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Appellate Advocacy

The Honourable Justice Peter Dutney

As long ago as 1991, David F Jackson QC delivered an excellent paper on appellate advocacy at a NSW CLE seminar. That paper is published in volume 8 of the Australian Bar review at page 245 and I commend it to you.

Fundamentals of Appeals

David Jackson is regarded by many of his contemporaries as probably the finest appellate advocate of his generation. I had the great advantage of observing him closely for a number of years during which we shared the same chambers in Brisbane. I also appeared with him on a number of occasions as junior counsel. In the introduction to his paper Jackson QC notes that the title of the paper, Appellate Advocacy, largely sums up the subject. It is worth repeating what he says:

"*Two fundamental elements are involved when appearing as counsel in appeals.*

The first is that the jurisdiction being discussed is appellate. *In short one does not start with a slate which is clean. There have been findings of fact and where necessary decisions on jurisdiction and on questions of law. On the way to those findings and decisions there may well have been rulings on evidence, or on the credibility of witnesses…. However one puts it, the circumstances will always be that the case is not having its first 'outing'. It will be the second, sometimes the third, and occasionally the fourth occasion on which it has been before a court.*

The second element involved in appellate advocacy is advocacy. Clients in appeals, not entirely unreasonably, usually prefer to win, and advocacy does play a part in achieving that aim. I mention that because it is sometimes forgotten. Not infrequently one sees practitioners, universally respected for tactical skills at first instance, not demonstrating similar skills in an appeal in exactly the same type of matter. One reason, I think, is that they are not really prepared to give full value to the fact that the slate is not clean. For example, if there is a finding of fact which is against your

side, you have two choices on appeal; you can accept it or you can attack it, but there is no 'half way house'. A second reason, which a psychologist might better explain, is that some otherwise 'hard-nosed' counsel change character on appeals, and utilise the occasion to debate – too fully (and too fairly) – every intellectual area which might possibly be thought to arise in connection with the appeal. The result, of course, is that their submissions tend to become somewhat vapid and directionless"

One observation I have made from both sides of the bench is that counsel, including even experienced counsel who do not often practice in the appeal courts, are sometimes intimidated by appearing in the Court of Appeal. There is nothing especially magical about the Court of Appeal. You have three judges instead of one and it might be more difficult to slip one through to the keeper but generally speaking the same rules apply to appeals as apply to any litigation. You must know your case and prepare thoroughly. Jackson QC identifies three issues that arise in every appeal and which must be dealt with;

1. What aspect of the judgment below is being attacked?
2. Why is it said to be wrong?
3. What is the consequence if it is wrong?

I should say something about each of these because they are not necessarily self explanatory.

(a) What aspect of the judgment is being attacked?

There is a difference between an appeal against a finding on a point of law, an appeal against an exercise of discretion and an appeal against a finding of fact. In a criminal case the appeal may be against an aspect of the judge's summing up, or against the verdict because it was unreasonable or against an intermediate ruling. The approach is different in each case. You must be able to tell the court precisely the nature of the error about which your client complains.

(b) Why is it said to be wrong?

In considering why the matter complained of was wrong, sometimes the appeal court will be in as good a position as the judge below to determine the matter. This would

be the case in a ruling on evidence or law in a criminal case, for example. The evidence does not change between the trial and the appeal. It was either properly admitted or properly rejected or it was not. If the ruling was discretionary, however, different considerations apply. An exercise of discretion is generally subjective although based on established principles. If a record of interview with an accused person is obtained lawfully but unfairly, the judge has a discretion as to whether or not to admit it into evidence. To overturn an exercise of discretion it is necessary to show that the trial judge made an error in principal rather than simply persuading the appeal court that they would have exercised the discretion differently.[1] A well known example of a discretion being overturned was in the case of Jihad Jack whose confession to the Federal Police, taken after he was interrogated by others in an improper way overseas, was excluded by the Court of Appeal in Victoria overturning an exercise of discretion by the trial judge[2]

(c) What are the consequences of the error?

The last of these three issues is often forgotten. There is no point in identifying an error in the judgment appealed if it does not result in an outcome more favorable to the appellant. This was illustrated by a matter which came before a Court of Appeal of which I was a member last year.[3]

The appellant was a doctor. She was registered as a medical practitioner conditionally on her successfully completing a residency year.

A doctor is not permitted to practice in Queensland without being registered under the relevant Act. Registration as a medical practitioner under the Act is for a period of 12 months. During that period or within three months afterwards, a registered practitioner is entitled to have the registration renewed for a further 12 months as a matter of course. If the registration is not renewed within that three months after lapsing the Board has no power to renew it and the doctor must reapply to the Board for registration and satisfy the Board that they are fit and proper. As a result of having her registration cancelled, the appellant could only practice as a doctor if she

[1] See *House v The King* (1936) 55 CLR 499.
[2] *R v Thomas* (2006) 163 A Crim R 567
[3] *Tsigounis v The Medical Board of Queensland* [2006] QCA 295.

applied afresh for registration and satisfied the Board of her fitness. The Board could impose whatever conditions it thought appropriate on her registration.

During the course of her residency year the appellant's skills were called into question with the result that the Medical Board determined that she was not a fit and proper person to be registered and cancelled her registration. She appealed against that decision to the District Court and subsequently to the Court of Appeal. She sought reinstatement of her registration.

By the time the matter was before the Court of Appeal more than 3 months had passed from the time her original registration would have lapsed by effluxion of time. What she overlooked, although counsel who appeared for her had not, was that even if the decision appealed from was shown to be wrong, all she was entitled to was reinstatement of a registration that had lapsed anyway. To practice she would have to reapply for a license from the Medical Board. She was entitled to do that anyway despite the cancelling of her earlier license. The appeal was, therefore, pointless. The appellant required leave to appeal which was refused because it would be futile.

It is essential that counsel understands the consequences of the finding appealed against being shown to be wrong. It does not follow that because a judge is in error about a point the decision will be reversed. Sometimes the error is not critical to the decision. Sometimes, although the judge has wrongly decided a point the decision can be supported on other grounds. A good illustration of this is the decision of the High Court in *HTW Valuers (Central Queensland) Pty Ltd v Astonland Pty Ltd.* [4] That was a case I decided in Mackay in which I awarded a sum of damages to the plaintiff for misleading or deceptive conduct and negligence by a valuer. The valuer appealed to the High Court against my assessment of damages. The High Court found that I had approached the assessment wrongly. Despite this, had I approached it correctly the result would have been the same. The appellant won the argument but lost the appeal.

[4] [2004] HCA 54.

In a criminal case, don't forget what is known as "the proviso". Section 668E of the Criminal Code provides that:

"(1) The Court on any such appeal shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

(2) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

An example from one of my own cases is the decision of the Court of Appeal in *Previte*[5]. That was the trial of the man accused of throwing the English backpacker, Caroline Stuttle off the bridge in Bundaberg. In that case I admitted into evidence some letters written by the accused while in custody and which had been used by the handwriting experts as comparison writing to determine whether apparently confessionary matter written on a park bench near where the accused lived was written by the accused. The tender of the letters was not objected to by defence counsel. On appeal, it was argued that the letters should not have been admitted because they were prejudicial to the accused. The appeal court agreed but dismissed the appeal on the basis that the other evidence was so strong that there had been no miscarriage of justice.

The Appeal Process

But let's go back to the beginning.

(a) Is there a right to appeal?

An appeal commences with a Notice of Appeal.

[5] *R v Previte* [2005] QCA 95

Where do you start? First, look at the legislation to see whether you have a right of appeal. Appeals are a creature of statute. There is no common law right to an appeal. If the appeal is from a higher court there is not usually any difficulty. The authority for the appeal is in the *Supreme Court Act* 1991 or the *District Courts Act* 1967. If the appeal is from a tribunal or some other body it may be more difficult. Assuming there is an appeal, is it an appeal as of right or is leave or special leave required?

(b) Is the error appellable?

Once you have determined the existence of the right of appeal you need to work out why the case was lost at first instance. If you find an error, was the point taken below? In *Whisprun Pty Ltd v Dixon* the majority said at [51]:

"It would be inimical to the due administration of justice if, on appeal, a party could raise a point that was not taken at trial. Nothing is more likely to give rise to a sense of injustice in a litigant than to have a verdict taken away on a point that was not taken at trial and could or might possibly have been met by rebutting evidence or cross-examination".[6]

In civil case it is rare to get leave to argue a point not taken below. It is more common in criminal matters particularly in relation to complaints about the trial judge's summing up. Nonetheless you must know when drafting the Notice of Appeal whether the point you want to make was taken below and whether it is a point that if taken could have been met by leading further evidence.

(c) Drafting the Notice of Appeal

The importance of a Notice of Appeal should not be underestimated. It may appear to be an inconvenience, existing only to kick off the appeal process, but it is, in fact, the initial document read by the members of the court before the hearing. It should contain a precise statement of the findings which are sought to be overturned and the basis upon which the initial findings are said to be wrong. However, the person drafting the Notice of Appeal should ensure that the notice does not include the arguments intended to be relied upon in the appeal. Nor should the Notice of Appeal

[6] *Whisprun Pty Ltd v Dixon* [2003] HCA 48.

simply be a list of everything that could possibly be thought to be an error, however slight, on the part of the trial judge. Remember, it is pointless appealing against findings that the judge may have got wrong but which had no bearing on the outcome.

Draft an appeal which contains grounds of appeal on which you think you can win. If you have a good point make it, make it early and make it clear. Don't lose it in a morass of trivial or irrelevant points on which you almost certainly won't win. The Notice of Appeal is a good place to start. Put your strongest ground first. If you have other grounds that might be arguably alter the outcome put them next. If you have identified a range of points which make the trial judge look bad but which didn't impact on the outcome, forget about them. The trial judge is almost certainly known to the appeal judges and may well be a friend. You will win no friends on the appeal court by gratuitous attacks.

When drafting a notice of appeal, it is important to understand the nature of the appeal. Is it an appeal as of right? Is leave required? If the latter is the case you must also make an application for leave supported by an affidavit. Is the appeal within time? If not, an extension must be sought by separate application supported by an affidavit explaining how the time limit was missed. For example, leave is required to appeal from an interlocutory decision of the District Court or against sentence in criminal matters.

I was provided by David Ross QC with a draft of a new chapter dealing with appellate advocacy for the second edition of his excellent little book on advocacy. I can't do much better than read some extracts from the draft he supplied relevant to the drafting of a Notice of Appeal. You will note that David never uses the impersonal pronoun, "one".

"An appeal takes a great deal of preparation. Often, the trial advocate will not to do the appeal. There are a number of reasons for that. First, a new mind is brought into the case. Second, the trial advocate might have made some tactical decisions that could be hard to explain and at worst may be professionally embarrassing. Third, in the high-level appeal courts, the drafting of the court papers and the conduct of the appeal is sometimes regarded as a specialty within itself. Some advocates are

champions at trial but not on appeal." (I should add that with regional counsel cost is often a factor with most appeals from the higher courts going to Brisbane.)

"If you are brought into an appeal in a case you haven't dealt with before, there is one thing you must do. Make sure you have all the papers. That will include the transcript of the evidence and any exhibits. Then you must immerse yourself in the facts of the case and the law that may apply. I'm afraid to say that there is no shortcut. But if there be a principle of preparation it is this. Get a full knowledge of the evidence. Decide what the facts should be. Then stand above the whole case to find out in law whether the decision below was right or wrong. Once you have read and analysed all the papers you will have to decide three things. Did the court below make a mistake? How? With what result?"

As you can see there is little difference between Jackson QC's three points and those made by Ross QC. Without having satisfied yourself as to the answer to all three questions, however, you cannot competently draft the notice of appeal or conduct the appeal.

The Outline of Submissions

The next step is the preparation of the written outline of submissions.

All appellate Courts these days from the District Court hearing appeals from Magistrates to the High Court, require a written outline of submissions to be provided at some time prior to the oral hearing.

I know from my own experience in the Court of Appeal that unless the presiding member of the Court states otherwise it can be assumed confidently that the members of the Court have read and considered the content of the outlines of argument prior to the commencement of oral submissions. Prior to the commencement of the oral submissions the members of the Court will have discussed among themselves the issues raised in the outlines of argument and formed a tentative view of the merits of the appeal which will be either confirmed or displaced as a result of the arguments presented orally. Because of the procedure just outlined the content of the outlines of argument is of great importance.

The importance of the written outline cannot be overstated. It has a number of purposes. It is a chance to state precisely, persuasively and without interruption the case the party seeks to make. It is an opportunity to influence the form of the final judgment. A well written outline will often be used by the Court as a template for its reasons for allowing or dismissing the appeal.

One other advantage of the written outline is that it enables the advocate to focus on the strong points during the oral argument. Often the ground of appeal contains points which are either weak or run on instructions without the advocate having any confidence in them. If they are properly covered in the outline, the good advocate will often argue his or her best points and then simply tell the Court that there are a number of other points on which the appellant/respondent relies but they are fully covered in the outline and there is nothing that counsel wishes to add to them. This means that the good point is exposed fully and prominently without the attention of the Court being distracted by lesser arguments. The lesser arguments have still been made and are not abandoned. Apart from gaining points for brevity, you will then not be embarrassed by being challenged too closely on a point in which you have little confidence.

Remember that the judges will have read the outline and a persuasive and well constructed outline is likely to have already made a favourable impact.

A long, meandering or poorly structured outline will also be likely to have made an impact before you get to your feet. In this case the impact is likely to be unfavourable. Former Chief Justice of Australia, Sir Anthony Mason gave this advice in a paper he delivered to the Australian Bar Association in 1984[7]:

"The opinion and the advice, the written medium with which the barrister is familiar, are not a sufficient introduction to the formulation of a persuasive argument in writing… The result is that written submissions tend to be either too lengthy so that the arguments are lost in the forest of detail, or too scanty so that the points are listed

[7] AF Mason, "The Role of Counsel and Appellate Advocacy" (1984) 58 ALJ 537 at 541

seriatim like particulars of negligence without the supporting elaboration which gives flesh and blood to the bare bones of the propositions. In the process, persuasion, which is the object of all presentation, seems to have been overlooked."

The Oral Argument

The next stage is, of course, the oral argument. It is generally acknowledged to be an advantage to go first. The first counsel gets to select the terrain on which the battle will be fought. There is no need to be "fair" as long as you are honest with the Court and not misleading. There is a difference.

Chief Justice Mason, in the paper from which I have just quoted had this to say about going first:

"Too often counsel fail to take advantage of the unique opportunity presented by the opening – to make an impact on the minds of the judges before they begin to move forward on their inexorable journey to a conclusion. There is no need for a ritual incantation of the history of the litigation. The Court is aware of it. Better to start with a statement of the issues, unless the case lands itself to an exhilarating or humorous introduction."[8]

Beware of the exhilarating or humorous introduction, however. The best humour in Court is that provided by the judge. He thinks his jokes are funnier than yours and doesn't like to share the limelight. As Jackson QC notes, *"Witty observations which blossomed in chambers tend to wilt in the more acid rain of the courtroom."*[9]

A much better approach is to stand up and address the appeal immediately and directly, as for example:

Again from Jackson QC[10]

[8] Ibid at 542.
[9] 8 Aus Bar Rev 245 at 250.
[10] Ibid at 250.

This appeal turns on the resolution of two issues, one a question of law, the other a question of fact.
The question of law is …
The question of fact is …"

Counsel has immediately identified the issues and categorized them. The judges will have noted the issues and will put all the submissions following by either side into one or the other. The counsel starting has thus identified the ground on which the battle will be fought and it will be extremely difficult for his opponent to shift it.

In an address to the Western Australian Bar Association on 25 October 2004, Justice Hayne of the High Court set out what he considers are 6 important points that should inform all advocates work and particularly that of appellate advocates. The text of the addresss can be found on the High Court's web page.[11] These are:

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

These are self explanatory.

You must know your court and listen to it.

I don't know if any of you pay much attention to such things but whenever I admit any of my associates as legal practitioners I make a point of telling them in my remarks that the most important skill of the advocate is the ability to listen.

Advocacy involves knowing when to speak and when to be quiet. It involves being aware of the shifting focus of the tribunal and being able to read the judges.

[11] http://www.hcourt.gov.au/speeches/haynej/haynej_25oct04.html

Justice Sackville of the Federal Court wrote an article on appellate advocacy in which he gives this advice:

"The understanding an astute advocate acquires of the personality and philosophical standpoint of each judge constitutes an invaluable aid to presentation. There are some judges for example, who respond sympathetically to attempts to assess authorities by reference not only to principle, but to considerations of policy as well. Others tend to respond less enthusiastically to overt policy arguments and tend to prefer submissions to be based on the protective mantle of precedent. Obviously it is not possible for all advocates to know personally the appellate judges before whom they are to appear. But assuming the composition of the bench is known in advance, a great deal can be learned by reading judgments of the members of the bench, especially on topics directly related to the issues on the appeal."[12]

If you don't know the judges before whom you are appearing ask someone who does.

David Ross also has something to say about this:

Watch the bench and listen. It goes without saying that you must never interrupt a judge who is speaking. But there are more important reasons for watching and listening. One example will do. You will have worked out an order of you submissions. A judge might ask you a question which interrupts your intended order. Do you say that you will deal with that point later, or do you answer the question you are asked? The answer is simple. Answer the question. No matter that it throws your plan out of kilter. If you say that you will answer in due course, that judge will lose some interest. Besides, the judges run the court, not you. But be careful of the answers you give to those questions. Plenty of appeal court judges were classy advocates before they went on the bench. They know how to ask what seem like an innocuous series of questions. Plenty of us have answered those questions only to find that what we said destroyed our appeal

[12] R Sackville J, "Appellate Advocacy" (1996-97) 15 Aus Bar Rev 99 at 104.

Now and then two judges may start talking to one another. You expect that it is a point which arises on the appeal. There is no point in your talking during that time. Stop. Wait. When they have finished their talk they will perhaps ask you a question or at least tell you to go on.

You must have a comprehensive grasp of the facts of the case. In the days when I practiced as an appellate advocate I always told my juniors that authorities were the last resort of a weak case. In saying that, I was not suggesting that a knowledge of the authorities were unnecessary. Rather, I was merely saying that in most cases the law is not in doubt. Usually appeals turn on whether the facts will support a proposition of law on which both sides agree. Therefore, if the facts are favorable to the legal proposition on which you want to rely, start there. That does not mean that you start by giving the Court a recitation of the whole case. By the time a case comes to the appeal court most of what you thought at trial was fascinating and crucial evidence has become irrelevant. Knowing your case is what enables you to give the court reference only to that part of the evidence essential to support the proposition you are then making.

Even if you suspect that the law will be uncontroversial you must know what it is and be prepared to explain it to the court. If the facts are failing to impress and you need to resort to the law you must also know what it is.

Don't read long extracts from cases to the court. It is far better to summarise the proposition you want to draw from a case in a sentence or two and then give the court the page reference where the particular passage or passages you rely on. Pause to give the court time to look at it if the judges want to. If there is a particularly important short passage, read it and summarise the rest. For example:

"May I take your Honours to the judgment of Justice_ in __ where at page _ he states the proposition on which I rely at about ._ on the page. [Read the short statement] Thereafter to the foot of the page and over onto the following page his Honour gives further illustrations of the application of the principle."

The Court can then read on if they wish but you have not lost the attention of the judges by reading a long passage in which they have no interest.

Don't forget what court you are in. A single judge decision from the same court may be very persuasive to a trial judge who does not wish to have a decision conflicting with another judge. The appeal court, however, is not bound by the decision and may not even find it helpful. The Court of Appeal, for example, is not readily persuaded by a decision from the District Court.

If there is an important case against you, cite it and try to distinguish it. If you don't refer to it, your opponent probably will. If you have not referred to it the court may take the view that you were endeavoring to conceal it. If you meet it head on, the Court will not only respect your candour but may also take the view that you are not frightened of it and may be more willing to disregard it.

A similar approach is desirable with hard cases. You may for example, have an appeal against a finding of fact based on credibility. You should face it squarely by acknowledging the difficulty in reversing such findings but submit that yours is that rare case where the appeal court might do it.

If you are challenging a finding on the basis of a lack of evidence don't start by reading great slabs of evidence. Jackson QC suggests this approach:

Our submission is that there is no evidence to support the finding in question.

There were only four witness who gave any evidence which might in any way be thought to touch upon the issue, and I will need to go to their evidence – as briefly as may be – to demonstrate that it did not go far enough.

The four witnesses were A, B, C and D. A's evidence commences relevantly at page …"[13]

[13] Op cit at 251

Don't be too ready to accept everything that appears helpful which is said from the bench. Judges often think aloud and sometimes set traps to see how far you are prepared to stretch credulity in the course of an argument. If the judge says something which appears helpful but you are unsure of whether it is correct, say something like, "*I would like to adopt your Honour's suggestion but I need to think about it for a few moments*."

Miscellaneous lists and issues

There are all sorts of issues that arise in appeals. It is impossible to cover them all in a paper like this.

Here is another list of points you might find helpful. This comes from Justice Kirby[14]

1. Know the court.
2. Know the law.
3. Use the opening.
4. Conceptualise the case.
5. Watch the bench.
6. Substance over elegance.
7. Cite authority with care.
8. Honesty at all times.
9. Courage under fire.
10. Explain policy and principle.

I have said something about most of those points. The others are self explanatory.

I have tried to give you some insight into the skills of appellate advocacy. Remember, however, that the art of all advocacy is to persuade. It is not always the most elegant speaker who wins the case. Many good appellate advocates are inherently no better or smarter than you or me. Consciously or unconsciously, they follow some very simple rules of the art of persuasion. Here is yet another set of rules. I promise these are the

[14] Kirby J, "Ten Rules of Appellate Advocacy" (1995) 69 ALJ 964

last. These are the rules as taught by Phillip Greenwood SC to the readers' course at the New South Wales bar.

1. Clarity of purpose.
2. Logical Structure and organization.
3. Identification of issues.
4. Audibilty
5. Pace
6. Clarity of expression.
7. Use of appropriate language.
8 Appropriate eye contact.
9 Anticipating points
10. Adapting to opponent's points
11. Courtesy.

I always thought arguing appeals was fun. It was an opportunity to discuss legal issues with someone who knew what I was talking about. It is what we all thought being a lawyer was like when we were in law school and didn't realize that most things just turned on their own facts. Before we knew that almost nothing was novel and very little was even interesting. It was always a challenge I looked forward to.

I shall conclude, however, by quoting the final two sentences of David Ross's draft chapter which sum up appeals:

"Appeals are demanding. Good Luck!"