


Best evidence or best interests? What does the case law say about the function of criminal cross-examination?

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Abstract

Since 2010 the English Court of Appeal has been engaged in an unprecedented campaign to reform cross-examination practice to reflect empirical research findings on obtaining best evidence from children and vulnerable adult witnesses. It is easy to assume that these cases break away from the conventional theory of cross-examination—carving out a series of exceptions to normal practice. This article reviews the common law rules on cross-examination before 2010 and argues that the new cases are in fact a logical extension of the ordinary rules.

Keywords

advocacy ethics, criminal trial reform, cross-examination

It cannot be too strongly emphasised that these are not the rules of a game. They are rules designed to safeguard the fairness of proceedings brought to determine whether a defendant is guilty of committing a crime or crimes conviction of which may expose him to serious penal consequences. In a criminal trial as in other activities the observance of certain basic rules has been shown to be the most effective safeguard against unfairness, error and abuse.¹

Introduction

In 2010, as is now well known, the English Court of Appeal began a ‘landmark’ (Plotnikoff and Woolfson, 2012) series of decisions regarding the cross-examination of vulnerable witnesses, beginning with *R v Barker*² in which the court held that even when cross-examining a complainant alleging a

1. *Randall v R* (Cayman Islands) [2002] UKPC 19 at [11], per Lord Bingham.

2. *R v Barker* [2010] EWCA Crim. 4; *R v Edwards* [2011] EWCA Crim 3028; *R v W & M* [2010] EWCA Crim. 1926; *R v Wills* [2011] EWCA Crim. 1938; *R v Farooqi* [2013] EWCA Crim. 1649.

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serious criminal offence, defence advocates must ‘adapt . . . cross-examination . . . to enable the child to give the best evidence of which he or she is capable’.³

This is not ‘best evidence’ in the sense of ‘most favourable to a party’. The key consideration in assessing the legitimacy of the questioning is the reliability of the evidence obtained, or, as the court put it in one of the later cases, *Edwards*, whether it is ‘helpful’ to the inquiry.⁴ Consequently, the court required significant cuts to a number of core cross-examination tactics, particularly the use of leading questions, and even curtailed the extent to which in cross-examination counsel can put the case (Henderson, 2014).

Lord Judge, the previous Lord Chief Justice, has called the Court of Appeal’s approach the culmination of a ‘revolution’ (Judge, 2013a, 2013b: 8–9). Compared to the view of cross-examination prevalent amongst criminal advocates in England and Wales until the last few years, and which still dominates related jurisdictions such as New Zealand and Australia, this would seem an accurate description. The conventional understanding is that although cross-examination is a method of testing a witness’s evidence, the reliability of the evidence the cross-examiner elicits is not something for the advocate to be directly concerned about (provided they do not actually know it is false). Driven by the demands of partisan advocacy, the core aim in cross-examination is to use it as a tool to advance the client’s case, within the (relatively loose) bounds of the rules of conduct. As an English silk in a recent qualitative study said:

The point of cross-examination is *not* to allow best evidence. It isn’t some sort of collaborative inquisitorial system. This is each side pursuing to the best of their ability the case for their client. . . . a good cross-examiner doesn’t just allow a witness to just say what they want.⁵

There is a significant disparity between this conventional view and that of the English Court of Appeal in its *Barker* decisions. Yet the Court of Appeal has gone out of its way to declare that nothing it has done in any way diminishes the right of cross-examination. Thus the court in *Edwards* cited *R v T*:

The judge . . . seemed to suggest that it was necessary for the court to balance on the one hand the interests of justice generally, and of the victims, against the defendant’s right to a fair trial. We do not agree. There is nothing set against a defendant’s right to a fair trial. Nothing can deprive a defendant of that right.⁶

‘It would be impossible,’ concluded the court, ‘more clearly to express the position’.⁷ Ergo, defendants relying on the Court of Appeal’s stripped-down version of cross-examination still receive everything to which they are entitled.

This is a challenging claim, not only because this best evidence model contrasts so sharply with conventional wisdom, but also because if ‘best evidence’ is ‘business as usual’ the Court of Appeal’s strictures might also apply to the cross-examination of robust adult witnesses, as indeed Lord Judge later suggested they should (Judge, 2013b). In fact, this is precisely what seems to be happening in two of the most recent cases on point: *Farooqi*,⁸ concerning the cross-examination of two police officers, and *H v R*,⁹ in which one of the witnesses was most certainly vulnerable but the other was a capable adult.

3. *Barker*, n. 2 at [42].

4. *Edwards*, n. 2 at [28].

5. Henderson (2015a). However, this same article suggests that, as a result of *Barker et al.*, attitudes are changing rapidly. For the way in which practising lawyers see the ethics of advocacy see Ellison (2001); Henderson (2001). For an appraisal of the ethics of advocacy and introduction to the academic debate in the US in particular, see Dare’s excellent *Counsel of Rogues? A Defence of the Standard Conception of the Lawyer’s Role* (2009).

6. *Edwards*, n. 2 at [26].

7. *Edwards*, n. 2 at [26].

8. *Farooqi*, n. 2.

9. *H v R* [2014] EWCA Crim 1555.

This article sets out to put *Barker et al.* in context, examining the rules as they emerge from the actual case law on cross-examination in the round (and not restricted to cases concerning vulnerable witnesses), to derive a picture of its function within the trial.

I argue that the case law on cross-examination is based on three fundamental principles, all of which have their foundation in concern for the completeness and accuracy of the evidence: First, the examination must be confined to relevant and admissible facts in the witness's knowledge and not used for other purposes. Second, the evidence elicited must be voluntary and uncontaminated. Third and finally, the examination must provide an opportunity for the investigation of all relevant aspects of the case.

In other words, the *Barker* cases are firmly grounded in precedent. The theory underlying the courts' conception of cross-examination is one of best evidence. *Barker et al.* may require—and, recent research suggests, is creating¹⁰—a revolution in practitioners' views of cross-examination, but in terms of the way in which the courts have conceived of it, there is no revolution at all. All that the Court of Appeal has really done is to begin to honour in the observance what has long been (dis)honoured in the breach.

The article concludes with a discussion of the implications of a best evidence theory of cross-examination for practitioners. The suggestion is that the theory, if it taken up as it is being taken up in England and Wales, offers substantial assistance in remedying long-standing issues with the way in which witnesses (and their evidence) are treated in trials.

Factual focus: The first principle

The set of rules related to the first principle are based on the idea that cross-examination is solely an inquiry into the facts in the witness's possession. The rules seek to ensure that cross-examiners should only 'elicit answers to matters of fact, which is the true purpose of cross-examination' (Richardson, 2000: 1073, para. 8-116). Consequently, their chief action is to prohibit counsel from exploiting examination for other purposes.

Counsel cannot ask witnesses (other than experts) 'to draw an inference from the facts'¹¹ to which they testify because cross-examination must be 'confined to the eliciting of facts known to the accused, not speculation'.¹²

Counsel must not ask questions which merely incite argument because (again) '[w]hat is wanted from the witness is answers to questions of fact'.¹³ Another rule, that counsel must not ask questions merely to vilify or insult the witness,¹⁴ would also seem to fit under this category. Both argumentative and insulting questions are most likely aimed at provoking an unflattering reaction, rather than adding to the substantive evidence.¹⁵

Continuing with the same theme, counsel cannot use cross-examination to introduce their own information 'from the Bar',¹⁶ or to suggest the existence of evidence which will not be called or tested.¹⁷ To ask 'If X was to say Y, would he be mistaken?' is wrong because it 'suggest[s] . . . to the

10. Qualitative research suggests that the conventional view is giving way in England and Wales (Henderson, 2015a); see also Henderson (2015b).

11. *R v Bernard* (1858) 1 F&F 239; 175 ER 709, 249; 713. See also RC7.4 of the Code of Conduct of the Bar in England and Wales (9th ed.) in Bar Standards Board (2015).

12. *R v T* [1998] 2 NZLR 257 (CA) at 266.

13. *R v Baldwin* (1925) 18 Cr App R 175, 178–179. See also *Farooqi*, n. 2 at [112]–[113]; *Randall*, n. 1 at [10] and *R v Cameron* [2001] EWCA Crim in which the CA upheld the trial judge's decision to reject 'merely inflame[matory]' questions.

14. *Randall*, n. 1; *Cameron*, n. 13; see also Code of Conduct Rule C7.1 (Bar Standards Board, 2015).

15. Obviously, it also is intended to protect the witness—see below.

16. *R v Jacquith and Emode* [1989] Crim LR 508; *Hutchinson v Davis* [1940] NZLR 490, 506; see also Code of Conduct Rule C7.4 (Bar Standards Board, 2015).

17. *Farooqi*, n. 2 at [111]; *Baldwin*, n. 13 at 178–179; *North Australian Territory Co v Goldsborough Mort and Co.* [1893] 2 Ch 381.

jury that there is a witness available to give such evidence, [which] is inappropriate' unless the witness will be called and will give that evidence.¹⁸ To give evidence from the Bar also introduces inadmissible evidence which will not be subject to any test, and that it comes through counsel may give it special weight because of counsel's stature in the court.¹⁹ Nor may the advocate attempt to mislead the court (or be reckless as to whether the court is misled) by inserting information into questions which is known to be false, or by allowing a witness or the client to make a statement the advocate knows to be untrue.²⁰

The courts have also said that the defendant's right to cross-examine is limited by society's interest in avoiding undue expense and delay for others in the criminal justice system. While the courts explicitly declare that nothing trumps the right to a proper exploration of relevant evidence, defendants have no right to pursue irrelevancies and the examination of relevant issues should be done efficiently, without repetition or belabouring of the point.²¹

The final restrictive rule is perhaps one of the most telling in relation to the function of cross-examination, and also one of the oldest.²² Cross-examination must not be used to comment on the evidence. In *Hardy's Trial*²³ in 1794, Chief Justice Eyre stated:

[Y]our questions ought not to be accompanied with... comments: they are the proper subjects of observation when the defence is made. The business of a cross-examination is to ask to all sorts of facts, to probe a witness as closely as you can, but it is not the object of a cross-examination to introduce that kind of periphrasis.²⁴

Not only does comment contravene cross-examination's purpose of eliciting facts, but it can distort the evaluation of the evidence.²⁵

[O]bservations... tend so to distract the attention of everybody they load us in point of time so much, and that [cross-examination] is not the time for observation upon the character and situation of the witness is so apparent that as a rule of evidence it ought never to be departed from.²⁶

Thus, the *Barker* decisions' criticisms of comment are entirely congruent with pre-existing case law.²⁷ 'Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence', that this declaration is not limited to vulnerable witnesses was shown when in 2014 the court issued its decision in *Farooqi*, an appeal concerning the cross-examination of two police officers whom counsel accused

18. *R v Lintott* (1995) CA168/95 25.9.95 (NZ CA), 11. But where the only evidential source is the defendant, a conflict arises between the defendant's right to silence and the duty to put the case, so that there is an exception allowing counsel to raise allegations without being able to call evidence in support: see discussion in 'Duty to put the case'.

19. *Jacquith & Emode*, n. 16; *Hutchinson v Davis*, n. 16. The NZ Court of Appeal also regards playing prerecorded police interviews which include comment from the officers as inappropriate because of the risk of influencing the jury: *R v Halligan* [1973] 2NZLR 158 (CA); *R v L* [1994] 2 NZLR 54; *R v Hunt* 26/9/00 CA 178/00; *R v Lawton* 30/10/01 CA221/01; *L v R* [2010] NZCA 131; and *R v Lockhart* [2013] NZCA 549 at [52]-[53].

20. See also Code of Conduct Rule C9 (Bar Standards Board, 2015).

21. *R v McFadden* (1975) 62 Cr App R 187; *R v Chaaban* (2003) EWCA Crim 1012; *R v Jisl & Tekin* (2004) EWCA Crim 696; *R v Butt* (2005) EWCA Crim 805. See also the Criminal Procedure Rules of England and Wales, in which the 'overriding objective' that 'criminal cases be dealt with justly' includes 'dealing with the case efficiently and expeditiously': available at: <http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/criminal-procedure-rules-and-criminal-practice-directions-complete-edition.pdf> (accessed 26 April 2016).

22. Beaten only by *R v Rosewell* (1663) 10 How St Trials 147.

23. *Hardy's Trial* (1794) 24 How St Trials 199; see also *Ing's Trial* (1820) 33 How St Trials 957 at 999.

24. *Hardy's Trial*, n. 23 at 745.

25. *Hardy's Trial*, n. 23 at 756.

26. *Hardy's Trial*, n. 23 at 745.

27. *Barker*, n. 2 at [42].

of being ‘professional liars’ and ‘tricksters’.²⁸ The court deplored the ‘modern habit’ of comment, ‘[t]he place’ for which ‘is during closing submissions to the jury’. Comment, it said, ‘is not true cross-examination’.²⁹

The first set of rules, in summary, prevents examination being used for purposes other than the interrogation of the witness. Not only do the restrictive rules destroy the conventional perception that cross-examination has a legitimate function as a ‘third speech’, but they also undermine any idea that in a fair trial the court must of necessity allow the defendant to use cross-examination as a symbolic confrontation or denunciation of the accusing witness. While the notion of a face-to-face meeting may have long disappeared as a prerequisite of an effective cross-examination³⁰ (except in the US where the issue remains unresolved),³¹ the idea that cross-examination embodies a right in natural justice to a ritualised denunciation still remains important to some English lawyers. As a barrister commented recently: ‘cross-examination is about more than just testing; it’s about challenging’ (Henderson, 2015a).

However, the rules against comment, merely insulting questions and questions inciting argument are all intended to prevent cross-examination being used as a purely symbolic exercise. Even the rules against prolix and irrelevant examination are premised on the idea that the defendant is not free to explore whatever aspects of the witness’s evidence or character he or she personally feels have a bearing on the matter. The investigation must be useful objectively. There is, as the courts have said repeatedly since 1794, time for argument and comment in submissions.³²

If the first set of rules were about restricting questions to the witness’s evidence, the next set concern the quality of that evidence.

Voluntariness: The second principle

The second principle underlying the rules of cross-examination is that evidence obtained during examination (whether in chief or cross) should be voluntary and authentic, uncontaminated by suggestion or by miscommunication.

The two main rules here are those governing the use of leading questions and those prohibiting oppressive questioning. While they are not normally coupled, both sets of rules are designed to prevent the witness’s evidence being contaminated by suggestion. They represent, in a sense, points along a contamination continuum, from suggestions to willing recipients in examination in chief through to bullying cross-examination capable of cowing witnesses into submission.³³

In both cases, there are serious issues with the courts’ factual assumptions about the dynamics of suggestion. However, the intention is clear.

The next sections deal with four instances where I suggest the courts’ rules demonstrate a fundamental ‘voluntariness’ principle.

28. *Farooqi*, n. 2 at [27].

29. *Farooqi*, n. 2 at [112]–[113]; see also *Barker*, n. 2 at [42]; *Randall*, n. 1.

30. *R v Camberwell Green Youth Court* [2005] UKHL 4; see also *R v Smellie* (1919) 14 Cr App R 128; *Cameron*, n. 13.

31. *Coy v Iowa State* (1988) 487 US 1012; *Ohio v Roberts* (1980) 448 US 56; *Maryland v Craig* (1990) 497 US 836; *Crawford v Washington* (2004) 541 U.S. 36.

32. For an analysis of the deleterious impact of restrictions on the ability to make submissions on cross-examination in ordinary criminal trials see Langbein (2003); Cairns (1998).

33. The alternative is that there is a total disjunction between the rules on leading questions in cross and direct examination, so that cross-examiners have permission to coerce evidence but examiners in chief do not. It makes no logical sense for there to be different rules for direct examination. Why would there not also be a permissiveness around suggestion in direct examination? Counsel could also seek advantages there. It makes more sense and is more consistent to go with the prevailing interpretation which is that the courts assume people’s wariness of cross-examiners allows them to develop resistance to suggestion they do not have in direct examination.

Leading questions

In conventional cross-examination, the use of leading questions (those which ‘suggest the answer which the questioner wishes to receive or which suggest the existence of disputed facts to which the witness has not already testified’)³⁴ is virtually unrestricted³⁵ until they reach the point of being actually oppressive. Conversely, leading questions are banned in examination-in-chief unless the witness is demonstrably hostile or where the suggestion is immaterial.³⁶

The rules are based on the assumption that suggestibility is a function of the reliability of the witness’s memory, so that honest witnesses with strong recollections are not generally suggestible. Accordingly, compliance with suggestion (not amounting to overt bullying) is generally a voluntary and unconstrained choice on the part of the witness. ‘[T]he assumption [is] that the witness’s partisanship, conscious or unconscious, in combination with . . . being questioned by an adversary will produce the state of mind that will protect him against suggestibility’,³⁷ thus, provided the courts prohibit leading in examination in chief (where it is assumed the witnesses will want to assist counsel), suggestive questioning is believed to be a very useful test of the evidence and a compliant response a good indication of inaccuracy or dishonesty.

Oppressive questioning

The same aim of ensuring voluntary and authentic evidence underlies the rules on oppressive questioning. On the traditional view, the two danger points with suggestion are the colluding witness in examination in chief and at the far end of the spectrum, the cowed victim of a ‘brow-beating’³⁸ cross-examination, coerced into agreeing with his or her tormentor.

It is very difficult to find case law where the courts have held that cross-examination actually became oppressive or even discussed the subject at all beyond a mere acknowledgment of the rule,³⁹ just as it is nearly impossible to find a case in which the courts considered that the rule against asking merely insulting or vilifying questions was breached.⁴⁰ The result is that it is difficult to derive any description of what is oppressive cross-examination.

However, although the courts are reticent on what constitutes oppression in cross-examination, they are quite vociferous when it comes to oppressive questioning by police.⁴¹

34. Hirst (1997: 194, para. 7-023).

35. *Parkin v Moon* (1836) 7 C & P 408; 173 ER 181.

36. For example: ‘[i]ntroductory or undisputed matters, questions of identity and questions designed to bring the witness’s mind to the point’ Tapper (1995: 283); Section 89 of the NZ Evidence Act 2006 codified this rule.

37. *Mooney v James* [1949] VLR 22 (SC Vict.) 28, a case in which the court was actually, exceptionally, critiquing these assumptions. For the conventional interpretation see *Bastin v Carew* (1824) noted in *Clarke v Saffery* (1824) Ry & Mood 126, 127; 171 ER 966; *Price v Manning* (1887) 42 ChD 372 (CA).

38. For the origin of the term and to see just how long this particular cross-examination behaviour has persisted, see Bentham (1827: 338).

39. See for example *Randall*, n. 1 at [10(2)(iii)]. A similar silence prevails in the US in relation to the Federal Rule of Evidence 611(a) ‘the court shall exercise reasonable control’ over cross-examination to ‘protect witnesses from harassment or undue embarrassment’. Rule 4.4(a) US American Bar Association Model Rules of Professional Conduct prohibits cross-examining with no other ‘substantial purpose’ than embarrassment, and the special ethical standards applying to criminal advocates include a responsibility to examine with ‘due regard for the [witness’s] dignity’. They are very rarely enforced: Lininger (2005: 1387–1391).

40. *Randall*, n. 1, in which the court does not accept the appellant’s description of the prosecutor’s cross-examination at trial as ‘badgering, bullying or brow-beating’. More recently see *H v R*, n. 9, in which the aggressive and lengthy cross-examination of a mentally ill teen rape complainant was held not to have been improper.

41. *R v Mushtaq* [2005] 1 WLR 1513 (HL); *Ibrahim v The King* [1914] AC 599 at 609–610; *R v Prager* [1972] 1 WLR 260 at 266; *Lam Chi-ming v The Queen* [1991] 2 AC 212 at 220, per Lord Griffiths; *Saunders v United Kingdom* (1996) 23 EHRR 313 at [68]; Similarly in New Zealand a police interrogation is oppressive if the police use tactics which caused a ‘derogation of the appellant’s right to exercise a free choice whether to speak or to be silent’: *R v Fulton* [2009] NICA 39 at [91]. See also Canada: *R+ v Oickle* [2000] SCC 38, 36 CR (5th) 129, 147 CCC (3d) 321; *R v S(K)* (2000) 36 CR (5th) 198, 148 CCC (3d) 247, 50 OR (3d) 321, 77 CRR (2d) 327.

Oppression is . . . ‘questioning which by its nature, duration or other circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent’.⁴²

This definition is echoed in one of the few lengthy discussions of oppression in cross-examination, that of the English Court of Appeal in *R v Jisl & Tekin*.⁴³ *Jisl* involved the ‘robust and powerful’ and very prolonged cross-examination of a competent adult defendant, where ‘the tone which eventually entered the exchanges’ was of ‘concern’, although ultimately the Court concluded there had been no actual oppression. The Court defined the test as whether the cross-examination had resulted in the witness becoming ‘overborne’,⁴⁴ or ‘cowed, or oppressed, or in any way disabled from doing justice to his own evidence’.⁴⁵ Voluntariness is the fundamental issue.

The rules on suggestion and coercion appear to rest on faulty empirical premises. Considerable research evidence amassed during the late 20th century shows that witnesses, however disposed to the questioner, are very suggestible and memory is both very fragile and very inconsistent. A witness who complies with a false suggestion in relation to a peripheral detail may be entirely honest and accurate in relation to their memories of more central events. Moreover, the research also suggests that the court’s perception of what amounts to potentially oppressive questioning in a courtroom probably underestimates the likelihood of coercion. Accordingly, researchers have expressed strong concerns that the level of suggestion which typifies cross-examination may well lead to considerable inaccuracy, especially with vulnerable people but also with ordinary robust witnesses (Ellison and Wheatcroft, 2010, 2012). However, despite these issues with the court’s factual understanding, its intention is still to prevent questioning which creates a risk of the witness becoming compliant, and tendering involuntary, inauthentic evidence.

Extending the definition of ‘involuntary’

In this context, the English Court of Appeal’s recent restrictions on the use of suggestive questions in the cross-examination of children do not represent a change but a continuation of the pre-existing policy, in the light of new factual information. The court is merely recognising that some witnesses may be overborne by suggestion, although they are supposedly hostile to the examiner and although there is no overtly bullying or threatening behaviour.⁴⁶

[T]he putting of direct suggestions with an indication of the answer: ‘This happened, didn’t it?’ Or: ‘This didn’t happen, did it?’ [means that] . . . it can be very difficult to tell whether the child is truly changing her account or simply taking the line of least resistance.⁴⁷

This is a welcome development and sees the rules on examination brought into line with the realities of human behaviour. However, the fundamental principle remains that the evidence obtained by examination must be voluntary and not the result of coercion.

Comprehensible questions

A voluntariness principle also makes sense of the fact that, alongside the Court of Appeal’s new strictures on the use of suggestive questions for vulnerable witnesses, it has also declared that questions

42. *Mushtaq*, n. 41 at [64] *per* Lord Creswell.

43. *Jisl*, n. 21.

44. *Jisl*, n. 21 at [29].

45. *Jisl*, n. 21 at [37].

46. *Edwards*, n. 2 at [28]; see also *Barker, W & M, Wills*, n. 2.

47. *W & M*, n. 2 at [31].

must be comprehensible or developmentally appropriate for the witness. If it is not appropriate for witnesses to be coerced into giving evidence it is also inappropriate that their evidence be involuntary and unmeant by reason of a miscommunication or misunderstanding.⁴⁸ To avoid linguistic confusion, the court in *Barker* declared that counsel should ‘formulate short, simple questions which put the essential elements of the defendant’s case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child’s credibility’.⁴⁹ The cases, in the words of Lord Judge, ‘underline the simple proposition that the objective of cross-examination is to investigate the truth by questions which must be clearly understood by the witness’.⁵⁰

A significant recent application of this principle is *H v R*, in which the Court of Appeal upheld a trial judge’s intervention to clarify a 15-year-old’s understanding of similar-sounding terms (‘amoral’ and ‘immoral’), correcting the cross-examiner’s misunderstanding, which had led him to draw an incorrect inference as to her credibility.⁵¹

The new rules are an extension of the old framework, but they uphold the same principle.

Facilitation: The third principle

If the previous principle concerned the accuracy of the evidence, the third and final principle of the examination concerns its completeness. It declares cross-examination to be one of the trial’s mechanisms by which there is opportunity for all the relevant issues to be tested, and sets out a series of rules by which a full inquiry is to be facilitated.

The duty to put the case, or, as it is sometimes known, the duty to cross-examine (Mahoney, 2004), requires counsel to cross-examine a witness on any allegation adverse to that witness on which they intend to rely in order to allow the witness to respond, even where doing so is potentially disadvantageous to the client. The need for the rule has been questioned (Mahoney, 2004), but my suggestion is that it is in fact very significant.

The reason for the rule is the recognition that, tactically, a party will quite often prefer not to raise an issue with a witness so that they have no opportunity to rebut some important aspect of the case.⁵²

That there is a strong incentive to concealment is shown by the quite considerable body of advice in cross-examination manuals advising counsel on how to disguise their actual intentions from the witness. The classic in this literature is the injunction against asking ‘one question too many’.

The desire to avoid exposing oneself to potentially damaging rebuttal is the reason advocates have developed a technique for putting the case which simultaneously attempts to limit the extent to which the witness can give rebutting information (i.e. by the use of tightly controlled options—posing yes or no questions) and also seeks to make the question itself as convincing a statement of the case as possible, both to distract from any answer the witness might make and to wring some rhetorical benefit out of the situation, turning a potential liability to counsel’s advantage.

There is sometimes confusion over whose interests the rule is designed to protect.⁵³ The usual starting suggestion is that the duty is owed to the witness ‘in fairness’ to facilitate his or her right to respond to adverse allegations. As the House of Lords said in the first recorded and still leading decision, *Brown v Dunn*:

48. *Barker, Edwards, W & M, Wills, Farooqi*, n. 2.

49. *Barker*, n. 2 at [42].

50. Judge (2013b) and see also Judge (2013a), Henderson (2014, 2015a).

51. *H v R*, n. 9 at [63].

52. *R v K* [2009] NZCA 97; *MWJ v R* (2005) 80 ALJR 329 (HCA) at [6].

53. English judges and advocates sometimes confuse the rule with the accused’s right to cross-examine (Henderson, 2015a). Even Professor Mahoney (2004), who gives one of the few comprehensive accounts of the duty to put the case, overlooks best evidence as its possible rationale and therefore sees it as being of little use.

[N]othing would be more unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice and to give them an opportunity of explanation and an opportunity very often to defend their own character, and not having given them such an opportunity, to ask the jury afterward disbelieve what they have said.⁵⁴

This formulation of the rule, and of the reason for it, is widely endorsed in the textbooks and the case law.⁵⁵

However, the extensive qualifications to the rule indicate that the witness's interest is in fact not its primary rationale.⁵⁶ Provided there has been adequate notice that an aspect of the witness's evidence is not accepted, there may be no need to put the issue at all,⁵⁷ because the defence or the party calling the witness have the opportunity to deal with that matter in evidence in chief.⁵⁸ Alternatively, a very obvious case can sometime be put in a very cursory fashion (even by a 'raised eyebrow').⁵⁹ *Brown v Dunn* says that the ridiculous nature of the defence can itself be sufficient to make its rejection obvious to all concerned without cross-examination.⁶⁰

Ludicrous cases aside, the reality is that while these exceptions may vouchsafe the opposing party an opportunity to deal with the allegations, they deny the witness any (or any reasonable) opportunity of responding themselves. It is, as Rev Paley put it, 'impossible to rebut a sneer', and the same must surely apply to a raised eyebrow. Further, there is no guarantee of championship by the party calling the witness, who is not obliged to lead him or her so as to give them the opportunity and may not, tactically, wish to do so. It is, in short not the witness who is really the focus of the rule. The court's main interest is, as the New Zealand Court of Appeal has said, 'the importance of putting evidence clearly before a fact-finder in an adversarial system'.⁶¹

[W]ithout challenge and confrontation of the witness . . . the trier of fact is denied the opportunity to assess from all perspectives conflicting recollections of events and there is the potential for a miscarriage of justice occurring.⁶²

Similarly, in 2014's *Farooqi*, the Court of Appeal concluded its discussion of the duty to put the case as follows: 'The objective is to reduce delay and inefficiency and enhance the prospect that justice will be done. Ambush defence or arguments are prohibited'.⁶³

The rule functions as a process safeguard, ensuring that each party will give the other notice of the central planks of their case and a proper opportunity for all of the relevant issues will be investigated,

54. *Brown v Dunn* (1893) 6 R 67 (HL) at 76–77.

55. For example: *R v Bircham* [1972] Crim LR 430; *R v McFadden*, n. 21; *R v Fenlon* (1980) 71 Cr App R 307; *Gutierrez v R* [1997] 1 NZLR 192; *Smith v R* (1998) CA136/97; *Collier v R* (1996) NZ CA81/96; *Murray v R* (1996) NZ CA506/96; *R v Birks* (1990) 19 NSWLR 677. See also Code of Conduct Rule C7.2 (Bar Standards Board, 2015).

56. See *R v Lovelock* [1997] Crim LR 821.

57. *Brown v Dunn*, n. 54 at 67; *R v Souter* [2009] NZCA 227 at [28]; *R v Dewar* [2008] NZCA 344 at [44], [49].

58. *R v Dewar*, n. 57 at [49].

59. *Lovelock*, n. 56.

60. One English lawyer, for example, recently told me a story of a case in which a recidivist burglar claimed he had merely taken his crowbar for a midnight stroll. The prosecuting barrister's cross-examination consisted of merely smiling at the defendant until both the defendant and jury began grinning, at which point the prosecutor said 'come off it!' and sat down, amid gales of laughter.

61. *Dewar*, n. 57 at [42]. There is very little discussion of the basis for the rule in the English case law or commentary and only a little in the Australian and Canadian case law but the NZ Court of Appeal has discussed it and reviewed the authorities extensively, partly because of the codification of the rule in section 92 of the Evidence Act 2006. As to the continuing relevance of the common law rule in NZ see *R v Souter*, n. 57 at [23].

62. *Dewar*, n. 57 at [42] citing *R v S* (2002) 19 CRNZ 442 at [19].

63. *R v Farooqi*, n. 2 at [114]. See from [112] the duty is to give the witness an opportunity 'in fairness' to respond and then [113] that the duty must not be used as an opportunity to comment or assert.

including, but not inevitably, during cross-examination with the witness most concerned.⁶⁴ Justice to the witness is a consideration, but the duty is fundamentally a notice requirement and concerned with protecting the integrity of the investigation.⁶⁵ Hence, the rule only requires parties to enable investigation of their own cases, and does not require them to cross-examine in order to patch up any holes which have emerged in the other's evidence at trial.⁶⁶

As was said in the introduction, one aspect of the *Barker* rulings is the restriction of the duty to put the case to situations where the witness can answer without raising concerns that the answer may be contaminated by suggestion.⁶⁷ However, while the cases may prevent counsel asking questions they have asked routinely for many years, the restrictions are no diminution of the duty.

The main decision dealing with the duty is that of *Edwards*, in which the court upheld a trial judge who had disallowed the heavily leading questions counsel intended asking of a six-year-old child on the basis that they were unlikely to produce reliable evidence. '[The defendant] did not punch you in the tummy, did he?' was impermissible because it:⁶⁸ 'risked confusion in the mind of the witness whose evidence was bound to take centre stage, and it is difficult to see how [that] could have been helpful'.⁶⁹

The duty is not activated unless the witness has the ability to respond and questions asked of the witness must be framed so as to enable a reliable answer—or not be put at all. The main focus of the decisions is the 'helpful[ness]' of the evidence to the inquiry. Rather than ignoring or devaluing the duty to put the case, the Court of Appeal is honouring it by insisting it be used for its proper purpose as a mechanism to ensure a full investigation.

Moreover, the court makes it very clear that even if the vulnerable witness is not available as an evidential resource, there are other ways to explore the same issues. The matter must still be investigated through another relevant witness—if one is available—or at least counsel can tell the jury what he or she would have asked, had a witness been available, so that they are fully cognisant of the limitations of the investigation. The same applies where the defendant *wants* to test the evidence but cannot: the chance to test through other witnesses and/or the chance to declare what can't be asked are both available. The court prevents spurious inquiries or ones likely to add nothing to the sum total of evidence, but makes provision for the jury to be informed of the inadequacies of the investigation.⁷⁰

It is important to recognise that these recent decisions do not diminish or write down the duty to cross-examine. The point is rather to ensure that it is used for its proper purposes—namely to safeguard the inquiry and to give witnesses a right of reply. It is not that they suggest the case should not be put to vulnerable witnesses but that the courts are realistic about the extent to which cross-examination can be expected to enhance the quality of the evidence of some witnesses.

Ironically, there are some signs that these restrictions could be exploited by counsel seeking to avoid having to ask risky questions. Some registered intermediaries have begun to report that some defence counsel now offer not to put the case to a vulnerable witness at all, although in fact the witness has the capacity to respond to the question provided the language is modified appropriately. The suspicion is that some counsel are exploiting the new case law to avoid the obligation to cross-examine, especially since the developmentally appropriate questions they would need to use are generally far less restrictive

64. *Dewar*, n. 57 at [42].

65. In NZ: *Souter*, n. 57 at [28]; *Dewar*, n. 57 at [44], [49]. In Australia see: *MWJ*, n. 52 at [38]; in Canada *R v Lyttle* [2004] 1 SCR 193 [65]. The importance of the requirement of notice via putting the case in cross-examination has, however, declined, as the NZ Law Commission pointed out, since the introduction of defence disclosure provisions.

66. *Gutierrez*, n. 55 at 196 (relieving the prosecution of that burden); *MWJ*, n. 52 (relieving the defence of the same). Just how token is this exception is shown in *MWJ*, where it is said that if counsel for the side with the holes offers to recall a witness for cross-examination on point, the other side should accept the offer or face adverse comment.

67. *Barker*, *Edwards*, n. 2; repeated in Criminal Practice Directions para 3E.4, 2014.

68. *Edwards*, n. 2 at [28].

69. *Edwards*, n. 2 at [28].

70. Where a witness is unavailable, the issues presumably will have been notified to the opposing side during discussions over the decision to admit hearsay evidence.

and controlling than the traditional forms, increasing the risk that the witness will answer in a way unfavourable to their case. It is important that counsel are not allowed to make use of the new qualifications to undermine what is an important provision for the integrity of the trial.⁷¹ There is no reason counsel should not be required to put the case in a comprehensible and non-coercive fashion. Certainly it is no answer to say that doing so risks an unfavourable answer. That is, after all, the reason for the rule.

The recent case *H v R*,⁷² discussed below in detail, suggests that where counsel does not put the case in a way which gives the witness a reasonable opportunity to respond, the judge can remedy the matter not only by the usual method of restricting counsel's ability to rely on inferences or material not put to the witness,⁷³ but also far more directly and, arguably, effectively, by simply asking the relevant questions him or herself. This is discussed further in the section on judicial intervention.

The duty to put the case is essentially part of or an instance of the advocate's duty to the court. Although defence advocates are not required to act as 'ministers of justice', in cross-examination they have a responsibility to the administration of justice to ensure the evidence is 'complete' as well as 'accurate', and if they do not, the judge can act to rectify the situation. Significantly, these rules see advocates with active duties to facilitate the investigation, even against the interests of their clients. The duty to put the case and the new insistence that counsel have a responsibility to use developmentally appropriate language both require them actually to 'enable' and 'facilitate', as the Court of Appeal says, the witnesses' 'best evidence'.⁷⁴ In neither instance is the rule made particularly for the witness's benefit: instead, it is for the decision-makers to assist them to make a reliable determination of the facts. The court wants counsel 'fully to ventilate before the jury the areas of evidence which bear on the child's credibility',⁷⁵ and will take measures to ensure the decision-makers have a true 'opportunity to assess from all perspectives conflicting recollections of events'.⁷⁶ The corollary is that, just as advocates have an immunity from liability to witnesses in defamation for statements made about them during trial, advocates also have an absolute defence to a client's negligence action if the act complained of was in fulfilment of the advocate's duty to the courts.⁷⁷ In each case, a responsibility to investigate is protected by a concomitant immunity from liability.

No one could deny that the duty to put the case is difficult to put into practice. It mediates the border between the advocate's responsibilities to court and client, and, more broadly, the border between the defendant's rights and interests within the trial and those of society.

The fundamental intention, however, is to ensure a balanced appraisal of the issues and a proper basis for the court's decision. It prevents overzealous partisans distorting the inquiry by preventing the investigation of important issues.

Judicial intervention

The law on judicial intervention into questioning can also be seen as grounded in a 'best evidence' theory of the function of examination.

Not only do judges have a duty to prevent improper questioning and to enforce the rules, including any directions specific to a particular witness,⁷⁸ but they can also intervene to ensure that the examination

71. Personal communications with registered intermediaries but see, most importantly, Plotnikoff and Woolfson (2015). Recent research suggests that English judges and advocates increasingly accept the efficacy of an open question approach to cross-examination (Henderson, 2015a).

72. *H v R*, n. 9 at [64]–[69].

73. *Wood Green Crown Court, ex parte Taylor* [1995] Crim LR 879; *R v Hart* (1932) 23 Cr App R 203.

74. *Barker*, n. 2 at [42].

75. *Barker*, n. 2.

76. *Dewar*, n. 57 at [42] citing *R v S*, n. 62 at [19].

77. *Hall v Simons* [2002] 1 AC 615; *Lumsden & Ors v Legal Services Board & Ors* [2014] EWCA Civ 1276; *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120.

78. *Wills*, n. 2; *Jisl*, n. 21 at [65]; *H v R*, n. 9 at [64], [69].

presents the fact-finders with best evidence, provided they do not take sides, or begin conducting their own investigations.⁷⁹ The judge has, first, a power to intervene to ask questions to clarify the evidence given: ‘Interventions to clear up ambiguities, interventions to enable the judge to make certain that he is making an accurate note, are of course perfectly justified’.⁸⁰

Thus in the recent case *H v R* the English Court of Appeal held that it was not ‘oath helping’ for a judge to clarify a child’s meaning, addressing the undeclared ambiguity in counsel’s questions. As noted briefly above, the judge intervened following cross-examination over a note in which the young teenage complainant had written that she wished she could be ‘amoral’. The judge asked what she understood by ‘morality’ and ‘amorality’ and then asked whether ‘she would describe herself as moral, immoral or amoral’. The court concluded: ‘In our judgment, that did not constitute a question designed to bolster X’s credibility; rather, it gave her the chance to deal with the implication in the cross examination’.⁸¹

In other words, cross-examiners should not take advantage of a vulnerable witness’s linguistic confusion to draw an unfavourable inference against her credibility, and it is the duty of the judge to prevent this.

Second, the courts are clear that judges are able to ask questions to elicit evidence issues the fact-finders—judge or jury—need to know about to make a proper decision. Judges may ask questions ‘if there were matters which had not been covered, either by way of elucidation, or to enable the appellant to give explanations for matters which the jury might be considering in due course’.⁸²

Again, *H v R* provides a useful illustration of this ability. The appellant had also complained that during or after the complainant’s mother’s cross-examination the judge had ‘elicited [evidence] about the relationship between the appellant and X’s mother’. The Court of Appeal accepted that the judge’s decision to ask further questions was an appropriate response to the cross-examination. His questions were ‘the consequence of the way in which Miss Griffiths had cross-examined’ the witness. First, the issue under examination was a vital one, going to the heart of the defence, which was that the witness was ‘a disgruntled ex-wife acting out of spite’ who had put her daughter up to the allegations. It was important for the jury to have a full picture of the evidence on point. Second, it was the ‘combative’ manner in which counsel had put the case which had obstructed the witness’s ability to answer. It is not clear whether the examination was obstructive because the questions were highly controlling (i.e. limiting the witness to a ‘yes or no’) or because they were so aggressive that they distressed or angered the witness too greatly for her to give her evidence. Either way, as a ‘matter of balance’, the judge reopened the subject and ‘properly allowed the mother to give such evidence as “a full picture of the state of the marriage and the family circumstances”’.⁸³ Judges are entitled, in other words, to remedy counsel’s failure to put the case properly by giving the witness the opportunity to do so themselves.⁸⁴

The judge’s discretion to put the case if counsel fails to do so properly is analogous to the trial judge’s other power to intervene directly to rebalance an improper use of a party’s discretion to control the evidence, namely the ability to call witnesses to correct a prosecution refusal to do so amounting to an abuse of process. Lord Parker CJ called this ‘the ultimate sanction’ where the prosecution refused to ‘exercise . . . [their discretion to call witnesses] in a manner which is calculated to further the interests of justice and at the same time be fair to the defence’.⁸⁵

79. *R v Zarezadeh* [2011] EWCA Crim 271.

80. *R v Hulusi and Purvis* (1974) 58 Cr App R 378 at 382.

81. *H v R*, n. 9 at [63].

82. *R v Zarezadeh*, n. 79 at [24].

83. *H v R*, n. 9 at [67].

84. Cf. *R v Khokhar* [2007] EWCA Crim 1756; [2007] All ER (D) 356, distinguished in *H v R*, n. 9 at [68], the Court of Appeal stating they did ‘not find the decision of any real value’.

85. *R v Oliva* (1965) 49 Cr App R 298 at 309. See subsequently *R v Haringey Justices, ex pte DPP* (1996) QB 351; *R v Well-inghamborough JJ ex pte Francois* (1994) 158 JP 813; *R v Richardson* [1993] EWCA Crim 4. See also Professor Spencer (2005), arguing that the judge’s discretion to question and call witnesses are proofs that the inquisitorial and accusatorial systems exist along a continuum rather than in opposition.

Summary

Taken together, the cases on cross-examination articulate a theory in which the right to cross-examine is the right to a proper opportunity to interrogate the evidence given in chief and to test for flaws. That right is bounded by considerations of reliability and relevance: the evidence elicited must be voluntary and uncontaminated by suggestion or linguistic confusion. The advocate owes his or her paramount duty to the administration of justice and the integrity of the investigation, and part of that duty requires that they ensure that there is opportunity for all of the relevant issues in their client's case to be investigated.

Thus, the right to cross-examination is *only* a right to interrogate: it is limited to facts in the witness's possession. It is not an opportunity for introducing extraneous information useful to the defence, or for comment and speechifying, and it does not function as a means to allow a symbolic confrontation between accuser and accused. Further, the right to cross-examine does not include a right to examine what is, objectively, irrelevant material (or overwhelmingly prejudicial material)⁸⁶ or to prolong the examination unnecessarily: the right to cross-examine is the right to a *reasonable* opportunity to interrogate rather than a right to an opportunity to interrogate to the examiner's subjective satisfaction.

The rules show that cross-examiners have wide-ranging powers to interrogate witnesses. Certainly, the rules prohibiting insult or vilification limit questioning, but the corollary is that they also show a significant ambit of operation. Advocates must not vilify or insult witnesses, but they may engage in questioning which will be hurtful and humiliating if it is important to the inquiry, in contravention of all the usual social or legal limitations on speech.⁸⁷ It is to this end that they have an immunity from defamation actions brought by witnesses for suggestions made at trial.⁸⁸ The duty to put the case can be seen similarly, as a parallel power of investigation, albeit one often exercised unwillingly, and its exercise is also protected.⁸⁹ Both immunities facilitate cross-examination as an inquiry into 'best evidence', protecting the advocate's 'overriding duty to the Court to act with independence in the interest of justice,'⁹⁰ never 'compromise[ing] his professional standards in order to please his client, the Court or a third party'.⁹¹

This 'best evidence' account is, I suggest, both coherent and internally consistent. Moreover, it is also consistent with accounts of the wider purposes and functions of the accusatorial trial, both by legal scholars, and also by the senior judiciary in the Criminal (and Civil) Procedure Rules, which describe the trial as an exercise in obtaining accurate outcomes whilst protecting the dignity, and enabling the participation of, the defendant in the process (see for instance Duff et al., 2004; Hoyano, 2014).

Conclusion

The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes to his client but it is also in the public interest that the duty should be performed.⁹²

86. See the restrictions on prior sexual history: England and Wales's Youth Justice and Criminal Evidence Act 1999, s. 41; NZ's Evidence Act 2006, s. 44.

87. *Jisl*, n. 21 at [45]: 'Strong language' may be necessary.

88. *Munster v Lamb* (1883) 11 QBD 588 CA; *Rondel v Worsley* [1967] 1 QB 492, at 501–502.

89. *Hall v Simons*; *Lumsden*; *Medcalf v Mardell*, n. 77.

90. Code of Conduct Rule C3 (Bar Standards Board, 2015). See also Rules C4 & C6.

91. Rule 307 of the 2013 Code of Conduct England & Wales. But 'these rules are retained in the new version of the Code of Conduct which came into force in January 2014.' *Lumsden*, n. 77 at [45]; see Code of Conduct Rule C3 (Bar Standards Board, 2015).

92. *Medcalf v Mardell*, n. 77 at [51], cited with approval in *Lumsden*, n. 77 at [14].

The ethic of zealous partisanship is an essential part of the machinery of justice in the context of the trial overall, but in the context of witness examination it can have deleterious consequences.

Partisanship means, as one judge explained, ‘as an advocate you think “I’m going to push it as far as I can go, within the rules”’. Another commented: ‘[T]heir job is to defend and they want to win. It is inevitable they want to win’ (*Judge* from Henderson, 2015a).

The consequence is that cross-examination is seen, wrongly, as an opportunity for advocacy:

It’s about using cross-examination as a means of developing your case, so in a sense it is a third speech. But [also] . . . you want to destroy prosecution witnesses, and use every tactic allowed to make them look unreliable or contradictory. (*Judge* from Henderson, 2015a)

The belief that they should use cross-examination to advance the client’s case incentivises its exploitation as a way to create a favourable impression on the jury, obstruct unwelcome evidence or manipulate a witness into giving favourable evidence they may intend, undermining any actual investigative activity (Ellison, 2001; Henderson, 2001, 2015a; Henderson et al., 2015).

Take, for instance, the QC in the following example, who decided to exploit the trial judge’s failure to give firm pre-trial directions as to the language to be used with a vulnerable witness:

There was a pretty weak judge who never set any ground rules, to our advantage, . . . [and] didn’t enforce them. I was asked to give [the judge] a list of questions [at the pre-trial hearing] but I thought of them as examples and in court pretty much abandoned them. (Henderson, 2015a)

The QC proceeded to ask questions about concepts and terms she was fully aware were beyond the witness’s comprehension. The accused was acquitted and while it is of course impossible to identify this cross-examination as the crucial factor, it is reasonable enough to suggest it is likely to have had an impact.

This version of cross-examination has exposed the legal profession to severe criticism—validated by extensive empirical research⁹³—and caused significant public disillusion with the trial.

Yet, whatever practices and understandings may have grown up amongst advocates, the reality is that when the courts are required to describe cross-examination’s functions, the fundamental purpose they articulate is not solely about the furtherance of the client’s ‘best interests’ but about the advocate’s role in assisting the inquiry to secure ‘best evidence’.

The law of cross-examination, then, has nothing to do with staging a persuasive performance and everything to do with conducting a rigorous and reliable investigation. To put it even more bluntly, the conventional view and much of conventional practice is wrong.

The *Barker* judgments may stand out as the most powerful and concerted statement of the law in many decades, but they are not a departure from principle.

The Court of Appeal’s reengagement with the rules of cross-examination was prompted by new information concerning the plight of vulnerable people. However, there is no logical reason why the same restrictions on conventional practice should not apply for other witnesses if similar risks could be made out.⁹⁴ Extra-judicial comments by Lord Judge show that he, at least, considers that the rules apply more widely (*Judge*, 2013a, 2013b), and, of their subsequent related judgments, both *Farooqi*⁹⁵ and *H v R*⁹⁶ suggest that the Court of Appeal agrees.⁹⁷

93. See for an overview Spencer and Flin (1993) and also Spencer and Lamb (2012); see also literature review in Henderson et al. (2015).

94. For a review of the research suggesting conventional cross-examination may also distort the evidence of normally robust adults, see Henderson (2015c).

95. *Farooqi*, n. 2.

96. *H v R*, n. 9.

97. For a digest of recent related decisions, see: www.theadvocatesgateway.org.

The further implication of these cases is that there is no actual need for further legislative intervention in the rules of cross-examination. Although some call for additional legislation around standards for cross-examination, an examination of the common law makes it clear that judges and advocates already have all the tools they need, if they are willing to use them.

The importance of the case law, however, does not lie in the rediscovery of a few useful but piecemeal restrictions on various unreliable or otherwise unsavoury practices. The crucial point is that the cases demolish the conventional view of the advocate's role in cross-examination. Practitioners view cross-examination as just another aspect of advocacy. In the case law, cross-examination—indeed, all witness examination—emerges as a separate task, qualitatively different from the rest of the advocate's duties. As described above, in advocacy generally, the task of the advocate is to argue the interpretation of the evidence in furtherance of the idea that 'truth is best discovered by powerful statements on both sides of the question'.⁹⁸ However, witness examination is different:

[Y]our questions ought not to be accompanied with . . . comments: they are the proper subjects of observation when the defence is made. The business of a cross-examination is to ask to all sorts of facts, to probe a witness as closely as you can, but it is not the object of a cross-examination to introduce that kind of periphrasis.⁹⁹

Witness examination is not advocacy. The fundamental difference here is that whereas in the rest of the trial the advocate merely discusses facts already established, in examination he or she is involved in establishing facts. Examination is the process by which evidence is not simply admitted into court: it is the method by which it is created.

This creates a very different relationship between advocate, client and court than at any other time during the trial. In examination, the advocate is in a position more analogous to that of a police officer at a crime scene or an expert assessing an exhibit and, like them, owes a duty to ensure the evidence is as reliable as possible. The advocate's duty is to search for evidence which throws doubt on the version advanced in chief, but there should, on this theory, be no question that it would ever be legitimate to seek to exploit the interrogation to confuse, coerce or conceal evidence.

This model has an internal coherence the conventional model lacks. Whereas the conventional model, attempting to both investigate and persuade, is riven with contradiction, the best evidence model ensures the client's legitimate interests are met whilst protecting the integrity of the investigation.

Nor does it require the importation of any new special interests or the departure from any basic precepts of the accusatorial trial, whereas some other reform options, such as the idea that we should introduce a greater role for complainants or separate representation for witnesses, stretch the accusatorial methodology to breaking point.

Cross-examination is crucial to a fair trial. However, that it has become unstable and unreliable as a means of producing evidence is undeniable. The fundamental problem is the way in which concern for the client's best interests has come to overwhelm concern for the safety and utility of the evidence.

In *Barker et al.*, the Court of Appeal, however, offers significant hope that the problem can be overcome. It is not the case, as is sometimes thought, that accusatorial cross-examination is irredeemable. It contains within itself the seeds of its own reform.

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98. *Jones v National Coal Board* [1957] 2 QB 55 at 56.

99. *Hardy's Trial*, n. 23 at 745.

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References

- Bar Standards Board (2015) *Bar Standards Board Handbook*. 2nd ed. Available at: https://www.bar-standardsboard.org.uk/media/1731225/bsb_handbook_sept_2015.pdf (accessed 15 April 2016).
- Bentham J (1827) *Rationale of Judicial Evidence*. Vol. 2. London: Hunt and Clarke.
- Cairns D (1998) *Advocacy and the Making of the Adversarial Criminal Trial 1880–1865*. Oxford: Clarendon Press.
- Dare T (2009) *Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role*. Farnham: Ashgate.
- Duff A, Farmer L, Marshall S, et al. (eds) (2004) *The Trial on Trial: Volume 3, Towards a Normative Theory of the Criminal Trial*. Portland, OR: Hart.
- Ellison L (2001) *The Adversarial Trial and the Vulnerable Witness*. Oxford: OUP.
- Ellison L and Wheatcroft J (2010) 'Could you ask me that in a different way?' Exploring the impact of courtroom questioning and witness familiarisation on adult witness accuracy. *Crim LR* 823.
- Ellison L and Wheatcroft J (2012) Evidence in court: Witness preparation and cross-examination style effects on adult witness accuracy. *Behavioral Sciences and the Law* 30(6): 821–840.
- Henderson E (2001) Persuading and controlling: Mapping the theory of cross-examination in relation to children. In: Westcott H, Davies G and Bull R (eds) *Children's Testimony: Psychological Research and Forensic Practice*. Chichester: Wiley.
- Henderson E (2014) All the proper protections—the Court of Appeal rewrites the rules for the cross-examination of vulnerable witnesses. *Crim LR* 93–108.
- Henderson E (2015a) Theoretically speaking: English judges and advocates discuss the changing theory of cross-examination. *Criminal Law Rev* 12: 927.
- Henderson E (2015b) Communicative competence? Judges, advocates and intermediaries discuss communication issues in the cross-examination of vulnerable witnesses. *Crim LR* 9: 657.
- Henderson E (2015c) Bigger fish to fry: Should the reform of cross-examination be expanded beyond vulnerable witnesses? *International Journal of Evidence and Proof* 19(2): 83–99.
- Henderson E, Heffer C and Kebbel M (2015) Achieving best evidence? Cross-examination in the English criminal trial. In Oxburgh G, Myklebust T, Grant T, et al. (eds) *Communication in Forensic Contexts: Integrated Approaches from Psychology, Linguistics and Law Enforcement*. Chichester: Wiley.
- Hirst M (1997) *Andrews and Hirst on Criminal Evidence*. 3rd ed. London: Sweet and Maxwell.
- Hoyano L (2014) What is balanced on the scales of justice? In search of the essence of the right to a fair trial. *Crim LR* 1: 4–29.
- Judge I, The Rt Hon The Lord (2013a) Half a century of change: The evidence of child victims. Toulmin Lecture in Law and Psychiatry, 20 March. Available at: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-speech-law-and-psychiatry.pdf> (accessed 26 April 2016).
- Judge I, The Rt Hon The Lord (2013b) The evidence of child victims: The next stage. Bar Council Annual Law Reform Lecture, 21 November 2013. Available at: <http://www.barcouncil.org.uk/media/>

- 241783/annual_law_reform_lecture_rt_hon_the_lord_judge_speech_2013.pdf (accessed 19 August 2014).
- Langbein J (2003) *The Origins of the Adversary Trial*. Oxford Studies in Modern Legal History. Oxford: Clarendon Press.
- Lininger T (2005) Bearing the cross. *Fordham Law Review* 74(3): 1353–1423.
- Mahoney R (2004) Putting the case against the duty to put the case. *NZ Law Review* 313.
- Plotnikoff J and Woolfson R (2012) Kicking and screaming: The slow road to best evidence. In: Spencer J and Lamb M (eds) *Children and Cross-examination: Time to Change the Rules?* Oxford: Hart.
- Plotnikoff J and Woolfson R (2015) *Intermediaries in the Criminal Justice System*. Bristol: Policy Press.
- Richardson J (ed.) (2000) *Archbold: Criminal Pleading, Evidence and Practice*. 48th ed. London: Sweet & Maxwell.
- Spencer JR (2005) Introduction. In Del-Marty M and Spencer JR (eds) *European Criminal Procedures*. 2nd ed. *Cambridge Studies in International and Comparative Criminal Law*. Cambridge: Cambridge University Press.
- Spencer JR and Flin R (1993) *The Evidence of Children*. London: Blackstone Press.
- Spencer JR and Lamb M (eds) *Children and Cross-examination: Time to Change the Rules?* Oxford: Hart.
- Tapper C (1995) *Cross and Tapper on Evidence*. 8th ed. London: Butterworths.