CROSS-EXAMINING THE PLAINTIFF'S DOCTOR

THE OATLEY MCLEISH GUIDE TO MOTOR VEHICLE LITIGATION 2017

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INTRODUCTION

> "*An advocate does not need to do a lot of trials to be successful, but he or she must understand the mechanics of the trial and the factors that contribute to the art of persuasion*."
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> - The Honourable Justice Michael F. Brown
> *The Advocates' Journal – Summer 2016*

The cross-examination of an opponent's expert witness is often an intimidating prospect, particularly in an era when civil trials are becoming less frequent and counsel have little opportunity to practice and develop cross-examination skills and techniques. Much has been written about the "art" of cross-examination, yet seasoned advocates unanimously agree that the key to a success is not necessarily natural talent but rather thorough and meticulous preparation.

The following paper will outline and discuss seven basic areas of consideration in the preparation and execution of the cross-examination of a plaintiff's doctor.

1. FIRST DETERMINE YOUR OBJECTIVES

It is rare that a cross examination will result in the total and utter destruction of the medical expert's credibility and opinions. However, cross-examination does provide counsel with an opportunity to score evidentiary points that can later be used to form the foundation of a compelling closing argument. As such, it is important to determine early on what it is you want to achieve and what points can be scored from this particular cross-examination. Common goals for the cross examination of the plaintiff's doctor include:

- undermine or reduce the impact of the expert's opinions
- emphasise weaknesses in the plaintiff's case generally
- obtain answers and evidence helpful to the defendant's theory of the case.

The specific manner in which these goals can be achieved will usually become apparent once counsel begins to gather information and documentation on the doctor who is to be cross-examined.

2. COLLECT INFORMATION AND DOCUMENTATION

This may very well be the most important part of laying the groundwork for a successful cross-examination. It is always important to gather all available information regarding the plaintiff's doctor as this will provide you with the ammunition that you will need in court. The following are common sources of such information:

a) The doctor's curriculum vitae

The doctor's curriculum vitae will inevitably list associations and publications. It is helpful to inquire into whether or not the associations are current and whether or not there have been any disciplinary issues. A review of the list of publications is also essential. Any publication that appears relevant to the doctor's opinion should be obtained and reviewed. If there are no publications relevant to the doctor's opinion, that should be noted as well. Lastly, if possible it is always useful to compare the doctor's current C.V. to prior C.V.'s to see what changes have been made and whether such changes may be relevant to the cross-examination.

b) Internet Search

The internet is an easy and extremely useful tool for gathering information on a doctor. There may be information regarding associations and publications not included in the C.V. If so, it is important to compare and contrast potential differences. There may also be biographies of the doctor on the websites of various medical institutions. The importance of gathering this information is to look for evidence that may be used to attack credibility, demonstrate bias or the existence of prior inconsistent statements.

c) The doctor's report

Almost all medical-legal reports will include a category or section listing the various documents that the plaintiff's doctor reviewed and/or relied upon in the preparation of his or her opinion and report. It is important to review these documents for the following two purposes:

- Whether the plaintiff's doctor had a complete medical brief

- To ensure that the plaintiff's doctor has properly and fairly characterized prior documents relied upon.

In many cases, the plaintiff's doctor may have written his or her report a number of years before the actual trial. It may be that since the date of the report, additional and relevant documents have been produced that may have changed or altered the doctor's opinion. At a minimum, it may demonstrate on cross-examination that the doctor does not have the benefit of the "complete" picture when giving testimony at trial.

Another area of consideration is whether or not the doctor has been fair in reviewing or relying upon all of the document's in the medical brief as opposed to "cherry picking" only those documents that support his or her own opinions.

Similarly, although it is rare, there are times when a doctor has misquoted portions of earlier documents or has mistakenly attributed their significance. One example that comes to mind is a neuropsychologist's report that placed great emphasis on the fact that the Ambulance Call Report indicated a loss of consciousness at the scene of the accident. A review of the Ambulance Call Report indicated that the note actually included a common symbol meaning "no" loss of consciousness. On cross-examination, the neuropsychologist first admitted that the fact that the plaintiff had lost consciousness was a very significant finding that supported the conclusion of a mild traumatic brain injury. When cross-examined on the fact that the Ambulance Call Report actually indicated the opposite, the neuropsychologist had no option but to admit that he had made a serious mistake.

Other sources of information include the doctor's file, transcripts of the doctor from previous trials, authoritative literature in the field and the reports of other experts in the case at hand.

d) Legal data bases and prior negative treatment by the courts

Another potentially useful source of information are legal databases that contain cases in which the plaintiff's doctor has previously testified. Within these cases are both prior opinions as well as treatment by court. While obtaining this information is often useful in getting a sense as to what to expect at trial, it is highly unlikely that counsel will be able to cross-examine the plaintiff's doctor on how prior courts have treated his or her evidence. The general rule is that cross-examination is not permitted on prior judicial determinations as prior determinations are

"in essence, no more than an opinion on the credibility of unrelated testimony given by this witness in the context of another case." (see: *R v. Ghorvei,* (1999) 46 O.R. (3d) 63 at para. 31 and *Bruff–Murphy v. Gunawarden*a, 2016 O.N.S.C. 7)

3. **DETERMINE THE BEST APPROACH FOR THE CROSS-EAMINATION**

After reviewing all the information and documentation gathered, it is time to decide on what issues to cross-examine. For example, the discovery of a prior inconsistent statement or opinion would most certainly be an issue for cross-examination as would be information gathered that would demonstrate bias on the part of the doctor. In his frequently consulted book "On Trial; Advocacy Skills, Law and Practice", Geoffrey Adair lists seven basic issues upon which to cross-examine an expert witness as follows:

i) attacking the qualifications
ii) attacking bias
iii) destroying the factual assumptions
iv) attacking the methodology
v) contrasting the opinion with other leading authorities
vi) exposing the opinion as a matter of judgment
vii) contradicting the opinion with prior statements

(Chapter 15; page 265)

For the purposes of this paper, the following issues will be discussed:

- Attacking qualifications

It is highly unlikely that a doctor called as a witness at trial will not have the necessary credentials to be qualified as an expert. In most cases, the doctor will likely have been qualified to give expert evidence on many prior occasions. That being said, there are points to score in cross-examining the doctor on qualifications such as:

- to demonstrate weaknesses in the doctors credentials such as a lack of experience in a certain area or that the doctor is no longer treating patients and his or her practice is now confined to writing medical legal reports, or

- to address the issue that the doctor's report also includes opinions outside his or her area of expertise and that such opinions should not be allowed in oral testimony.

- **Attacking bias**

If defence counsel is dealing with a doctor who is known to be "plaintiff friendly", then there may be good reason to cross-examine on this issue in order to demonstrate bias. Typical areas for cross-examination include prior dealings with plaintiff's counsel, the number of prior assignments and the fees earned. This line of questioning is not without controversy and potential pitfalls. Certainly, similar questions maybe asked of defence counsel's own expert witnesses. In addition, it is essential that counsel know the answers to the questions asked before embarking down this line of questioning.

- **Attacking the factual foundations of the opinion**

As it is often very difficult for a lawyer to go head-to-head with a doctor in the area of that doctor's specialty, it is much easier to attack the facts and foundations upon which the doctor's opinions are based.

In this regard, it is important to know whether the plaintiff's doctor had the benefit of a complete medical brief as stated earlier. If not, it is useful to cross-examine the doctor on the fact that he or she was operating without knowing the "complete picture".

Another important area is the information or personal history that the plaintiff gave the doctor during the initial interview. There are times when a plaintiff may fail to advise the doctor that he or she suffered from a prior and relevant health problem such as pre-existing back pain. The

plaintiff's doctor may very well have relied on this fact to conclude on the issue of causation. If the plaintiff gave incorrect information to the doctor, then this is an easy area to exploit on cross-examination. Such a cross-examination may look like this:

Q. You had the opportunity to interview the plaintiff?
A. Yes.
Q. And this is an important part of your information gathering process?
A. Yes.
Q. And you relied on the information provided to you by the plaintiff in forming your opinion in this case?
A. In part, yes.
Q. But certainly doctor, what the plaintiff tells you about his physical condition before the accident is an important consideration.
A. Yes.
Q. And doctor you assume that what the plaintiff told you about his pre-existing health was accurate?
A. Yes, I had no reason to doubt him.
Q. And should it turn out that the information provided to you by the plaintiff was not accurate, that would be of concern to you?
A. Yes, most definitely.
Q. In fact, if you have been provided with incorrect information that may very well alter your opinions in this case?
A. It may.
Q. In your report you state that the plaintiff told you that prior to the subject accident he had never experienced back pain?
A. That's correct.
Q. And it was important enough for you to note that in your report?
A. Yes.
Q. And you conclude that the plaintiff's current back complaints were caused by this accident?
A. I do.
Q. And one of the reasons for so concluding is the fact that the plaintiff told you that he did not suffer from any back pain prior to the accident?
A. That's correct.

Q. I am going to show you the physiotherapy records of the plaintiff for dates prior to this accident. You will see doctor that the plaintiff received physiotherapy for back issues including back pain prior to the subject accident?

A. I see that.

Q. And this information was not provided to you by the plaintiff prior to the preparation of your report?

A. That's correct. I have not seen this information before.

Q. And had you been provided with this information, it may very well have resulted in a different opinion from you?

A. It may have.

Q. It certainly cannot be said that the plaintiff's back pain is exclusively caused by this accident when he had back pain for which he received treatment even prior to the accident.

A. That's true.

Attacking the foundation of an expert opinion is one of the more useful cross-examination techniques. A doctor is very much powerless to rescue the situation and may not even want to assist the plaintiff upon learning that the plaintiff has been less than forthright. In addition, not only does the above cross-examination undermine the doctor's opinion on the issue of causation, it also reveals credibility issues pertaining to the plaintiff as an added benefit

- **Attacking prior inconsistent statements or opinions**

In his article "*The Ten Commandments of Cross-Examination*", attorney Timothy A. Pratt of the law firm Shook, Hardy & Bacon, LLP based in Kansas City, Missouri demonstrates an excellent cross-examination on a prior inconsistent opinion by a medical doctor. In this regard, the plaintiff's argument at trial was that her cancer was caused by the defendant's product. Although there was apparently little evidence to support a causative link, the plaintiff was able to obtain a report from a doctor, which concluded that the defendant's product caused the plaintiff's cancer. This doctor was then cross-examined on a prior inconsistent opinion set out in an earlier publication found on the internet. The cross-examination on this point went as follows:

Q. Your are on staff at M.D. Anderson Cancer Hospital?

A. Yes.

Q. Isn't it true that M.D. Anderson Cancer Hospital has a web page?
A. Yes
Q. Have you ever had any articles published on the M.D. Anderson web page?
A. A few.
Q. Do you remember one of your articles that appeared on the web page just three months ago?
A. I think so.
Q. In that article you talked about T-cell lymphoma, the very type of cancer involved in this case.
A. I believe so.
Q. Let's be sure. Is this the article that was published on the web page?
A. Yes, that's my article; it has my name on it.
Q. I assume you knew that physicians and others might read this article?
A. Yes, I assume so.
Q. And, therefore, you wanted to be as accurate as possible?
A. Of course.
Q. Turn to page four of the article.
A. Okay.
Q. In this article, which you published on the web page just three months ago, you talk about what is known regarding the cause of T-cell lymphoma, isn't that right?
A. Yes.
Q. Isn't it true that you said the following: "No one knows what causes T-cell lymphoma". Is that what you wrote just 3 months ago?
A. That's what it says.

Obviously, this cross-examination seriously discredited the doctor's evidence and is a useful example of the power of cross-examining on prior inconsistent statements. (Timothy A. Pratt's entire article "*The Ten Commandments of Cross-Examination*" can be found at http://www.thefederation.org/documents/Pratt-SP03.htm).

- **Obtaining admissions that help your case**

Another useful issue or approach in cross-examination is to obtain evidence helpful to your own case which can later be used in closing argument. Such admissions may include the following:

- that the plaintiff's complaints of pain and limitation are largely subjective
- that there is no objective test for pain
- that the plaintiff's credibility is the most important basis for the expert's opinions
- that the defendant's doctor carried out a proper examination of the plaintiff
- that the defendant's doctor's findings were similar or the same as the plaintiff's doctor's findings and the only difference is "opinion".
- that the defence doctor is well respected and well qualified to give an opinion in the case
- that a treating doctor may be in a better position to give an opinion in the case at hand.

Each case is unique but it is useful to give careful consideration to what evidence may be obtained by from the plaintiff's doctor. Obviously, helpful evidence from an opposing expert will carry more weight and credibility than the same evidence from your own expert.

4. **STYLE AND TECNIQUE**

As confidence is a key factor in any successful cross-examination, counsel must develop their own style and not try to emulate others to the extent that they find themselves outside their comfort zone. There are, however, a number of techniques that can be used to assist any counsel, regardless of their style, in undertaking an effective cross-examination. In his 2009 article "*Cross-examining the opposing expert*" (The Advocates' Journal, Winter 2009), Toronto lawyer John McLeish sets out a number of "do's" and "don'ts" for cross-examination including the following:

DO

- Cross-examine softly
- Start and close strong
- Ask leading questions
- Ask short questions
- Use simple words
- Use headlines to introduce new subject areas
- Ask for facts, not evaluations or opinions

- Get one fact straight at a time

DON"T

- Use tag endings such as "isn't that correct?"
- Use introductions such as "Am I correct is assuming…"
- Wing it
- Be offensive or sarcastic
- Argue with the witness
- Become angry
- Ask a question to which you don't know the answer
- Ask one question too many

Asking one question too many or "asking the ultimate question" as it is sometimes described should always be avoided. When cross-examination is going well and the plaintiff's doctor has been agreeing with you consistently, it is often tempting to go one-step further and ask the ultimate question relating to that specific point. For example, if on cross-examination the plaintiff's doctor agrees with you that the plaintiff was inconsistent with his prescribed therapy and missed many appointments - that is useful information. At this point, counsel likely has enough to make the argument that the outcome may have been different had the plaintiff been more diligent in his therapy. In fact, the jury may have already come to that conclusion on their own. Accordingly, there is no reason to ask the doctor the question that had the plaintiff been more compliant with his therapy, his outcome would have been better. You simply risk giving the doctor the opportunity to disagree with you and take away a powerful point in closing argument.

Lastly, it is imperative to be organized and know what documents you will require for the cross-examination and have them easily available to you at the podium. In this regard, it is useful to speak with the court registrar before you begin to ensure that any exhibits that will be used are available and that enough copies have been made for the judge, jury and opposing counsel.

5. CONTROLLING THE WITNESS

Most seasoned lawyers will say that the most important element in effective cross-examination is controlling the witness. This can be very difficult when dealing with an expert witness who

likely knows more about the subject matter than counsel and who has testified in court on many prior occasions. The most effective way to control a witness is by asking only leading questions. It is even better if the leading questions result in “yes” answers.

Again, the old adage comes into play; only ask those questions for which you know the answer. This too will allow counsel to maintain control of the witness.

Regardless of how hard one tries, there are going to be times when an expert witness is unresponsive. The plaintiff’s doctor may be a seasoned witness who will use cross-examination questions as an opportunity to repeat what he or she said in direct examination. If that happens, it is important for counsel to re-establish control. There are number of different techniques in this regard. The easiest is to simply ask the question over again in a calm and professional tone. For example:

Q. Doctor you state that the plaintiff’s range of motion in her right arm is limited by pain.
A. That’s correct.
Q. And pain is a subjective measure?
A. I don’t know, it wasn’t my arm that was shattered in the accident.
Q. I’m sorry doctor. Perhaps I didn’t make the question clear enough. Pain is a subjective measure.

If unresponsive answers continue, do not be afraid to pause for effect and ask the question again. Eventually, it is permissible to ask the judge to direct the witness to answer the question but it is better to control the witness without such judicial intervention.

Sometimes, a rare opportunity arises to actually undermine the expert’s credibility when they are being a difficult witness. For example, an expert witness who is scoffing or snickering at your questions can be easily scolded with the simple comment: “Doctor you may consider this all a joke but I can assure you that the rest of us are taking this trial very seriously”. A simple rebuke of this nature without anger or sarcasm can often have a powerful effect in controlling a witness.

The final point on controlling the witness is to avoid being drawn into an argument or debate on issues within the expert’s area of expertise. This will likely end in victory for the expert and

frustration for counsel. For this reason, it is important to ask factual questions and not get into areas of opinion unless it is to simply establish the fact that there are contrasting opinions on a particular issue.

6. START BIG AND END BIG

Many commentators on the topic of effective cross-examination subscribe to the theory that is important to start strong and end strong. This is consistent with studies that have demonstrated that audiences tend to remember what they learn first and what they hear last in any given presentation often referred to as the principle of primacy and recency.

Accordingly, it is always important to start cross-examination in an area where counsel is likely to achieve some degree of success. That will set a strong tone and provide counsel with the confidence required to approach more difficult areas. Certainly, if counsel feel they have an effective cross-examination on the issue of bias, then it is probably useful to start there as it may very well taint the remainder of the expert's evidence.

The middle portion of the cross-examination may be used to obtain admissions and evidence necessary for closing argument but may involve subject matter that is not particularly interesting. It is best to proceed through these issues efficiently and effectively so as to avoid losing the interest of the trier of fact.

As for the conclusion, most counsel wish to end their cross-examination in dramatic fashion. In reality, that is rarely possible. That being said, counsel should save at least one strong point for the end so as to conclude on a high note.

7. KNOWING WHEN TO QUIT

According to Timothy A. Pratt in his earlier cited article "*The Ten Commandments of Cross-Examination*", there are generally two times to quit. The first occurs when the witness has been discredited or has made a monumental concession. The second time to quit is when the witness is destroying counsel's case.

The latter situation is a further reason to hold back at least one area of cross-examination for which there is little doubt of success. If counsel finds themselves in trouble, they can simply move to this area of questioning, score a quick point or two and sit down.

CONCLUSION

For defence counsel, the cross-examination of the plaintiff's doctor is an inevitable part of any motor vehicle trial. As noted by Mr. Justice Brown in the opening quote of this paper, a lawyer does not need to do a lot of trials to be successful, but he or she must understand the factors that contribute to the art of persuasion. In the context of cross-examination, the main factor is preparation. For it is only through meticulous preparation that counsel can develop the skills required to control the witness and obtain the evidence necessary to develop a compelling closing argument.

THE FOLLOWING PUBLICATIONS WERE RELIED UPON IN PREPARING THIS PAPER:

1. Geoffrey D.E. Adair, Q.C., On Trial Advocacy Skills Law and Practice, Butterworths Canada Ltd. 1992
2. John McLeash, "Cross-examining the opposing expert", The Advocates' Journal – December 2009
3. Timothy A. Pratt, "THE TEN COMMANDMENTS OF CROSS-EXAMINATION", found at http://www.thefederation.org/documents/Pratt-SP03.htm
4. Sam N. Poole Jr., "Cross-Examination of Plaintiff's Expert: The Art of War", found at http://www.mandaq.com
5. Joseph T. Mordino, "Cross-Examining Plaintiff's Expert" found at http://faulknerandtepe.com
6. Frank Ramos, "The Art of Cross-Examination" found at http://adviceforthe young lawyer.blogspot.ca