

Advocacy: A view from the bench

Introduction

- 1 Over the years I have been asked to give many presentations on advocacy, as have my colleagues. Increasingly, the title that is allocated is “*Advocacy: A view from the bench*”. To my mind, this is quite telling. Once upon a time, these speeches were given by the great advocates of the day. However, that was in the days when the oral tradition of advocacy reigned and, even more particularly, the oral tradition of jury advocacy was the pinnacle of the art.
- 2 The requests for judges to give these lectures is indicative, it seems to me, of two things:
 - first and the point I wish to focus on today, the changing nature of the way the courts require cases to be run; and
 - second, the increasing, but sometimes unnecessary, complexity of litigation.
- 3 The first point is exemplified in the statutory injunction that the purpose of the court’s processes is to achieve the “*just, quick and cheap*” resolution of disputes or to use the terminology of the *Federal Court of Australia Act 1976 (Cth)* the “*just resolution of disputes ... quickly, inexpensively and efficiently as possible*”.
- 4 Both expressions are deeply embedded in the jurisprudence of court procedure. The phrase “*just, quick and cheap*” was used, for example, by Justice Young in *Hunter v Commonwealth Trading Bank of Australia* (Supreme Court, unreported, 12 June 1985). As his Honour pointed out, this is a reflection of the basic principle that the court has control over its

own processes. Jessel MR said as much in 1879 in *Mullins v Howell* (1879) 11 Ch D 763.

- 5 The Federal Court terminology reflects what Justice Mahoney said in *Government Insurance Officer (NSW) v Glasscock* (1991) 13 MVR 521 at 529-530:

“The principles of judicial administration require that the procedures of the justice system be **effective, efficient, and timely**.

They are to be **effective** in the sense of bringing to an end the disputes with which they deal.

They are to be efficient in the sense of using for the purpose no more resources than are appropriate.

And it is necessary that what is to be done be done in due time.”

- 6 His Honour explained that what was to be done under these principles was to be done within the parameters established by the requirements of justice.

- 7 There are two major differences between those long established principles and the position today. The first is their statutory enshrinement. The second is the daily emphasis placed upon them by the courts.

- 8 A survey of the Supreme Court’s formal judgments reveals nearly 200 references to the phrase “*just, quick and cheap*” in the past 12 months. The Court of Appeal has repeatedly stressed the primacy of the provisions: see *Tripple Take Pty Ltd v Clark Rubber Franchising Pty Ltd* [2005] NSWSC 1169; *Boulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2005] NSWSC 1339; *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37; *Hans Pet Constructions Pty Ltd v Cassar* [2009] NSWCA 230; *Bi v Mourad* [2010] NSWCA 17 at [47]; *Richards v Cornford (No 3)* [2010] NSWCA 134; *McMahon v John Fairfax*

Publications Pty Ltd [2010] NSWCA 308; *Hamod v State of New South Wales & Anor* [2011] NSWCA 375.

- 9 I would add that the High Court has spoken. See *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27; 239 CLR 175 where the Court was considering rules of the ACT Supreme Court which were in similar terms to s 56. Justice Heydon captured the importance of efficiency in litigation perfectly. His Honour said, at [137]:

“While in general it is now seen as desirable that most types of litigation be dealt with expeditiously, it is commonly seen as especially desirable for commercial litigation. Its claims to expedition may be less than those of proceedings involving, for example, extraordinary prejudice to children; or the abduction of children; or a risk that a party will lose livelihood, business or home, or otherwise suffer irreparable loss or extraordinary hardship, unless there is a speedy trial. But commercial litigation does have significant claims to expedition. Those claims rest on the idea that a failure to resolve commercial disputes speedily is injurious to commerce, and hence injurious to the public interest.

...

Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. In each case that is because it is important that both the claimants and those resisting claims are able to order their affairs. How they order their affairs affects how their creditors, their debtors, their suppliers, their customers, their employees, and, in the case of companies, their actual and potential shareholders, order their affairs. **The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.**” (emphasis added)

- 10 This is an important observation and underlies the partnership between the courts and practitioners in the administration of justice. I don’t propose to dwell on s 56 for long, but I remain curious and sometimes astounded as to the lack of knowledge in the legal profession not only as to its existence but as to its full impact.

- 11 The terms of the *Civil Procedure Act* 2005, s 56 are as follows:

- “(1) The overriding purpose of this Act and of rules of court, in their application to a civil dispute or civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the dispute or proceedings.
- (2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
- (3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
- (3A) A party to a civil dispute or civil proceedings is under a duty to take reasonable steps to resolve or narrow the issues in dispute in accordance with the provisions of Part 2A (if any) that are applicable to the dispute or proceedings in a way that is consistent with the overriding purpose.
- (4) Each of the following persons must not, by their conduct, cause a party to a civil dispute or civil proceedings to be put in breach of a duty identified in subsection (3) or (3A):
- (a) any solicitor or barrister representing the party in the dispute or proceedings,
 - (b) any person with a relevant interest in the proceedings commenced by the party.
- (5) The court may take into account any failure to comply with subsection (3), (3A) or (4) in exercising a discretion with respect to costs.
- (6) For the purposes of this section, a person has a **relevant interest** in civil proceedings if the person:
- (a) provides financial assistance or other assistance to any party to the proceedings, and
 - (b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.

Note. Examples of persons who may have a relevant interest are insurers and persons who fund litigation.

- (7) In this section:
party to a civil dispute means a person who is involved in the dispute.”

- 12 The *Federal Court of Australia Act 1976* (Cth), s 37M follows a different trajectory, but the starting point is the same: namely the overarching purpose of court processes is the just facilitation of disputes as inexpensively and quickly or efficiently as possible. Its terms are as follows:

“37M The overarching purpose of civil practice and procedure provisions

- (1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
 - (a) according to law; and
 - (b) as quickly, inexpensively and efficiently as possible.
- (2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
 - (a) the just determination of all proceedings before the Court;
 - (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
 - (c) the efficient disposal of the Court’s overall caseload;
 - (d) the disposal of all proceedings in a timely manner;
 - (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.
- (3) The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.
- (4) The civil practice and procedure provisions are the following, so far as they apply in relation to civil proceedings:
 - (a) the Rules of Court made under this Act;

- (b) any other provision made by or under this Act or any other Act with respect to the practice and procedure of the Court.”

13 In the past, when the great orators have spoken about advocacy they did so in terms of Art, the *Art of Advocacy* being a frequently used term. Students of the subject were looking for ways to be brilliant, or at least to appear brilliant. Thus, there was much talk not only about the *Art of Advocacy*, but it came with a subtext: the *Art of the Advocate* was the *Art of Persuasion*.

14 In more recent times, with the advent of written submissions and the fiscal implications for the Courts in having litigation before it which limps along in a mire of inefficiency, two messages have become predominant.

- Advocates need to be “*clear, concise, accurate and comprehensive*”;¹ and
- Litigation is process-driven and advocates must have an eye to the central purpose of the process (the *Civil Procedure Act*, s 56).

15 All of these points were effectively captured by Justice Hayne in his 2007 presentation to the Victorian Bar where his Honour said:

“The principal task of an advocate is to persuade. The principal purpose of written advocacy is, therefore, to persuade. If the author is to persuade, **the written submissions must be useful to the audience to whom they are directed** – the judges who are to decide the case. If the submissions are to be useful to the judges, **the author must convey the requisite information clearly, concisely, accurately and comprehensively.**”²

16 The end result should be analytical, structured and referenced.

¹ The Hon. Justice K.M. Hayne AC, “Written Advocacy”, A paper delivered as part of the Continuing Legal Education program of the Victorian Bar on 5 and 26 March 2007

² Ibid at 4.

17 There are several important points in that brief statement but distilled down to a single proposition it is this: written or oral submissions must convey the “*requisite information*” to “*the audience to whom they are directed*”.

18 The proposition, however, begs two significant questions:

- What is the content of the requisite information?
- Who is the audience?

19 Justice Hayne limited the audience to judges. I consider that to be too narrow, at least for the purposes of a court at first instance and an intermediate appellate court. At least in those courts the audience should be understood to include the other parties to the proceedings. The content of submissions will affect the arguments that will be put forward by the other side. It is the role of the parties to determine the parameters of the dispute. Judges (mostly) work within the confines of the issues identified by the parties (sometimes these confines can be quite expansive if parties allow themselves to be overly expansive).

20 Should there be any doubt as to the court’s views, both as to the content of the submissions and the relevant audience, let me refer you to what was said in *Hamod v State of New South Wales and Anor* [2011] NSWCA 375 at [715]:

“... unfortunately, **the State's written submissions**, which failed to refer to the particular statements in the newspaper reports or to the law relating to witness immunity, **were not of assistance to the Court. Nothing was added in oral submissions.** Had the State attended to these matters, particularly in the written submissions, Mr Hamod's legal representatives may have realised that there was nothing in this ground of appeal and abandoned it before the hearing. The result was that the Court was required to undertake the search in the fine print of nine pages of poorly reproduced material for the relevant material upon which Mr Hamod relied and which the State contended did not bear out his claim. **The Court is entitled to rely upon the assistance of the legal representatives to aid it in the determination of disputes.**”

Unfortunately, that assistance was not forthcoming on this occasion.”

21 Mr Hamod’s case was colourful. The trial judge described it as being akin to a “*spy novel*”. This led to an allegation in the appeal of a breach of natural justice. Mr Hamod said he should have had an opportunity to address his Honour to dissuade him from any such perception. That ground of appeal did not succeed. However, the point I want to make is how the respondent dealt with many of the submissions advanced by Mr Hamod:

- “The ground of appeal is nonsense.”
- “The ground of appeal is incoherent and fanciful.”
- “The ground is not pressed. Query how it ever came to be raised.”
- “The ground of appeal was always unarguable and hopeless.”

22 However, the Court cannot be as dismissive. We have a very heavy obligation to give reasons for our decision. The court is entitled to and expects the assistance of the advocate to know why the point is good or bad; why the trial judge was correct or not correct.

23 Justice Sackville made this point in the most compelling way in the *C7* litigation (*Seven Network Ltd v News Ltd* [2007] FCA 1062). He wrote to the parties in the following terms:

“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.”

- 24 Given what I like to refer to as the executive nature of modern litigation, the role of the solicitor in litigation has assumed great importance. The central role of the solicitor in the organisation and preparation of the case finds recognition: first, in the obligations that are imposed by the *Legal Profession Act 2004*, s 345; the penalties that flow from breach of those obligations: *Legal Profession Act*, s 348 and the *Civil Procedure Act*, s 99; and second, in the protection that the law gives for negligence in the recognition that advocates’ immunity extends to solicitors’ work that is “*intimately connected with the case in court*”: *D’Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1.
- 25 An example of the costs penalties that can flow from s 345 and s 348 came before the Court recently in *Keddie & Ors v Stacks / Goudkamp Pty Ltd* [2012] NSWCA 254. In brief, the factual matrix was:
- (1) General conference between counsel, legal practitioners and client in respect of professional negligence claim. No material at the conference and advice following conference is that there appeared to be a reasonable case.
 - (2) Two years later, medical evidence was obtained indicating a high degree of disability. That medical evidence was patently flawed.
 - (3) Second conference between counsel, legal practitioners and client where both counsel and legal practitioners had access to all relevant material including the flawed medical evidence.
 - (4) Following the conference, counsel advised that the claim was unlikely to succeed and **should not be run**. Nonetheless, counsel drafted pleadings requested by the solicitors.

26 The case was run over three days, until in cross-examination some of the many flaws in the case were exposed.

27 At a conceptual level, the case may have been arguable. However, a case needs evidence. None of the evidence supported an arguable case, but I will only refer to the expert evidence.

“[153] I would make two final comments. A solicitor, in the preparation of a claim, is entitled to rely upon the expert views expressed by witnesses with expertise in a relevant field of inquiry. However, where there are specific statutory regimes that regulate particular types of claims, an expert’s opinion must comply with the requirements of the legislation governing the claim. Further, an expert’s opinion is only reliable to the extent that the opinions expressed are based upon correct facts and histories. As I have explained, the expert reports ... failed these fundamental requirements.”

28 The medical report had two basic flaws. The opinion was formulated under the wrong statutory regime. The expert also assessed the plaintiff as having a working capacity of a few hours a day. However, as the solicitors knew, the plaintiff had been working full time for two years. So it didn’t matter what the report said about the degree of incapacity, it was wrong. It was of absolutely no use to prove what needed to be proved in the case. The solicitor was required to read the report to ascertain (i) was it factually correct; (ii) was it legally accurate; (iii) were the opinions expressed supportable by the known evidence.

29 The expert reports in *Keddies* were not inadmissible. They were simply worthless. However, the very basic rule that an expert’s report must be admissible can never be overlooked. The requirements for the admissibility of an expert’s report has now been settled by the High Court in *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; 243 CLR 588. Sackville J also referred to this in C7. His Honour said, at [23]:

“If the parties insist on tendering expert reports that fail to comply with the rules of evidence or are simply unhelpful, they may find that the tender is rejected.”

- 30 A question also needs to be asked as to whether expert evidence is in fact required. An argument was raised about this in a simple breach of contract case: *North Sydney Leagues' Club Limited v Synergy Protection Agency Pty Limited* [2012] NSWCA 168. The Managing Director had prepared a summary of the losses claimed from the primary accounting records. The appellants argued that this task was required to be undertaken by an expert. However this was a pure accounting or book keeping exercise. This was a small business and the Managing Director had a detailed understanding of the finances. The data he had prepared sufficiently demonstrated its losses. The appellant had spent considerable time complaining that there was a fatal deficiency in the respondent's evidence because the financial data had not been collated by an expert accountant. The argument failed. In any event, it had not been raised at trial.
- 31 I have been focussing thus far principally upon matters that concern the Court of Appeal. The Court of Appeal is fundamentally concerned with:
- Written submissions;
 - What the issues at trial were;
 - What the issues on the appeal are; and
 - Whether the points to be argued on the appeal were argued in the Court below.
- 32 The Court of Appeal is an entirely different playing field from first instance. The tactics of the case are not played out in the appellate court. Rather, the Court is concerned with the consequences of the forensic and tactical decisions that are made at trial and, I would add, the forensic and tactical omissions at trial. Those tactical and forensic decisions commence with the pleadings. The emphasis placed upon the issues raised by the

pleadings cannot be stressed enough. Cases that are not pleaded properly usually do not succeed.

33 In *Edingbay Pty Ltd v Horwath (Vic) Pty Ltd* [1999] VSC 317 Hansen J said, at [62]:

“The role and importance of the pleadings in identifying the issues which are in dispute and which require a determination is critical, and all the more so in massive litigation involving huge costs of the type which these parties have engaged in. It would conduce to mischief and possible scandal in my view if the true role of pleadings in the fair administration of justice was to be disregarded in circumstances such as the present.”

34 In *Patrick v Capital Finance Pty Ltd* [2003] FCA 206 at [10] Tamberlin J made the following points:

- The issues in the case are defined in the pleadings;
- Decisions have to be made progressively through the preparation of the case as to:
 - The documentary evidence that is required;
 - The oral evidence that needs to be called;
 - Whether to cross-examine witnesses and if so the extent of the cross-examination;
 - Late amendments (especially at the close of pleadings) may cause substantial injustice and more likely than not will not be allowed.

35 These points may seem to be straightforward. However, they are honoured in the breach too frequently and a failure to observe them often (and usually) results in cases being lost. And hiding behind the simplicity of these requirements is an ancient store of wisdom. Accordingly, I wish to make some brief comments about each.

36 **The issues:** As I have already explained, everything revolves around the issues that are pleaded. Good pleading is fundamental. Almost inevitably in modern day litigation, parties are bound by the pleadings.

37 However, if the parties allow the issues to evolve during the course of the hearing, they will be bound by that just as much as a party has a right to insist that the case be confined to the pleadings.

38 In *CMA Corporation Ltd v SNL Group Pty Ltd* [2012] NSWCA, 138 Barrett JA referred to what was said in *Gould v Mount Oxide Mines Ltd* [1916] HCA 81; 22 CLR 490 by Isaacs and Rich JJ:

“But pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest.”

39 I have said that good pleading is fundamental. The relationship between the pleadings and the evidence is also fundamental. A really good litigator will do a forwards and a backwards check of the relationship between the pleadings and the evidence. A case will begin with a set of facts which will form the basis of the pleaded cause of action. Each element of the cause of action has to be proved. Accordingly, a check has to be done to ensure there is evidence to support each element of the cause of action.

40 **The evidence and cross-examination:** In *Australian Securities and Investments Commission v Rich and Anor* [2009] NSWSC 1229 Austin J made an important point that ASIC should have been “*proactive about the early identification of [fact-dependent] issues*”.

41 He referred to the requirement for the parties to adopt a “*cards on the table*” approach and the need for ASIC to remain within the confines of their pleaded case. This cards on the table approach to which his Honour

referred was a reference to the frequently stated notion that the days of “*trial by ambush*” are well and truly over. That is important in terms of preparation. It means that the case has to be thought through thoroughly, well before the case comes on for trial.

42 I also wish to make reference to two principles of evidence that are often overlooked or misunderstood. The first is the principle in *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969 that evidence is to be weighed according to the capacity of a party to adduce it .

43 The second is *Jones v Dunkel* [1959] HCA 8; 101 CLR 298 and the allied principle in *Commercial Union v Fercomm* (1991) 2 NSWLR 413. It is often said that that a *Jones v Dunkel* inference is a weak form of inference and not much is gained from having the benefit of it. That is not universally correct. A *Jones v Dunkel* finding can strengthen or weaken an inference that is available on other evidence. The principle applies to the failure to ask a question and the failure to tender documentary evidence.

44 This was of critical importance in *ASIC v Rich*. Austin J explained, at [474]:

“It therefore seems to me that the absence of One.Tel management witnesses:

- (a) to explain management accounts and the relationship between board papers and flash reports and other financial documents including cash flow spreadsheets; and
- (b) to explain the profile summaries and the process of provisioning for doubtful debts;

has the consequences:

- (c) under the principle of *Blatch*, that ASIC’s failure to call those witnesses can be taken into account in deciding whether it has discharged its onus of proof with respect to the facts in issue to which the documents relate ,,,

- (d) under the principle of *Jones*, that the court should infer that the evidence of the absent witnesses, if called, would not have assisted ASIC's case ...”

45 ASIC had argued that it was not necessary to call the evidence. To do so would only prolong the trial. Austin J pointed out however that that was only good if ASIC had proved its case by other evidence. If that premise was not correct the submission failed. The result was that ASIC had not proved its case.

46 **Late amendments:** Only one reference needs to be made about that and that is the High Court's decision in *Aon Risk Services Australia Limited v Australian National University* should be compulsory reading before the commencement of every case.

Conclusion

- 47 The message that I wish to leave you with is that good advocacy relies on:
- having a well organised case based on clearly framed issues;
 - which is supported by evidence;
 - that the case is underpinned by legal authority; and
 - that there has been compliance with procedural rules prescribed by the Court's Practice Notes, the Uniform Civil Procedure Rules 2005 and the *Civil Procedure Act*.
- 48 When advocacy is considered in these terms, the relationship between thorough preparation and good advocacy is clear.
