant would be seeking acquittal, whether or not he was guilty, so that motive alone cannot

However, the contradiction between competing versions of the facts is, of course, a crucial component of the weight of the evidence when it is considered as a whole. For that reason, contradiction is mentioned in the present context.

In conducting the examination-in-chief of his own witnesses, an advocate should, in addition to reinforcing their evidence to meet the challenge of cross-examination, also ensure that, so far as possible, they counter the positive evidence which the cross-examiner will lead from his own witnesses at some point.

Chapter 6

Cross-examination: foundations

I PREPARATION

A Time required

At the earliest stage of preparing for the trial, an advocate should formulate his overall theory of the case and plan the strategy by which he will present it. These are separate, but related, processes.

Ample time should be allowed for this. Everyone involved in creative activities knows that once the essentials have been grasped and worked on consciously and intensively, subconscious cerebration over a period of time can make a very real contribution to a task.

This occurs during sleep, leisure or while attention is given to other tasks. This mental work is part of the brain's integrative function and is indispensable for simplifying and organising complex material.

A period of time is necessary to allow an overview of a case to mature. It provides opportunities for revision as new aspects develop. It also promotes assimilation and mastery of unfamiliar material.

Although sufficient time is required for all this, in practice, it is often limited by the nature of an advocate's profession. Advocates may have excessive workloads or they may receive late or even last-minute instructions which they must accept.

If they try to accelerate the above processes, their efficiency may suffer. Fortunately, this may be offset by an experienced advocate's familiarity with patterns which recur in many trials.

B Theory of case

An advocate's theory of the case is his total and integrated view of all the facts, and the law which applies to them, in conformity with his objective.

Undisputed facts present no problem, whether or not they are agreed expressly or formally or lack of opposition to them is simply foreseen. If the defence contend that the defendant was not the offender, the commission of the crime is unlikely to be an issue, but if the crime is contested, identity is unlikely to be disputed. This follows from the analysis in Chapter 2, 'The anatomy of a criminal trial'.

The disputed facts for consideration at this stage consist of the parties' respective contentions based on their supporting evidence.

This may have been disclosed by opponents, formally or informally, or obtained directly from the advocate's own enquiries. It is in this area that cross-examination will be planned.

The theory of the case will also cover any disputed points of law which may arise, such as the admissibility of evidence, a submission of no case to answer or the application of the law to the facts proved.

Although an advocate's theory of his case has an adversarial aim, it should not be an exercise in one-sided propaganda. Its prospects of acceptance will depend on the extent to which it has a sound basis in fact, evidence and law, even where alternative views are possible.

C Outline of strategy

The theory of the case is an analysis, but strategy is a plan for presenting that analysis convincingly so that the court accepts it.

An advocate's closing speech is the final stage of a trial at which he sums up and presents his whole case. It is therefore recommended that the strategy should be focused by means of drafting a provisional closing speech. This has two advantages.

The speech is ready for presentation whenever the trial reaches the appropriate stage. It is difficult to predict when this will be. Having the speech ready will eliminate hasty improvisation.

This speech will also be a blueprint for the advocate's conduct of the case and it will integrate all the relevant law and the facts on which his final argument will rest.

Those parts of the draft which deal with contested evidence should contain outlines of the proposed cross-examination. Summaries of the evidence elicited in this way are what will be presented to the court.

This may be illustrated in a disputed visual identification of a suspect by a police witness. Police officers receive a radio message in their van to look out for a stolen white Renault with a specified registration number which is suspected of having knocked down and killed a child. They see and chase the vehicle. It stops and the driver runs off across a stubbled field in darkness chased by an officer who fails to catch him, but who claims that he recognised the driver as the defendant.

The defence advocate, in challenging the visual identification, may note such points as the following:

- location of suspect at point where recognised;
- lighting at that spot;
- distance of witness from suspect then;
- extent to which field was stubbled and needed care in running by suspect and witness;
- number of times suspect looked over shoulder;

- distance from suspect increasing or decreasing;
- why suspect was lost unless far away;
- previous familiarity with suspect, but omitting prejudicial material, for example, convictions.

Each of these eight points could be a focus for cross-examination in which the identification is challenged as mistaken or untruthful. Allowing for individual variations in note taking, each point would only require one or two words to call it to the cross-examiner's mind.

This outline of strategy would include a list of the witnesses to be cross-examined, the proposed topics and tactics and related matters.

Naturally, this will be subject to variation in the trial according to what witnesses actually say, how they say it and the context at the time. In the above illustration, the cross-examiner would have to decide whether to treat the police identification as an honest mistake or a deliberate lie and he would modify his tactics accordingly. He would decide this in the light of the officer's testimony, which might suggest one or other alternative.

The outline would be in the form of bold headings, sub-headings and any crucial details. It should cover all important points, but must be flexible to allow for suitable questions to be improvised in response to the unpredictable form and content of the evidence which will actually be given.

The draft should certainly not contain verbatim lists of intended questions or detailed notes. Instead of being a help, preoccupation with notes could be a real handicap by interfering with the necessary alertness to the witness and to the evidence and its nuances as it emerges.

This could impede the ability to make swift, tactical decisions and may suggest inexperience and lack of confidence. In advocacy, thinking on one's feet is essential. The plan for cross-examination is only an overall guide. It is a map, but not the territory. To omit such preparation would be less than professional, but even thorough preparation cannot replace good practical judgment in the actual trial. They should be combined for maximum effect.

II STRATEGY

A Deciding to cross-examine: objectives

Like surgery, cross-examination is often of crucial importance, but neither technique should be used indiscriminately.

It is a fundamental principle never to cross-examine without a clear and definite purpose. Skilful advocates only cross-examine when they must. When they do rise to their feet, the effect of their cross-examinations is enhanced by the expectancy that it will be significant.

Inexperienced advocates often ignore this principle with resulting damage to their cases.

Much of an advocate's skill consists of knowing when not to do something, where inaction is the more effective option. This negative form of skill is really an expression of purpose and control. It should pervade everything in cross-examination, such as keeping it as brief as possible and stopping whenever the aim is attained.

Aimless cross-examination wastes time, gains nothing, invites criticism, suggests the absence of a real case, emphasises challenged evidence, elicits harmful testimony, dilutes any gain achieved and may create new rights to adverse re-examination.

Such effects, by themselves or in combination, may be seriously damaging or fatal.

The most common type of futile cross-examination consists of going over the evidence-in-chief aimlessly or, perhaps, with a vague hope that some defect may emerge or that it will be changed somehow in going over it again. An aggravation is to delve into pointless detail.

This is not cross-examination in any meaningful sense; it only qualifies as such in the procedural sense of questioning another party's witness.

The probable effect of doing this is to emphasise the harmful aspects of the opponent's evidence-in-chief in various ways.

These include repetition giving the witness a second chance to assert the unhelpful evidence more firmly and allowing him to add supporting detail.

This can convert even relatively harmless evidence into a real difficulty. It would be hard to imagine any greater fault in cross-examination than to achieve precisely the opposite effect to that which is intended.

Such aimless questioning is not converted into anything significant by suggesting finally that the witness is either lying or mistaken where no foundation was laid for this. The witness will simply deny such suggestions of inaccuracy. Little more can be expected.

Confronted with such a feeble challenge, it would be a very shaky perjurer whose facade disintegrated or a very timid witness who conceded that he was mistaken.

However, it is a quite different, and possibly worthwhile, technique for a cross-examiner to ask a witness to repeat his evidence-in-chief in the expectation that he will do so in nearly identical terms which will show that it is memorised.

An advocate should not cross-examine if he cannot foresee any significant and helpful result.

It is not justified if, at best, it will achieve no more than a minor gain, for example, if the evidence to be challenged is merely neutral, unhelpful or only slightly or remotely unfavourable. It is often best to disregard trivial points, even if they are contested, in order to avoid diluting what counts.

To ignore evidence minimises its importance; cross-examining on it shows concern and emphasises it.

Cross-examination is not designed to discredit truthful evidence. If unfavourable evidence will obviously be accepted as true and accurate, it may be more effective to concede it with good grace than to challenge it or pretend that it does not exist.

Despite these reasons for not cross-examining, a party is expected to put his case to his opponent's witnesses who know the facts, partly as a legal duty and partly for tactical reasons.

Texts on the law of evidence should be consulted for the obligation in law and the consequences of failure to comply. Sometimes an advocate who fails to challenge evidence at the time may be deemed to have accepted it, but, in any event, this failure may become an impediment to later forms of challenge.

The legal position may differ in trials on indictment and in summary trials.

Within the ambit of these requirements, a case may be put in ways which range from asking about one point after another, in full detail, to one global and comprehensive question so framed as to elicit a 'yes' or 'no'

answer. Even though this answer is unwanted, it does minimal damage – especially if the words of the question are carefully chosen.

Where the rules of evidence leave the matter open, a tactical decision should be made. If the case is only put for formal purposes, the more briefly this can be done the better, namely, by one comprehensive question or as near to it as possible. This minimises the harm which an adverse witness can do. The danger of emphasising adverse evidence by cross-examining a resistant witness in detail should be avoided. It may be better for the cross-examiner to contradict him by relying on the evidence which he will lead himself.

Assuming that a decision to cross-examine has been made, what are its objectives?

The objectives of cross-examination are not laid down by law. They are tactical. Tactics may be divided into those which have a constructive purpose and those which have a destructive purpose.

The aim of constructive cross-examination is to build or strengthen one's case with positive and favourable evidence obtained from another party's witness which supports one's evidence-in-chief.

Witnesses called by another party are not necessarily hostile, biased or unwilling to co-operate. If they are honest, they may be expected to concede favourable facts where this is justified. Even if they are partisan or untruthful, the context may oblige them to admit some indisputable facts.

The techniques of constructive cross-examination are the subject of the next chapter, namely, emphasis, eliciting new meanings, eliciting new facts and putting the alternative case.

The aim of destructive cross-examination is to weaken, and if possible to destroy, harmful evidence given by a witness (including one's own witness if the court allows this) in order to defeat the opponent's case.

To achieve the rejection of evidence led by the opponent, a cross-examiner usually has to rely on the support of evidence which he calls himself to contradict and overcome the evidence which he is challenging.

However, while cross-examination alone may not destroy the opponent's evidence, its contribution is indispensable. To confront one point of view with another in cross-examination is the heart of the adversarial process. It is an essential factor in persuasion. It is the most natural reaction to

ask a witness 'well, what do you have to say to this?' and to evaluate the reply. Failure to challenge adverse and material evidence can be fatal. A court should not be left simply to adjudicate on competing versions of facts without putting the conflicts to appropriate witnesses.

The techniques of destructive cross-examination will be dealt with in Chapter 8. The overall approaches are either to challenge the witness as a mistaken or untruthful source of evidence or else to attack the evidence itself as inconsistent, improbable or unrealistic.

While these two main approaches of challenging the witness or the evidence are separable on analysis, this is somewhat unrealistic. In practice, one implies the other and they are normally combined, as in this illustration:

> Q: 'You agree now that there was a seven feet high wall in the yard, blocking your view. Were you not lying when you said that you saw the fight?'

B Witnesses liable to cross-examination

The rules of evidence and procedure which govern rights of cross-examination should be known. Restrictions apply to one's own witnesses, co-defendants and their witnesses.

As a general principle, any witness called by an opponent is liable to cross-examination once he has been sworn.

This applies even if the witness does not undergo any examination-in-chief. Sometimes a Crown witness is called for the sole reason of giving the defence this opportunity.

Co-defendants may cross-examine each other and their respective witnesses, within certain limits.

As a general rule, an advocate may not cross-examine or discredit his own witness, although his evidence is unfavourable. He should end the process as quickly as possible and meet the difficulty by leading other evidence to correct the unwanted evidence.

Exceptionally, on the application of an advocate, if his witness seems to be testifying unfairly and to have no intention of telling the truth, a judge may allow the advocate to treat the witness as hostile. If so, the advocate may cross-examine his own witness and may confront him with previous inconsistent statements.

C Subjects of cross-examination

Within the bounds of the rules of evidence, a witness may be cross-examined on any subject which is relevant to the issues of fact or his credit, although it was not raised in the examination-in-chief.

The issues of fact in criminal trials on which cross-examination may take place were analysed in Chapter 2. Almost always, the two main issues of whether the crime was committed or whether the defendant was the offender are limited to the one which the defence choose to dispute, the other being proved formally.

Crimes were classified into result-crimes, conduct-crimes and object-crimes. Issues of identity depended on whether the defence deny that the defendant was at the locus with or without an additional plea of alibi.

Cross-examination on the issues will refer to the facts involved in these forms of crime or, alternatively, in these questions of identification.

By asking about character, previous convictions, bias or previous inconsistent statements, on reasonable grounds where imputations may materially affect credibility, cross-examination as to credit is intended to show that the witness should be disbelieved.

D Sequence of cross-examination

Cross-examination should follow the best tactical sequence, although it ought to balance what is effective for extracting wanted evidence from witnesses and what is effective for convincing the court. No one type of sequence is always best; it depends on the context.

A chronological or logical order helps the comprehension and retention of evidence. This may be best where the advocate's approach is open and direct, for example, if he is eliciting helpful and positive evidence from a co-operative witness or is trying to have him concede that he may be mistaken. Here, the aim will be clear to the witness and to the court.

However, a cross-examiner must often conceal his disbelief of a witness suspected of lying and his intention to expose the deception. If so, he may follow an indirect tactical sequence, which the court may not grasp, by asking questions whose point is not immediately obvious.

A cross-examiner should be prepared to justify his line of enquiry if objection is taken or the court intervenes. This may be done either in the absence of the witness or by assurances or circumlocutions which the

court, but not the witness, understands so that the cross-examiner's purpose is not revealed and vitiated.

Where an indirect sequence is followed in order to conceal the aim from the witness, this will be followed by a direct challenge at the appropriate stage.

In such an indirect approach, the cross-examiner may follow an unpredictable order, perhaps with rapid questioning. He may switch unexpectedly from one topic to another, swing back and forward from crucial to secondary facts or change the angle of approach. This can disrupt a memorised story or interfere with attempts to improvise leading a lying witness with no foundation in reality into confusion and inconsistency.

A cross-examination may start boldly by attacking evidence as untruthful; the sequence may run from strong to weak points. Early success may eliminate the need for later challenges. A good first impression may shake the witness and cast doubt on his later evidence.

The opening of cross-examination is significant. Often, it has maximum impact since interest is at its peak and attention and expectancy are focused on the confrontation.

The sooner a cross-examiner puts forward an alternative version of the facts to those stated in the opponent's evidence-in-chief the better, especially if the witness is the first important one. Ideally, the first questions should state the whole issue and lay a foundation for the rest of the cross-examination.

It is therefore good to begin cross-examination as forcefully as possible, especially by challenging the evidence as untruthful on the strongest grounds available, for example, manifest inconsistency, improbability or confrontation with some strong material which contradicts it. If the witness can be taken by surprise, the impact may be even greater.

Sometimes where cross-examination must begin indirectly in order to lead a lying witness into a trap, it may be necessary to conduct some preliminary probing in order to find the best approach. However, this should never be allowed to deteriorate into the kind of aimless repetition of the evidence-in-chief of the kind which has been described.

An obvious sequence may be followed in constructive cross-examination with the objective of eliciting helpful evidence. The cross-examiner

should open his questioning reassuringly, showing trust in the witness and the appearance of simply asking for additional information.

To open tactfully is also desirable where it will be suggested that the witness is mistaken.

A neat way to open, which shows alertness and exploits continuity, is to ask a first question which follows on directly from the last answer in the evidence-in-chief, as in this example in a charge of indecency:

A: 'As I've told you, I was too afraid to tell my mother about what he did to me.'

(Evidence-in-chief ends)

(Cross-examination starts)

Q: 'Even if you were too afraid to tell your mother, why did you not tell your big sister?'

How cross-examination ends is also important. As soon as any specific objective has been attained, the cross-examination should stop altogether or an unrelated topic should be taken up at once. Cross-examination should never continue beyond the point at which everything material has been covered fully.

An advocate may be tempted to go further in the pursuit of some perfectionist aim like improving the evidence by confirmation or emphasis or to develop a helpful theme. It is rarely beneficial to yield to this temptation. It could ruin the beneficial result which has already been achieved. The risks of continuing usually outweigh the possible gains. It gives the witness a chance to qualify or retract what he said. For the opponent, it highlights the need for re-examination, leading further evidence and final argument.

It is effective if the cross-examination of each witness can be finished by making a good and enduring impression, especially if the last answer sums up as much as possible of the cross-examiner's case in a favourable way.

A good ending would be an explicit victory over the witness, such as a trap which exposes lying, inconsistency, statements contradicted by other credible evidence or obvious improbability. If the trap seems to be inescapable, the cross-examination might exploit it from as many angles as possible, but this may sometimes involve risks of the type which have