Effective advocacy and kindness

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At lunchtime on 20 April 1968, Enoch Powell MP rose to address a Conservative Association meeting at the Midland Hotel in Birmingham. He warned that unrestricted immigration would lead to a race war, which would see the streets of Britain 'foaming in blood'. It subsequently became known as the 'Rivers of Blood' speech. Although the content was racist and unacceptable, the speech established him as a major political figure of national standing but at the same time destroyed any prospect of him holding high office. It captured and ostensibly legitimised the prejudices of many in the white population and it continues to echo in public debate, such as in the lead-up to the Brexit referendum in the United Kingdom and in the Tampa affair and the Voice referendum in Australia.

Powell was a very impressive orator, and the speech successfully deployed a number of rhetorical devices. Apart from the content, there was the effective use of what Aristotle described in *The Rhetoric and the Poetics of Aristotle* as 'the three things … that a speaker bears in mind', namely 'volume of sound, modulation of pitch, and rhythm'.

I saw Powell address the Oxford Union in a debate about abortion in 1989. I came expecting a rabble-rousing speech from him that would stir the emotions and leave me appalled but unmoved. Instead, he was softly spoken, methodical, and frighteningly effective. Even his silences were cleverly deployed. As Mark Twain wrote in *Pudd'nhead Wilson and Other Tales*, 'Wilson stopped and stood silent. Inattention dies a quick and sure death when a speaker does that.'

What I realised, although maybe not for some time afterwards, was that Powell had judged his audience perfectly: students who regarded themselves as too intellectual to be swayed by emotion and hyperbole were persuaded by narrow, cold logic. Powell no doubt appreciated that an intellectual detachment would be effective, whereas an emotional connection in the broader context would have countered and undermined his arguments.

As a barrister, I have always tried to retain a moderate tone in my work, but I vividly recall being admonished for my use of exaggeration and hyperbole in the first submissions that I drafted for a silk in Australia. I cannot now recall how many uses of the word 'very' and how many adjectives I had to remove, but I learned a (very) valuable lesson.

The court context – at least where there is no jury concerned – is one that is usually more susceptible to the persuasion of cold logic rather than emotional entreaty. As Lord Bingham of Cornhill is said to have observed, '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.'

Apart from the professional obligations that underpin such comments, I have always regarded this in a civil context, where the standard of proof is the balance of probabilities, as an obvious approach. Describing the submissions of one's opponent as 'arrant nonsense' (see, for example, *Arena Management Pty Ltd v Campbell Street Theatre Pty Ltd (No2)* [2010] NSWSC 1230) is likely to lead the judge to push back and towards the position that those submissions are not so bad and might even be right; whereas a submission that they are 'surprising' is more likely to provoke judicial support, particularly if deployed with an effective use of 'volume of sound, modulation of pitch, and rhythm'.

Indeed, to address otherwise can be counterproductive in other ways. In *Lets Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243, the trial judge had made adverse credit findings that were based, at least in part, on the fact that a witness' demeanour changed

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at a particular point in cross-examination, which was when it was put to him that he was lying. The Court of Appeal held that there had been no factual basis so to accuse him and further that counsel's questions and comments, many of which had been 'gratuitous and supercilious' and accompanied by 'inappropriate rebukes', made the witness' response understandable.

It should not be thought, however, that 'volume of sound, modulation of pitch, and rhythm' are less important in a non-jury context. I have, on occasion, received admonishment for being too enthusiastic – 'you are not addressing a jury now!' – but of course, the answer to that is that there is a jury, just a jury of one. Thus, the tools of 'volume of sound, modulation of pitch, and rhythm' still need to be deployed, but modified depending upon the audience, as Enoch Powell recognised and achieved so successfully.

I have written previously on the 'civility and professional comity' expected of professional representatives, including 'a rational and non-combative approach to resolving the issues raised' in proceedings (*Nair-Smith v Perisher Blue Pty Ltd* [2011] NSWSC 878); and of the mental strain that can result when this is not adopted.

The legal system often forms a central part of public debate, and this can lead to very significant pressure being put on the participants, whether by other lawyers or by the parties. In examples that are becoming frighteningly normalised, at least in the United States, Donald Trump recently called Judge Lewis Caplan, who presided over the second E Jean Carroll case, 'a nasty judge', 'seething and hostile', and 'abusive, rude, and obviously not impartial'; he called both the New York attorney-general who brought the civil fraud case against him and the judge who presided 'corrupt'. One can hardly imagine the effect of the resultant harassment, including death threats and racist, sexist and antisemitic abuse, of Justice Engoron and his clerk, whose abuse was reported thus:

> I have been informed by Ms Greenfield that she has been receiving approximately 20–30 calls per day to her personal cell phone and approximately 30–50 messages per day online. Ms Greenfield also informed me that since the interim stay was issued lifting the gag orders on November 16, 2023, approximately half of the harassing and disparaging messages have been antisemitic.

As the Court of Appeal frequently reminds us, 'parties are entitled to appeal from orders made and not reasons given' (see for instance *BP v New South Wales* [2019] NSWCA 223: at [11]). Thus, even a successful party may be dissatisfied and commercially damaged, and left without redress, if adverse findings are made. Such findings may be unavoidable, but sometimes they are not necessary to the ultimate result and, even if made as observations or matters of impression without a formal finding, they may be damaging commercially but also emotionally.

Findings or observations in judgments may also be damaging, both emotionally and commercially, to barristers and solicitors. Further, of course by contrast with parties, lawyers are left with no right of appeal. There are many examples of such personal criticism, and given that most cases now have a neutral citation, they are available permanently on the internet. Many were probably well deserved, but not only did the lawyers have no right of appeal, many of those findings or observations would have been made without the lawyer being given the opportunity of addressing specifically in defence of his or her conduct and reputation. Indeed, if personally attacked, the lawyer's responsibility remains in furthering the client's interests, which will likely involve not joining issue with the judge on the lawyer's conduct but rather seeking to return the debate to the issues upon which the resolution of the proceedings depends.

It should also not be ignored that judges do not have a right of appeal. Thus, their judgments are pored over, scrutinised, and criticised in submissions in appellate courts and then in appeal judgments. While there may be no real commercial imperative for a judge, there remains the potentially emotional effect of criticism in an appeal judgment.

There is an increasing awareness of the potential negative effect of criticism of judges and the judicial system in the public context. Thus, in November 2023, Chief Justice Andrew Bell responded, on behalf of all the court's judges, to New South Wales Industrial Relations Minister the Hon Sophie Cotsis calling the court 'legalistic, slow and costly', stating that those comments were 'not accurate and cannot go uncorrected as a matter of public record'; and at this year's Opening of the Law Term dinner, he said:

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>
> The pool of their undoubted goodwill and physical and emotional capacity is not infinitely deep.

I thought back to the High Court's criticism of the Court of Appeal in *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89 and wondered whether Chief Justice Bell might have had something to say in defence of his judges had that decision been delivered today. He might have prickled at paragraph [131]: 'It was a grave error for the Court of Appeal to have taken this step. That is so for two reasons: it was very unjust and it has caused great confusion.'

Then again, he might have drawn the High Court's attention to the dicta of Lord Bingham and suggested that this paragraph

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should be rewritten, at least to remove the exaggeration and hyperbole: 'It was an error for the Court of Appeal to have taken this step. That is so for two reasons: it was unjust and it has caused confusion.'

Perhaps he might even have suggested: 'It was surprising that the Court of Appeal took this step, which cannot be supported.'

And this brings me to the comments of the Chief Justice of the Australian Capital Territory, the Hon Lucy McCallum, in a note to the territory's lawyers at a time when its government was preparing to release the final report of the Sofronoff inquiry into the ACT prosecution of Bruce Lehrmann:

> The administration of justice in the ACT has been the subject of unprecedented attention in the past year. While public scrutiny is a welcome and necessary incident of open justice, a point can be reached where the personal toll on the practitioners concerned becomes oppressive and unfair.

I urge all practitioners to show kindness and respect towards each other at this time and look forward to continuing to work with the local legal profession to build on the many strengths of this jurisdiction.

Irrespective of the ongoing debate about the Sofronoff inquiry, about which no doubt much still stands to be written, her Honour's comments should be taken on board by lawyers and judges alike; and applied to scrutiny and comment not only in the public arena, but also in court and in judgments. BN