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ORAL ADVOCACY – THE LAST GASP?

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Orality in the process of litigation has been regarded as a defining characteristic of the common law, one which sets it apart from civil law systems. In England the shift in direction away from the influences of the Roman law took the form of the adaptation of the accusative system of trial by jury, whilst the Continent adopted the inquisitorial system of trial by public officials. A factor thought to be influential in this development was the early appearance of teaching at the Inns of Court¹. One result of the jury system was the need for orality in the giving of evidence and in addresses at the conclusion. It has been observed that what also resulted from orality was "immediacy"², with a trial with a beginning and an end taking place on the one occasion. The characteristic of orality may also be found in the early system of pleading and of course it has been ever present in the mode of argument before the courts.

Whilst the topic of orality in proceedings has been discussed in civil law countries, particularly in more recent times, some commentators observe that there has not been much discussion or writing on the topic in common law countries. Professor Jolowicz suggests that this lack of scholarly interest may stem from the nature of legal teaching in England, with its focus on substantive law rather than procedures and because orality has always been a central element of court proceedings³. It is accepted as such and no need is perceived to comment on something which is not under threat. But now it may be otherwise. The use of written materials, notably statements of evidence of witnesses and written submissions, may threaten this characteristic of the common law which has always been valued, even if taken for granted.

There is no shortage of writings upon the art of *advocacy* however, although much of it was penned in periods which might now be regarded, at least by barristers, as golden ages, when counsel had something approaching celebrity status. Such writings about advocacy, however, tend to concentrate upon the great cross-examinations, such as Sir Edward Carson of Wilde on his cross-examination of William Cadbury, who had sued the Evening Standard for defamation over an article expressing its hypocrisy as a model

¹ Stone and Wall, *Evidence, Its History and Policies*, (1991) at 29-30.

² Jacob, *The Fabric of English Civil Justice*, (1987) at 20; Jolowicz, "Orality and Immediacy in English Civil Procedure" (September-December 1975) *Boletín Mexicano de Derecho Comparado*, New Series Year VIII, Número 595 at 608.

³ Jolowicz, "Orality and Immediacy in English Civil Procedure" (September-December 1975) *Boletín Mexicano de Derecho Comparado*, New Series Year VIII, Número 595 at 596-597.

employer and the exploiter of slaves. The question he put was: "Have you formed any estimate of the number of slaves who lost their lives on preparing your cocoa from 1901 to 1908?" Sir Malcolm Hilbery, a justice of the King's Bench Division wrote, in 1946, that not much is said about an "adroit and impeccable" examination-in-chief, yet nothing is more important and nothing better displays the craft of the advocate⁴. The oral examination-in-chief may now also be an endangered form of procedure because of the use of written statements of evidence.

Sir Malcolm encouraged the use of rhetoric by an advocate before a jury but cautions⁵:

"But before the judicial tribunal it is a thing to beware. A Judge is rendered uneasy by oratical flourishes. Let the language there conform to the standards of the best prose. In the words of Robert Louis Stevenson, 'Beware of purple passages. Wed yourself to a cold austerity'".

There has been renewed interest shown in rhetoric. A series of essays by barristers, judges and academics, principally from New South Wales, was published in 2008⁶ under the title "Rediscovering Rhetoric: Law, Language and the Practice of Persuasion". Justice Scalia of the United States Supreme Court together with Bryan Garner has written a text "Making Your Case: The Art of Persuading Judges"⁷. Courses on advocacy have also enjoyed some popularity in recent times.

Are these recent publications and educational courses a response to a perceived need for advocacy of a higher standard? Do they acknowledge that the standard of advocacy has fallen? Many counsel today do not have the regular experience of the courtroom that counsel in the past had. The reduction in the number of cases brought before the courts and the coincident rise in alternative dispute resolution have contributed to that. There is far less opportunity now for all but a few counsel to appear often in court and hone their skills. And when they do appear in court they do not usually take their witnesses through their evidence in chief and they rely, to a significant extent, upon written submissions.

"Advocacy" can be said to be practised in the preparation of pleadings, the taking of evidence and the presentation of argument. In earlier times all three were entirely oral, written pleadings being a later development in English courts. The system of written pleadings may now be viewed as the first real intrusion upon orality. The reduction of evidence in chief to writing and outlines of argument, which became common practices in the latter part of the 20th century, further eroded the element of orality in proceedings. But an important aspect of orality had been lost much earlier.

⁴ Hilbery, *Duty of Art in Advocacy*, (1946) at 31-32.

⁵ Hilbery, *Duty of Art in Advocacy*, (1946) at 27.

⁶ Gleeson and Higgins (eds), *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion*, (2008).

⁷ Scalia and Gamer, *Making Your Case: The Art of Persuading Judges*, (2008).

In medieval English courts issues were identified by debate between counsel, which was carried on subject to the advice or rulings of judges. This allowed for much greater freedom in the statement of the case⁸. Holdsworth says that in this process Serjeants and apprentices not engaged in the case would also intervene with their advice. The line between argument and decision was obliterated⁹. It was the argument rather than the final decision which interested the profession. He ascribes three reasons for this: (1) that there was then no rigid theory as to the binding force of decided cases; (2) the discussion and elucidation of legal principle was to be found in the arguments and not the dry, formal decision; and (3) because decisions on points of law were often not given¹⁰ or were difficult for the private reporter to collect. It needs also to be recalled that at that time the laws of evidence hardly existed¹¹.

There was a gradual shift away from oral to written pleadings. Pleas were required to be enrolled as part of the court record by clerks, although the final form of the plea was settled by oral discussion at the bar. This still left it to the clerks to enrol a case according to their understanding of the arguments. Significantly, in the 16th or 17th centuries, the practice developed of the legal profession providing drafts of the entries they wished to have on the roll. The practice of allowing unrepresented persons to put in paper pleas also contributed to the development of written pleadings¹².

The system of oral pleading, which was both time consuming and expensive, is said to have "collapsed under its own weight"¹³. But the system of written pleadings itself became very complex in both the common law and chancery courts, and the 19th century saw significant reforms. In more recent times the complexity of cases has contributed to the practice of lengthy and complicated pleadings. There may be questions as to whether many cases are in truth necessarily so complex or whether hard decisions are simply not made about what the real issues are. But that is a topic in itself.

The point to be made at this juncture is that in the late 20th century there was a blow out in litigation which the courts were not able to accommodate, with the result that serious delays were involved in matters coming to trial and being finally determined. It was thought necessary to devise new procedures which allowed the court greater role in the management of cases. By this means it was hoped that cases would become more streamlined and litigation more efficient and less costly.

⁸ Holdsworth, *A History of English Law*, 5th ed (1991 reprint), vol 3 at 635.

⁹ Holdsworth, *A History of English Law*, 4th ed (1982 reprint), vol 2 at 555.

¹⁰ Holdsworth, *A History of English Law*, 4th ed (1982 reprint), vol 2 at 556.

¹¹ Holdsworth, *A History of English Law*, 5th ed (1991 reprint), vol 3 at 635.

¹² Holdsworth, *A History of English Law*, 5th ed (1991 reprint), vol 3 at 645 and 648.

¹³ Reeves, *History of the English Law*, 2nd ed (1969 reprint), vol 2 at 71.

Professor Zuckerman noted in 1999 that the clearest trend in national accounts, at international symposiums, was towards judicial control of the civil process. It was seen as necessary action against the self-interest of the parties¹⁴. Interestingly, the trend was said to be evident in both common law and civil law countries, but of course it was in the common law systems that the parties had for so long largely enjoyed some control of litigation. The parties would plead their case, choose their witnesses and the court would largely accept what was put forward and determine the case as presented. The role of the court was now changing.

It may be said that in Australia effective control was not given to the courts until 2009, when *Aon Risk Services Australia Limited v Australian National University*¹⁵ was decided. *Queensland v J L Holdings Pty Ltd*¹⁶, which was decided 12 years earlier, had placed some limitations upon the court's powers relevant to the exercise of case management. But the practice of case management was by then well underway in any event. Importantly, this more interventionist approach taken by the courts coincided with a marked move away from orality¹⁷. What the courts required of the parties had to be provided in writing. Statements of evidence had to be provided to the opposing party and the courts at an early point. Chronologies were required. Documents were bundled and indexed. There had already been in place, voluntarily by members of the bar and for some time, the practice of providing the court with a short outline of argument. That came to be entrenched and expanded into written submissions. It would therefore seem to follow that if significant aspects of orality have been lost, it may be that the courts, in seeking to exercise some control over litigation, were the effective cause of it.

Different views are held about the practice of allowing statements of evidence as a witness' evidence in chief. Certainly it is a matter which should require careful consideration, of the nature of the case and the evidence involved. Its use, as a matter of course, may be questioned when the credibility of a witness is in issue and where the witness statement appears to reflect more of the lawyer's pen than the witness' own account.

Justice Arthur Emmett has observed that the abandonment of the practice of the giving of evidence in chief orally provides greater scope for the abandonment of the concept of a trial. In this regard there is a shift towards the Continental system¹⁸. Such a shift would be rather ironic, considering the position adopted by the common law historically. But then one of the reasons for orality, the jury, is much less utilised today in

¹⁴ Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure", in Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, (1999) 3 at 47.

¹⁵ (2009) 239 CLR 175.

¹⁶ (1997) 189 CLR 146.

¹⁷ As observed by Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure", in Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, (1999) 3 at 47.

¹⁸ Emmett, "Towards the Civil Law?: The Loss of 'Orality' in Civil Litigation in Australia", (2003) 26 *University of New South Wales Law Journal* 447 at 472-473.

civil proceedings. It is strange that at the time when moves were being made in the common law world towards written procedures, civil law countries were apparently discussing the adoption of oral procedures¹⁹.

In a contribution to the Oxford Companion to the High Court, the former Solicitor-General, my co-speaker today²⁰, records that Sir Anthony Mason, in 1985, supported the greater use of written submissions to compliment oral argument and considered that they might assist a judge in appreciating the argument and might shorten hearings. The contrary view, expressed by Sir Harry Gibbs, a year later, was that written submissions could not be as effective as oral argument in bringing the attention of the court quickly to the heart of the problem and therefore could never be a satisfactory substitute for oral argument.

Needless to say, it would seem that now written submissions are here to stay. Their potential value, in some respects, cannot be denied. They are most effective as an outline, in providing the *shape* of the argument for a party. The process of writing submissions should assist counsel to identify core issues, focus argument upon them and to realise problems in the argument, even before the other side has done so in their response. It should encourage the refinement of argument. More importantly, from the perspective of the courts, it should provide a platform for dialogue between bar and the bench, which is such an important part of the process, both at trial and upon appeal.

Justice Bryan Beaumont suggested that written submissions were often little more than a position paper, in cases of complexity, and did not involve a square joinder of issues, which is essential if the court is to be equipped properly to address the correct questions²¹. Another difficulty in written submissions, in cases of factual complexity, is that they often cannot provide the factual background necessary for an understanding of the issues and argument upon them, without resembling novels. An oral outline, sometimes with questioning as an aid to understanding, is often more readily comprehensible, not the least because the speaker is able to discern whether his or her audience is following the explanation. Written accounts of fact appear to suffer from the fear that something may be left out and as a result provide too much information. Oral explanation of fact tends to be more concise.

Justice Dyson Heydon, as a contributor to the recent text on advocacy to which I have earlier referred, records²² a problem with the dual regime of written and oral

¹⁹ As observed by Sir Jack Jacob: Jacob, *The Fabric of English Civil Justice*, (1987) at 20.

²⁰ Bennett QC, "Argument before the High Court" in Blackshield, Coper and Williams (eds) *The Oxford Companion to the High Court of Australia*, (2001) 31 at 32.

²¹ Beaumont, "Written and oral procedures – The common law experience", (2001) 21 *Australian Bar Review* 275 at 276.

²² Heydon, "Aspects of Rhetoric in Forensic Advocacy Over the Past 50 Years", in Gleeson and Higgins (eds), *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion*, (2008) 217 at 235.

submissions which had been identified by Sir Anthony Mason in the course of a hearing. He said that it can sometimes be hard for the court to work out how the oral and written submissions are related. Sometimes the order of the submissions is different; sometimes different matters are stressed; sometimes what appears in written submissions does not appear in oral argument and it is not clear whether it has been abandoned.

Given that written submissions appear to be entrenched as part of our procedure, it may be time to address how their quality and usefulness to judges, as well as the parties, may be assured. It may be necessary to consider the *purpose* they are intended to serve and their *relationship* with oral argument. If oral argument is to continue to have a significant role, decisions may need to be made about the extent to which the parties should be permitted to rely upon written submissions. And in this regard it should be borne in mind that the use of written submissions requires not only the parties to be prepared in advance; it requires a significant allocation of a judge's time. It is not generally well understood that a judge's out of court time is a scarce resource, even in a docket system. The more that parties are allowed to rely upon substantial written submissions, the more time judges have to invest of that time. In some cases the detail of submissions may be more readily provided and comprehended by oral presentation.

One would think that the opportunity presented by oral argument would be apparent to advocates. Justice Scalia more directly observes that oral argument is more than a chance to show off before the client. He points out that, whilst oral argument may not change the mind of a well-prepared judge, a judge may be undecided at the time of oral argument, especially where the case is a close one. In his view oral argument makes the difference because it provides information and a perspective that the written brief cannot contain²³. Justice Heydon says that a judge who has failed to grasp a point made in writing may do so after oral argument, because there is a freshness and vitality in oral presentation; a new angle of vision²⁴.

Those who do not favour the retention of oral argument, or who wish to further restrict its length in favour of written argument, may not consider that it has the persuasive qualities claimed for it or the ability to elucidate argument any better than written submissions. These views may have more relevance in some areas of law than others. I understand that there is a proposal under consideration for wholly written submissions in Corporations matters in the Federal Court.

Advocates may be interested in persuading judges, but judges are more interested in ascertaining the correct answer, which requires the refinement of the real questions in the case and the consideration of different possible approaches. This may often be assisted by dialogue between counsel and the bench. Differing views have been expressed over the years as to the extent to which the court should question counsel. Some such views may reflect differing levels of insight into a judge's own practices. It is not necessary to enter

²³ Scalia and Gamer, *Making Your Case: The Art of Persuading Judges*, (2008) at 139.

²⁴ Heydon, "Aspects of Rhetoric in Forensic Advocacy Over the Past 50 Years", in Gleeson and Higgins (eds), *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion*, (2008) 217 at 241.

upon that debate, but it may be observed that the extent to which questions will be necessary will largely depend upon the state of the previous case law, the principle in question and the clarity with which counsel has outlined the approach taken in written submissions. Less questioning and therefore less interruption is required when the court can see where the argument is heading. And of course this will depend upon other matters which have occurred to the judge as possibly relevant to the outcome sought or defended.

It can hardly be doubted that the opportunity for dialogue is of benefit to judges. It allows for fuller explanation of the facts, referenced to the evidence; it permits discussion of the approach taken in the argument; it may elicit a more direct answer to different approaches to an issue; it allows for the resolution of uncertainties about what was said in written submissions; it allows arguments to be tested. The problem of the oral argument being too long, usually because it is not properly prepared, discursive and repetitive, should in theory occur less in the dual regime of written and oral argument, at least where the written submissions identify the arguments which are sought to be advanced.

The value placed upon dialogue between counsel and the bench is evident in the layout of the court room in the new Supreme Court of the United Kingdom. The bench is shaped as a semi-circle in close proximity to the bar table and on the same level. And, although restrictions were placed upon oral argument at a relatively early point in the history of the United States Supreme Court, there is nothing to suggest that the period allowed for oral argument is not regarded as valuable.

In the early 19th century there were no restrictions in that court on the time for argument. It was towards the end of Chief Justice Marshall's tenure that the Court is said to have become "less enchanted with the prolonged nature of each oral argument"²⁵. Chief Justice Taney, who replaced Chief Justice Marshall, complained on one occasion that an advocate "introduced so much extraneous matter, or dwelt so long on unimportant points, that the attention was apt to be fatigued and withdrawn, and the logic and force of his argument lost"²⁶.

By 1849 the United States Supreme Court required counsel to submit a printed abstract of points and authorities and limited oral argument to two hours to each side²⁷. Further restrictions were imposed over time. Nowadays a brief is prepared for the court and 30 minutes is regarded as adequate for argument²⁸. On rare occasions the Court will extend time. But the intensity of questioning is still evident. The current Chief Justice,

²⁵ Wrightsman, *Oral Arguments before the Supreme Court: An Empirical Approach*, (2008) at 16.

²⁶ Wrightsman, *Oral Arguments before the Supreme Court: An Empirical Approach*, (2008) at 16.

²⁷ Wrightsman, *Oral Arguments before the Supreme Court: An Empirical Approach*, (2008) at 17.

²⁸ The Supreme Court of the United States, *Guide for Counsel in Cases to be Argued before the Supreme Court of the United States October Term*, (2009) at 7.

John Roberts, recalled that as counsel before the court in one case, 150 questions were asked of him in 30 minutes²⁹.

Courts in Australia do apply time limits, by the time which is provided for argument, although clearly they allow longer at an appellate level than the United States Supreme Court. Whether time for argument needs to be shortened in a particular case might be evident from the nature of the case as revealed in case management or because written submissions can largely deal with it. This is not likely to occur in other than simple cases. Otherwise it is not apparent what benefit is to be gained from such restriction, so long as the dialogue remains of real value. But if oral argument is to be effective judges may need to reconsider the role of written argument and ensure that the quality of both written and oral argument is both demanded and maintained. And of course judges will have to accept the need to be well prepared.

Having taken a more active role in the management of litigation, it would be a retrograde step for the Court to allow practices concerning the written materials to be provided and the extent of oral argument to be presented to be developed or controlled largely by the Bar. It may be necessary to give more attention to the use made of statements as evidence in chief, not only as it may affect the quality of the evidence, but because its reception may make the work of a judge much more difficult. It needs to be borne in mind that the dual regime, with its focus on writing, requires a lot more preparation on the part of a judge. Judges necessarily have a different perspective towards the presentation of argument. They will be seeking answers. It may be necessary to further consider the balance to be struck between written and oral submissions and bring the focus back to the latter, if judges are to be assisted in their work.

It may also be timely for courts to remind advocates of what is expected of them in the presentation of oral argument. To an extent we get the standards we demand. Justice Story, who served on the United States Supreme Court from 1811 to 1845, could often be seen to be writing during the presentation of argument. He penned the following advice for counsel³⁰:

"Staff not your speech with every story of law,
Give us the grain and throw away the straw...
What's a great lawyer? He who aims to say
The least his cause requires, not all he may."

²⁹ Wrightsman, *Oral Arguments before the Supreme Court: An Empirical Approach*, (2008) at 7.

³⁰ Wrightsman, *Oral Arguments before the Supreme Court: An Empirical Approach*, (2008) at 16.