The Intruding Judge

There is a fine line between judicial control of a trial and judicial intervention to which counsel may object. R.S. Hulme QC explains where that line runs.

One of the problems counsel, particularly fairly junior counsel, have to contend with from time to time is a judge who wishes to interfere with counsel's running of a trial. Despite a number of decisions extending back at least as far as 1945 - and observations as far back as Lord Bacon - both experience and authorities show that not all judges both know and accept the limitations to such interference. It has been suggested that the writer might contribute, if not to the learning in this area, at least to the dissemination of such learning.

The most recent case in the field seems to be that of *Government Insurance Office of New South Wales v Glasscock* (NSW Court of Appeal, 19/2/91 - unreported) wherein Handley JA. observed:-

> "One of the most difficult and distasteful tasks a barrister is ever called on to perform is to have to make an application to a trial judge to disqualify himself or herself from hearing or further hearing a case".

The task is even more difficult if the barrister is young, possesses a decent degree of humility and is conscious not only of the judge's position but also that the judge should and presumably does know how trials should be conducted. On the other hand the task is easier if Counsel is conscious of how far a judge is and is not entitled to go. It is hoped that this article may widen the spread of knowledge in this regard.

The overriding principles are that a trial shall be conducted according to law, shall be fair and shall appear to be fair. These principles of course have operation outside the current topic - operation which it is not intended to pursue here. It suffices for present purposes if it be recognised that these principles lie at the heart of the instant topic.

So far as the first of the elements mentioned is concerned, it is to be borne in mind that -

> "Under our law a criminal trial...is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law" - per Barwick CJ. in *Ratten v The Queen (1974)* 131 CLR 510 at 517.

McTiernan, Stephen and Jacobs JJ. agreed.

To similar effect is perhaps the best known of the cases in this area of the law, *Jones v National Coal Board (1957)* 2 QB 55 at 63 -

> "In the system of trial which we have evolved in this country the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large ... ".

See also *Titheradge v R (1917)* 24 CLR 107 at 116.

Furthermore excessive judicial intervention is seen as reducing the judge's chances of fairly appreciating and weighing the case put forward by a party.

> "A judge who observes the demeanour of the witness while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge to what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue." - *Yuill v Yuill (1945)* 1 All ER 193 at 198.

This principle has been accepted in *Jones v National Coal Board* at p.63, *R v Butler (1953)* 70 WN (NSW) 222 at p.223 and *Galea v Galea (1990)* 19 NSWLR 263 at 280.

Indeed, the party helped by a judge may have only a pyrrhic victory.

> "The questions were, after all, leading questions inviting the answers they got, and they were put by the judge, not by counsel. They could not have been put in chief, and would not have been put in cross examination. I do not believe a judge may make impregnable findings of fact by expressing a belief in evidence which he has put in a witnesses's mouth". - per Meagher JA *Commonwealth Bank of Australia v Mehta* (NSW Court of Appeal 28/3/91 - unreported).

Fairness involves each party having the opportunity of fully advancing its case and challenging that of the other side by way of evidence in chief, cross-examination and address and in the case of a jury trial having a summing up which fairly presents the issues to the jury. So far as the presentation of evidence is concerned -

> "There is no reason why the Judge should not from time to time interpose such questions as seem to him fair and proper. It was, however, undesirable in this case that, beginning in the way which I have described, the Judge

counsel of a witness who is himself accused should be constantly interrupted by cross-examination from the Bench. Cross-examination in cases of this kind is usually quite efficiently conducted by counsel for the Crown." - *R v Cain (1936)* 25 Cr. App. R. 204 at 205.

The substance of the above was approved in *R v Bateman (1946)* 31 Cr. App. R. 106 at 112 where the Court added -

"We would adopt those observations and apply them to any witness, whether called by the prosecution or the defence."

To similar effect is the following extract from the judgment of Street CJ., with whom Owen J. agreed, in *R v Butler (1953)* 70 WN (NSW) 222 at 224 -

"Quite apart from the judge's view of the demeanour of a witness there is the matter of the jury's view of the demeanour of the witness, after hearing the summing up, and for a judge to take part, as if he were counsel, in an elaborate examination or cross-examination of a witness is unfair to the witness himself, is unfair to counsel, and may destroy a line of examination-in-chief or of cross-examination which counsel had carefully decided upon beforehand. It must be remembered that counsel examining-in-chief obviously has thought how that examination is to be conducted in the light of the information before him in his brief, and it would be impossible for him to maintain the thread of his examination if he were subject to constant interruptions or if the examination were taken out of his hands. So also in regard to cross-examination. So much may often depend upon the way in which counsel intends to conduct his cross-examination, the matters up to which he proposes to lead by appropriate questions, and the stage at which he intends to put a crucial question. The whole object and effect of his cross-examination may be destroyed by an unduly hasty intervention on the part of the presiding judge."

Notwithstanding the circumstances that often a judge will be more experienced than counsel and perhaps, by an abstract test, better, he usually has not the benefit of knowing what information is available to counsel or of preparation of an overall cross-examination.

"In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself." - *Yuill v Yuill* at 185.

Timing is a recognised ingredient in the art of cross-examination. There are often doors to be shut or counsel may defer a question so he can ask it of two witnesses without the intervention of an adjournment. It is also a legitimate technique in cross-examination not to let the witness know which way the questioner is heading.

A party is also entitled to address fairly and fully and in this regard it is appropriate to record a passage in *R v Clewer (1953)* 37 Cr. App. R. 37 at 39-40, most of which was quoted with approval in *R v Martin* 1960 SR (NSW) 286 at 288.

"No doubt it is sometimes difficult, when the defence is one that appears to the presiding judge, whether a judge of assize, recorder or chairman of quarter sessions, to be fantastic or devoid of merit, to treat it with the same consideration as he would pay to a defence not marked by those characteristics. At the same time, the first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial, and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury. If counsel is constantly interrupted both in cross-examination and examination-in-chief, and, more especially, as in this case, during his speech to the jury, his task becomes almost impossible. The more improbable the defence, the more difficult it is for counsel to discharge his duty to his client adequately, and, provided that he keeps within the bounds of fair advocacy - as it is beyond question Mr Du Cann did here - it is highly desirable that he should be allowed to do his best in presenting his case, leaving it to the judge to deal with, and maybe to demolish, it in his summing-up.

Some of the judge's observations must have indicated to the jury that he himself had come to a conclusion with regard to the case that was adverse to the appellant and that he regarded the defence as devoid of any foundation. As we have already said, when he came to sum up, he summed up perfectly clearly, perfectly fairly, and as need hardly be said with regard to any summing-up of this learned judge, with meticulous accuracy as to the law, but it does seem to the court that the whole conduct of the case must have conveyed to the jury the idea that the learned judge was completely convinced of the appellant's guilt, and was disparaging the defence which Mr Du Cann was gallantly endeavouring to lay before them.

Issues of fact are under our law entirely the province of the jury. Everyday experience shows that juries sometimes accept defences which appear highly improbable to judges, and which would not be accepted if the decision rested with the judge alone. The prisoner is entitled to have his defence, even the most improbable, put to the jury by his counsel, whose task is rendered impossible if he is constantly subjected to the kind of interruptions that occurred in the present case." (emphasis added).

See also *Stead v State Government Insurance Commission (1986)* 161 CLR 141

Trials must also appear to be fair - *Galea v Galea* at p. 277 and the cases there cited. Intervention, depending on the form it takes, may make it appear that the judge has taken sides and that the trial is unfair.

"So also it is for the advocates each in his turn to examine the witness and not for the judge to take it on himself lest by so doing he appears to favour one side or the other." - *Jones v National Coal Board* - at p. 64.

Though it would appear leading questions from the bench are not, per se, objectionable - it was so held in *Government Insurance Office v Glasscock* - a significant number of them leads towards an appearance that the scales of justice are not being held evenly.

Nothing in the foregoing is intended to suggest that a judge may not question a witness either in chief or in cross-examination. The judge's entitlement in this regard is recognised in virtually all of the cases cited. Such questioning can almost always be done with little or no significant interference with counsel's conduct of the case and, particularly when a witness is under cross examination it is suggested that almost always a judge, moved to intervene, should time his intervention to avoid such a consequence. In the writer's experience most good trial judges generally do so restrict their intervention - See also *Government Insurance Office v Glasscock* per Handley JA. at page 5.

It must also be borne in mind that judges are not bound by a monastic vow of silence. While certain conduct may be deprecated, one will not succeed on appeal merely because a judge has been sorely irritated by an irritating witness, *Galea v Galea (1990)* 19 NSWLR at 283-4, or reduced to sighing, groaning and appealing to the Almighty during counsel's address, *R v Hircock (1970)* 1 QB 67 at 71, or walks up and down the bench during counsel's address (suffering from "a fibrositic condition"), *R v Boundy* 76 WN (NSW) 395.

It would seem also that a judge may be entitled to a greater degree of intervention when counsel is inept - see U. Gautier *"Judicial Discretion to Intervene in the Course of the Trial" (1980)* 23 Crim. LQ 88 at 100 and cases there cited. Furthermore, the reasons which argue against judicial intervention may well have different weight according to the nature of the trial, civil or criminal, jury or non-jury. Judicial intervention later in a witness's evidence may be easier to justify than if it occurs at an early stage of the evidence-in-chief or cross-examination - *Galea v Galea* at 281. A judge is also clearly entitled to indicate, by questions or otherwise, matters which concern him.

However, none of this really bears on the fundamental issues with which this article is concerned. A judge is not entitled to take over a trial or a significant part of it; his interventions should not be such as to suggest bias towards one or other of the parties and the interventions must not prevent counsel from effectively presenting and conducting their cases.

This then is the law. How should counsel respond when in counsel's view a judge's intervention does interfere with his client's interests?

Firstly, as soon as practicable after the intervention passes what counsel believes to be legitimate, counsel should object or ask the judge to desist or moderate his intervention. If intervention continues or is repeated, it may be appropriate for counsel to repeat, possibly more than once, his objection or request. One can not lie by and then complain on appeal - see *Vakauta v Kelly (1989)* 167 CLR 568 at 572, 577, 587 - though some latitude may be given and once complaint is made, it need not be frequently repeated. *Government Insurance Office v Glasscock*, per Handley JA. at 14-15.

Counsel should ensure that, preferably on the transcript, there is a contemporaneous record of the conduct complained of and of one's objections or applications so that an appeal court may properly consider them. *Vakauta v Kelly (1988)* 13 NSWLR 502 at 524. See also *Builders Licensing Board v Mahoney (1986)* 5 NSWLR 96. The first of these cases makes it clear one is entitled to have matters of substance noted.

If judicial intervention makes it impossible to follow a train of thought then this should be stated and recorded.

No doubt questions to and answers from witnesses will be recorded but in the writer's experience not all judicial interventions are. For example, there was one celebrated New South Wales judge some years ago who, while properly instructing a jury that they should give to the accused's defence the weight they saw fit, would hold his nose with one hand and go through the motions of pulling a lavatory chain with the other. The record as presented to the Court of Criminal Appeal was unexceptionable!

If the intrusions are sufficiently extensive then the application to have the judge discharge himself should be made.

Finally, it is suggested that counsel should recognise, as some of the cases referred to show, that not all judges accept with equanimity a submission that their interventions are undesirable and should be more limited in the future. Apologies for the mere making of a submission which amounts to a criticism of the particular judge's conduct are not required - and indeed inappropriate - but it should be remembered that tensions are apt to rise and it is desirable that counsel exhibit care in the formulation of his submissions - see for example *Government Insurance Office v Glasscock.* Subject to this -

> "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful which he thinks will help his client's case." - *Rondel v Worsley (1969)* 1 AC 191 at 227

and those contemplating the "difficult and distasteful" task to which Handley JA refers may take comfort from the observations of Sir Owen Dixon on the occasion of his swearing in as Chief Justice -

> "Counsel, who brings his learning, ability, character and firmness of mind to the conduct of causes and maintains the very high tradition of honour and independence of English advocacy, in my opinion makes a greater contribution to justice than the judge himself". - (1952) 85 CLR p xii. ❑

Pleading!

(Extract from verified statement of claim in Common Law proceedings in the Supreme Court).

"The 2nd Defendant further says that to the extent the plaintiff suffered loss and damage, the events as pleaded in paragraphs 11 and 12 of the Statement of Claim were together events occurring and would have occurred, without any act or acts or any breach of duty of the 2nd defendant and in particular the events were caused by Mother Nature and Almighty God acting jointly and severally. " ❑