# AN ADDRESS TO THE WESTERN AUSTRALIAN BAR ASSOCIATION
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# "ADVOCACY IN THE HIGH COURT OF AUSTRALIA"

For many years I have spoken to those undertaking the Readers' Courses conducted by the Victorian Bar. Before I was appointed as a Judge I conducted a number of sessions about pleadings for each new group of readers. More recently I have spoken to the readers about some aspects of appellate advocacy. In all of this work I have tried to convey glimpses of the blindingly obvious. When talking about pleadings I have tried to instil two thoughts: that a barrister preparing a pleading is taking a step in an action, and that a barrister preparing a pleading must do so in the English language, not some foreign tongue. Those principles, although obvious, are not easily learned by the new barrister.

Likewise, when I have spoken about advocacy, especially appellate advocacy, I have tried to remind those who are about to become barristers that their first and principal task is to persuade. I suggest to them that in order to do that there are six points that must inform their work:

1. counsel must know the facts of the case;

2. counsel must know the law that applies to the case;

3. counsel must know what order that he or she wants the court to make;

4. counsel must know how he or she wants to achieve that result;

5. counsel must convey that to the court; and

6. counsel must avoid distracting the court from the path that he or she wants it to follow.

All of these are glimpses of the blindingly obvious. All of them are, or should be, the standard stock in trade of any advocate. All too often, however, experience dictates that counsel may not have paid sufficient attention to one or more of these propositions when preparing an argument for presentation in an appellate court.

Tonight I want to narrow the field of view to advocacy in the High Court. You will find, on reflection, however, that what I have to say about advocacy in the High Court is no more than the amplification of the six propositions I give to the readers in Victoria.

A lot has been written about appellate advocacy. In this country, read what Sir Anthony Mason said in his article, "The Role of Counsel and Appellate Advocacy"[1]; read Justice Sackville's article, "Appellate Advocacy"[2]; read the two articles by Mr David Jackson about High Court and appellate advocacy[3]. Do not confine your attention to this country. Look at Justice Robert Jackson's paper, "Advocacy before the United States Supreme Court"[4]. Justice Jackson was United States Solicitor-General and often conducted oral arguments in the Supreme Court of the United States at a time when the period allowed for oral presentation was one hour rather than the 30 minutes each side is now allowed by that Court. It was Jackson who said that, as Solicitor-General, he made three arguments in every case: "First came the one that I planned – as I thought, logical, coherent, complete. Second was the one actually presented – interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night."[5] All of us who are, or have been, advocates know the truth of Justice Jackson's comment.

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1 (1984) 58 *Australian Law Journal* 537.

2 (1997) 15 *Australian Bar Review* 99.

3 "Practice in the High Court of Australia", (1997) 15 *Australian Bar Review* 187 and "Appellate Advocacy", (1992) 8 *Australian Bar Review* 245.

4 (1951) 37 *Cornell Law Quarterly* 1; (2003) 5 *The Journal of Appellate Practice and Process* 219.

5 (2003) 5 *The Journal of Appellate Practice and Process* 219 at 225.

More recently, David C. Frederick has published his book, "Supreme Court and Appellate Advocacy", a book filled with hints and examples of what to do or not to do when arguing cases in the Supreme Court of the United States or the appellate courts of America. Much of what is said there, can be applied in Australia. Indeed, in all of the writings I have mentioned, you will find advice that should be heeded.

If forced to distil all of that advice to two simple propositions, I would say to the advocate who is to appear in the High Court of Australia:

1. "Remember what court you are in"; and

2. "Think about the case".

Let me say something more about each of those propositions.

Remember what court you are in. I utter this injunction not for the purposes of what our American friends would describe as "shock and awe". Counsel do not need to be intimidated about the task of appearing in the Court, but they do sometimes need to be reminded of some very basic propositions.

The High Court is now the court of final appeal in Australia. That has a number of consequences for the way in which counsel present argument in the Court. Let me look at two of those consequences. First, there is a consequence about the way in which counsel use decided cases in the course of argument. The Court is not bound by what is said in the decisions of other courts in Australia. It follows that there will seldom be much to be gained by reading slabs from judgments of intermediate courts of appeal or judges at first instance. The Court will not be much persuaded by advocacy of that kind. Indeed, I would say that the reading of slabs from any decided cases is seldom helpful in any argument in the Court. We are all literate. We will all read the references you give us. Tell us therefore what *you* say the case decides and show us where we find that in the case.

Nor is the Court bound by what has been decided in foreign courts. That is not to say that the Court will not be interested to know how other jurisdictions have resolved a particular question. The Court will almost always want to know what has been done in similar cases in England, Canada, New Zealand and the more authoritative courts of the United States. And for like reasons the Court will want to know what academic commentary there may be upon the point at issue in the Court. But how are you to use such material? For the moment it is enough to point out that you do not use it by saying, "The House of Lords has decided X therefore you should likewise decide X". Argument in that form will simply draw

the response that it is more than 40 years and 100 volumes of the Commonwealth Law Reports since the Court decided in *Parker v The Queen*[6] that the Court would no longer "follow decisions of the House of Lords, at the expense of our own opinions and cases decided here".

There is a further aspect of the use of authority in the Court that can be brought under this general heading of "remember what court you are in". Although the Court is not bound by its earlier decisions, the majority of the Court takes the view that leave is necessary before advancing an argument that the Court should depart from one of its earlier decisions. The principles governing such applications are set out in *Evda Nominees Pty Ltd v Victoria*[7], and a number of subsequent cases, and you may read those for yourselves. For the moment the point I want to make is that some care needs to be exercised when using decided cases in the course of argument in the Court, whether written or oral argument. Remember what court you are in.

Let me pass from that set of simple propositions about the use of decided cases to a second, more deep-seated and difficult consequence of the proposition, "remember what court you are in".

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6 (1963) 111 CLR 610 at 632-633.

7 (1984) 154 CLR 311.

Because the Court is the final court of appeal its chief focus in appellate work is upon the development of legal principle. Generally speaking, cases that attract the grant of special leave will fall into one of two classes. Either the point is one of general application, in the sense that a point of principle is at stake, or the case falls into the much less numerous class of "visitation" cases. This latter class of case (the so-called "visitation" jurisdiction) comprises cases where the interests of justice in the particular case require a grant of special leave.

Let me put this second class of case aside for the moment and focus upon those appeals in which some point of principle is at stake. In cases of that kind counsel must give close attention to identifying the principle which it is said should be applied by the Court to the resolution of the particular appeal. That requires much closer and deeper analysis than is achieved by focusing upon the particular facts of the case and suggesting that "therefore" the Court should arrive at the result which you urge.

It requires consideration of what the Court has already said about the subject. What is it that you draw from earlier decisions of the Court? That will usually require distillation from a number of decisions or from a number of opinions in one or more decisions. It requires you, as counsel, to articulate what you say is to be derived from the cases rather than simply pointing to a number of passages in the Reports. It requires you to identify whether you can

legitimately say that the principle you advance has been decided by a majority of the Court in a particular case or, as may often be the case, is a principle which finds support in the opinions of one or more members of the Court which travelled rather further than the ratio decidendi of the particular case in which these statements were made. It requires you to pay the strictest attention to whether the view you propound finds support only in dissenting opinions. But in the end you must be able to answer that most innocent of questions from the bench, "What is the principle that you say applies?" That will require *your* formulation of the principle in a way that can find accurate and sufficient support in what has gone before in the Court or, if what you propound is new, can be shown to be a logical development from what has gone before.

There is a further corollary of the propositions I have just advanced about the way in which argument must be formulated. Arguments that appeal to emotion, prejudice or preconception have no place in any court. Least of all do they have any place in the High Court. The Court is not a jury let alone a talk-back radio announcer's audience. The Court's reasons are intended to be intellectually rigorous. The arguments that are advanced in the Court must likewise be intellectually rigorous.

The last point to make in this respect is that counsel arguing any case in the Court will usually labour under one considerable handicap. Much more often than not this will be the first time that

counsel has had to consider the particular problem that is presented to the Court at the level of principle at which the Court will wish to consider it. By contrast, one or more members of the Court will have had to consider this problem, or a problem very much like it, at some earlier time. You will find, therefore, that one or more members of the Court will bring to the discussion some aspect which you may not have considered. Not only that, as a court of final appeal, we are exposed to an extraordinary range of legal problems. Although we live in an age of increasing specialisation, coherence of the common law remains an important value. The advocate who is well versed (say) in matters of town planning may look at a particular problem through the prism provided by that discipline whereas we must attempt to keep the whole of the development of the common law present to our minds.

At this point you may rightly suggest that I have appeared to divert from what I said was a glimpse of the blindingly obvious – remember what court you are in. Let me return to that proposition. In most appeals you will be travelling beyond the application of known principle to the particular facts of the case. You will be concerned to identify some new development of principle. To do that, you must have in mind the principle that you say you want the Court to adopt. You must be able to defend that formulation. To do so it will not be sufficient to point to what other judges in courts other than the High Court have said or done, but at the same time

you must know both what the High Court has said and done and what you say is the principle that emerges from those decisions.

How then do you go about this task?

First and foremost, think about the case. You can do that effectively only once you have mastered the facts of the case and the present state of the law. Even if you have been in the case since it first began, you must begin by identifying the facts that you say are relevant. Ordinarily that might suggest that you should confine your attention to identifying the findings of fact that were made below. That is a necessary, but it is not a sufficient, step in this aspect of preparation. Begin at the beginning. It is the facts of the case about which the Court will know least. What was in issue in the case? What sort of case was it? What is the chronology of the essential steps that have occurred in the passage of the case from its institution to the point where you stand on your feet in the High Court? You cannot be expected to carry all of this detail in your head, so write it down. Write it down with references to where, in the appeal books, the Court will find the information. Have it available to you for use in Court. If you find that presenting a coherent picture requires you to go beyond what appears in the appeal book, what then are you to do? Do you need to have some extra papers copied and available for use at the hearing if the point emerges?

What is the chronology of events that underpins the litigation? Again, where in the appeal book do you discover the relevant findings about these events?

Having taken these steps, it is then necessary to begin to discriminate between the various pieces of information that you have assembled. What are the *relevant* facts? What are the principal findings upon which you will rely? What is the simplest, but nonetheless accurate, description of the facts upon which your argument depends?

What is the applicable law? As is apparent from what I have said earlier, do not confine your researches to Australia. What has been said on this subject on this subject by courts of authority elsewhere? What academic literature is there that is useful?

If, as is so often the case, legislation bears upon the questions that arise in the matter, what is the form of the Act that was in force at the relevant time? Read the Act. Do not, whatever you do, build your argument upon some paraphrase of the statutory language. It is the words of the Act with which the Court will begin; so too must you. And because that is where the Court will begin, one of the very earliest questions you will be asked is, what is the form of the Act at which we should be looking? We have reprint number X before us. Is that sufficient for our purposes? What answer will you make?

Having undertaken all of these largely mechanical tasks, the real work will then begin. It will seldom be sufficient to reproduce the argument that you advanced in the intermediate court of appeal. That court, almost certainly, will have approached the case very differently from the way the High Court will. Of course you cannot completely recast your case. There are important respects in which you are bound by the way in which the case has been conducted below[8]. But, for the reasons I have given earlier, the argument you advance in the High Court will have far less reading from decided cases and much more emphasis on your articulation of what is said to be the applicable principle.

None of this can be put together overnight. Ideas of this kind require refinement. That takes time. Almost always it will benefit from discussion with others. I do not suggest that you adopt the common United States practice of undertaking several moot courts about the case before argument, but those working with you on the case should be expected to participate by contributing their ideas to the way in which you will formulate your argument and identifying those areas where it may be that the Court will direct questions. As I say, all of this takes time but it also takes thought. That is why my second precept is think about the case.

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8 See, for example, *Coulton v Holcombe* (1986) 162 CLR 1.

Although what I have said has application across all of the work of the Court, let me deal specifically with applications for special leave to appeal.

The requirement that an appellant have special leave to appeal to the Court is a statutory requirement. It follows that you must begin with the relevant statute – Pt V of the *Judiciary Act* 1903 (Cth) (ss 34-35A). Section 35A states the criteria for granting special leave to appeal. The Court does not need to be reminded of its text but counsel cannot begin to frame an application for special leave or an argument for or against the grant of special leave without having first examined the section. The Court "may have regard to any matters that it considers relevant" but it "shall have regard to" the two matters set out in s 35A, namely:

> "(a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
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> (i) that is of public importance, whether because of its general application or otherwise; or
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> (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
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> (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates."

My earlier references to points of general principle and to the interests of justice in the particular case take their meaning and significance from these provisions. And the section reveals why it will seldom suffice for an applicant for special leave to show that the point on which the decision below turned was contestable. Something more must be shown.

Special leave applications have two distinct aspects – the written argument and the oral argument. Let me deal separately with each.

Written argument in the Court is very important. In an appeal, the written outline of argument is the *first* opportunity you have to persuade the Court. In a special leave application, the written argument is the *chief* opportunity you have to persuade. Under the new Rules, which take effect on 1 January 2005, where applications for special leave to appeal may be dealt with on the papers, it may be the *only* opportunity you have to persuade.

In any written argument, but especially in applications for special leave to appeal, the statement of the issue that is said to arise is very often of critical importance. Putting the issue in terms that reveal the issue of principle that is said to be at stake is very important. That is not done by saying that "the issue is whether the Court of Appeal erred in making the orders it did". Such a statement of issue tells the High Court absolutely nothing about the case.

The requirement found in the Court's Practice Directions for parties to identify the issue that arises is a requirement that derives from the United States Supreme Court Practice. As you know, United States appellate practice places much greater emphasis on the written brief than on oral argument. One of the key steps in the preparation of a written brief is the identification of the issue that is to be decided by the court. One leading author, Bryan A. Garner, says that, "[t]here is no more important point in persuasive and analytical writings – and certainly no point that is more commonly bungled – than framing the issue"[9]. He maintains that the issue should be brief – no more than 75 words – phrased in separate sentences. He suggests that the format is generally "statement, statement, question" or "premise, premise, conclusion". Garner gives a number of examples of how to frame an issue. Let me offer an example that is not drawn from Garner's work:

> "John Smith will likely be convicted of capital murder and sentenced to death at next week's trial unless he can present evidence of his mental retardation. Smith's expert on mental retardation must undergo emergency surgery to remove a cancer that his doctors have just discovered. Did the trial court abuse its discretion in refusing to grant Smith an adjournment?"

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9 Garner, *A Dictionary of Modern Legal Usage*, 2nd ed (1995) at 471.

As Garner suggests, that statement of issue is in the form of statement, statement, question or, if you prefer, premise, premise, conclusion. It identifies what the court has to decide. It tells the court what that party says are the basic facts. It does all this in less than 75 words.

Again, the preparation of written argument takes time. It takes time to formulate what has to be said and then to edit it properly. When I speak of editing the written argument I do not mean only making sure that there are no errors of fact and no typographical errors, although those are common enough in written arguments. I mean that you must refine the argument. Cut out the epithets and intensifiers and produce an argument that self-evidently stands on its own feet.

These are not skills which Australian lawyers have had much opportunity to develop. But it seems inevitable that written argument will play a more prominent part in proceedings of every kind in every court. They are, therefore, skills to which every lawyer must give proper attention.

Counsel must give attention to more than just the written summary of argument. How is the argument that is made in the summary reflected in the draft notice of appeal which an applicant must file? Does that reveal the point that is said to arise? Does it show that this case is a convenient vehicle for its determination? In

particular, does the draft notice of appeal reveal that the Court must deal with the point which is said to be of general public importance or does it show that there is another and simpler way of resolving the dispute?

Appearing on the oral hearing of an application for special leave to appeal tests the skills of any advocate. The Court has read the written materials and usually will have formed a tentative view about the disposition of the case. You have 20 minutes in which to dissuade the Court from that tentative view. Let us hope that your advocacy does not change the Court's tentative view that you should win.

Go at once to the heart of the matter. What is it that you say makes the case suitable or unsuitable to a grant of special leave? Remember that the chief concern of the Court is to identify cases raising a contested point of principle. What is the point of principle? What shows that the point is controversial? Is there some difference between the way intermediate courts are dealing with the issue? Is the point novel?

If the point is said to be one of general principle, does the particular litigation really raise the point? The Court is unlikely to grant special leave to debate some point of principle if the order made in the court below can be supported on some other, uncontroversial, basis such as particular findings of fact.

If you say the case is one in which the interests of justice in the particular case warrant a grant of special leave, what is it about the case that reveals that to be so? That presents particular difficulties in some criminal cases where the point which is said to warrant the attention of the High Court is a point that has not been taken at trial or on appeal. What is it about the case that suggests that there may have been a miscarriage of justice?

In this, as in many other aspects of oral argument in the Court counsel must be discriminating about the arguments that are to be advanced. No doubt there are cases in which numerous errors are made. And even if there is only one substantial cause of complaint, there may be several ways of putting that single complaint. Do you put them all, or are you more discriminating?

For my own part I am a firm believer in the "infection" theory of advocacy. A bad point always manages to infect good points. If a court concludes that one of the ways in which the case is put is legally infirm, human nature dictates that the other methods of putting the case are examined more closely. It follows that step one is to jettison the point which you think is bad. If, as sometimes happens, the Court picks up the discarded point and proffers it in aid of counsel, counsel will do far better to point out why that way of putting the case is flawed than they will if they simply adopt the gift

from the bench and allow the Court later to discover for itself that it is wrong.

On leave day, there is no choice except to go straight to the heart of the matter. You have no time to beat around the bush pointing out the typographical errors in your written outline of argument. But even without a formal limitation on the time for argument of an appeal, go at once to the heart of the matter. Do not delay with matters at the margin.

You cannot expect the Court to remain silent during your argument, whether in a leave application or on the hearing of an appeal. The Court will ask questions of counsel which you must always attempt to answer as clearly and directly as you may. It is inevitable that some of the questions asked will not assist the case you are making. The Court wants to know what consequences follow from adopting particular arguments. It is important to understand the limits of the principle which it is said underpin the argument. Counsel are paid to advocate a particular client's case. The Court is concerned not only to decide the particular case correctly but also to formulate principles properly. It follows that you must be prepared for questions that are designed to show whether your argument is faulty. If you can anticipate the questions and have an answer in mind, so much the better. Your answer will be more direct. Bear in mind, as well, that there are times when questions asked of counsel enable discussion of the matter along the

bench. A question which you are asked may be intended to provoke an answer that will reflect upon a line of questioning by another member of the Court.

Because the Court wants to gain as much as it can from oral argument, it is inevitable that argument never quite follows the order which counsel intends to follow. Answering a question from the bench with "I will come to that later" is not often sensible. Much more often than not it is better to deal with the question then and there, at least in summary form. But it means that you will have to alter the way in which you intended to present your argument.

Opinions differ about how much you should write down. Some of the best advocates in the Court have had very full notes of their argument. This has enabled them to cut and paste on their feet according to the direction that debate takes. Others seem to treat it as a badge of honour that they have very little written material before them except the appeal book. In the end, it is, of course, a matter for individual choice but, if in doubt, write it down. The discipline of writing often conduces to brevity and accuracy. Whether, as American literature suggests, you prepare a "podium book" in which you have your speaking notes, chronology and one or two critical documents is a matter for you. Some find it helpful. The guiding principle is that you must be able to present your argument in a way in which you are engaging the Court. Counsel

who puts his or her head down in order to read a prepared speech, or a slab of judgment, foregoes any opportunity to engage the Court.

I said at the start of this address that reflection would show that I have tried to impart glimpses of the blindingly obvious that represent little, if any, development upon the six propositions I place before those who are about to sign the roll of counsel. I make no apology for doing that because the essential tools of the advocate remain the same wherever the advocate practices. In the end, the advocate has only two tools – the English language and the thought that that language is intended to convey. The art of the advocate lies in the way in which he or she uses those tools.

The legal problems that come to the High Court are, or should be, the most difficult and challenging problems in the Australian legal system. It follows that advocacy in the Court will never be easy. But proper performance of the advocates' task is essential to the proper performance of the Court's work as the "federal supreme court to be called the High Court of Australia". We who must decide the cases look for as much help as we can get in performing our task. I hope that what I have said tonight may, in some small measure, assist you in the performance of your task.