

- (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
- (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

Libke v The Queen (2007) 230 CLR 559

Albrighton v Royal Prince Alfred Hospital [1980] 2 NSWLR 542

- sexual assault by man to woman with problems
- offensive comments by cross examiner, compound questions (2 in one) cutting off witness, argumentative questions
- questioning was calculated to belittle and humiliate and couldn't argue back
- amounted to bullying
- not disallowable just because it might not be what they want to hear
- court balances probative value of question against any distress the witness is experiencing

## Testamentary Evidence II, Documentary & Real Evidence

### Cross-Examination

- **Cross-Examination** - Querying of a witness by a party other than the party who called the witness to give evidence - Evidence Act, Sch 2, **Dictionary**
- Regarded as crucial to the operation of the trial and the examination of witnesses
- **Rationale:** Most evidence in a trial is agreed on by parties, they just disagree on the crucial things, so competing versions of relevant facts need to be tested. **Fairness requires that a party has an opportunity to respond to the version put by the other party.**
- Cross-examination is thus characterised by leading questions
- Effective cross-examination does suggest an answer in the form of a yes/no question. Examples:
  - 'I put it to you that you knew the worker was not wearing a safety harness'
  - 'You agree, don't you, that the other car was stationary when you collided with it'
- These questions invite the witness to agree or disagree with a proposition, not give their version of events.
  - The questions test to what extent a witness will resist an alternative version of facts.
  - Can undermine and weaken the case of the other party by attacking the witness's version, diminishing the weight of their evidence possibly attacking their credibility.

### Section 42 - Leading Questions

#### *Evidence Act 1995 (NSW)*

##### **Section 42 - Leading Questions**

- (1) A party **may put a leading question** to a witness in cross-examination unless court disallows the question or directs the witness not to answer it.
- (2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, **it is to take into account the extent to which:**
  - (a) evidence that has been given by the witness in examination in chief is **unfavourable** to the party who called the witness, and
  - (b) the witness has an interest consistent with an interest of the cross-examiner, and
  - (c) the witness is **sympathetic** to the party conducting the cross-examination, either generally or about a particular matter, and
  - (d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers
- (3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used
- (4) This section does not limit the court's power to control leading questions.

- **Section 42(1)** - says leading questions may be put to a witness
- **Section 42(2)** - outlines the factors that should be considered by the court when asking them to disallow a leading question or to direct that an answer need not be given.
- **Section 42(3)** - leading question must not be allowed if it will not be the best way of finding the facts
  - **Example** - some witnesses may easily be led to every proposition put to them simply because they are anxious to give what they think is the correct answer or they are overcome with their experience in court, it could be a child or a person with an intellectual disability or language problems, this is why this section allows the court some flexibility.
- Section 26 allows court to control questioning and here, allows discretion to prohibit leading questions.
- However, courts remain conscious of the common law tolerance towards cross-examination because of the belief that the truth will come out under vigorous questioning.
- CE should be limited to the issues of the case but often courts have difficulty assessing this.
  - Example - An attack on a witness's credibility is allowed through exceptions. This attack may be related to the real issues but only indirectly, such as whether a witness can see properly. This may not be directly related to the issue. It may only be a collateral fact that affects fact-finders' assessment of facts in issue.
- A line of questioning by defence counsel may be obscure.
  - A good cross-examination might lead a witness to a particular point where they are cornered, but this can take time.
  - The judge may not know where it is leading or to which facts in issue the questions are being directed
  - They may ask the examiner where it is going and counsel will have to make this clear to the judge.
- This is where we get the judge may intervene in the cross-examination.
  - Example - Where cross-examination is conducted by self-represented litigants. Judge may make sure there is no treatment of the witness that may undermine that person's case unfairly.

## Section 41 - Improper Questions

### Evidence Act 1995 (NSW)

#### **Section 42 - Improper Questions**

- (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a "disallowable question")
- Is misleading or confusing
  - Is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating, or repetitive, or
  - Is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate,
  - Has no basis other than to stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability)

- **Section 41** - Makes clear that some questions are improper and therefore disallowable.
  - The court must disallow a question or inform a witness if the question is (factors (a)-(d))

#### Libke v The Queen (2007) 230 CLR 559

**Facts** - Involved a sexual assault by a man against an intellectually impaired woman. He appealed against his conviction partly against improper questioning at the cross-examination. His appeal failed for other reasons but

**Held** - Heydon J gave a useful exposition of improper questioning. This included offensive questioning, comments by the cross-examiner, compound questions (questions in one), cutting off the witness while giving answers, controversial assumptions and argumentative questions. He said, in this case the questions were indefensible and improper because it was calculated to belittle, humiliate and break the witness. It amounted to bullying, intimidation, personal vilification or insult, none of which was permissible. This case was not about section 41 of the Act, but it simply illustrates the limitations on improper questioning in cross-examination to which section 41 is addressed.

#### Albrighton v Royal Prince Albert Hospital [1980] 2 NSWLR 542

**Facts** - Based on CL principles. Held that counsel should not regard himself as entitled to harass a witness until the other side objects. If the occasion arises, the judge has power and duty to protect a witness if they think witness is under undue pressure. However, a question is not disallowable just because it challenges vigorously the truth of a witness. Or, if it requires the witness to discuss private issues and distasteful matters. Court must balance probative value against any distress witness experiences.

#### Rule in Browne v Dunn (1894) 6 R 67

- **Rule in Browne v Dunn** - 'A party must have the opportunity to respond to the other's version of facts'.
- A central aspect of fairness in court process is ensuring that one party has the opportunity to answer the claims and allegations of another party.