Advocacy in the face of confirmation bias

By Anthony Cheshire SC

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Over January I read Richard Beasley's recent book, which is titled *Dead in the Water* but subtitled: *A Very Angry Book About Our Greatest Environmental Catastrophe … the Death of the Murray-Darling Basin*. And, to quote the British wood stain and wood-dye manufacturer Ronseal, it 'does exactly what it says on the tin'.

The content and the message are depressing, namely the death of the Murray-Darling basin while the various interested parties squabble between themselves and fail to take any effective action to save one of Australia's most precious and irreplaceable resources. Beasley's style is, however, exhilarating and great fun, peppered with (as described in various reviews) sarcasm, black humour, hyperbole and profanities.

Beasley observes about the 2012 Murray-Darling Basin Plan:

> The Basin Plan does not come within a bull's roar of compliance with the Water Act. Beyond that, it is also an illegal political fix. Just how sinister that part is will test the backbone of my publisher and its lawyers.

and about efforts to defend the Basin Plan:

> François-Marie Arouet coined the phrase, 'Perfect is the enemy of good.' I've heard this expression used a number of times by politicians, and particularly about the Basin Plan. This is a weak-as-piss saying used by chicken-hearted, limp-noodled, Bud Light-drinking, glassed-jawed, weak-kneed invertebrates. It's also a saying used to justify a really shit idea that is often not in conformity with the law. Like government policy.

I have never had Beasley as an opponent and so cannot comment on whether this reflects his court style, but I have revisited the *Report of the Public Inquiry by Commissioner Richard Beasley SC into the Auburn City Council, dated 10 February 2017* and I can confirm that, in spite of a baying press pack, his writing style there was a model of moderation and restraint. For instance, in his report Beasley said this about the process by which infamous Councillor Selim Mehajer procured road closures for his opulent wedding:

> While multiple helicopter landings and partial road closures requiring Traffic Plans are not synonymous with every wedding, it is clear from the above history that Mr Mehajer sought appropriate approvals from the relevant authorities, including the Council, to have the kind of wedding that he wished.

I suspect that Beasley's submissions as senior counsel to the Murray-Darling Basin Royal Commission were more moderate than the content of his book, although one

can sense Commissioner Bret Walker SC straining at the boundaries of probity and restraint in his report. For instance, in the context of a discussion about New South Wales Fisheries Minister Niall Blair and the Sustainable Diversion Limits project at Menindee, Walker said:

> The published accounts attribute to the Minister two egregious propositions. First, he is said to have insisted that the Menindee Lakes Project 'must' proceed. How that could be properly asserted before all the various statutory steps and safeguards have been taken and observed beggars the imagination. It threatens a travesty of lawful administrative decision-making, along the lines of 'the fix is in'.

In his book, Beasley describes a meeting with the self-proclaimed 'bush lawyer' mayor of Renmark:

> In his royal commission report, Commissioner Walker described the mayor of Renmark as 'obstreperous', and as having made a 'discourteous error'. This is not how the commissioner described the mayor as we drove away from the Renmark Council Chambers that night.

Beasley told the *Australian Financial Review* that Walker had described his book as 'Hunter S. Thompson, but more logical', which rather brought to mind an analogy between Thompson's demise and the state of the Murray-Darling basin – deteriorating health, death and blown into space in smithereens.

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So why did I enjoy Beasley's book and why did it make such an impression on me? Perhaps it was just confirmation bias – reinforcing my views about climate change and the need for urgent action.

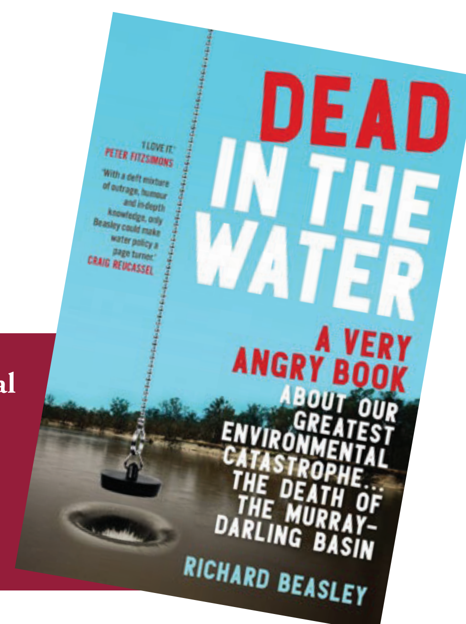
Confirmation bias appears to have been first used as a term in a 1977 paper *Confirmation bias in a simulated research environment: An experimental study of scientific inference* by Mynatt, Doherty & Tweney, although it was first described empirically by Peter Wason in 1960 when he asked participants to discover a rule based upon sequences of three numbers. Of course, as a phenomenon its history is much older. For instance, in his 1852 book, *Extraordinary Popular Delusions and the Madness of Crowds*, psychologist Charles Mackay wrote in relation to the seventeenth century witch trials: 'When men wish to construct or support a theory, how they torture facts into their service!'.

The term has not been without criticism, particularly as its use has expanded. For instance, Fischhoff and Beyth-Marom (1983) complained:

> Confirmation bias, in particular, has proven to be a catch-all phrase incorporating biases in both information search and interpretation. Because of its excess and conflicting meanings, the term might best be retired.

Confirmation bias significantly affects the scientific method, at least as I learnt it in school: one proceeds to investigate by experimentation a hypothesis that has already been formed and the results are therefore viewed and interpreted through the lens of that hypothesis.

Although Mynatt *et al* noted that numerous authors (e.g., Popper, 1959) argue that scientists should try to *falsify* rather than *confirm* theories, human nature perhaps makes this unlikely and it would



be unworkable in fields such as medicine. Confirmation bias also plays a significant role in the legal system. Each advocate is given a case and then searches for evidence to support it and seeks to interpret authority in the same way.

Perhaps more problematic, however, is the confirmation bias that can follow from a judge's initial or preliminary impressions and thoughts (whether or not expressed). Once such a view is formed, however tentative, there is a real risk that what follows, particularly if the evidence has not closed, may be seen through the lens of that view and thus give rise to confirmation bias. The firmer the preliminary view, the greater that risk.

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It is of course important for a judge to flag preliminary impressions or views, whether of fact or law, so that counsel is given a full opportunity to address those matters; and a preliminary observation is to be contrasted with an impermissible prejudgment (although the boundary is not always clear). As the majority (Heydon, Kiefel and Bell JJ) said in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283:

> It was accepted that the lay observer must be taken to have some understanding that modern judges, responding to the need for active case management, are likely to intervene in the conduct of the proceedings and in so doing may well express tentative opinions on matters in issue.

What made me pause, however, was just how effective Beasley's style in *Dead in the Water* was. Had Beasley's humour, sarcasm and perhaps even hectoring not only entertained me, but also browbeaten me into submission to his point of view? Was this perhaps a style that I should incorporate into my advocacy?

I have always been mindful of, and sought to follow, the words attributed to Lord Bingham of Cornhill (and cited with approval by many judges in this country):

> The effective advocate is not usually he or she who stigmatises conduct as disgraceful, outrageous, or monstrous, but the advocate who describes it as surprising, regrettable, or disappointing.

Iain Morley QC puts it this way in *The Devil's Advocate: A Short Polemic on How to Be Seriously Good in Court* (Sweet & Maxwell, 3rd edition, 2015):

> To be irresistible, an argument is three things:
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> REASONABLE, not emotional,
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> SOFTLY DELIVERED, and
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> COMMON SENSE
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> An irresistible argument is one which seems obvious and is delivered in a manner which makes the advocate seem incidental, as if almost not there. The cunning feature of the irresistible is it appears no persuasion techniques are at work. Oh, but they are. They are just hidden by careful word choice and skilful, measured delivery.
>
> To be irresistible, there is no need to thump tables as if delivering some fine 1930s oratory.

It is apparent that I have not always been successful as an advocate. Apart from experiencing judicial resistance to my submissions and losing cases, I have at various points over the last nearly 20 years (and some quite recently) had judges direct criticisms to matters of style. Thus, I have been told in submissions to slow down, that I was repeating myself, not to read passages that the court could read for itself and that I am not addressing a jury; and in cross-examination not to raise my voice at, or admonish, a witness and to use simpler language.

At least on some occasions, I suspect that these criticisms have reflected a disconnect between the judge and me (although on other occasions no doubt it was poor advocacy). Thus, the admonition that I was not addressing a jury probably reflected the fact that the judge had formed a view (against my case or me or perhaps both) and I then became frustrated that my calmly delivered and understated submissions were not being received as 'irresistible'.

It is also a reflection, however, of the fact that as advocates we vary and adapt our style for each case and often from minute to minute, depending upon the witness or the judge.

Was my jury-style advocacy necessarily ineffective or wrong? It may have been for that judge and at that time, but I am not convinced it does not have its place. After all, judges are in reality a jury of one.

I have recently had several experiences where I have seen a more forceful style of advocacy being deployed effectively. They started with me delivering what I regarded as an irresistible argument, which gained traction and seemed to have finished the matter as a contest. The judge expressed a preliminary view in my favour and my opponent was asked whether there was anything to add, but it was only a formality. Instead of the 'reasonable' and 'softly delivered' concession that I thought the moment required, however, my opponent went into bat with full force and considerable dollops of emotion and with more than one adjective. Worse still, although this initially provoked judicial irritation (and on one occasion raised voices on both sides), by the time my opponent had finished, what had been a preliminary view in my favour had become a firm and concluded view against my case. Any attempt to save the position in reply only provoked further irritation.

I do not take from these experiences and *Dead in the Water* that the effective advocate is in fact emotional, loud, full of adjectives and bathed in hyperbole, but perhaps a less understated style can on occasion be effective. It seems to me that this is most likely to be the case in the face of a judge having expressed a preliminary view that is in fact fairly firmly held.

But even then, it may sometimes be counterproductive. One of my more strange experiences was where a judge who had clearly formed a view adverse to my case accepted the evidence of the first witness whom I cross-examined at some length (and I had thought effectively) but rejected the evidence of a subsequent witness to whom I merely put my case. In that instance, saying less and with less emphasis was the more effective advocacy. I have, however, seen opponents fold unnecessarily in the face of a judicial preliminary view when it was my case that was in fact weak.

Ultimately, whatever image we may project outwardly, it is vital that we continue to engage in self-reflection about our performance on a daily basis. Indeed, we learn not only from our performance but also from that of our opponents, whether for good or bad. Our approach must be adapted to the situation, which must include any position that the judge may have taken (however preliminary or tentative).

There are of course limits to appropriate behaviour and while more forceful advocacy may be acceptable in the face of judicial resistance (although it may also be counter-productive), we must be mindful of our obligations of respect and politeness. To adapt Lord Bingham, the application in court of the sarcasm, black humour, hyperbole and profanities of *Dead in the Water* would be 'surprising, regrettable [and] disappointing'.

There are also the limits of our own personalities. So, although I may have to accept that a more forceful advocacy style may on occasions have its place (if the use of the 'double might' is not too controversial), I cannot see myself using hyperbole or adjectives in my advocacy any time soon. **BN**