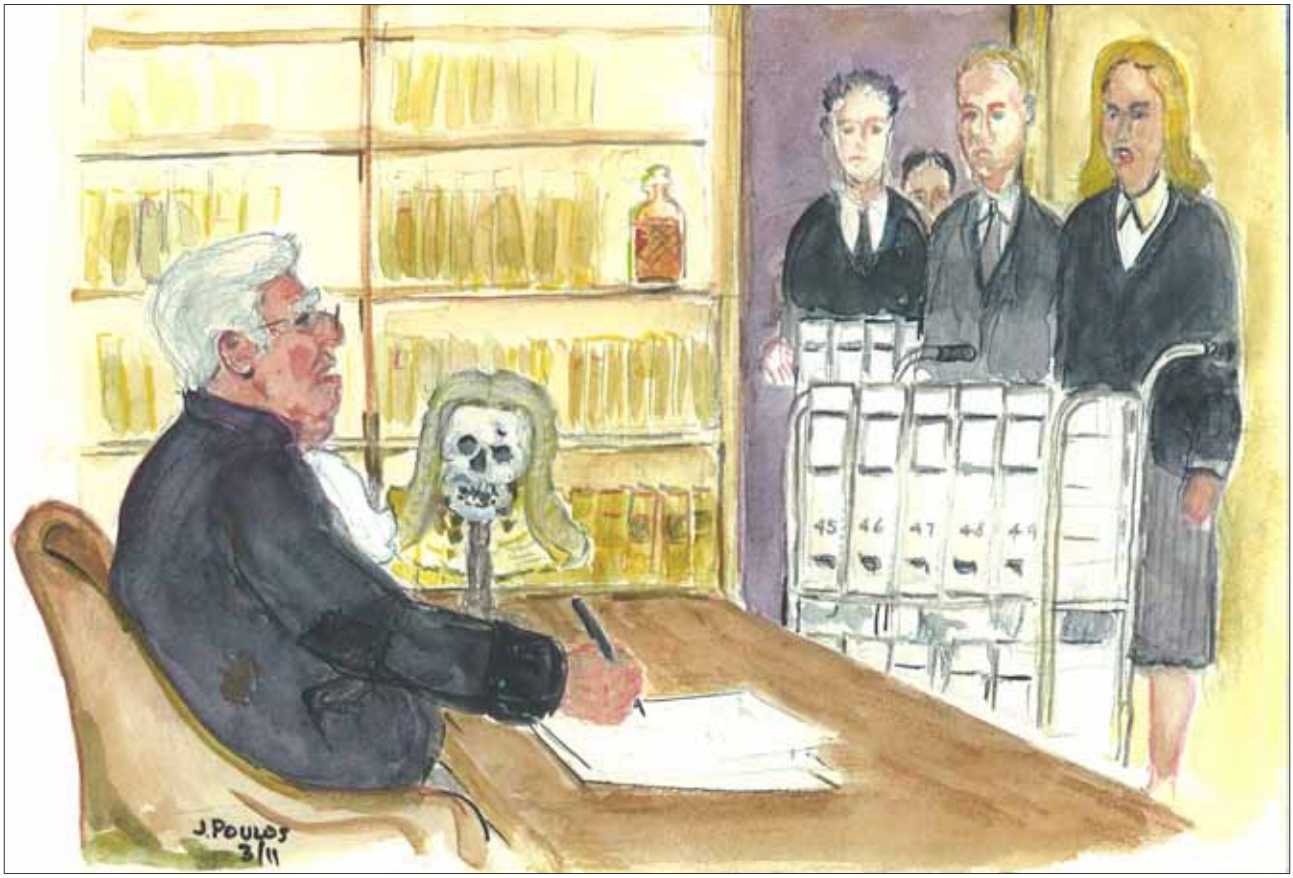
# Bullfry and the end of 'orality'?

By Lee Aitken (illustrated by Poulos QC)

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'Another thing that underpins our system of advocacy – orality – will have gone'. Doyle CJ quoted in *The Australian* on 11 February 2011.

'This looks most ominous!' Bullfry slowly refilled his Scotch, and patted the judicial skull (incautiously purchased from its wanton executrix) with an avuncular smile.

A senior, interstate, jurist was forecasting the end of 'orality' (a most unusual expression – was it 'Australian' English? – to Bullfry's fevered brain it always conjured up another image entirely). Apparently, counsel were so expensive, and given to such untrammelled oratorical extravagance, that trials were constantly going for too long – as a result, legal costs were getting (so it was claimed) entirely out of hand. Even the benighted Legal Aid Commission was threatening to establish a 'panel' to prevent an unnamed cohort of unscrupulous barristers from 'rorting' the commission by deliberately letting trials overrun – was it any wonder, when the rate for defending an armed robber, rapist, or murderer attracted the princely emolument of $200 per hour – twice that rate would not even guarantee a plumber on site, half that rate would bring someone to the door to teach a laggardly child Latin for an hour, a quarter of it would see a bathroom cleaned by a 'visitor' from some part of Latin America! If you were looking at twenty five years on top for an unexplained head in your refrigerator, was it too much to want a defender whose heart was in it? (Or would it be better to follow the US practice – have a drunken, or otherwise incompetent, and grossly unremunerated, advocate to appear at trial, and use this as the basis for endless appeals to stave off a quick dose of sodium pentobarbital?)

There was something odd about this as well in so far as it was aimed at the Bar – since most matters settled, surely the largest component of any legal costs was

the amount charged by the relevant law firm *long before* the involvement of any barrister at all!

Bullfry recalled a case when he had advised the solicitors of the recipient of a large 'uncommercial payment'. As a professional, a liquidator is even more craven than a solicitor (simply because as a professional, he is even more closely aligned with the business interests of the client – in fact, a large accounting firm now engages in 'consulting' as its most lucrative activity – auditing, and otherwise blowing the whistle, is at best a highly dangerous loss-leader). Bullfry knew from long experience that 'throwing ' an early bone to a liquidator by offering a deeply discounted payment was a good way to settle a matter – this gave the liquidator at an early stage 'fighting' funds to continue recovery actions against more difficult defendants.

Successfully to compose such a claim involved saying as little as possible on oath about the financial position of the payor company's solvency. With this object in mind, Bullfry had prepared a masterly draft affidavit (11 paragraphs including the jurat!) to that effect after reviewing the papers for a few hours. The firm, of course, wished to deploy two or three young associates, and a senior, to review (and charge for reviewing) all the documents. This led to the workers so deployed preparing a voluminous, and wholly counterproductive, statement. So it came to pass that Bullfry was thanked for his services, and sacked, after a day – his modest fee was paid. A sixty page affidavit (with supporting folders) was prepared – the case was settled on the door of the court, where the liquidator was paid 95 cents in the dollar of the claim, and his costs – honour was satisfied all around, and Bullfry's erstwhile solicitors could charge an appropriate fee for eight weeks of work!

Any barrister who was busy did not want a case to run on – it was all his instructing solicitor could do to keep Bullfry present in any court for the day. 'I will not wait for Mr Bullfry any longer', the chief judge would say. An urgent call would go to Level 11, and Bullfry would rush down – on one occasion he had found his solicitor conducting the case, with the client in the box! He had had, politely, to reprove the presiding jurist for this breach of protocol. (Still, Bullfry, supposed, it could be worse – of late, he had appeared before a particular jurist who insisted on reading out from his computer the orders he had made *without even calling on counsel*. That was certainly an expeditious way of proceeding but seemed to deny a number of basic precepts of natural justice (the Court of Appeal had confirmed Bullfry's own misgivings about this jurist in a couple of celebrated reviews)).

What was the real source of the present difficulty? Modern commercial life was more complex, legislation immense, the photocopying, and emails, of any business, enormous. But, fundamentally, the Woolf, and Jackson, and UCP 'reforms' were the main source of all the trouble. What was the purpose of the old system of special pleading? Quite simply, it was to have but one question of fact to leave to the jury – with the opportunity to review any error *nisi prius*. In equity, the purpose of the summons, in the ideal case, was to expose the claim to a demurrer! *Cadit quaestio*. The judge to whom he had been a youthful associate had told him of an exemplary case – the Dancing Man, unable to discover any proper basis for his claim in equity, had been advised simply to tell the Funnelweb that he was unsure of his equity, whereupon that kindly jurist would remedy the deficiency – boldly he sallied forth to be greeted quite simply by Mr Justice Myers: 'Yes, Mr McAlary, you have no equity – your claim is dismissed!' That didn't take two days; it took two minutes. In an older Commercial List, the plaintiff got value for money – on the first return of the summons, a damaged

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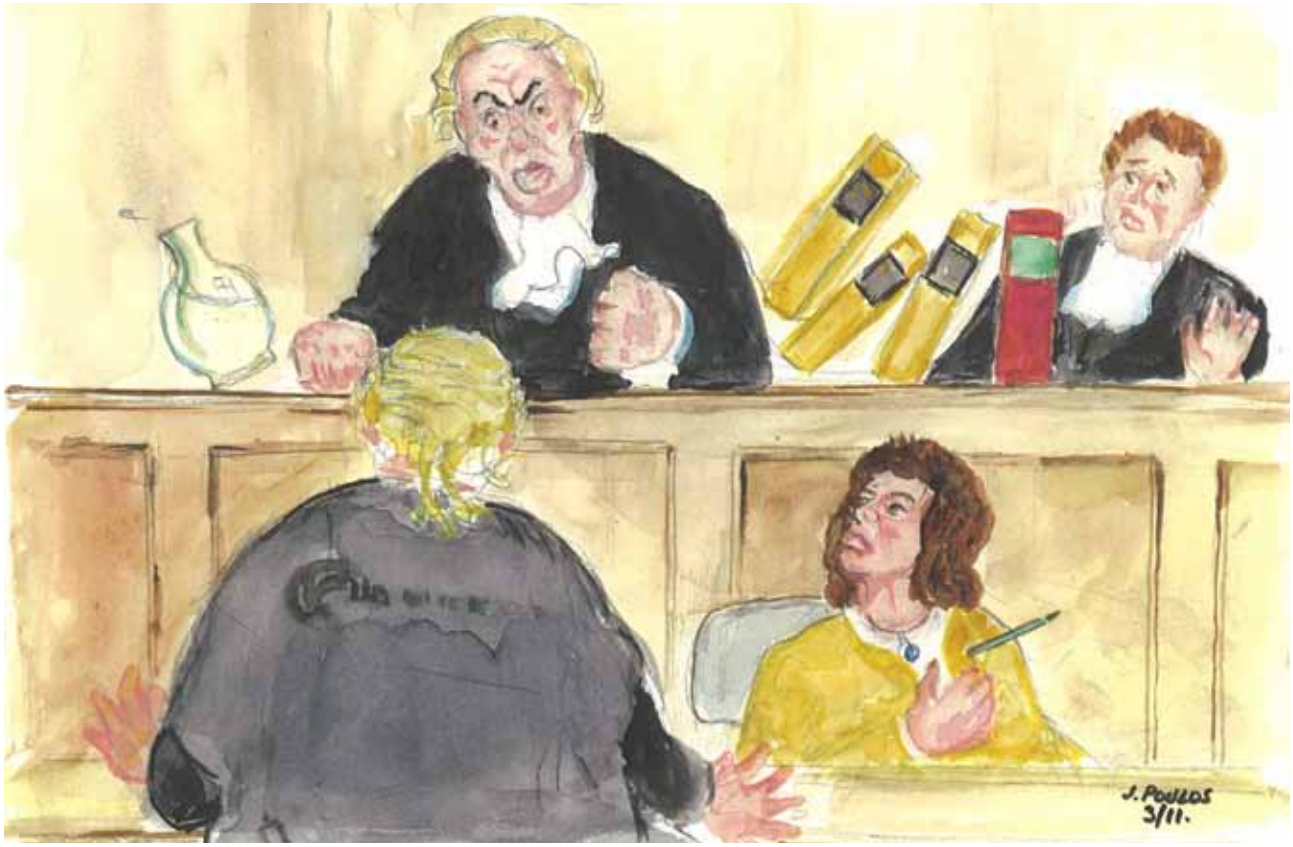


It's rejected!!

hand would tap a pen and say to the shorthand writer: 'Take the defence down now!' If counsel could not, ore tenus, provide a defence, judgment would be entered for the plaintiff forthwith.

Now, of course, anything could be pleaded, and then amended. A solicitor 'advocate' would be granted any largesse, or dispensation. Frequently, the drafting of pleadings was handled 'in house' by the firm. It was impossible to strike out, or demur to anything – it was well-nigh impossible to enter summary judgment. A default judgment was liable to be set aside on any whim. If anything was arguable, anything would be argued. And who was responsible for this shambles? – why, the very jurists in the very courts who now sought to impugn the way in which 'counsel wasted time, and ran up unnecessary costs'.

Furthermore, in Bullfry's sad experience, counsel were now inevitably deployed later and later in the conduct of any litigation – to be told that a matter was unarguable by counsel too early in the piece would undermine the possibility of many lucrative and leveraged hours examining the entrails of the computers, and other systems of the opponent, on discovery.

'Orality' was essential to the system – otherwise one would be reduced to the situation which pertained in the US Supreme Court where each side had half an hour to argue and all of the 'special leave applications' (cert. denied) were decided by young law clerks from Louisiana. Who would forget Sir Edward Mitchell's reply to a question from a now ancient High Court on when a certain part of the argument would be reached: 'Your Honours, I intend to deal with that on next Thursday'. That was perhaps taking things too far but the essence of the local system had always involved a highly skilled advocate putting a case, carefully veiled, to an astute tribunal. If a supine tribunal was now so lacking in resolve that it

was unable properly to control proceedings, the fault lay entirely with its officers, not with honest toilers trying to make a quid.

Bullfry well remembered a scarifying exemplum of just this approach from his youth. He was acting for a recalcitrant debtor before one of the most expert judicial officers (who in a previous life had been acknowledged, by general agreement, as the leading commercial silk). The relevant bankruptcy notice had long expired – Bullfry had brought along a gold cup, and a briefcase containing $80,000 in used 'bricks', to try to demonstrate the debtor's solvency. He had placed both on the bar table. This initial method of proceeding had not found favour with the jurist. At one stage in an increasingly heated case Bullfry was cross-examining the bank officer:

Jurist: 'Rejected'.

Bullfry: 'Would your Honour just hear me on the question whether ....?'

Jurist (rasping voice rising to a shout): 'It's ***rejected!!***'

They don't make them like that anymore – trials would be over in a flash if only they did.

# Verbatim

**Chinese numerology and masonic telephone numbers**

Q. Did you know a fellow by the name of Mr [Smith] who worked at Mallesons?

COUNSEL: I object.

HIS HONOUR: What is the relevance of him knowing Mr [Smith]?

FIRST DEFENDANT: Mr [Smith] had a very interesting direct telephone number. The number, 9296 2171. When you add all those numbers, and you know how to -

HIS HONOUR: Sorry? The number 9296.

FIRST DEFENDANT: 9296 2171.

HIS HONOUR: Yes.

FIRST DEFENDANT: If you add all those numbers, and they will add up to 11: Nine and two are 11. And nine is twenty. And six is 26. And two is 28.

HIS HONOUR: What has Chinese numerology got to do with this, if that's what you are doing?

FIRST DEFENDANT: Excuse me, let me finish.

HIS HONOUR: Go on.

FIRST DEFENDANT: I can't speak Chinese and have never been a Chinese numerologist.

HIS HONOUR: All right.

FIRST DEFENDANT: Let's start again. Nine and two is 11, and nine is 20. Twenty and six makes 26. Twenty-six and two make 28. And one make 29. 37. And the next number - I will leave that be for a while.

HIS HONOUR: What is the point you're making?

FIRST DEFENDANT: You get certain numbers, telephone numbers -

HIS HONOUR: Yes.

FIRST DEFENDANT: When you add them up -

HIS HONOUR: Yes.

FIRST DEFENDANT: - you end up with a double digit number.

HIS HONOUR: Yes.

FIRST DEFENDANT: If you add up those two digits and they come to nine, it means that is a Masonic telephone number.