New South Wales Bar Association 1995 Tutors' and Readers' Dinner

The Hon. Justice M H McHugh AC spoke at the June 1995 Tutors' and Readers' Dinner.

It is a great pleasure for me to be the guest of honour at this year's Tutors' and Readers' Dinner. I was at, what I believe was, the first institutionalised Tutors' and Readers' Dinner in 1961, the year that I was admitted to the Bar. I understand that, at irregular intervals during previous years, informal Tutors' and Readers' dinners had been arranged by individual members of the Bar. But 1961 was the year when the New South Wales Bar first organised reading lectures and made attendance compulsory.

Mr Vice President, the course of reading lectures in 1961 was much inferior to the course that the Bar runs today. On the other hand, we did not have to pay $1,000 to enter the course. Our course was free. It consisted of half a dozen or so lectures held at night in the Common Room over a period of some months. Any barrister could attend the lectures. When J W Smyth QC gave his famous lecture on cross-examination in 1961, most of the then 422 members of the Bar attended.

From the start, the Reading Programme was a success. It certainly helped me avoid many mistakes that I am sure that I would otherwise have made. Of course, like most new barristers, I made my share of mistakes. But making mistakes in the conduct of litigation is not confined to new barristers. Take the case of a young Equity silk who cross-examined a defendant a year or two ago. The cross-examination went like this:

Young silk: "I want to put this proposition to you. You used the company's money for your own purposes?"
Defendant: "No."
Young silk: "Look at the document I hand to you! Isn't that a sworn statement, in your own handwriting, in which you admit that you used the company's funds to pay your own debts?"
Defendant: "No. I have never seen this document before today."
Young silk: "Do you seriously tell his Honour that this is the first occasion on which you have seen the document that I just handed to you?"
Defendant: "Yes, I do. The document you just handed me is headed - 'Notes for Cross-examination of the Defendant'."

One advantage in being a High Court Justice is that you get the opportunity to read the transcripts of trials conducted throughout Australia. Styles of advocacy differ from State to State. One thing that has struck me is that few interstate practitioners have adopted the New South Wales technique of putting a series of propositions to a witness at the commencement of the cross-examination. This technique was used with great effect by two legendary cross-examiners at the New South Wales Bar - J W Smyth QC and J W Shand QC - and during my time at the Bar became something of a Sydney tradition. The cross-examiner begins by getting the witness to agree that he or she accepts the validity or truth of one or more propositions concerning what would be expected of a person who was honest, reasonable, prudent and so forth. The cross-examiner then questions the witness in such a way that, if the witness gives an answer contrary to what the cross-examiner wants, the witness, on his or her own admission, must be dishonest, unreasonable, imprudent, and so on. In the hands of a skilled practitioner, it is a very effective technique. But it is a technique, not without its dangers, as a Sydney silk found out some time ago when cross-examining a quick-witted witness in a Supreme Court action. The transcript reads:

Stitt QC: "I would like to put a proposition to you."
Woman Witness: "You would? My luck has changed at last."
His Honour: "I think you had better wait until you hear what the proposition is!"

At the next adjournment the exchange continued when Stitt and the witness met in the lift:

Woman Witness: "Still interested in that proposition?"
Stitt QC: (not to be outdone): "Madam, I hope you realise that, under our Bar Rules, whatever I get, my junior must get two-thirds."

There can be little doubt, I think, that the Bar no longer has the high standing that it once had. The barrister of today certainly does not have the same hold on the public imagination as his or her counterpart of earlier times seems to have had. Leading counsel in the Victorian and Edwardian eras were public figures. When Sir Edward Clarke QC, a leading English silk at the turn of the century, attended the theatre on the night of one of his great forensic triumphs, the audience rose and applauded him. Leading silks at today's Bar would love that kind of adulation. Imagine David Bennett QC, in top hat, cape and tails, entering the Opera House after another triumph in the High Court of Australia. Of course, not every silk would like it. Shy, self-effacing QCs - like Tom Hughes - would be forced to slip into the theatre after the lights had gone out. Sadly, for the Bar, however, the days when barristers were public idols are gone.

The public idol of today is the film or television star, the pop star, and the sporting hero. Perhaps the lack of public interest in the personalities of today's barristers means that they are not as colourful as their predecessors. However, the media interest in colourful solicitor-advocates such as Chris Murphy suggests that advocates can still excite public

attention. Nevertheless cases do not get the publicity they once did. In my early years at the Bar, there were two afternoon papers in Sydney. Both they and the morning papers carried very lengthy reports of cases, often setting out long verbatim extracts of cross-examinations and counsel's addresses. I would think that, as late as 1965, many of the leading silks were household names in Sydney. But those days are gone. There is no prospect of even the most colourful advocate competing for public attention with pop stars like Michael Jackson or Madonna, or film stars like Hugh Grant.

However, it is not the loss of the Bar's glamour that is worrying. What is worrying is the undoubted fact that in recent years there has developed a perception, particularly among some journalists and politicians, that barristers are persons with grossly inflated egos who are not interested in justice and whose principal concern is to string out cases and make as much money as they can from the conduct of litigation. If that perception is true of some barristers, it is not in my experience, and never has been, true of the very great majority of barristers.

Like Sir Owen Dixon, I believe that the role of counsel in the administration of justice is more important than that of the judge or jury. It is counsel who have the responsibility for ensuring that the relevant facts are brought before the court: it is counsel who select the legal and factual issues upon which the decision in a case will turn. If counsel fail to carry out their responsibility, justice, at least justice according to law, will fail. The most able and conscientious judge cannot correct a wrong if counsel have failed to call or extract the relevant evidence or refuse to argue a relevant issue. On the other hand, when counsel present well prepared and well argued cases, the reasons for judgment of even a judge of average ability can be outstanding. It is therefore a matter of great concern to the administration of justice when counsel fail to present a case as well as it should have been presented.

Inattention to the proper preparation of cases is, I think, one of the root causes of much of the present public dissatisfaction with the Bar. Failure to prepare properly causes delay in vindicating rights, lengthens the hearing of cases and thereby increases the cost of litigation, contributes to congested court lists, and leads to settlements that create a sense of injustice among litigants that finds its outlet in criticism of the Bar as an institution.

Having practised at the Bar for 23 years, I know as well as anybody that relevant evidence is not always obtainable or, if it is, that the cost of obtaining it may be prohibitive. I know that law is complex and that the decisive issue is frequently revealed only after the most painstaking and acute analysis and that it is easily missed. I know, too, that a barrister is often brought into a case when it is too late, in a practical sense, to change its direction. But when full allowance is made for these problems, it appears to me and other judges that a significant number of cases are not as well prepared as they ought to be. Moreover, with alarming frequency, courts of appeal - particularly in criminal cases - are asked to consider points that were not raised at the trial. If this trend of failing to conduct cases properly continues, the privileged position of advocates in relation to immunity from actions for damages for negligence is likely to be lost.

It may be, as I think is probably the case, that the number of cases that are not as well prepared as they should be, are a small percentage of all the cases that come before the courts. But, assuming that is so, it needs only a handful of dissatisfied litigants to take their complaints to the media and to politicians to paint a picture of a Bar that is concerned only with its own welfare.

One of the surest ways that the profession can answer the criticism that it is uninterested in seeking just and speedy outcomes to legal problems is to demonstrate that in this State litigation can be conducted expeditiously, efficiently, without excessive technicality and relatively cheaply. I would like to draw attention to a few areas where I think the conduct of litigation can be improved and thereby contribute to the achievement of those goals. Many factors contribute to delay, to congested court lists and to the building up of costs. One of them is the failure of legal advisers to come to grips at an early stage with the real issues in dispute. Much unnecessary expense is incurred in respect of cases that are settled far later than they should be. Clients feel betrayed when, just before or during a hearing, they are told that their cases are not as strong as they were led to believe and that they must settle for less than they expected. Full and early preparation helps to avoid that situation.

"If counsel fail to carry out their responsibility, justice according to law will fail."

In respect of cases which proceed to decision, a great deal of time is often lost in contesting issues which in the end are irrelevant. It is worrying to see Appeal Books with hundreds of pages of evidence that by the start of the addresses have become irrelevant. Not everyone has the courage, confidence and psychological makeup of Sir Patrick Hastings QC who claimed always to have selected a single issue to fight a case on and to have abandoned the rest. But if counsel is on top of the law, the facts and the issues relevant to the case, he or she will not waste the court's time and the client's money by contesting issues which should be conceded.

This is an appropriate point to mention the issue of the rambling cross-examination. Few barristers are blessed with the gifts of incisiveness and economy of words that marked the cross-examinations of the late J W Smyth QC or the late Harold Glass QC. But proper preparation, knowledge of the issues, and a determination to stick to the essential would greatly reduce the length of many cross-examinations. Some counsel seem to embark on cross-examination with little knowledge of what they are after or how to get it. Questions are asked with no knowledge or expectation of the probable answer and with no control of the witness. This results in the unnecessary prolongation of cases with consequent expense

and waste of judicial resources. Sometimes, it results in the destruction of the client's case.

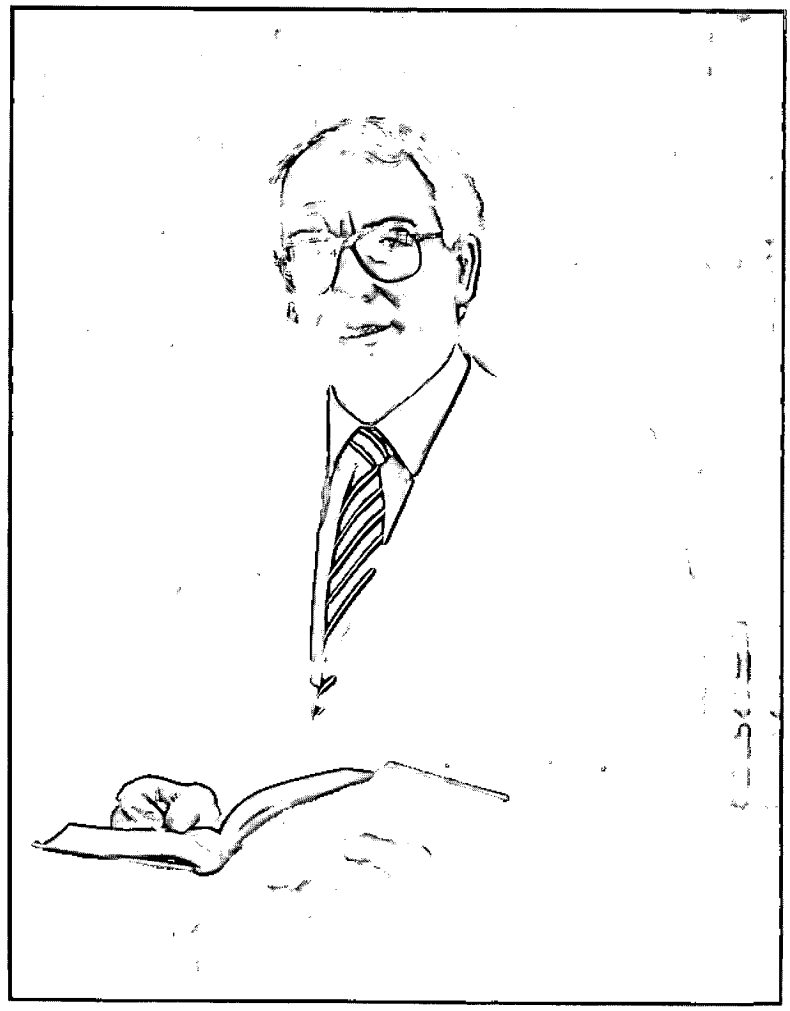
Similar criticisms can be made of some submissions and addresses. Too much time is spent addressing on peripheral issues, on minor inconsistencies in the evidence, and in the reading of long passages, particularly of the facts from reported cases. Reported cases are not statutory texts. They should only be used in argument to illustrate and document general principles and specific rules of law. Insufficient attention is paid in some submissions to developing and establishing a theory of the case which reconciles its facts with the relevant principles of law.

But most of all, a significant number of submissions and addresses are too long.

This Bar has produced no greater advocate than Murray Gleeson QC, and he has always contended that good advocacy is economical advocacy. I agree. No better advocates in presenting special leave applications can be found at this Bar than David Bennett QC and David Jackson QC. Yet their submissions are always short and to the point, often taking a few minutes only. You can count on two fingers the number of times that they have required the full 20 minutes of allotted time to put a special leave application. They put their point or points briefly and concisely.

If you have a point, put it as concisely as you can. Then sit down. If the point is put clearly, the brevity of the submission will not detract from its persuasive force.

Three or four years ago, David Bennett opened an appeal in the High Court at 10.15am, put his point, and sat down at 10.19am. When Sir Anthony Mason said to him, "Have you got nothing further to put?", Bennett said, "Well, I can repeat what I've just said". But there was no need for him to repeat the point. He had seized on the essential point, put it, and sat down. The appeal was allowed.



"... good advocacy is economical advocacy"

...The Hon Justice M H McHugh AC

When counsel complain that a judge or a magistrate was slow to comprehend a point, the cause is more likely to be found in the submission's lack of clarity than its brevity. An argument is clearest when the significance of each new piece of information is understood as soon as it is received. That means that context should be put before detail. Information is most easily comprehended when it can be immediately related to information that is already known. Let the court know what your argument is and how it will be developed before you demonstrate its proof. Let each step follow logically and coherently from the last step.

The short submission also happens to serve counsel's self-interest. It helps counsel to avoid what the late Mr Justice Hutley used to call the judicial uppercut, the unanswerable question that knocks counsel's argument out of the ring. It is a necessary part of the judicial equipment for dealing with the rambling, irrelevant or plainly erroneous submission.

Sir Anthony Mason was adept at using this blow, particularly in special leave applications. On one occasion, after a penetrating question from Sir Anthony, counsel could only dazedly reply, "You Honour has got me on the ropes!", to which Sir Anthony quickly replied, "On the canvas, I would have thought".

It was not for nothing that some of us called Sir Anthony the Muhammad Ali of the Federal judiciary.

Mr Vice President, I loved the 23 years that I spent practising as a barrister at the New South Wales Bar. I envy the Readers of this Class of '95 as they embark on their careers as barristers. I wish them well. I will follow their careers with interest.

I am very grateful to be invited here tonight as the guest of honour at this dinner. I thank you most sincerely for the invitation. ❑