Notre Dame Law Review

Volume 7 | Issue 2 Article 1

1-1-1932

Fatuous Cross--Examination

Walter R. Arnold

NOTRE DAME LAWYER

"Law is the perfection of human reason"

VOL. VII | JANUARY, 1932 | NO. 2

FATUOUS CROSS-EXAMINATION

It is not at all uncommon to hear the expression at the bar as well as among the laity: "That case was won by the cross-examination." The observation is frequently correct, but the laity and novitiate assume too much the positive, instead of the negative of the declaration—understand it to mean that skillful cross-examination proved the *bete noir* of the vanquished side. Perhaps it is no exaggeration to say that a third of the bitterly contested cases dependent on facts, as distinct from questions of law, are won by the side whose witnesses have been *over-cross-examined,* or *ineptly cross-examined.* A famous trial lawyer was known to spend very little pre-trial time with his witnesses touching the evidence they would give on direct examination, but devoted a great deal to preparing them for the cross-examination.

It is purposed here to point out, by example and admonition, some of the innumerable pit-falls the inexperienced cross-examiner is faced with in the trial of a cause, with the hope that some of them may be avoided.

Doubtless one of the most prevalent phenomena of maladroitness found at the trial bar is the almost universal belief by the novitiate that he *must* cross-examine *every* witness the other side presents. Especially damning is this belief when the cause is tried to a jury. The psychological effect (detrimental to the cross-examiner's side) on the un-

trained jury of an unsuccessful cross-examination—a verbal scrutiny of the testimony which leaves the evidence given wholly unshaken and perhaps fortified—is too often underestimated. Prolific examples are cases where a witness is testifying to something formal that is not at all disputed. A replevin trial comes to mind where the cause was irretrievably lost (vouched for by the jury) because of a half hour's barrage of irritating and scornful cross-examination by counsel for the defendant. The plaintiff's witness, a demure young lady of some charm, testified to naught but that she, on behalf of the plaintiff, before action commenced, made demand upon the defendant for the *res* in action. There was no dispute, although not formally conceded, but that a demand had been made. In fact the circumstances of the case [1] were such that a demand was not essential, but the plaintiff put it into evidence on the theory *abundans cautela non nocet*. To more potently demonstrate the fatuity of the cross-examination, we give a portion of it *in haec verba*:

"Q. Are you certain that the defendant, when you saw him on that evening, wore a lumber-jack?

A. I would not be positive, that is my best recollection. I did not take particular note.

Q. He may have been wearing an ordinary shirt—a cotton shirt?

A. I may have been mistaken.

Q. What color was it?

A. I would not be prepared to swear as to its color. I think it was blue.

Q. You think it was: young lady, you are under oath to tell the truth, not to speculate. Will you say it was blue?

A. I am not certain.

---

[1] Jordan v. Jordan, 136 N. E. 866 (Ind. 1922)

Q. Then why do you undertake to tell this jury, when you are under oath, that it was blue, when you are not certain?

A. I did not intend to tell them, positively.

Q. Perhaps you did not intend to tell them positively that you demanded the return of this ring? (The subject-matter of the suit.)

A. Yes, of that I am certain.

Q. How certain?

A. As certain as I can be of anything.

Q. As certain as you can be that the defendant at the time wore a blue lumber-jack.

A. I am not certain about that.

Q. Then why did you swear to it?

A. I did not swear to that for sure.

Q. How is the jury to know what you are swearing to for sure, and what you are swearing to on mere guess?

A. As to asking Mr. Lindrum for the ring, of that I am sure.

Q. As sure as you are that Mr. Lindrum on the evening in question wore a blue lumber-jack?"

And so on, *ad infinitum*. The sarcasm, taunt, and disparagement, implicit in the voice and mannerisms of the cross-examiner, cannot be illustrated. Of course, the witness remained unshaken on the only topic touching which she was called. The defendant, when he took the stand, did not deny that demand was made upon him by the witness. He was not asked concerning his sartorial investment on the evening in question, nor the color of his shirt or lumber-jack. The only important question in the case, hotly disputed, was whether the plaintiff, seller of a diamond ring on the installment plan under a conditional sales contract, had or had not granted defendant, the purchaser,

three month's extension of time to make a payment, past due at the time of demand, which, if sustained, would have carried it beyond the time of institution of suit. The natural ensemble of the case was such as to bode ill for the plaintiff. If there could be any illegitimate sympathy influentially operative—and in such cases there usually is—the defendant had it all his way. But for the unfortunate trend of the cross-examination, which in its last phases clearly indicated a determination on the part of the cross-examiner to cast aspersions upon the witness's moral character, but from which effort she came unscathed, the plaintiff would have unquestionably obtained the verdict. The unsuccessful attempt to cast suspicion on the witness's testimony aroused the ire and disgust of the jury. From that point onward, the verdict belonged to the plaintiff. The shrewdness of counsel for the plaintiff was also here shown. Notwithstanding numerous objections could have been successfully directed to many irrelevant and assumptive questions asked, plaintiff's counsel sat by silent and unperturbed, heartily enjoying the seance. He knew every question and answer was costing his opponent dearly.

The most dangerous witness on cross-examination is the "loaded" witness. Women predominate in this category. The term is employed to designate a witness who, on the slightest opening given on cross-examination, will "fire" damaging but incompetent testimony in favor of the side for which the witness is called. It is the fashion, though perhaps of questionable ethics, for counsel of that side to "prime the load" beforehand to encourage, or even suggest, that the witness "fire" when the cross-examiner "pulls the trigger." It may not be amiss to resort to another verbatim illustration:

In a contest over the validity of a will of a testatrix, who was unquestionably insane at the time of her death, one of the defendants was on the stand. Her competency to testify was limited to the question of the mental capacity

of the testatrix upon which the witness was permitted to give an opinion. Only such facts and transactions, as basis of the opinion, were admissible as were open to the general observation of others—friends and relatives.[2] Some three days after the will was executed, the testatrix had visited the office of the cross-examiner, who then represented a neighbor of the testatrix with whom the latter had some difficulty over a line fence. The witness, her daughter, was with testatrix, but remained in the ante-room while her mother went into the private office of the attorney. The witness could hear through the transom most of what was being said. A portion of the testimony follows:

"Q. You believe your mother was of sound mind then? (Referring to the time of the execution of the will).

A. I am sure of it.

Q. You would not say she was of sound mind at the time of her death?

A. No, I could not and would not say that.

Q. Now, this will was executed about two years before her death, when would you say your mother ceased to be of sound mind?

A. It was a gradual process. I could not definitely fix a day, or even a month, when she changed from sound mind to unsound mind. That would be impossible for me to say.

* * *

Q. But you do say she was of sound mind at the time this will was signed?

A. I have no doubt about that.

Q. And a year later?

A. I would not be too sure of that.

Q. Well, six months later?

A. Her age was beginning to tell on her mind then—slightly at least.

---

2 Gwinn v. Hobbs, 118 N. E. 155 (Ind. 1917).

Q. You would not be sure of her mental soundness six months after she made this will?

A. I would hesitate to express an opinion.

Q. Is there any time, after the execution of the will, that you would be willing to swear that your mother was of sound mind?

A. Yes, three days afterwards.

Q. Why? (Fatal of all fatal questions on cross-examination in such a tight place.)

A. Well, three days afterwards, on the 22nd of April, she and I went to your office—

PLAINTIFF'S COUNSEL INTERRUPTING: Your honor, we object to this witness testifying what may have occurred at my office three days after the will was executed. Has nothing to do with any issue in the case. Besides, may have been a privileged communication. Moreover, not in the presence of others, a matter not open to the observation of the public generally.

DEFENDANT'S COUNSEL: We have not asked the question. Counsel has asked for particulars upon which Miss Laird bases her opinion that her mother was of sound mind on the 22nd of April. If there is anything not responsive to the question, I have not heard it thus far.

THE COURT: It appears to me that the witness, at the time you interrupted her, was confining her answer to the question, Mr. Roberts (Plaintiff's counsel). If you did not want her to give something specific, your question should not have been so specific. You asked her why does she hold such an opinion—a conviction that deceased was of sound mind some three days after the will was executed. Let her answer. Objection overruled.

THE WITNESS: As I commenced to say: Three days after the will was signed by Mother, she and I went to your office. She asked you if you were representing Mrs. Harden, you answered, "yes." She said Mrs. Harden had told her that you said a fence which had been erected between her land and ours was up less than twenty years; she told you she knew it was up more than twenty-one years, because Emil (the plaintiff, who had been partially disinherited by the will, son of testatrix) had gotten five hundred dollars from her when the fence was erected, and she had made a will a few days ago, and had calculated against him the interest and principal so he would not get the advantage of the rest of us by her will."

The estate was shown to be worth $4,500.00. There were five children. Figuring 6% interest on $500.00 for 21 years made the amount $1,130.00. This added to the value of the estate made $5,630.00, or $1,160.00 for each child. The will gave to the son Emil $25.00, within five dollars of his just share if the testatrix' statement, as recited by the witness was true. There was no other means of proving the advance by qualified witnesses. The plaintiff was incompetent to deny the advance. The court properly instructed the jury that they should not take into consideration, as an established fact, any recital of conversation or other transaction given in evidence by any party to the proceeding, as such recitals were only admitted as foundations for opinions of the witnesses as to the soundness or unsoundness of mind of the testatrix.[3] But on inquiry from the jury after a verdict in defendants' favor sustaining the will, this item of evidence to the jury, as was to be expected, proved conclusively that: (1) testatrix, at the time she made the will, knew the value and extent of her property; (2) the number and names of those who were the natural objects of her

3 Gwinn v. Hobbs, *op. cit. supra* note 2.

bounty; (3) their deserts with reference to conduct and treatment towards her, and their capacity and necessity; and (4) had sufficient active memory to retain all these facts long enough to have her will prepared and executed; all in strict conformance with the instruction of the court.[4] That little cross-query "Why?" undoubtedly settled the issue.

Another psychological *faux pas* to which the uninitiate, and even some hardened practitioners, too frequently are prone on cross-examination, is that of giving an impression —intentional or unconsciously—that the cross-examiner disbelieves the witness and intends to make the witness out a liar, before anything has occurred in the trial upon which to base the assumption. The injury accomplished to the cross-examiner's side of the case from this manœuvre is frequently incalculable. In the absence of eliciting on that examination something tangible to sustain the predetermined theory of falsehood, and if the witness successfully withstands the ordeal, it is the cross-examiner, and not the witness, who emerges with the hall-mark of Ananias. Intuitively the jury, and not unlikely the trial judge, will, in such circumstances, build up a mental resistance against the suggested inferences and innuendoes cast out by the examiner. It is not meant to discount the importance of putting to discomfiture an obviously mendacious witness and thereby emphasize not only his own worthlessness to the side which called him, but also to bring additional dubiety to the whole case he seeks to sustain; however, be certain that the triers of the facts are convinced the witness is intentionally prevaricating, before risking this artifice.

Closely allied with the indiscretion last noted, is that of according over-emphasis to a discrepancy in some inconsequential detail of the witness's examination—a slight variation between statements on direct and cross-examination

4 Hoffbaur v. Morgan, 88 N. E. 337 (Ind. 1909)

of the witness especially to be expected on estimates, such as speed, distance, time, value and narration of conversations. It tries the patience of even a jobal tribunal for counsel to put question after question to a witness apparently seeking explanation as to why, on direct examination, the witness said the motor car was going between twenty and twenty-five miles per hour, when on cross-examination the testimony is that it was going between eighteen and twenty-three miles per hour; or on the point that heretofore the witness said the land was plowed two weeks before the crop was put in, and now says that it was about ten days. The net advantage usually to be gained by such an hyperbolic course is exactly nothing, and the risk attending its pursuit is entirely out of all proportion to the possible profit. Of course, this criticism is not intended to apply to those instances where the witness makes a positive and unqualified statement of a material fact in issue, of controlling importance, without indicating, or it being apparent that the witness relies on estimate, fallible recollection, or judgment which is necessarily inexact. Hence, when a witness undertakes to speak with positiveness that the distance was so and so by measurement; that he at the time looked at his watch or at the speedometer; that it was on Sunday; etc., etc., and from such actual observation, or exact knowledge he is presumed to possess, on cross-examination a discordance is established which the witness admits, then it is not only proper, but demanded that he be pilloried for the incongruity.

To the average layman the most inexcusable blundering of a lawyer in the trial of a cause is his relentless, blustering, browbeating and bear-baiting of witnesses on cross-examination. With few exceptions the brow-beater is Euripides' lion lashing himself with his own tail. He may, and usually does, cause the witness subjected to the torture, pain, discomfort, embarrassment, and psychic distress, but insofar

as producing any advantage to his own case, it rarely gets him anywhere. There are exceptional occasions, confined almost wholly to criminal cases and matters of domestic relations, where the cross-examiner confronts a particularly vicious or brutal type, when such conduct may be called for, or at least justified; but to appropriate the procedure as a rule or habit, is bound to bring irremediable loss to one's clients.

Then we have the unbearable repetitive cross-examiner. He is blood-kin to the perpetual-motion machine and just about as impossible. He tries and irritates court, jury and co-counsel, to say nothing of the witness. Moreover, it is not unlikely that he may seriously and irretrievably damage his case in the process, by giving undue emphasis to the examination in chief. It calls to mind an action for breach of promise to marry, accompanied by seduction. The plaintiff had recited with considerable reluctance some intimacies with defendant. Only by stretching logic and probability to their remotest bounds, could it be inferred from plaintiff's direct examination that she surrendered herself to the defendant under the beguiling influence of a promise of espousal. In all likelihood, had she not been cross-examined, the court would have taken from the jury the question of seduction. However, an enterprising youngster proceeded to take her all over the ground covered by the direct examination. Amateurishly mistaking her hesitation on the crucial question in chief and the gingerly handling of that phase of the inquest by her counsel as evidence of total lack of a case on this theory, the cross-examiner, prying into minute detail, to his discomfiture, brought out a clear and unmistakable case for the plaintiff, and despite the positive denials of the defendant, the jury found for the plaintiff on the charge. This example afforded to the blunderer a lesson he will ever remember, but at what a cost to his client!

Besides holding in store grave pit-falls for the examiner, a repetitive cross-examination makes unwarranted draughts on the time of all concerned in the trial. Apart from any abuse, cross-examination almost always consumes more time than the direct. When, one adds to the time legitimately occupied with cross-examination, an entire repetition—and perhaps two and three repetitions—of the direct, tacit and perhaps expressed censorship is quite likely to ensue.

The ideal cross-examiner has mapped out in his mind, and usually memorized by charted notes, just what course he will pursue with the witness before the direct is finished. He commences and ends with a purpose and definite objectives, whether he achieves them or not. Having failed to gain his points, and feeling persuaded that they are unattainable, he drops the quizzing to avoid injury to his own case. The average novice is possessed with a feeling of seasickness when his adversary finally says: "Take the witness." He has been listening to the witness's recitals with an attitude about the same as his client's. Taken wholly off guard, yet resolved to conceal his unreadiness, he disconsolately glances to the top of his notes and in a confusion of errors, proceeds with a monotonous retracement of the path blazed by his opponent. His ideas on what to ask and how to ask are a jackdaw's hoard, picked up anyhow and piled together anywise. Of only one thing does he appear certain—the witness *must be cross-examined!*

By no means have we set forth all criticism that would properly fall under the rubric captioning this article. Others will be recalled by every experienced trial lawyer. It is thought that the most flagrant botches are here exposed. In essaying a remedy, we point to the patient and say: "Within yourself lies your own cure. Become educated, not merely instructed. Know the reason for asking, besides the ability to ask."

Walter R. Arnold.

South Bend, Indiana.