

ADVOCACY & EVIDENCE CONFERENCE

KEYNOTE ADDRESS

The Hon Justice MJ Beazley AO

President, New South Wales Court of Appeal

Introduction

- 1 I have been invited to open this morning's conference with some reflections on "*Advocacy: the View from the Bench*". I have been given 20 minutes to do so. That is the same amount of time that the Court of Appeal gives, as a matter of convention, to each party on an application for leave to appeal. However, I haven't been given the benefit of providing you with 10 pages of written submissions.
- 2 It did seem to me that the conference organisers were setting up a challenge to see if I could do what the Court demands of counsel. In short, it was a challenge to be succinct, persuasive, educative and, I suspect, inspirational.
- 3 Let me then rise to that challenge and see if I can succeed in being at least succinct, persuasive and educative. I will leave the last, being inspirational, to your assessment.

4 There has been a significant change in advocacy over the last 2 decades. I will deal with the features of modern advocacy shortly. What has not changed, however, is the role of the advocate. Justice Pagone, now of the Federal Court, has encapsulated the role of the advocate in these terms:

“The advocate is the professional legal intermediary between client and decision maker simultaneously assisting both by sifting for each what is needed to achieve an outcome in the client’s interests but consistent with the judge’s duty to ascertain the rights of the parties upon evidence according to law”.¹

5 How do these essential attributes dovetail with the requirements and demands of modern advocacy? This calls for an analysis of the precise task that is being undertaken by the advocate, having regard to the particular forum in which the advocate is appearing.

6 A court case essentially has 3 features: a set of facts; a body of law; and the application of the correct law to the facts as found. It is no different on an appeal. However, there is a striking difference in emphasis. On an appeal, the court is concerned with *issues*. This is so regardless of whether the appeal is an appeal by way of rehearing pursuant to the *Supreme Court Act 1970* (NSW), s 75A(5) or whether it is an appeal on question of law, as is the case under *Land and Environment Court Act 1979* (NSW), s 57.

7 The issues are based on the grounds of appeal. However, it is essential to remember that the case commenced with the pleadings at first instance. Accordingly, an appeal should unravel before the Court with the advocate having a firm grasp of the following.

8 First, the case that was run at first instance. Points not pleaded and points not taken in the court below may be precluded from being raised on appeal: *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418. The rule is not absolute, but it is a high hurdle to get over.

¹ The Honourable Justice G T Pagone, ‘Advocacy’ (Lecture as part of the Melbourne University Law School Guest Lecture Series, 24 March 2011) 7

- 9 Secondly, the decision of the primary judge. Whilst an appeal is brought from the order or judgment of the court below, it is the reasons that are the basis of the challenge. Accordingly, it is error in the reasons that needs to be identified. This is so even where the appeal is by way of rehearing, as under s 75A of the *Supreme Court Act*.
- 10 Thirdly, the grounds of appeal. I reiterate that the issues in the case are based upon the grounds of appeal. Each ground of appeal has to identify for the advocate and ultimately for the court what the error is in the judgment. The more profuse, explanatory and repetitious the grounds of appeal the less likely the issues will emerge in the argument of the case. There is to be a lecture at the Bar Association on 12 April 2017 in relation to grounds of appeal and I will not pre-empt what is to be said there. I trust I have already made the single point that needs to be made. To state the matter positively: grounds of appeal should be few in number and concise in content.
- 11 The fourth point is that attention must be given to the orders that are sought. At the end of the day, the court is concerned to make an order or orders. More importantly, the client is only concerned, or is mostly concerned, with the order that is made in its favour or which is made against it.
- 12 At this point I suspect that you are thinking that, so far, you have only heard a series of dot points – motherhood statements – when you have come to learn the advocate’s tricks for engaging the bench. Can I assure you, lack of attention to each of the 4 points I have made are an advocate’s failure. They are the points which if not attended to will not only derail the case, they will totally derail the flow of the advocate’s argument.
- 13 In short, if those matters are not attended to, the court will be peppering the advocate with questions directed to whatever the perceived deficiency is in the advocate’s presentation: whether that be to require the advocate to explain the point being made, because it is not clear, to identify the issue that

is being addressed, because it is not obvious, to explain how the matter was put in the court below, or to inform the Court what the relief is that is being sought and why the appellant is entitled to that relief.

- 14 The last point, as to the orders that are being sought, is of particular importance in judicial review matters. Apart from certain exceptions, the court on judicial review remits the matter to the court below for determination according to law. It doesn't make the order that should have been made by the primary judge or decision-maker. I can indicate that this has been a particular nightmare in relation to appeals to the District Court from costs assessments which are then the subject of judicial review in the Court of Appeal. That too is another lecture and there is not time to develop it now. What I wish to emphasise is that the advocate must understand the jurisdiction that is being invoked.
- 15 That brings me to the main 2 aspects of what I characterise as modern advocacy. The first is written submissions. The second is oral argument. The point to be emphasised is the synergy between the two. Let me give a definition of synergy: it means the interaction of two or more agents or forces so that their combined effect is greater than the whole.
- 16 Written submissions have to capture each issue derived from the grounds of appeal – and should do so in 20 pages or less, if I can encourage you to brevity. It is helpful, and indeed good written advocacy, to give a heading to each issue by reference to the ground or grounds of appeal. That will ensure clear thinking on your part and will help you conceptualise your appeal.
- 17 Written submissions can and should also form the base for your oral advocacy. From the headings in the written submissions, you should be able to say to the Court: there are 5 issues (or whatever the number is) in this appeal. They are: then make a statement of each. Tell the Court which ones you will address orally. I must emphasise however that there is no one template for how you open your appeal. You might say, for example:

“The essential point in this appeal is that the trial judge misconstrued cl 8 of the contract entered into between the parties. That will require the court determining these issues. I will first have to take the court to the contract documents.”

18 There are many other ways, but you have to capture the court’s attention in those first few minutes and you then have to retain the court’s attention for the rest of your address. So there you have, in a nutshell, good appellate advocacy.

19 There are a couple of other matters I would like to mention. Can I suggest that you take care about bringing interlocutory applications in the Court of Appeal. The Court seriously discourages strike out applications and challenges to competency unless the grounds for doing so are very strong. It is a waste of the court’s resources to sit judges on matters that can effectively be dealt with as part of the hearing. This is particularly so when there is a self-represented litigant involved.

20 There is also the question as to the use of humour by advocates. There is a great saying that if you can’t be funny be short. It is not a bad saying to remember as an advocate – very few advocates are funny. If there is to be a burst of humour, it’s always better to let it be initiated by the judge. I will give you a few examples, unfortunately mostly from the trial courts. Both examples are problematic in their own way:

(1) **Crown Prosecutor:** I tender a further conversation, a disc and a transcript.

His Honour: Yes that will be exhibit BR. I hate to think what exhibit BS will be.

Crown Prosecutor: Perhaps the list of admissions tendered by the defence.

- (2) **Crown:** Your Honour, the applicant has been engaged in an almost Hollywood style car chase.

His Honour: It's hardly Hollywood Mr Crown. He's driving his mum's Toyota Corolla.

- 21 The matters I have been addressing thus far will be addressed in greater detail by other presenters. However, as Justice Pagone said, an advocate is a professional. You are not paid to be unprepared. Put yourself in the shoes of the patient whose doctor doesn't understand the implications of the operation being performed or the medication being prescribed. Your task as an advocate is as important. It was well summarised by Justice Sackville in a letter he sent to the parties in *Seven Network Ltd v News Ltd* [2007] FCA 1062, as extracted at [34]:

“At the risk of stating the obvious, part of the art of advocacy is to make it easy for the decision-maker to understand what issues need to be resolved and to explain clearly, cogently and concisely how and why the crucial issues should be resolved in favour of a particular party.

To leave the Judge, if not completely at large, then without a reliable working compass in a vast sea of factual material, is not a technique calculated to advance a party's case. This, I hasten to say, is not because any Judge would consciously penalise a party by reason of the bulk of its submissions or the manner in which its arguments are presented. It is because **the cogency and persuasiveness of submissions depends on the ability of the Judge to follow them and to isolate the critical legal and factual issues upon which a case is likely to turn.**” (emphasis added)

- 22 It is exactly what I would have said should I have been writing that letter.