The American Way of Advocacy

Paul Elliott reports on the National Institute of Trial Advocates, Philadelphia USA

"Running a good trial is like having an orgasm". So said the robust black female instructress. I was in Philadelphia. This was not the Full Court of the Supreme Court of Victoria. This was the National Institute of Trial Advocates - America - the US of A. But it did make me think. Either I had never run a good trial or if I had then I had never...

The National Institute of Trial Advocates is America-wide. It is extremely well organised. It runs conferences for trial advocates (their sort of equivalent to barristers) at all levels. The courses vary from two weeks to a few days and are very intensive. There are many video sessions on "directs and crosses", which translates into evidence in chief and cross-examination. Full mock trials are organised. Everyone must put in, both as advocates and witnesses. I was sent a mass of material to consume before I attended the Eastern Region Conference held at Temple University, Philadelphia in March of this year. I was to "audit" the conference in that I was to observe their advocacy methods along with the teaching methods, although, inevitably, I did take part as a witness and, when asked, did a bit of Australian cross-examination.

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The most stimulating part of the course was the opportunity to actually talk and think about the techniques of advocacy with a large group of practitioners. Often barristers are so busy running cases that we don't sit down and analyse how we have presented the case, how we have cross-examined, or how we have addressed. Getting the case organised, mastering the facts and the law is often the major concern.

It was dogmatically asserted by Professor Tony Bonnici, the leader of the course, that you must never, ever ask a non-leading question in cross-examination. The actual question is very important. You *should* know the answer. Just think about this. Did you do that in your last cross-examination? Did your opponent? Is this a really correct view of cross-examination?

We tend to write off American law as L.A. Law. American advocates are a bunch of braces-snapping prima donnas, strutting around the court room, staring eyeball to eyeball into the faces of cringing witnesses. They are fat men from Hawaii, good ol' Southern boys who appear as thick as a slice of mom's apple pie but really are as sharp as tacks. They are beautifully coiffured women, with marvellously cut suits, and Gucci briefcases, who have had to work extra extra hard to beat the men, but underneath have a heart of gold and an insatiable sexual appetite. They are Robert Redford and Paul Newman. Boozy Irishmen from Boston on their last legs, or slick L.A. lawyers with extremely complicated partnerships and personal lives. Every one of them spends most of their days approaching the bench.

This, in general, is not true. In some of the counties in Pennsylvania the lawyers do not even stand to cross-examine, let alone pace up and down in front of the jury. The recording microphone is set on the bar table which anchors the advocate to his chair.

Observing the participants did not reveal any histrionics or hyperbole. It was very professional. It was very well organised.

Of course there are great differences. The manner in which they object to evidence is an art form which I never understood. The principles of evidence were similar but the manner of stating an objection usually took a recognised form, which the judge either upheld, over-ruled and then noted for the "record" in the event of an appeal. Also there was a great deal of striking from the record.

Much more latitude is given in allowing in the background or personal evidence of parties. Whether the person was married, had children, was a good family man, went to college, worked hard - (the puritan work ethic being very important), was a WASP etc. was stressed to be of importance in presenting evidence in chief (direct evidence). We were told that an advocate had to paint a picture of his client. Sympathy and prejudice were important.

A lot of commercial cases are tried by juries in various state jurisdictions. As part of the course we had to prepare a very large contractual dispute over computers. Much evidence was introduced and cross-examination proceeded as to the character of the parties. The plaintiff was painted as a large heartless multi-national computer company manned by ruthless and ambitious executives who delegated important decisions to secretaries. The defendant (with a counterclaim) was depicted as a small friendly company started by an all-round nice guy genius, whose only mistake was to employ a failed close friend who "goofed" on this particular deal. The plaintiff's advocates made them out to be incompetent criminals. I had prepared the case on the basis of it containing very fine points on the existence of a contract (Americans seem to have a different view as to the doctrine of consideration) with elements of waiver and estoppel. No, said our instructor. Don't bother with all that law. A jury never understands any of that. Just paint a picture of the good guy and the bad guy because that's how the jury will decide the case. Therefore the small company would win so long as it did not pursue its greedy counterclaim for loss of profits. Introducing juries, on this basis, would certainly enliven the Supreme Court Commercial List.

Meeting lawyers from all parts of America was another great advantage of the course. Personal injuries cases were held in high regard, even above commercial cases. But then again their system of personal injuries is very different. Over dinner some hard-nosed New York lawyers asked me to assess a recent decision in their fair city. A black civil rights worker had been wrongly arrested by the police. He had been beaten up, suffering broken ribs, bruising, a black eye, the usual assault-type injuries, but nothing permanent. "How much?" they said. I submitted that in Melbourne there would be an initial problem in succeeding against the police at all - but I assessed the claim at $7,500. They laughed. The jury awarded $76,000,000 (US) - $40,000,000 being for punitive damages and general damages amounting to a mere bagatelle of $36,000,000. Of this award the plaintiff's lawyer was to receive 50 per cent plus disburse-

ments. Bring on contingency fees!!! On the downside a surgeon's professional indemnity insurance runs at about $180,000 (US) and a lawyer's $90-$100,000 per year. Surgeons are refusing to perform operations, especially gynaecologists.

Americans are extremely friendly - especially in their home country. Australians pride themselves on friendliness. But in relation to tourists and visitors this is somewhat of a myth. It was a great experience to meet Southerners from South Carolina, hard-nosed New Yorkers, Bostonians, Washingtonites and lawyers from Lancaster County, Pa - the home of the Amish. I was invited to stay with a Pennsylvanian practitioner in the town of Media. She assured me that life in the towns and counties of Pennsylvania was much different to Philadelphia and the other east coast big cities. Indeed Media was very picturesque, a large town with the traditional white clapboard buildings of the east coast.

Each county in Pennsylvania had its own *elected* judges and varying systems of law. I met one of their County Court judges who was about to empanel a rape jury. It was all refreshingly informal. We entered the large Georgian-style court which was filled with the jury panel and lots of people in various uniforms with guns - even the tipstaff seemed to have a gun. We just walked past them all, knocked on the door of the judge's chambers and went in. He was a charming judge of Irish descent. We chatted about the forthcoming St. Patrick's Day Parade and Irish Australians. He was not concerned about keeping the jury panel waiting at all. He then ascended the bench and gave a marvellous oration on justice, America and the jury system.

The empanelling of the jury *was* different to Australia. Those who even knew or were friendly with any police were asked to raise their hands. Those who considered themselves racist (the accused being black) were asked to raise their hands - and many did without a blink. Finally both counsel were asked to approach the bench with their challenges. Suddenly a strange electronic noise filled the court; both counsel were talking to the judge but no-one in the court could hear what they were saying. The judge had thrown his "white noise" switch. In order to avoid juries going in and out of court while counsel argue points of law, judges in Pennsylvania have switches behind the bench which create "white noise" to black (or white) out counsel's arguments to all but the judge. I'm certain many judges in Victoria would love a white noise switch, perhaps even to block out the dulcet tones of certain members of counsel.

Whether or not you admire the content of American advocacy, the organisation, the thought, and the efficiency of their approach to advocacy must be admired. Mr Justice Hampel is a great proponent of the advocacy teaching techniques employed by NITA. He has attended many of their courses and introduced some of the methods on the present Readers Course. It was on his and Douglas Salek's (who attended the Western Conference - see his article in an earlier Bar News) advice that I decided to attend. I thoroughly recommend the NITA courses as being stimulating, informative and a good way to meet interesting and friendly fellow practitioners of the art of advocacy. ❑

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