GOOD BARRISTERS; BAD DAYS[*]

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Some of you will soon begin work at the Bar. You will find it the most challenging work you have ever done, at least if you have not undertaken active service in the armed forces. You will discover that the Bar's rules of ethics and etiquette are not archaic oddities of no practical value, but necessary mechanisms for taking the heat out of the controlled nuclear fusion that is litigation. If you succeed, you will also find the Bar to be the most interesting job you have ever done.

But there will be bad days. They will not always be your fault: 100 per cent of cases that proceed to judgment have a loser. No one can make a silk purse out of a sow's ear, and sometimes even though you know that the brief you hold for your client is a sow's ear, you will be duty-bound to fight the case out to the bitter end.

Sometimes you may feel that the judge has let you down. You will not be the first barrister to feel that way; but you should understand that the judge may feel the same way about you.

A common complaint of judges about barristers is that the arguments presented by the Bar are becoming less helpful because of the undue length and complexity of the arguments presented for our determination.

The length and complexity of Counsel's arguments do pose real problems for judges in trying to digest the cases of the parties and they can cause judgments to be unnecessarily lengthy and complicated.

Some arguments are unnecessary because the case will be determined by better arguments, and some arguments are unduly ambitious. As to these concerns, it might be said that it is hardly a fault in Counsel that they are reluctant to abandon arguments which push the envelope. After all, it is not unknown for arguments to be upheld which had, only recently, seemed excessively adventurous, or indeed devoid of foundation. And we all know of cases where the court has been attracted by a point which Counsel thought was less than their client's best.

It is fair to say, I think, that the general view of judges is that the burdensome effect of overly elaborate and insufficiently discriminating arguments is, to some extent, a consequence of the shift to written submissions as the principal vehicle for argument. Ironically, the pressure for this shift was generated by the expectation that written submissions would put a curb on undisciplined argument and rhetorical flights which tended to waste time. And time has become more and more precious as court lists became busier and busier.

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Experience over the last three decades has shown, I think, that some barristers, writing in their chambers free from the pressures of oral argument, put their names to written arguments that they would never put orally, in open court. When the case comes to court, there is the annoying ritual incantation: "We rely upon our written submissions."

And so the judges are left to write lengthy essays about issues no one really cares about.

There is the somewhat harsher view that the problem of overly elaborate arguments presented by Counsel is due to a diminution in the judgment and courage of modern barristers.

In this view, the multiplicity of arguments and their diffuse articulation are symptoms of an inability on the part of Counsel, whether through lack of experience or learning or judgment, to pick their best argument, to state the good point succinctly and to stick with it. And, perhaps, as H L Mencken said: "Some people write because they lack the character not to."

It is hard to say precisely when the Bar's skills began to degrade in this way. But few judges, I suspect, are entirely immune to the suspicion that the problem became distinctly worse at the moment he or she accepted appointment to the Bench.

No doubt you will perceive this sort of judicial petulance as detracting from the satisfaction you derive from your work. But in the long story of the common law, this is a minor irritation. You should take some comfort from the knowledge that courts in the common law tradition have been treating advocates much worse for a very long time, and yet the system survives.

Charles Lee

My award for the good advocate most ill-treated by a court in a major case in the common law tradition goes to Mr Charles Lee of Virginia for his role in the great case of *Marbury v Madison*[1]. I want to tell you his story for a number of reasons. First, it is much easier to talk about people than about rules and principles. Secondly, *Marbury v Madison* is the case that stands as the foundation of our own constitutional law, and so every lawyer should know about it. And thirdly, it is to be hoped that, paradoxically, rather like the rainbow after Noah's Flood, the wrong that was done to Charles Lee should stand as a promise by the judges to the Bar that we won't do it again.

Charles Lee was a most distinguished American lawyer. He was the older brother of General "Light Horse Harry" Lee, a hero of the War of Independence. He served as Attorney-General of the United States during the administrations of both George Washington and John Adams. He appeared in some of the most important cases in the founding of the United States: in 1805 he appeared as defence counsel in the impeachment trial of Justice Samuel Chase of the Supreme Court of the United States. Judge Chase's nickname was "Old Bacon Face"; and that nickname may provide us with a clue as to why his personal charm seems not to have been sufficient to enable him to avoid the process of impeachment.

[1] 5 US 137 (1803).

Two years later, Charles Lee appeared for one of Aaron Burr's co-defendants in Burr's famous treason trial. Burr had been Thomas Jefferson's Vice-President and had shot and killed Alexander Hamilton in a duel in 1804.

In 1809, Charles Lee's nephew was born. This boy was christened Robert Edward, and his fame would eventually eclipse that of his eminent uncle and indeed all the other members of his family.

All that having been said, Charles Lee's greatest claim to a place in legal history remains that he was the barrister who lost *Marbury v Madison*.

As you all should know, in *Marbury v Madison*, Chief Justice John Marshall established for the United States, and indirectly for us as well, the principle of judicial review of legislation. The idea that the Supreme Court might strike down as invalid legislation which was inconsistent with the Constitution was not novel – Alexander Hamilton had foreshadowed the possibility in No 78 of the Federalist Papers where he had said: "No legislative act … contrary to the Constitution, can be valid." But while that view was not novel, it was far from universally accepted.

Most significantly in this regard, the contrary view was held by Thomas Jefferson. According to Jefferson, each branch of government was obliged to come to its own view of the constitutionality of its own actions: "[T]o make each an effectual check, it must have a right in cases which arise within the line of it's [sic] proper functions, where, equally with the others, it acts in the last resort & without appeal, to decide on the validity of an act according to it's own judgment, & uncontrolled by the opinions of any other department"[2].

We might pause here for a moment to reflect upon the respect properly to be accorded to the views of Thomas Jefferson on constitutional matters. He was a trained lawyer. He was the principal author of the Declaration of Independence. He was the third President of the United States, and as President he effected the Louisiana Purchase which doubled the territory of the United States and set the nation on its path to a continental destiny and beyond.

He had previously been Governor of Virginia and Minister to France. He was the architect of the University of Virginia at Charlottesville, whose quadrangle and rotunda are still among the most beautiful buildings in the United States. He was an enthusiastic and accomplished botanist. He was James Madison's mentor. He was a politician of true genius.

President John Kennedy, at a White House dinner for Nobel Prize winners in 1962, said that the event was the greatest gathering of intellectual talent and knowledge in the White House in its history, "with the possible exception of those occasions when Thomas Jefferson dined alone".

It's easy for us to see, with the benefit of hindsight, and our own professional bias, that Jefferson's view was, to say the least, likely to lead to practical difficulties and inconvenience, and be difficult to sustain as a matter of constitutional theory, given that the Constitution established the court and the historically well-settled role of courts is to determine the meaning

[2] Jefferson, quoted in Sloan and McKean, *The great decision: Jefferson, Adams, Marshall, and the battle for the Supreme Court*, (2009) at 92.

and effect of written instruments such as contracts and wills and constitutions. But that view was not, and indeed is not, inevitable.

A constitutional structure which includes a judicial branch may operate without the exercise of a supervisory role by judges to ensure the validity of the operations of the legislative and executive organs of government. The Constitution of the People's Republic of China, for example, contemplates that there will be cooperation between the various organs of government in accordance with rules which are not thought to require authoritative exposition or enforcement by the judiciary[3]. Jefferson's rejection of the rigidity which judicial supremacy brings to the interpretation of a written constitution was of a piece with his view that human wisdom is not fit to seek to order the lives of those to be born in the distant future. As he wrote to James Madison only weeks after the fall of the Bastille, "the earth belongs always to the living generation."[4]

In *Marbury*, the plaintiff had been appointed a justice of the peace for the county of Washington in the District of Columbia in the last moments of the administration of President Adams. Marbury's commission had been signed but not delivered. Jefferson, the incoming President, took the reasonably orthodox view that the commission, like any deed, took effect only upon delivery. Marbury brought proceedings for mandamus against James Madison, Jefferson's Secretary of State, to compel him to deliver the commission to the plaintiff.

One of the more remarkable aspects of this remarkable case was that the Administration did not appear and was not represented in the proceedings before the Supreme Court. It would seem that Jefferson and Madison took this course as part of a two-fold strategy to suggest that the Court had no legitimate role in the resolution of an issue which arose entirely within, and was therefore a matter for, the executive branch. It also gave the plaintiff as little assistance as possible in proving his case. As to this latter point, the plaintiff had to prove that the commission appointing him had, in fact, been duly executed by the President.

Charles Lee boldly called some State Department clerks to seek to establish this crucial fact. He called them, as we would say "cold", not knowing what they would say. They objected to testifying on the ground that, as officers of the executive government, they were not obliged to disclose any matters relating to their functions. It was the first, but not the last, invocation in an American court of executive privilege[5].

Lee brilliantly countered the claim of privilege, persuading the Court that Madison, as Secretary of State, exercised two capacities, one as the agent of the President in respect of which (because he was answerable to the President) privilege might attach, and the other as a public ministerial officer of the United States in respect of which his duty was to the citizens of the United States. And so he was able to prove the fact necessary to his argument by eliciting the necessary answers from the witnesses he had bravely called.

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[3] Chen, *An Introduction to the Legal System of the People's Republic of China*, (1992) at 46.
[4] Thomas Jefferson, letter to Madison, 6 September 1789, in Julian P Boyd, *The Papers of Thomas Jefferson*, ed (1956) at 15:396.
[5] Sloan and McKean, *The great decision: Jefferson, Adams, Marshall, and the battle for the Supreme Court*, (2009) at 133.

Next, Lee argued that the Supreme Court could issue mandamus directed to the Secretary of State. He relied upon the provision in the *Judiciary Act* of 1789 passed by Congress in its very first session, whereby the Supreme Court was given jurisdiction to issue "writs of mandamus … to … persons holding office, under the authority of the United States." Lee argued that the Secretary of State could be ordered to obey the law where he was acting in his public ministerial role although not as an agent of the President in "the exercise of his high functions"[6].

Lee argued that, once President Adams had signed Marbury's commission, and given it to the Secretary of State to be sealed, it became the Secretary's "duty to seal, record and deliver it on demand" by the appointee[7].

Lee sat down. His arguments were not opposed. Levi Lincoln, Jefferson's Attorney-General, was in the Court. He informed the Court that he had "received no instructions to appear"[8].

Marshall CJ, evidently uneasy about the absence of an adversary, stated that the Court would "attend to the observations of any person who was disposed to offer his sentiments". No-one accepted this call for the assistance of an "amicus curiae"[9].

The case was reserved. When Marshall CJ, some weeks later, read out the decision of the Court, it seemed, initially, that Lee had won a famous victory.

Marshall began by complimenting Lee, observing that he had presented his argument "very ably". No doubt, Lee, as an experienced advocate, shuddered at this point. You will come to understand that this judicial compliment is usually a very bad sign for the outcome of your client's case.

Moreover, Marshall agreed that Marbury had a right to the commission he demanded, and that that right had been violated by the refusal of Secretary Madison to deliver his commission. Marshall also went on to accept Lee's argument that the Executive Branch was amenable to the jurisdiction of the Supreme Court, observing that even the King of England "never fails to comply with the judgment of his court" where the law assigns duties to the Executive[10].

This was pretty strong stuff. Marshall had been John Adams' Secretary of State until the end of Adams' term. He and Jefferson were second cousins; and they cordially hated each other. Here was Marshall stating boldly that Madison and Cousin Tom had acted unlawfully.

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[6] Sloan and McKean, *The great decision: Jefferson, Adams, Marshall, and the battle for the Supreme Court*, (2009) at 139.
[7] Sloan and McKean, *The great decision: Jefferson, Adams, Marshall, and the battle for the Supreme Court*, (2009) at 140.
[8] Sloan and McKean, *The great decision: Jefferson, Adams, Marshall, and the battle for the Supreme Court*, (2009) at 141.
[9] Sloan and McKean, *The great decision: Jefferson, Adams, Marshall, and the battle for the Supreme Court*, (2009) at 141.
[10] Sloan and McKean, *The great decision: Jefferson, Adams, Marshall, and the battle for the Supreme Court*, (2009) at 156-157.

It seemed like a triumph for Lee and his client. But then Marshall said that the provision of the *Judiciary Act* which empowered the Court to issue mandamus was invalid because claims for mandamus were not included in the original jurisdiction of the Court conferred by the Constitution. The Court was, of course, sitting in its original jurisdiction.

And so Marshall went on to strike down this provision of the *Judiciary Act*, famously observing that "It is emphatically the province and duty of the judicial department to say what the law is"[11]; and so putting to rest Jefferson's notion that the Supreme Court could not invalidate the acts of the other two branches of government.

Charles Lee was having a very bad day.

At no point in the argument of the case had the validity of the *Judiciary Act*'s conferral of the power to grant mandamus been called into question by anyone. Charles Lee had not been asked to address the point on which he lost the case. While this was a bad day for Charles Lee, on a broader view, there is something quite unsettling about the circumstance that the most fundamental principle of American (and Australian) constitutional law was established in a case in which the Court had no power to grant the relief sought, and in which the crucial point that it did not have the power was not even raised, much less argued, by the parties or by the Court with the party against whom the point was decided.

Marshall's disposition of the case has ever since been hailed as statesmanlike because his court established, by an obiter dictum, the doctrine of judicial review while at the same time avoiding a head-on clash with the executive branch by issuing the mandamus, or indeed seeking argument on alternative modes of redress for Mr Marbury, who was left with a right but no remedy.

Statesmanlike, Marshall's decision may have been – and his opinion was certainly beautifully written: John Marshall and Cousin Tom shared a gift for silver-veined prose – but if one judges the proceeding from the perspective of a professional lawyer, one is left with particular sympathy for Charles Lee to go with that general sense of uneasiness. In praising Marshall's historic statesmanship, one should not lose sight of the plight of Charles Lee's client, Mr Marbury.

The judge's professional obligations

Marbury v Madison is an example of a momentous decision which is largely the product of the judges' own devising. It is a poignant reminder that in the division of function between Bench and Bar, the Bench's role is to rule on arguments, rather than to originate them. If historic cases like this happen too often, they may come at a high price to the legitimacy of the judiciary.

You are entitled to expect that no Australian judge should do to you what John Marshall did to Charles Lee.

Cases like *Marbury* represent a breach of the ethos which has historically joined Bench and Bar in the enterprise of administering justice. To decide a case on a point not argued is not only a failure to accord procedural fairness to the losing party, the most important person in the

[11] 5 US 137 at 177 (1803).

courtroom, it is also a breach of the mutual understanding between judges and barristers as to the nature of the process in which we are engaged.

That having been said, it should also be said that this process is necessarily a two-way street. If judges are to observe the self-denying ordinance that they may decide only upon the arguments presented to them and deal with all the arguments presented to them, it behoves the Bar to ensure that the best arguments, and only the best arguments, are presented.

One of the most misleading clichés which you will hear about advocacy is the phrase "Keep it simple, stupid." The reason for having barristers at all is that it is not simple. The task is not to keep it simple; but to make it simple. And that is hard.

Michael McHugh QC, himself one of the legends of the Australian Bar, has observed[12] that the secret of Sir Garfield Barwick's success as Australia's pre-eminent advocate lay in his ability to simplify what was complex and to illustrate an abstract proposition with a concrete example. This is the quintessential skill of oral argument.

The skills of refinement, simplification and synthesis that we value most highly in our advocates have been developed over the course of a millennium in oral argument in court or in mooting in the Inns of Court, rather than in the marshalling of citations from academic treatises. That is no less true today than it was in the time of Edward I.

But the exercise of these skills is harder for barristers today than ever before because our confident and rights-conscious fellow citizens who will be your clients, and the commercially savvy solicitors who will be briefing you, will often bring moral and economic pressure to bear on you to pursue every possible point regardless of your view of its merits or lack thereof. It is part of your job, perhaps the hardest part, to counsel your clients and your solicitors against what will appear to the court to be a wasteful self-indulgence. You will need to be brave. You might lose the support of some solicitors as a result, but you will, in the long run, be, and be seen to be, a better barrister for it. The courts will be better for it too. And you will impress the judges and others.

Next, it is necessary to say that it is the daily experience of judges that earnest young advocates press upon them bundles of cases taken from online services in support of their submissions. Almost always these bundles consist of single judge decisions which merely illustrate a particular principle. This is, of course, no use to the judge, just as the existence of 20 copies of The Courier Mail does not make its stories more true.

Judges often form the impression that the cases in the bundles are unread by the earnest young lawyers who thrust them at the Court. The information overload is the most serious challenge for the administration of justice; and it is intolerable when the information is unorganised.

The only antidote to information overload which bedevils the discharge of the judge's role, and the perception that it is the advocate's fault, is the application of critical intelligence to sift the

[12] McHugh, "The Rise (and Fall?) of the Barrister Class" in Gleeson and Higgins (eds), *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion*, (2008) 165 at 189.

wheat from the chaff and to collate and digest what is valuable in terms of the development of legal principle. That is your job. And you have to do it yourself because you are responsible for the presentation of your case. In that regard, there will be nothing and no-one between you and the judge's appraisal of your effort. And you can expect that your client will be particularly interested in any signs of an adverse appraisal by the judge.

You will be assisted in your task by the valuable work performed by the Council of Law Reporting in the sifting of the important cases from the unremarkable examples of the application of well-recognised principle. And you will have the benefit of the application of critical human intelligence in the articulation of the point of principle in the headnote; but don't think that you can just read the headnote to the court. You need to identify the material facts of the case and articulate why the decision advances your case or does not help your opponent.

The Commonwealth Law Reports offer many illustrations of compelling presentations of legal argument by the likes of Sir Garfield Barwick QC, Nigel Bowen QC, Frank Brennan QC and Murray Gleeson QC. A young barrister facing his or her first appeal can learn a lot from seeing how the masters marshalled their arguments.

The professionalism of the Australian Bars is, and always has been, such that our advocates are not, and are not seen to be, mere mouthpieces for the client, mere spear-carriers for agendas pursued by others. With us, professional advancement does not depend on association with a powerful client or enthusiastic networking.

And the professionalism of our judges is fostered, in turn, by the standards inculcated by their experience at the Bars, where Counsel are acculturated to regard themselves, first, last and always, as officers of the court.

By professionalism, I mean, first of all, the crucial difference between competence and mere self-confidence. The former can only be gained by dedication and hard work. It is the ability and willingness of our advocates to engage in the rigorous, and often tedious, process of ensuring that the facts are marshalled and presented in the most efficient and compelling way, and that a given legal issue is turned over and looked at from all sides, with the best side being presented, that identifies the competent barrister.

And secondly, I refer to a dedication to the clients' interests above a concern for the success of one's own business, but not a dedication which slides into subservience to the client at the expense of the advocates' primary duty to the court. Independence does not mean merely independence from the State; it also connotes a degree of independence from the client and from the solicitors who provide your work. Maintaining that independence is a challenge; you may have to stand up to your solicitor and your client, and that may mean putting your economic interests at risk. But in maintaining its independence, the Bar maintains the very thing that gives it its edge in terms of advocacy, and thereby ensures that it remains indispensable.

Conclusion

You are joining a legal system which is rightly regarded as one of the most independent and rigorous in the world. You do so as members of a profession which is second to none in the

English-speaking world in terms of the quality of its legal education and professionalism. You must strive to be worthy of that education and of the best of the traditions of your profession.

That will be hard; and you will have some bad days. But I have every confidence that your good days will outnumber your bad days; and you will enjoy your time in the most interesting profession in the world even if it is not always remunerative. It is not something that you will do for the money: it is at once too hard and too satisfying for that. I wish you every success. I will leave you with the words of Brennan CJ from an address to the Australian Bar Association conference in August 1996:

> "A life at the Bar [is] replete with its triumphs and its tragedies, its wins and its losses, the friendships forged and the battles fought, the long nights of reading and the flashes of inspiration that sometimes fail in their application. The Bar captures the mind and governs the life of those who join it. Its rewards are sometimes financially generous, sometimes financially parsimonious. It is a profession to be entered only by those who have a passionate desire to be a barrister. But that is the best of all reasons. For those, the experience of practice does not disappoint."

Thank you for your attention.