Reciprocal duties of Bench and Bar

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This article deals with the dependence of the rule of law on an independent judiciary and a legal profession, the rule of law being less vulnerable where an independent bar exists. The common law trial is the ultimate vindication of justice and it relies on an interplay between the bench and the bar. This article illustrates the interplay and the reciprocal duties and rights which underlie it. Duties involving the keeping of an accurate trial record, ensuring that proceedings display the characteristics of regularity, guarding against the dangers of publicity, identifying the relevant issues of law and fact, the tendering of evidence, the controlling of the evidence, formulating jury directions and final addresses among others, are examined.

It is very hard to imagine a society which could be characterised as subject to the rule of law unless it had an independent judiciary. It is almost equally hard to imagine one which could be so characterised unless it had an independent legal profession. The rule of law can exist, after a fashion, in countries which lack an independent bar; but the experience of countries which have taken their legal and political traditions from the British Isles has been that the rule of law is less vulnerable where an independent bar exists. As in England, Scotland and Ireland, so in the three eastern States of Australia the independent bar has for a long time been vigorous and talented. In the other States and the two mainland Territories, small and capable independent bars have gradually evolved under pressure of social need despite an unsympathetic structural background, lower populations and less significant commercial life. Here in Australia, in Darwin, as in England, in the words of Lord Pearce, "the present independence of counsel is a carefully considered part of a great legal system which has commanded admiration from various parts of the world".[1]

That is so because the skill and probity of specialist trial advocates is a vital element in protecting and advancing the rule of law – even though most disputes never lead to the commencement of litigation, and most of the litigation which is commenced never goes to trial. It is so because the small minority of disputes which are litigated to finality establish the tone of the whole legal system. The common law trial is the ultimate vindication of justice. The hopes it inspires and the fears it generates are vital engines of the rule of law. Although most disputes do not in fact go to trial, any dispute could. The knowledge of that fact makes the proper conduct of trials central to the operation of society.

Clausewitz said that the day of battle bears the same relationship to dealings between nation states as the day for cash settlement of commercial obligations bears to trade. The day of trial is a similar day of reckoning for the resolution of legal disputes. Clausewitz also said that success on the day of battle depends on doing the simplest things right; but that the pressures of the day are so great that no-one who has not experienced them could understand them, and so great that even doing the simplest thing right is very hard. That, too, can occasionally seem true of the day of trial. To the demands of that day the parties' legal advisers must devote a full measure of concentration and effort. It is a day which, once fixed, is unlikely to be vacated for the purpose of adjournment. That is because the hopes or expectations of all litigants that finality will be achieved sooner rather than later are not likely to be disappointed in view of the expense, strain, pressure and uncertainty of litigation.[2] The day of trial is a crucial time. The day of trial is not a rehearsal, warm-up, dummy run, practice, training session, or getting-to-know-you event before the real contest is conducted in an appellate court. It is not the first set in a three-set tennis match, the winner of which is only determined by who

* Justice of the High Court of Australia. This article is an edited version of a speech presented as the Martin Kriewaldt Memorial Address (Darwin, 22 August 2006).

[1] *Rondel v Worsley* [1969] 1 AC 191 at 268.

[2] *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220; *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* (1992) 29 NSWLR 487 at 494.

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triumphs in the third set. It is a day of decision. Many things can happen on that day which have consequences that are impossible, or very difficult, to alter later. For one thing, witnesses and documents which are not found before the day of trial and used on it generally cannot be used after it has passed. For another thing, the way a case is put at trial can be departed from only with difficulty on appeal.[3] And there are many outcomes of the trial which cannot easily be disturbed thereafter on appeal – such as those turning on the credibility and demeanour of witnesses,[4] on matters of practice and procedure,[5] on the "atmosphere" of the trial, on the making of discretionary judgments,[6] and on the impression formed by objects and physical circumstances.[7] The day of trial is an occasion on which the court, using only finite materials incapable of later supplementation, must resolve a particular controversy in which the stakes may be high – liberty, reputation, the access of parents to children, property rights, financial claims for compensation for personal and other injuries which are vital to the happiness of plaintiffs. The intense pressure of trials gives the crucial reasoning resolving these controversies the shape and status of legal principles, capable of application in innumerable future cases. Hence, the conduct of trials is at the heart of our civilisation. That makes the obligations and entitlements of those responsible for the conduct of trials important.

The aim of litigation is to achieve a result which is just according to law, and to do so after a trial which is fair and is seen to be fair. The achievement of these goals is not a task committed exclusively to judges. It is not the case that counsel need do nothing more than ensure that all filing fees have been paid and turn up. It is counsel who conduct trials, not judges. Counsel are the combatants; judges are umpires who preside over and "control" proceedings.[8] Justice depends on an interplay between combatants and umpire, between bench and bar. Some illustrations of that interplay, and the reciprocal duties and rights which underlie it, will now be given. The advocate's duties discussed below are in general not the familiar duties forbidding the making of reprehensible allegations unless they are relevant and supportable, commanding the citation of unfavourable authorities and requiring positive action to prevent the court from being misled or from drifting into an appellable irregularity even if silence might be in the client's favour. The duties to be discussed are more mundane and sometimes less well remembered, but equally important.

THE TRIAL RECORD

The importance of the trial makes the integrity of the trial record a matter of significance. In modern conditions, at least in superior courts, the "trial record" consists in substance of a group of documents of which the court and the parties have either originals or copies: the initiating process and other documents defining the issues; a transcript recording all the oral evidence (including the objections to it and other evidence and rulings on these objections); all affidavits and other documents received into evidence; all rulings made and all judgments delivered; all matters of fact agreed on between the parties or formally admitted by one party; and any written submissions. The accuracy and completeness of the record is a precondition to the fairness of the trial, and a precondition to the capacity of appellate courts to review the fairness of the trial. That is why it is common for time to be taken at the start of each day's proceedings in ensuring that the transcript for the previous day is correct.

Since it is quite usual for transcripts not to record oral arguments, whether offered on evidentiary rulings, or in relation to procedural questions, or in opening or final address, the incompleteness or inaccuracy of the record can often cause disputes to break out on appeal. Was particular evidence now complained of admitted by consent or over objection or only on conditions or only for a limited purpose? Does the case put on appeal differ from the case presented by the parties at trial? Was a

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[3] *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 437-439.

[4] *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

[5] *Re Will of Gilbert* (1946) 46 SR (NSW) 318.

[6] *House v The King* (1936) 55 CLR 499.

[7] *SW Hart & Co Pty Ltd v Edwards Hot Water Systems* (1985) 159 CLR 466 at 478.

[8] *Ashmore v Corp of Lloyds* [1992] 2 All ER 486 at 493.

submission put which the trial judge did not deal with? Was an issue decided on a point on which the victorious party did not offer argument or of which the losing party did not receive notice? What facts were judicially noticed?

In resolving these disputes, an appellate court can only take into account information from five sources, apart from the record as described above and untranscribed shorthand notes or tape recordings prepared by court reporters. They are: a report from the trial judge, where this course is permitted;[9] a formal or informal admission by one party; an agreement between the parties; affidavit or oral evidence as to what happened; or a contemporaneous note by counsel, solicitor or other person present.[10] This means that appellate courts will not take into account conflicting statements from the bar table on what happened at the trial. In turn, that makes it important for counsel to request a direction from the judge that particular, potentially crucial, forensic events be recorded and, if that direction is not forthcoming or not complied with, for counsel to ensure that an accurate note is made.

THE REGULAR COURSE OF THE TRIAL

The duty of judge and counsel to secure a fair trial carries an additional correlative obligation – to ensure that the proceedings display the characteristics of regularity. For judges, those characteristics include punctuality; "[p]atience and gravity of hearing";[11] the actuality and the appearance of impartiality; moderation; good manners; restraint; prudence and expedition in the control of proceedings; abstention from anger or malice or personal attacks, whether on counsel or parties or witnesses; respect for other organs of government and for other decision-making bodies; the evolution and application of convincing factual reasoning; and, above all, adherence to the law. All these traits are associated with the idea of the "rule of law". They are the more desirable because of the strain and emotion pressing on the parties and their representatives.

The display of these characteristics by barristers is also desirable, though qualified by a duty to advance client interests and hence by a relaxation of the need for impartiality. Barristers must present their clients' cases "fully and properly … fearlessly and with vigour and determination".[12] But, as Lord Eldon said, a barrister is "merely an officer assisting in the administration of justice, and acting under the impression, that truth is best discovered by powerful statements on both sides of the question."[13] It is not the personal opinions of barristers which matter. Their personal sympathy for, or antipathy towards, clients or opponents of their clients is both beside the point and not to be revealed. They must certainly try to win, but not at all costs. Barristers have "an overriding duty to the court, to the standards of [the] profession and to the public".[14] They have a "public duty … to participate in and contribute to the orderly proper and expeditious trial of causes".[15]

It is in recognition of the importance of regularity that studious forms of courteous address are employed by judges to barristers, barristers to judges, and barristers to each other. They may not always be sincere but they help forestall intemperate and disorderly conduct.

The regularity of proceedings as a whole is fundamentally damaged when not all participants in the trial display the characteristics just suggested. The relationship between regularity and justice, however, is not merely formal. Singleton LJ once said:[16]

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[9] *R v McGarvey* (1987) 10 NSWLR 632 at 634.

[10] Even the last three were viewed as only exceptionally receivable in *Government Insurance Office of New South Wales v Fredrichberg* (1968) 118 CLR 403 at 410, 422-423.

[11] Sir Francis Bacon, "Of Judicature", *Essays Civil and Moral*, The Harvard Classics Series (PF Collier & Son, New York, 1909-1914) Vol 3, Pt 1, p 3.

[12] *Lewis v Ogden* (1984) 153 CLR 682 at 689.

[13] *Ex parte Elsee* (1830) Mont 69 at 70n, 72.

[14] *Rondel v Worsley* [1969] 1 AC 191 at 227.

[15] *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 233.

[16] *Beevis v Dawson* [1957] 1 QB 195 at 201; Parker LJ concurred at 218.

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> [A] member of the Bar is a helper in the administration of justice. He is there to help the judge, and, when there is a jury, to help the jury, to arrive at a proper result in the dispute between the parties. If a case is conducted as this was, the judge is deprived of the assistance which he is entitled to expect from counsel. Continuous bickering becomes a burden for everyone in court – for judge and for jury – and it is almost impossible for justice to be done if that goes on. It is not surprising if, in such circumstances, a judge gets tired or if the jury get tired; sometimes it leads to confusion.

In a recent English case, Tomlinson J said this of Mr Gordon Pollock QC, a very distinguished but aggressive counsel:[17]

> Mr Pollock was only infrequently rude to me and I ignored it. Not everything said by Mr Pollock is intended to be taken seriously and sometimes his offensive remarks are the product of a well-intentioned but ill-judged attempt to lighten the mood … Mr Pollock's sustained rudeness to his opponent was of an altogether different order. It was behaviour not in the usual tradition of the Bar and it was inappropriate and distracting. I should have done more to attempt to control it, although I doubt if I should have been any more successful than evidently were Mr Pollock's colleagues whom on at any rate one occasion I invited to attempt to exercise some restraining influence.

We have generally been spared experiences of that kind here.

The more regular the trial, the more likely it is that it will be fair; and the more likely it is that a just result correct in law will be achieved.

DANGERS ASSOCIATED WITH THE PUBLICITY OF THE TRIAL

Trials take place in public. Though publicity aids justice, the potential for publicity in relation to questions, speeches and judgments protected by immunities from actions for defamation carries dangers and temptations.

There can be a temptation for barristers, sometimes encouraged by clients, and for judges, to seek headlines, particularly by making colourful allegations against unpopular persons not immediately able to respond or by mouthing slogans which it is thought might attract popular applause. That temptation is not always resisted.

Conversely, publicity can also create a temptation to refrain from being appropriately candid, because of a fear of press or other public criticism, whether ill-informed or not. Those susceptible to that fear should perhaps consider whether their legal careers might not prosper better in non-litigious fields.

Bench and bar are also open to the temptation, partly increased by the chance of publicity, to try and clinch a conclusion by exaggerating the premises which might lead to it. In view of the damage which exaggerated criticism can cause, there is much to be said for abstaining from any attempt, whether in questions, addresses or judgments, to deride the unsatisfactory witness with moralising adjectives or to bury the losing party in anathemas and maledictions. This temptation is nurtured by natural human emotions. If a witness has engaged in tiresome prevarication or untruths, and if a party's conduct is morally dubious, it may be understandable that counsel and, whether at counsel's instigation or otherwise, the court, respond with harsh criticism. It is common to see cases in which, to use the words of Meagher JA, who delivered the Martin Kriewaldt Memorial Address in 1998, "an exceptionally irritating witness … eventually succeeded in irritating the judge".[18] His Honour adds: "where a judge is confronted by a witness who is both deceitful and evasive, there is no principle that he is not at liberty to express his measured displeasure at being trifled with. There is no principle that he must endure the ordeal with ladylike serenity."[19] But any damaging criticisms by counsel or court which go beyond the legitimate necessities of the occasion should be avoided.

An even baser motive can be coupled with the last temptation discussed – the desire to secure protection from appellate intervention by making strongly expressed credit findings on the supposed

[17] *Three Rivers District Council & Bank of Credit & Commerce International SA (In Liq) v Governor & Co of the Bank of England* [2006] EWHC 816 at [135].

[18] *Galea v Galea* (1990) 19 NSWLR 263 at 283

[19] *Galea v Galea* (1990) 19 NSWLR 263 at 284.

basis of unsatisfactory demeanour.[20] It is understandable why counsel might seek such findings, and they are entitled to do so if there is an arguable basis for making them, but it is wrong for judges to make them unless it is reasonably necessary to do so.

MASTERY OF THE ISSUES

It is important for both judge and counsel to be clear what the relevant principles or issues of law are. Normally they are familiar with the relevant case law, but care must be taken to ensure that the authorities relied on have not been overruled by the courts or reversed by statute. Statutes can raise graver problems. It is a serious vice to refer to the wrong reprint of a statute – either one which is out of date or one which has only come into force since the period to which the litigation relates. To commit that vice can cause the entire proceedings to misfire. It is a real danger in a time like the present, when both the Commonwealth Parliament and other parliaments tend to change important legislation with distressing and unpredictable frequency. Though counsel has a paramount duty to ensure that the correct legislation is being employed, this task in particular is a task too important to be left to counsel alone: their most solemn assurances must be anxiously and thoroughly checked.

Not only must judge and counsel understand the issues of law: they must be clear what issues of fact are being tried. They usually are defined before or when the trial starts.

The initial definition of the issues for trial, whether that definition is effected in opening addresses, in pleadings, or in some other way, can become obsolete. The course of the evidence at trial can cause the parties to choose to fight the case on different issues. If this happens, the pleadings or other relevant documents should be amended so that they conform to the new case now reflected in the evidence; though failure to do this is not necessarily fatal to the new case being considered at trial and on appeal,[21] it carries risks because of the difficulties facing an appellate court in clarifying whether the case has changed. And, if the pleadings of one side are not amended, counsel for the other is entitled to insist that the case be fought within the boundaries marked by the unamended pleadings. Similarly, if the changing course of events makes it necessary to seek new orders, the appropriate amendments should be applied for as soon as possible.

TENDERING EVIDENCE

The next duty of counsel is to tender evidence in a clear fashion, and the next judicial duty is to rule on the admissibility of evidence as it is tendered. It is common now for every objection to be attended by speeches supporting and opposing the objection, and by the giving of reasons for the ruling. It is highly unsatisfactory that the flow of oral testimony, particularly but not only that elicited in cross-examination, should be interrupted significantly. The interruption can distract the judge. If a jury is sitting, it distracts the jury, whether they have to leave the court or not. It can upset the concentration of a witness giving evidence in chief. And it gives witnesses under cross-examination a measure of relief from the legitimate pressures of that process which they should not have. Truth will out when counsel asking the questions turn out to be sharp-witted and better prepared than the witness. The reasonable exploitation by counsel of any advantages they have in this respect is wrongly impeded if the questioning is interrupted by objections, whether meritorious or otherwise, which trigger long periods of debate and then use up further time while reasons for the judge's ruling are given. The problem is not the objections themselves, but the time taken in dealing with them. Witnesses should not be afforded numerous intervals in which to rest or reconsider their position in manoeuvring to meet different challenges from the questioner. Once cross-examiners have got witnesses on the run, they should be allowed to keep them moving. Hence the decisive practices of former times should be followed.

The practice which was traditional, and which is desirable, is as follows. It is the duty of counsel wishing to oppose the reception of allegedly inadmissible evidence to object at once.[22] What is

[20] See *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

[21] *Leotta v Public Transport Commission* (1976) 50 ALJR 666 at 668; 9 ALR 437.

[22] *Woods v Rogers; ex p Woods* [1983] 2 Qd R 212 at 217.

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objected to should be clearly and precisely identified. The specific grounds of objection should be identified clearly and precisely[23] – but only if the court requires it, since it will be common for a question to be rejected by a judge for a different, and better, reason than that which counsel might assign, and there is little point, and some waste of time, in this process being exposed in the course of public debate. The tendering party, if called on, should be equally specific in riposte to the specific grounds of objection identified.[24] If either party wants the evidence admitted only on conditions, or for a limited purpose, the conditions or the purpose should be clearly articulated and recorded on the transcript to avoid future misunderstanding and debate. The mere fact that it seems likely, judging by the success of other objections, that other tenders will fail will not permit complaint on appeal about the rejection of that evidence unless it has actually been tendered and rejected.[25] The same applies to evidence received without objection after previous unsuccessful objections, but it is common for counsel to protect their clients (while simultaneously saving time) by inquiring whether a past unsuccessful objection "covers" the whole of a particular subject on which evidence is being elicited. If the judge agrees, it becomes unnecessary to keep repeating the objection. With the possible exception of objections on grounds of relevance, where sometimes the evidence is admitted provisionally and its relevance determined later, objections should generally be ruled on at once.[26] Counsel have a right to receive, and the court has a duty to give, clear and decisive rulings so that the case can be conducted in an informed and expeditious way. But counsel are not entitled to reasons for the rulings, though sometimes reasons for rulings on fundamental questions of relevance may properly be given; this can be valuable in enabling counsel sensibly to modify the future conduct of the proceedings. So that appellate rights are preserved, counsel should ensure that the trial record includes objections and rulings; if the trial judge refuses to ensure that this is done, counsel must ensure that a note is made for later appellate use if necessary.

Next, judges have a duty to understand what the parties submit and what the evidence they tender means and signifies. Counsel have a duty to assist judges to do so in ensuring, through their manner of presenting evidence, that its meaning and significance is clear. If the failure of counsel requires judicial questioning of witnesses, the need for the judge to avoid dropping the mantle of a judge and assuming the robe of an advocate, thereby interfering with the real advocates as they seek to carry out their proper functions, must be kept constantly in mind.[27]

CONTROLLING THE EVIDENCE

Both court and counsel have duties to maintain control over the bulk of the evidence and the time which the matter takes to try. Modern conditions have made these duties acutely difficult to comply with. Every aspect of litigation has tended to become sprawling, disorganised and bloated. The tendency can be seen in preparation; allegations in pleadings; the scope of discovery; the contents of statements and affidavits; cross-examination; oral, and in particular written, argument; citation of authority; and summings-up and judgments themselves.

Where oral evidence which is unnecessary (in the sense of being only marginally relevant) is elicited in chief, the shared tedium of the experience usually ensures that objections succeed even if the tendering party fails of its own motion to bring the process to a close. The problem of control is more acute with written testimony.

A related difficulty for trial judges arises where, while the evidence tendered is undoubtedly intrinsically relevant, it is merely repetitive of other evidence tendered earlier.

Lord Upjohn said that counsel is "under a duty with a view to the proper and speedy administration of justice to refuse to call witnesses, though his client may desire him to do so, if

[23] *Bennett & Co v Connors* [1953] St R Qd 14 at 24-25.

[24] *King v Bryant (No 2)* [1956] St R Qd 570 at 575.

[25] *Penn v Bibby (No 2)* (1866) LR 2 Ch App 127 at 137-138.

[26] *International Harvester Co of Australia Pty Ltd v McCorkell* [1962] Qd R 356 at 358-359. See generally Forbes JR, "Inadmissible Evidence: Objections Well Taken and Rulings Well Made" (1984) 13 U of QLJ 197.

[27] *Jones v National Coal Board* [1957] 2 QB 55 at 63-64 per Denning LJ.

counsel believes that they will do nothing to advance his client's case or retard that of his opponent".[28] The coming years may see principles emerge to guide judicial intervention against evils – the waste of time and money – that result from unhelpful or excessive tenders of both oral and documentary evidence.

But whether or not legal principles capable of dealing with these evils emerge, there must be an ethical duty on counsel to abstain from excessive tenders. Lord Hoffmann said that counsel "should not waste time on irrelevancies even if the client thinks that they are important".[29]

The court has power to terminate pointlessly repetitive cross-examination, though it is a power to be exercised only with caution[30] and in some circumstances only after advance notice that it may be exercised has been given.[31] Bacon's observation that one function of the judge is "to moderate length, repetition or impertinency of speech"[32] must apply as much to questioning as to addresses.[33]

FORMULATION OF JURY DIRECTIONS

It is prudent, and common, for judges presiding over trials by jury to raise with counsel the question of what specific directions should be given on particular difficult points.

It is also generally accepted that, leaving aside whatever particular rules of court apply, if counsel wishes to have a criminal jury (or, in the few cases in which civil juries sit, a civil jury) directed along particular lines, or if counsel objects to the way in which a jury has been directed, it is incumbent on counsel to formulate, in direct language – to "specify with precision", to use a phrase of McHugh JA's – what direction or corrective direction should be given.[34] The failure to do so suggests that, despite particular imperfections which might be noticed in hindsight after minute and leisurely inspection by counsel briefed on the appeal lounging in an armchair, from the perspective of counsel actually fighting the case at trial, who were familiar with its tactical environment and its atmosphere, the directions actually given were satisfactory, were not harmful to the client, or at least were less harmful to the client than any theoretically superior direction might have been. The failure to formulate directions is also reprehensible in that it creates the risk that the evils of a second trial – distress to victims, inconvenience to other witnesses, uncertainty for the accused, expense for the state – will have to be endured because of a supposed flaw which could easily have been cured if the judge had been asked to cure it. And the failure to do so causes suspicions to arise, however unfairly, that the failure stems not from incompetence or inadvertence, but from a desire to arrange for a little insurance by leaving available an appeal point to be deployed by fresh counsel in the event of loss at trial. It is desirable for counsel to request that the direction be marked for identification (if it is handed up in writing, which is good practice) or recorded in the transcript (if it is propounded orally). This will minimise later disputes about any divergence between the direction requested and the direction given.

FINAL ADDRESSES

There is an analogy between counsel's duties in relation to evidence objections and summings-up and their duties in final address. It is at the stage of final address that counsel have a direct and very real, though sometimes unremembered, personal responsibility for what the courts decide. Submissions should be of such a character that they are capable, if concurred in by the judge, of forming the substance of the judgment. From this follows many things – the need to be accurate, the need to be

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[28] *Rondel v Worsley* [1969] 1 AC 191 at 283.

[29] *Arthur JS Hall & Co v Simons* [2001] 1 AC 615 at 686.

[30] *Wakeley v The Queen* (1990) 64 ALJR 321 at 325; 93 ALR 79. See also Hayne KM, *Judicial Case Management and the Duties of Counsel*, Address to Readers of Bar Practice Course (Brisbane, 24 February 1999) pp 4-5.

[31] *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15 at 23.

[32] "Of Judicature".

[33] For American attacks on the problem, see Ipp DA, "Reforms to the Adversarial Process in Court Litigation – Part II" (1995) 69 ALJ 790 at 805-810.

[34] *Singleton v Ffrench* (1986) 5 NSWLR 425 at 440. See also *R v Sorlie* (1925) 25 SR (NSW) 532 at 539; *John Fairfax & Sons Ltd v Vilo* (2001) 52 NSWLR 373 at 375.

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restrained, and the need to cite sufficient, but not too much, authority. On that approach, counsel should not make merely ambit submissions, which are so extreme that if they are accepted an appeal would inevitably succeed and which cast on the judge the burden of remoulding them into something more realistic. They should avoid extravagant language. They should descend to appropriate detail, but not excessive detail. Lord Templeman has said:

> It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. [It is not right to] make every point conceivable and inconceivable without judgment or discrimination.[35]

It must be remembered that if counsel "indulge in over-elaboration", they will not be allowed

> unlimited time and unlimited scope so [as to conduct the] case in all respects in the way which seems best … The results not infrequently are torrents of words, written and oral, which are oppressive and which the judge must examine in an attempt to eliminate everything which is not relevant, helpful and persuasive.[36]

The interests of the client are advanced and a duty to the court is fulfilled if counsel can not only submit coherently, with reference to the detail of the relevant evidence, what particular findings of fact should be made, but also submit what the relevant law is, on the strength of apt yet brief citation of cogent authority. If counsel wish to request an appellate court to overturn prior authority binding on the trial judge, while the submission to that effect at trial will normally only be formal, it may be necessary specifically to request particular factual findings which, though not material to the existing law, may be material to the law which counsel wants to have established by having the earlier authority overruled. If the judgment which counsel wants a trial court to arrive at is a discretionary judgment, counsel ought to indicate precisely what questions are and are not relevant to the discretion, what facts are relevant and irrelevant, what the principles are, and how application of those principles ought to lead to one discretionary conclusion rather than another. Complaints by counsel on appeal that the trial judge failed to find the appropriate facts, or misstated the law, or misstated the relevant questions, or failed to take material matters into account, or took immaterial matters into account, should be given a chilly reception if the course said on appeal to be correct was not laid out before the trial judge as the one which the trial judge ought to follow. Again, the way the matter was argued before the trial judge is a sounder guide to the real issues at the trial as perceived by counsel and court than the deployment of overly pedantic hindsight.

Some points of detail will now be discussed.

Whether required or not, detailed chronologies are useful addenda to written submissions, and useful documents to hand up while opening a trial or an appeal. Those used in appeals can be more detailed, setting out appropriate references to the appeal book.

It is of course wrong to misquote, or erroneously summarise, either the evidence or the relevant law. To do this intentionally may bring a short-term advantage, but if the truth is discovered before the end of the case, it tends to diminish rather than to assist the chances of victory; if it is discovered after the case ends, it can be permanently damaging to the long-term reputation of counsel. Even if these errors take place innocently, it is disrupting for counsel to have to go back to correct them, and irritating for the court.

It is undesirable for counsel to say or write facetious or excessively emotional or rude things about their opponents or their opponents' clients or witnesses or other judges, just as it is undesirable for solicitors to write emotional or abusive letters. The problem is that others may read the records of what was said in the cold light of day after the occasion which stimulated the facetiousness, emotion or rudeness has passed away and its stimulus gone. Read in that cold light, they can be very unimpressive.

Numerous formal points are worth bearing in mind. It is undesirable to fail to give the best reports of cases (for example to give another report if a case is in the Commonwealth Law Reports, or the

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[35] *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486 at 493.

[36] *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1991] 2 AC 249 at 280-281.

Federal Court Reports, or the Appeal Cases, or an official or semi-official State series). Much time can be wasted if references to the pages of appeal books, the transcript, the exhibits and the authorities are not accurate.

In referring to Acts, regulations, agreements and the like, it is desirable to refer both to the section, regulation or article number and to the page number.

Correct methods of case citation should be employed (for example, putting square brackets around the date of a case the volume reference of which is governed by the year, and round where it is governed by a consecutive volume number, or citing a case argued in one year and decided in another by reference to the last date, not both).

In oral, as in written argument, it is desirable to give the full case citation of any authority each time the case is mentioned, or nearly each time. Courts in which oral argument is transcribed in a case in which judgment is reserved are likely to spend much time reading through the transcript closely. It is frustrating if the lines of argument being advanced cannot be readily followed because cases are referred to without any indication of their citation and of where precisely in the case the propositions are to be found.

In reading documents or case reports to the court, counsel must try to be disciplined and specific. Some advocates begin to read and never stop. Almost everyone has the irritating habit of saying "I take you to the top of page 356. No – I had better start at the bottom of page 355."

When reading from or referring to documents or case reports, it is desirable to pinpoint the place on the page – by paragraph number, or marginal letter, or point (where the top is point one and the bottom point nine). Since documents annexed to affidavits, and other documents, often end up with several page numbers, particularly in appeal books, it is necessary to work out which is the system of pagination being employed by the judge. Similarly, a document can have several systems of line numbering: the judge's preference must be discovered and accommodated.

When referring to documents it is wise to give them their dates.

In appeals, and in trials too, it will often be the case that the rules or practice notes of the court, or specific directions, will require written submissions. If so, it is desirable to put the whole of the argument in writing. To leave some out carries the advantage of surprising one's opponent, and sometimes what is left out did not appear originally because it is a late thought. It is true that sometimes late thoughts are best, but they do have disadvantages. One is that a strict court may not allow any oral argument not foreshadowed in writing, or may allow it only if an adjournment is granted at the expense of the party who caused it. Another is that the court may lose its way and its patience, as it seeks, but fails, to find the oral argument in the written submissions. Another is that an oral argument advanced – of which there is no trace in written submissions filed earlier – has an unattractive air of afterthought, and of the last result of a desperate search. This is particularly so where the arguments in the written submissions are not in terms referred to, or even contradict the oral submissions.

Despite the increasing popularity of written submissions, it is important to practise self-discipline in composing them. The longer something is, the less likely it is that it will be fully read. In very long modern cases, written submissions often extend to thousands of pages. This is much less likely to be productive than elegant, precisely targeted and much briefer submissions. On the other hand, there are some kinds of evidentiary analysis which can only be undertaken at length, and sometimes it is more effectively presented in writing than orally.

Should it be assumed that written submissions have been read? If there has been time, it is a judicial duty to have read them, but it is a duty which regrettably is not always fulfilled. It may be necessary for counsel, in the manner of a dentist, to engage in exploratory probing to see how much of what is in the written submissions needs to be put orally. Where judges have read and understood the written submissions, oral argument becomes a process of interrogative testing by the court – an experience which can be more painful than uninterrupted droning, but can also be more useful from

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the point of view of the client in the long run. It is worth reading the classic defence of this method in Sir Garfield Barwick's speech on retirement as Chief Justice in 1981.[37]

In arguing appeals, whether orally or in writing, it is desirable to organise the argument around the grounds of appeal, at least if they have been well considered. That is, it is desirable to state the ground of appeal, and then the arguments in support of it. Similarly, in addressing in trials, it can be useful to proceed by reference to previously announced headings. The court gets a sense of organisation and progress – a feeling that, although time is passing, efficient and productive work is being done, and that the journey will eventually end. It is counterproductive to give the court a sensation of purely circular motion.

Where a decision under appeal has been reported before the appeal is heard, it is desirable to give references to the judgment appealed from, not only by reference to appeal book page numbers but also by reference to the page and paragraph in the reported case. Opposing counsel may be using one document and the court the other.

A judge should not be interrupted while addressing remarks to counsel. Counsel should just listen. If a problem is emerging it will not go away merely because of an interruption. And some problems which appear to emerge early in a judge's intervention as major ones often narrow down as it runs its course. If two or more judges begin to talk to each other, it is not wrong to stop addressing until they stop talking. In general, their duty is to listen to counsel or talk to counsel, not talk to each other.

If the judge asks a question about a matter which is outside the planned order of the argument, it is a nice question whether it should be answered at once, or later, at the more logical time. To delay an answer can disappoint the inquirer. It can also look evasive. On the other hand, it can be more sensible to delay the answer if it is complex or requires some approach work. If an answer is delayed, and a promise is given that it will be supplied later, it is essential that that promise be kept.

It is desirable to adopt the correct forms of advocacy etiquette. Thus it is desirable to say "our submission is" rather than "our view is" or "our opinion is". As Dr Johnson made clear long ago, it does not matter what an advocate's personal opinion in court is; all that matters is the argument being advanced, and it is for the court to make up its mind as to the correctness of the argument. It is not necessarily wrong because its author doubts it.

It is desirable to be oneself in the sense that if one does not speak a foreign language, it is dangerous to employ phrases from it. Thus it is a mistake to talk about "criteria" when one means "criterion". It is a mistake to talk about an "obiter" when one means an "obiter dictum". It is best not to refer to famous names or use complex words unless one knows how to pronounce them correctly. It is essential to avoid slang or bad grammar.

It is generally conventional in speech to refer to all judges, at least those who have sat in the last 20 years or so, by using the form "Justice Smith", not "Mr Justice Smith" or "Smith J". This applies even to those whose names appear in print with "JA" after them. Thus one speaks of "Justice Beazley" not "Justice of Appeal Beazley".

It is also conventional in speech to say, for example, "Commonwealth Law Reports", not "CLR".

It is a breach of etiquette – common but regrettable – for those who are Queen's Counsel or Junior Counsel to place an indication of that fact next to their name on written submissions. It is a similar error to refer to decorations there.

It is important to conform with local custom. In some jurisdictions advocates begin by wishing the court a good morning. Where that is the custom, it is no doubt courteous. Where it is not the custom, it sounds strange. Similarly, in some jurisdictions judges are addressed as "Sir" and in some they are not. In some, advocates begin by announcing their names and in others not.

Sir Owen Dixon said that advocacy was tact in action. The essence of tact is to avoid irritating a judge. Infringement of quite a few of the above suggestions can engender irritation.

[37] Sir Garfield Barwick, *Address to the court upon retirement* (1981) 148 CLR v at vii-viii.

Other irritating habits to be avoided are to give erroneous time estimates for the length of argument, or cross-examination, or the duration of the case. Nothing is more vexing than having false hopes built up and then dashed. In giving an estimate, of course, it is always necessary to make allowance for time taken up by judicial interruptions. Further, if three barristers in the same interest announce that one will deal with topic A, the second with topic B and the third with topic C, it is irritating for the second to go back over part of topic A, or for the third to repeat anything the others have said.

Turning more briefly to judicial duties during counsel's addresses, there is a duty not to talk so much, or demonstrate so much dismissiveness, that advocates, who vary in the thickness of their skins and their determination, are diverted from the proper presentation of their submissions. This runs in parallel with the duty not to question witnesses so much as to give an impression of a lack of partiality. The consequences of breach of this duty can also be serious in causing more costs to pile up for the parties and in wasting public resources. But there is a paramount judicial duty to grasp precisely what arguments are being put by counsel. This may compel the judge to ask for particular arguments to be repeated until they are understood.

Just as counsel ought not influence the judge into awarding victories which are so overwhelming that they are indefensible on appeal, there is a correlative duty on judges to avoid being persuaded into these excesses, or lurching into them without persuasion.

There is a judicial duty to give the parties natural justice. Two aspects may be noted.

First, if the judge proposes to rely on a point of law not advanced in argument, or to make a finding of fact which might surprise the parties, the point should be raised early: ideally not later than before the close of the moving party's case, so that both sides can call evidence on the point without the need for cases to be reopened, certainly no later than the close of final addresses. A party who loses on a point on which that party was never heard will experience an intense and justifiable sense of grievance, particularly if the court could have avoided the error if the party had been heard. If a new point of law is identified by the judge after judgment is reserved – which may very well happen as the judge ponders the arguments presented and draws on a lifetime of legal experience – the judge should list the matter for further oral argument, or call for written submissions.

Second, a particular illustration of non-compliance with the rules of natural justice which can arise is reliance by the court on matters judicially noticed, on matters of common experience, on matters of expertise lacking evidentiary support, and on "legislative facts". Where a matter is judicially noticed by a court, both in common law jurisdictions[38] and in jurisdictions which are governed by the *Evidence Act 1995* (Cth), s 144 and its equivalents, the parties must be given an opportunity to controvert or comment on the matter noticed. There is no such rule for those matters of common experience which a trier of fact may rely on without proof and which probably fall outside the area of judicial notice. Nor is there any such rule for the increasingly common, but generally fundamentally questionable, tendency for courts to employ lines of reasoning involving expertise without specific testimony supporting it, eg economic reasoning in cases on the *Trade Practices Act 1974* (Cth). However, Callinan J has contended that there is such a rule where "legislative facts" are taken into account.[39]

So far as litigation is adversarial, it is for one side to submit in the presence of the other what matters of judicial notice, or common experience, or expertise, or legislative fact should be incorporated into the court's reasoning. So far as a judge is entitled in reaching conclusions to take into account those matters, they should be raised in the presence of both sides. Giving notice of the matters to be relied on reduces the possibility of egregious errors on the part of the court, and increases the chance of the parties feeling that they received fair treatment from the court.

If a judge fails to comply with the duty to give natural justice in either respect, it is not inappropriate for the losing party to make an immediate complaint when judgment is given ex

[38] *Cavanett v Chambers* [1968] SASR 97 at 102.

[39] *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 514.

tempore. It is possible but, in practice, much more difficult to do this when a reserved judgment is received; the reasoning usually will have developed a rigidity only effectively capable of correction by appeal.

Judicial duties in relation to judgments

If possible, and if the judge feels sufficiently confident, it is desirable to deliver judgment ex tempore. This brings many advantages. It is of course often not possible, for any of a range of good reasons.

Judgments should be as brief as the case will permit. They should be brief in avoiding excessive citation of cases. To some extent, the proneness of the bar to cite too many cases is stimulated by the proneness of the judge to do so. Where the law is well settled by a line of authority, judges ought not to seek to restate it where there is no desire on their part to change it. Well-meaning restatements simply produce confusion: they encourage future counsel to submit that the law has changed when it was never intended that it should be changed.

Judgments should also be brief in concentrating on one fundamental but very difficult task which only the trial judge can carry out – making clear findings of material fact on all questions in issue, and avoiding rambling summaries of testimony by some witnesses and criticisms of others.

Judgments should be courteous, even where adverse credit findings are made. It is not desirable to go further than is necessary to decide the case.

Conclusion

It is plain that, while the roles of judges and barristers are far from identical, they have many common features and a single common function – the administration of justice. The performance of the duties involved in each role is made easier the more satisfactorily the duties of the other role are performed. To that ideal each side of the bar table should always aspire.

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