Appellate Advocacy in the High Court of Australia

Chief Justice R S French AC

World Bar Conference
29 June 2012, Supreme Court of the United Kingdom, London

Ambrose Bierce defined the word 'appeal' as a transitive verb meaning 'in law to put the dice into the box for another throw'. Perhaps he had in mind Francois Rabelais' Judge Bridlegoose who decided his cases by the throw of dice. He was impeached for making the wrong decision on a tax appeal and taking too long to do it. His defence was that he misread the dice and that a case needed time to ripen to maturity before decision. Time he said was the father of truth.

The outcome of any litigation is always uncertain. But good advocacy can resolve that uncertainty. It is particularly true of appeals to the High Court at the sometimes shifting boundaries of the law of the Constitution, the common law and the interpretation of important statutes. Such appeals are not the same as appeals to intermediate courts of appeal. Generally they will raise matters of public importance or questions on which there are different opinions in the lower courts. Sometimes they may involve reconsideration of existing lines of authority. Former Chief Justice Sir Harry Gibbs observed in an address to the Australian Bar Association in 1986:

> There is an essential difference between a court of last resort and an intermediate court of appeal … a final court of appeal can be persuaded to depart from established precedent ...[1]

A well known but possibly apocryphal anecdote has 28 year old Robert Menzies appearing before the High Court in the *Engineers' case* and, confronted with an observation from the Bench that he was talking nonsense, replying that he was obliged to do so by the previous decisions of the Court. The Court then proceeded to

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[1] H Gibbs, 'Appellate Advocacy' (1986) 60 *Australian Law Journal* 496.

reconsider and overrule its previous decisions relating to the limits of Commonwealth and State legislative power.

The persuasive arts of the advocate can and do influence outcomes. At best they will illuminate not only the legal and factual merits of the client's case but also, if there be justice in it, the justice of that case. In that context I am reminded of one of the early practitioners at the Bar in the Northern Territory of Australia who told a client who said he wanted justice:

> We will probably do better. I think we can win your case.[2]

The justice of the case does not always have to be deployed like a broadsword in argument. A little withdrawal from the scabbard and a glint of moral steel will often suffice. The real challenge will arise where what is in contest involves a step in the development of the law be it the common law, the statute law or the law of the Constitution.

For the great majority of cases the Court is well served by those who appear before it. As is to be expected, however, competencies, skills and experience vary between counsel. Some counsel have good days and better days. Very occasionally there is a temptation to begin a judgment with the words 'despite everything that was urged on behalf of the appellant by his counsel, we are of the opinion that the appeal should be allowed'. The members of the Court try to reach the correct or preferable decision even where there is a mismatch between the abilities of counsel on the hearing. But the advocacy of counsel is not just some sort of cosmetic trapping to create an appearance of procedural fairness. It informs the exercise of the judicial power. It finds its expression in the written submissions filed before the appeal, the written outline of oral argument handed up at the beginning of the hearing, and also and particularly, the exchange between the Bench and the Bar during the oral hearing. It is in the course of that exchange that the argument will be most rigorously tested. It is in the course of that exchange that the shape of a case may alter as premises are examined and the priorities accorded to issues in the case shift. Counsel must be

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[2] D Lockwood, 'The Front Door: Darwin, 1869–1969', (Rigby, Adelaide, 1968) 234.

ready to adapt to the changing currents of discourse in the case without losing the forward momentum of the primary argument.

There are many lists of handy hints for appellate advocates to be found across many jurisdictions represented in cyberspace in bar journals and in innumerable continuing professional development seminars. The lists lack novelty probably because the important requisites of advocacy are universal and reasonably obvious.

The usual hints are:

1. Careful preparation on the facts – what the Americans call 'knowing the record'. I do not know how you do that effectively without reading the record. It may be, however, that the issues in the case mean that only part of the record is directly relevant.

2. Careful preparation on the law which will include the history and judicial exegesis of the relevant law, be it statutory, judge-made or constitutional. The treatment of similar legal questions in other countries should also be considered although used with care and discrimination.

3. Clear definition of the issues to be argued.

4. Clarity in the line or lines of reasoning which are proposed with respect to each issue.

5. Succinctness in expression both written and oral. The High Court requires that the parties file written submissions in advance of the oral hearing. Their importance cannot be under-estimated. They must disclose clearly the lines of argument. Those lines should not be obscured by thickets of dense prose, interesting but ultimately irrelevant asides, or gratuitous kicks in the direction of the opposing party. The three page written outline of oral argument handed up at the commencement of the hearing is also of great importance. It should provide a readily comprehensible roadmap of the argument to be presented.

6. Candour - including the preparedness to make appropriate concessions. This is not just fair play. It is, as Sir Owen Dixon said, a weapon of advocacy.

7. Courtesy and civility in written and oral argument in references to other counsel in the proceedings, the court below or the justices sitting in the case.

8. The avoidance of purple prose and useless ephithets such as 'clearly', 'plainly', 'gross', 'hopeless', 'misconceived'. 'Fundamental' should be used sparingly. The term 'transcendental' should be used with extreme caution. Counsel in a special leave application a few years ago put to the Court that the point at issue in the case was one of 'transcendental' importance. The term 'transcendental' used as an adjective has as its primary meaning 'of, pertaining to, or belonging to the divine as opposed the natural or moral world'. It was difficult to appreciate its application to the construction of a provision of the Goods and Services Tax legislation which was in issue in that case.

9. Discrimination in judgment about what is essential and what is inessential to the argument.

10. Knowing when to stop writing in written argument, and knowing when to sit down in oral argument, and having the courage to do so.

These are standard requirements. To them I would add some additional practical considerations which arise from time to time in the High Court:

1. Counsel should be aware of the jurisdiction which was exercised by the primary judge and by the intermediate appeal court and the source and nature of the powers exercised by both, including the nature of the appeal from the primary judge. If the primary decision-maker is a tribunal subject to a statutory appeal to an intermediate court of appeal, the nature of that appeal and its appurtenant powers require particular attention. Relevant to the Australian context, counsel should be aware of whether or not the courts below were exercising State or Federal jurisdiction. It has sometimes occurred

that the identification of the source of jurisdiction was only made in the course of argument in the High Court. (see eg *Momcilovic v The Queen*[3]).

2. In a case involving the construction or application of a statute, the Court should be taken early in argument to the text of the statute, for it is the text that offers the constructional choices in issue and it is the text which will control the outcome. And as a small but vital point for the avoidance of irritation, counsel should have clearly identified to the Court the relevant version of the statute.

3. Knowing the relief sought. In this respect I cannot improve on advice given to the Victorian Bar by Hayne J in an address in 2007. If an appeal is to be allowed - What is to happen about the orders made in the courts below? Which of the orders are to be set aside? Are any orders to be made in their place, or is the matter to go back to the intermediate appeal court for reconsideration? What is to happen about the costs in the court below? These questions are tied to the prior question about the nature and content of the jurisdiction and the powers of the courts below.

4. When all else is done by way of preparation, you reflect upon the case as a landscape of fact and law through which you propose to take the court. Be able to move to any part of the landscape under questioning without losing track of the main road. Finally, look to your assumptions or premises, particularly those which, if falsified, would place an impassable obstacle in your chosen path. Alternative routes should be mapped.

The preparation of good written submissions and a clear outline of oral argument and adherence to the standard requirements of appellate advocacy provide the platform from which counsel can proceed to persuasion. As Sir Anthony Mason said in an address in 1984 about the role of counsel and appellate advocacy:

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[3] (2011) 85 ALJR 957; 280 ALR 221.

> Persuasion calls not only for mastery of the materials but also for an element of constructive imagination and boldness of approach.[4]

One feature to which he referred to was the unique opportunity presented by the opening. He said:

> There is no need for a ritual incantation of the history of the litigation. The Court is aware of it. Better to begin with a statement of the issues, unless the case lends itself to an exhilarating or humorous introduction.[5]

His Honour cited the example of junior counsel for the respondent in *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd*,[6] a leading case on revocation of a licence who, following his leader and four days of argument, began by quoting in Greek from the *Iliad*:

> The others sat down and were ranged in their places, but Thersites alone still chattered like a jackdaw without restraint of language.[7]

Counsel added that if their Lordships should revoke his licence to address he would ask only for a reasonable time to remove himself from the bar of the House.[8]

Persuasive advocacy at its best, is an expression of the advocate's personality. As one American teacher of appellate advocacy said: 'Be yourself – everybody else is taken.'

A great Australian advocate, with whom I had the pleasure of appearing in the High Court, was the late Sir Maurice Byers, Solicitor-General for the Commonwealth, in the early 1980s. He respected the Court but was not overawed by it. In a case about the scope of the corporations power and the validity of provisions of the *Trade*

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4 A F Mason, 'The Role of Counsel and Appellate Advocacy', (1984) 58 *Australian Law Journal* 537, 538.

5 Mason, fn 4, 542.

6 [1948] AC 173.

7 Mason, fn 4, 542.

8 Mason, fn 4, 542

Practices Act 1974 (Cth) imposing accessorial liability on natural persons, I was appearing for a party relying upon the challenged law. I was harried from the Bench by a Victorian Justice, with the affecting example of an office boy who might be liable for taking a misleading message from the managing director of one corporation to the managing director of another. My responses were very middle-of-the-road. Sir Maurice, intervening for the Commonwealth in support of the law and our side of the case, made the questions of the scope of power and validity all sound very simple, then said: 'and as for that wretched office boy who probably hails from Victoria, I have nothing to say.' His considerable physical presence and his lightly worn authority, based upon deep knowledge and great experience, enabled him to say things in a way that other advocates could not.

We are what we are, and not all of us are like Maurice Byers or Robert Menzies. But all of us can bear in mind Sir Harry Gibbs' advice:

> 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 later not too laboured.[9]

Appellate advocacy in the High Court generally takes place at the leading edge of the common law of statutory interpretation and the interpretation and application of the Constitution. It frequently demands consideration of matters of legal history, comparative law, public policy and criteria to inform difficult choices affecting the development of the law. Their difficulty is illustrated, from time to time, by the disagreements that occur within the Court itself about the appropriate resolution. These cases, however, offer the highest challenge to the advocate's arts and the greatest opportunity for their creative exercise which, fortunately, can never be defined by a tick list of do's and don'ts.

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[9] Gibbs, fn 1, 499.