APPELLATE ADVOCACY

Address to the Second Biennial Conference of the Australian Bar Association, Alice Springs, 3 July 1986, byThe Right Honourable Sir Harry Gibbs, GCMG, KBE, Chief Justice of Australia.

This is the Second Biennial Conference of the Australian Bar Association and, like the first, its programme includes a paper on appellate advocacy. It is not for me to attempt to explain why the organisers of the Conference appear to be obsessed with that topic. But I should explain at the outset the limits which the topic imposes on the speaker.

Advocacy is an art or a skill. Success as an advocate may come from the development of innate abilities, particularly by practice and experience, or by observing, and perhaps imitating, those who are expert, but it is not achieved, in my opinion, by study or instruction. Of course the appellate advocate must have acquired, by study or otherwise, a sufficient knowledge of the law to enable him to attempt his task, but that necessary precondition has little to do with the qualtity of advocacy.There are, it is true, certain general principles, mostly rather trite, of which anyone who aspires to be an advocate ought to be aware.

It will be seen that I am about to enter a field which is both narrow and well-tilled, and that I shall be compelled to expatiate on the obvious. It is tempting for one dealing with this subject to attempt to divert attention from the sterility of one's own discussion by deploring the decline in professional standards that has occurred since he himself was at the Bar. There would be nothing new in such a lament — writers have been taking that line ever since Quintilian wrote his work on the decay of oratory in the First Century AD. However I shall avoid it, mostly because I am by no means satisfied from my own observation that this sad decline has in fact occurred.

There is a further limitation which I shall impose on myself in this address. I shall speak mostly about advocacy in the High Court. During my judicial life I have sat on appellate courts at three levels, but my longest experience has been on the High Court. One obvious principle which must guide any advocate is to keep in mind the nature of his audience. There is an essential difference between a court of last resort and an intermediate court of appeal.

Although appeals to the Judicial Committee have finally been abolished in Australia only this year, the High Court has, for all practical purposes, been in the position of a final appellate tribunal since 1975. Although the members of an intermediate court of appeal may long to soar on the wings of policy, the net of authority casts its threatening shadow over their endeavours. However a final court of appeal can be persuaded to depart from established precedent and indeed at the present time many such courts, including the High Court, have shown an increased readiness to do so.

Lord Griffiths has suggested that the greater freedom of a final appellate court means that arguments based on emotion are more likely to succeed in such a court than in an intermediate court of appeal. I am not so sure

that that is so, but it does serve to reinforce the view that an argument in the High Court may require some differences in technique from argument in other appellate tribunals in Australia. There would be little point in my now saying much about advocacy before the Judicial Committee. One essential difference between the methods of that tribunal and those of the High Court is that the Judicial Committee conducts its business with the intention that at the conclusion of the argument all the members of the Board will be in a position to express their conclusions as to the result of the case, whereas in the High Court the judges will sometimes depart from the courtroom just as undecided about the fate of the appeal as when they entered it.

The aim of advocacy is to persuade, and in the case of appellate advocacy the primary aim is to persuade the appellate tribunal to take a particular course of action, namely, to allow or to dismiss the appeal. The advocate will, of course, seek to lead the court to the desired result by inducing it to accept a particular argument of fact or law, which, if correct, means that the appeal must have the fate which the advocate wishes it to have.

It may be noted that persuading the court to accept a particular argument is only subsidiary to the main purpose of winning the appeal, and that the arguments on which the advocate initially relied may sometimes be abandoned or modified in the light of the perceived views of the members of the court. Nevertheless, in most cases the task of the advocate is to formulate the argument that is most likely to persuade the court to take the course that he wishes it to follow and to present that argument as clearly and forceably (and, preferably, as succinctly) as possible.

It is traditionally said that in our courts arguments are presented orally. This is now only partly true. In all appeals to the High Court counsel is required, usually at the commencement of his argument, to hand up to the Court a written outline of the submissions on which he relies. This outline forms an important part of the argument, since if skilfully drawn it can immediately attract the attention of the Court to the strongest points of counsel's submission. Moreover, it is an enduring part of the argument. There is a latin phrase (platitudes often sound better in latin) *literae scriptae manet* (written words remain) and the written outline of submissions remains visible when the sound of counsels' voices no longer vibrates in the memory.

There is no doubt a possible danger that a court may attach too much importance to a written outline but certainly no counsel should underestimate its importance. It should be brief and clear, and should set out the heads of argument which counsel actually intends to present, and not something which the junior has thought up and the senior has abandoned. It does not tie counsel's hand if in one way or another the argument is made to depart from its intended course.

I seek pardon for digressing to mention two matters. First, I have been somewhat disturbed to learn that some counsel charge a fee for the preparation of the written outline. I should have thought that any advocate who knows his job would in any case have prepared some similar sort of outline for his own use, simply to provide a framework for the argument which he intended to present. It was certainly never intended that the preparation of a written outline should be added to the cost of litigation.

Secondly, written outlines are not to be confused with a written submission or a written brief, United States style. Now that American methods are becoming increasingly fashionable in the law, there are some who advocate an increased use of written submissions. I am not amongst them. My experience has been that written submissions are not as effective as oral argument in bringing the attention of the court quickly to the heart of the problem. Moreover in oral argument, counsel can, as the argument progresses, perceive and immediately correct any misunderstanding that may arise and dispel doubts that would otherwise remain unresolved.

When I have sat on the Privy Council I have never found that the written cases of the parties enlarged the understanding that one had already gained by reading the judgments. I suspect that the system of written cases before the Privy Council was devised at a time when it was not the practice of judges in England to read judgments under appeal before the commencement of the hearing — that, of course, has become the practice in the United Kingdom only quite recently.

In the High Court, on the rare occasions when written submissions have been extensively used, I have found that they added more to the costs of the litigation than to the understanding of the argument. Sometimes written submissions have been found useful as a supplement to oral argument, particularly in cases where the facts are technical or complex, but although on occasion useful as a supplement, they can never in my opinion be a satisfactory substitute for oral argument.

I have said that the task of the advocate is to persuade. What are the qualities that an appellate advocate needs to succeed in this objective? Sir Garfield Barwick, one of the greatest appellate advocates of his age, often used to attribute his success to his power of recall. A gift of that kind is of course particularly useful in enabling counsel to answer a question from the Bench with confidence and accuracy, and an apt answer to a question on a crucial matter not infrequently swings the opinion of the judge in favour of counsel's argument. However, given the necessary equipment which any counsel who appears in an appellate court ought to have — a requisite knowledge of the law, an ability to marshal facts and a clarity of expression — in my opinion, the two qualities most necessary for success in appellate advocacy are a sense of relevance and tact.

Quintilian (if I might mention him again) said *Festinat enim judex ad id quod potentissimum* (the judge hurries to get to the strongest point). That statement is true of the High Court and it ought to be true of counsel. Fundamental to success in appellate advocacy is the ability to perceive the point or points on which the resolution of the appeal will depend and to cut a path directly to those points, without meandering to explore side issues, however interesting, or worse still, entangling the court in a thicket of irrelevancies of fact or law. The skill lies in discerning what are the critical issues and in distinguishing between what is and what is not necessary to be presented to enable the argument directed to those issues to be properly understood.

Tact (by which I include tactical skill) is required at almost every point in the delivery of an argument. Let me give some examples. Almost every judge (if not every judge) can be influenced by the merits of the case;

the judge hopes that the law will permit a decision which accords with the merits as he sees them. Almost every judge, however, is annoyed and insulted to think he can be deflected from the strict path of justice by a vulgar appeal to his emotions. One of the most demeaning things that a counsel has to do is to put forward what Sir Garfield Barwick used to call "points of prejudice" in a way which will not antagonise the Bench.

A second task of some difficulty is knowing whether or not to accept a suggestion from a judge, which is intended to be helpful, but which is obviously out of line with the apparent views of the rest of the Bench and which counsel himself may have already rejected as not worth pursuing. Some counsel, it is true, are so suspicious by nature that they reject the most helpful of suggestions, fearing that they may conceal a trap. However, assuming that the suggestion is recognised as the gift which it is intended to be, counsel has to make a quick decision whether to accept it, thus possibly winning the vote of the judge who thought up the argument but possibly alienating the other judges, who may conclude that the suggested argument and the argument which counsel principally advanced stand or fall together, so that if the judge's suggestion, when examined, is seen to rest upon faulty logic or upon a misunderstanding of fact or law, the main argument should also fail.

A rather similar difficulty sometimes arises when counsel has alternative arguments, each regarded by him as sound. As I hope I have already indicated, to advance a bad argument when a good one is available is the essence of bad advocacy. However it not infrequently happens that an argument can possibly succeed by alternative paths, one perhaps short and attractive, the other long, slow and tortuous, both, however, resting on sound ground. It requires considerable courage in such a case to abandon the less attractive argument. I have seen Sir Garfield Barwick do so with success, but it is a tactic which one would expect to succeed only in a few cases and is not recommended for beginners.

I would give a final example of the sort of situation where great tact is required on the part of counsel. To what extent may it safely be assumed that the court is seized of a knowledge of the relevant facts and legal principles?

The fact that the court has read the judgments does not mean that every member has noticed, or remembers, every circumstance which is vital to counsel's argument. The court may also be assumed not to be completely ignorant of the law, and in some fields on which it has frequently or recently pronounced, to have rather more than an elementary knowledge, but an argument cannot be presented without a starting point in legal principle.

One counsel (and a very competent one) against whom I frequently appeared almost always acted on the assumption that the tribunal which he was addressing had no knowledge whatever of the facts of the case or the legal principles involved; no doubt some unfortunate experience had led him to this somewhat cynical approach. The only court in whose favour he made an exception was, for some reason, the Privy Council. The method of argument which resulted from this distrust of judicial knowledge and memory did not endear him to his audience, but it did ensure that if his arguments did not succeed it was not because the court overlooked some vital fact or failed to appreciate the signficance of an important authority. Fixing the critical matters in the mind of the judges without losing the sympathy of the court in the process sometimes requires steering a narrow and perilous course.

It should go without saying that another quality which an advocate should endeavour to acquire, even if he has not had it bestowed on him by nature, is that of candour.

Sir Owen Dixon said that candour could be used as a weapon in advocacy; certainly the absence of candour can prove to be an Achilles heel. Nothing can be more destructive to an argument than for a court which has viewed it with favour to discover, when opposing counsel comes to address, or when the court retires to consider the matter, that counsel who was putting the argument has failed to refer to some fact, statutory provision or decision that seems to present an insuperable obstacle to the acceptance of his argument.

On the other hand, nothing is more effective than to direct the court's attention to what seems to be one's opponent's strong point and to reveal its hidden weakness before the opponent can fortify his position. It is pleasing that ethical requirements and pragmatism coincide in this respect and that virtue can be its own reward. There is no reward however for counsel who spends hours distinguishing authorities that have nothing to do with the case.

It is an enormous advantage if the argument is an interesting one. Some counsel can bring life and sparkle to a patent case; in other hands the most lurid crime of passion is given a patina of somniferous dullness. Elegance and wit never go astray, if the former is not too high flown and the latter not too laboured.

The art of using the reply to mount a deadly counterattack is one which Sir Garfield Barwick was accustomed to use with great advantage. It is an art not often attempted nowadays. It is not easily mastered and is another tactic not recommended for beginners.

A distinctive feature of advocacy in the High Court is the need for brevity and compression. Effective High Court advocacy requires the tactics of a blitzkrieg rather than those of a war of attrition. That does not mean that any point of substance should be omitted or glossed over in argument, but that each point should be reached and dealt with as quickly as is consistent with its proper appreciation by a group of persons who, it may be expected, are where they are because they are able, with reasonable speed, to grasp a proposition of law or fact.

They can also read, and do not wish to have read to them long passages from judgments when it is possible, by judicious selection, to find in a few sentences a clear expression of the views upon which reliance is placed.

There are one or two matters of practice prescribed by directions of the High Court to which I would refer, because they are sometimes misunderstood. The outline of submissions which I have already mentioned is to be handed up in open court and is not to be given to any Court official beforehand. There are two main reasons for this — first, that the outline is part of the argument and therefore must be delivered in public view; and secondly, if it is prepared beforehand, it may not contain an accurate outline of the argument which counsel wishes to present on the day. The appellant's

outline is handed up when he commences his address and normally the respondent's outline is handed up when he commences his address, although sometimes the respondent's argument may be sought earlier in the proceedings, for example, at an adjournment. An outline is supposed not to exceed three pages, although the Court usually takes a liberal view if it is a little longer. It should state the principal authorities in support of each contention that needs authority, but it is not intended to take the place of the list of authorities next to be mentioned, and should not degenerate into a mere recital of cases. A chronology may be appended if that seems appropriate.

A list of authorities is to be handed to the Court forty-eight hours before the hearing is listed to commence. Inexperienced counsel often misunderstand the purpose of this list. Its sole purpose is to enable the tipstaves to have the necessary volumes in court and to enable photocopies to be made where that is necessary to achieve that result. It will be helpful if the list is prepared with some discrimination; on the one hand inconvenience will be caused and money wasted if, as often happens, the list contains many cases which are not cited in argument; on the other hand, the argument will suffer if the necessary volume is not available when counsel cites a case. The latter fault will be remedied if counsel provides the Court with photocopies of cases which are actually going to be cited but which were not put on the list of authorities.

It is particularly important that the Court should have before it copies of statutes whose construction is in question and the better practice is for counsel to hand up copies of any such statutes and for the list of authorities to indicate that this course will be taken. It is a minor irritation when counsel cites a case by reference to its number in the list without at the same time mentioning the volume and page of the report in which it appears; it is also irritating if counsel gives a citation other than to Commonwealth Law Reports when the case is reported in those reports, or refers to a case in one of the specialised series of reports when the case is reported in the ALJRs or in the ALRs. It is helpful if both counsel cite from one series of reports; for example, if both refer to the ALJRs or the ALRs, although it is not always possible to arrange for that to be done; in any case it is useful, when the case is reported in both of those series to be given both references even though the citation is to be made from one only.

The excuse for this discussion of matters which are for the most part obvious or trivial is that it is of great importance that the standards of advocacy in all appellate courts should be maintained at the highest possible level. If the court can rely on counsel to direct its attention to all the relevant matters of fact and law, and to refer to all authorities that are truly relevant, it is very greatly assisted in performing its task. Counsel form an integral and important part of our curial system, which could not operate in its present form without their assistance. And a court is much more likely to function successfully, and to achieve a just result, if counsel on both sides have followed what is, in short, the governing principle of advocacy — to say what can usefully be said in support of one's client's position and to say it well.