T.C. BEIRNE SCHOOL OF LAW

INAUGURAL DAVID F JACKSON DINNER

Women's College, University of Queensland, 19 November 2012

Chancellor, Dean, Dr Billings and members of the Faculty of Law, Dr Atkinson (Chair of the Council of the College), Adjunct Professor Davies (Head of College), Judges of Federal and State courts, fellow practitioners – and future competitors.

The University does me great, and I fear undeserved, honour by naming this Dinner after me. Thank you so much. I appreciate it enormously.

It is 49 years ago, as best I can recall, when we hosted the Inter-Varsity Moots at this University and I had the privilege of leading the University of Queensland team. Leading them to defeat in the Finals.

There was only one University in Queensland at that time and the same was true of the States other than New South Wales and Victoria. So that the organisation of mooting was much simpler, but there were far fewer opportunities for engaging in it.

Our coach in mooting was Dr Paul Gerber. I do not think that any of the staff here had taught mooting before that, and I am not sure that it was strictly part of his duties to do so. But he was a recent arrival and had been at the Bar in Victoria. And he was enthusiastic and carried us on the tide of his enthusiasm.

Moving half a century on it is a pleasure to see tonight how many have participated in mooting during the year, and how successful they have been. I congratulate you all. It is a very useful preparation for the years ahead. It also enables you to meet people from other parts of Australia, and other parts of the world, people whom you may well meet in later life. I congratulate too those responsible for direction and coaching in the area. It has been very effective.

May I indulge myself tonight by saying a few things about advocacy.

Many aspects of legal practice involve advocacy; sometimes without the lawyer realising that he or she is doing so. A simple example is a solicitor's letter on behalf of a client seeking a short extension for settlement of a contract of sale. So too is completing an application for a client seeking a social security entitlement.

In fact, of course, observations about methods of advocacy are most commonly made in connection with advocacy in courts or tribunals but such observations are applicable also to other circumstances involving persuasion. They are applicable because of the nature of advocacy. At its heart it is an endeavour to persuade. An endeavour to persuade the person, or persons, to whom it is addressed to decide a particular matter in favour of the client on whose behalf one is acting.

There are three facets of that which merit particular mention.

I said "person or persons to whom it is addressed". In courts it may be a Judge or Magistrate sitting alone. It may be a Judge and jury. It may be an appeal where there will be three judges or, in the High Court, five or seven.

The task of persuasion is not mechanistic. It involves human beings trying to persuade other human beings. Nor does it often take place in a simple one to one context. Almost always there will be opponents, other human (or almost, depending on the vigour of the proceedings) beings endeavouring to persuade the decision maker not to accede to the other side's arguments.

The second facet is that the persuasion is *of others*, not of oneself. Otherwise good advocates, particularly those who are naturally fluent speakers, can sometimes be seduced by their own oratory and forget its object. Self-satisfaction can be fine; but the clients, at least in the main, prefer to win.

Many years ago now, before Queen Street became a mall, I met a friend of mine. He had come to Australia from Italy, with his parents, when he was a teenager, and had done well.

He said: "I was in court yesterday on a speeding charge. I had to get one of your barrister mates. You blokes certainly know how to charge". "Who was it?", I said, "And was it worth it?"

He told me which barrister it was and said "Was it worth it? He was marvellous! He was *full of bullshit*!" "How did you get on?" "$300 fine and $100 court costs".

That is why I said people like to win, "at least in the main".

The third, and somewhat related, feature is that one is acting on behalf of a client rather than on one's own behalf. What the advocate says will often be attributed to the client, or used against the client. This may have effect in later litigation, or in later stages of the litigation, or be damaging in the media. One needs to be careful.

Forms of advocacy. The mooters are well aware of the fact that modern advocacy takes two forms, written and oral.

But when I first appeared in the High Court in the 1960s, there were no written submissions. Apart from the documents in the court below, there was a Notice of Appeal and perhaps a Notice of Cross-Appeal or Notice of Contention.

Written submissions in fact were positively discouraged. Sir Garfield Barwick, when Chief Justice, said to one of my leaders who sought to hand up some such submissions: "You just want to avoid answering our questions." In the particular circumstances Sir Garfield was correct. That was exactly what my leader, a somewhat odious character, not a graduate of this university, had in mind.

Within a few years, however, the High Court introduced a form of skeleton argument. Later flesh was put on the skeleton with a requirement for full written submissions. Now, in addition to that, there is an Outline of Propositions (a kind of resurrection of the skeleton).

Today, every appellate court requires written submissions in advance of the hearing. Other courts frequently do so, before or at the hearing. The written submissions are as much part of the advocacy as the oral submissions at the hearing, and it is a waste of an opportunity, and a disservice to the client, if sufficient attention is not paid to them. Or, in the case of an appeal, if they are simply a "rehash" - the lazy junior's rehash, I call it - of written submissions from the trial. An appeal, for example, can be won by well done written submissions; it can be lost by the slipshod. They need to be crisp, and to the point.

Sometimes too written submissions will be the *only* submissions. That is particularly true of special leave applications in the High Court when there is a growing trend to dispose of such applications "on the papers". And in any event, in any court, the written submissions are likely to be the submissions on which a Court's prima facie view is based.

Advocacy in courts. Advocacy in courts does not take place in an unregulated environment. Every court in Australia has statutes and rules which govern its jurisdiction and its powers to make orders.

Matters of this kind are important to advocacy. Let me illustrate that by reference to appeals, the area in which I have practised for many years. They affect the ability to appeal, the ambit of any appeal and the orders which might be made on appeal. They thus affect significantly the approach and courses to be taken in advocacy on appeal; they cannot be disregarded.

I mention three matters particularly.

The first is the importance of bearing in mind that appeals are not creatures of the general law; any appeal is by statute. The ambit of the right to appeal will depend on the terms of the statutory provision conferring it.

It is not unusual to find that leave is required to appeal from an interlocutory judgment or order, or from a final judgment where less than a specified amount is involved or from an order as to costs only. The statute will provide from whom such leave is obtained. It may be the judge making the order to be appealed from, or another Judge of the same court, or the court to which the appeal is to be brought, or either such court.

The statute may also confer an entitlement to appeal, but restrict its ambit. The most common restrictions are to error of law or of jurisdiction, but there may be others. Appeal may also be prohibited.

The point I am seeking to make – and this is important in *any* court or tribunal – is the need to identify where the court's jurisdiction to entertain the matter comes from.

Mr Justice Mack, a Judge of the Supreme Court of Queensland, and for a short time its Chief Justice, was a somewhat gothic figure. He is the only Judge I have ever seen make a barrister of many years experience break down and cry in court.

One of his minor amusements - and one that I have to say he was perfectly entitled to engage in - was to ask new barristers "Where do I get jurisdiction to do this or that?"

A particular favourite was on motions for probate which were required when an executor was out of Queensland. The answer– as best I can now recall – was s.32 of *The Probate Act of 1867.*

The provision had probably been invalid since federation because of s.117 of the Constitution, but no one had taken the point.

One of my friends as a junior barrister had not taken the trouble to find the answer to the question which inevitably came: – "Where do I get jurisdiction to make an order of this kind?" A pause, followed by a stab in the dark: "It's in the Supreme Court Rules, your Honour". "Whereabouts?" "I'm sorry, your Honour, I don't have a copy with me". "Use mine". And the torture went on and on. (I can see Justice Daubney thinking: "This is very useful information".)

The second point is that whilst one has to know when the jurisdiction to entertain the matter comes from, one needs also to know what powers the court has within that jurisdiction.

In the case of an appeal, that involves two questions, what are the powers of the appeal court, and how should those powers be exercised.

The former question, the ambit of the court's powers, is usually answered fairly easily. The relevant statute will say what they are. The latter question may not be answered so easily. It is not always a case of allowing the appeal, setting aside the judgment below and giving judgment for the opposite party. Setting aside factual findings will sometimes leave the court with no alternative than to order a new trial. It is important to be aware of the consequences of success on appeal.

The point I have tried to make is that - and this is true of advocacy in every jurisdiction – one is not in a world without rules. Those rules shape the way in which advocacy in proceedings should be undertaken, if it is to be successful. And, of course, there are other rules which apply too, such as those of procedure and evidence.

Content of the law. Let me say something about the *content* of the law.

More and more the law, in both its substantive are its procedural aspects, has become statutory. That affects advocacy in a number of ways.

There are more cases where earlier judicial decisions are no longer relevant, or have become of diminished relevance. The ultimate question in the litigation will be the meaning (or application to the facts) of the statutory provision, in the context of its statute.

I say "in the context of its statute". A temptation brought about by computerisation of legislation is that there is to look only at the provision of immediate interest - the provision on the screen - and not to read the whole of the enactment. It is a temptation which, if I could adapt some recent words of the United States General Petraus, is better avoided.

Speaking about the general law, I am sure that the law course has dwelt on the doctrine of precedent.

In its briefest exposition, it means that courts lower in the judicial hierarchy are bound to apply the legal principles which have been essential to decisions by courts higher in the judicial hierarchy. The *ratio decidendi* has to be distinguished from an *obiter dictum*, and not every *dictum* is *obiter.*

The effect of the doctrine is that thus the lower one goes in the judicial hierarchy, the more decisions by which the court is bound. People tend to forget, however, that the coin of precedent has two sides. The higher one goes, the fewer decisions by which the Court is bound.

And the High Court is not *bound* by any decision, even its own earlier decisions. It may overrule them. Of course it does not overrule them willy nilly; leave to reopen is required. In reality there are instances too where the generality in which propositions of law have been stated in earlier decisions is reduced, without the decisions themselves being overruled.

The fact that the High Court is not bound by any decisions can have significant effects on advocacy in that Court. Decisions which seemed persuasive to the intermediate court may themselves be overruled, or not followed. Decisions of courts of other countries, even decisions of their final courts, may or may not be followed. Decisions of the Privy Council are not sacrosanct, even decisions given when it was a court of appeal from the High Court.

In other words the effect in the High Court of other decisions is that they are tools of persuasion. One can say that: "There is a pretty settled course of decision on this issue. The Court should hesitate before departing from it". To say, however: "There is a settled course of decision on this issue. The Court is bound to follow it" is, like Icarus, sailing a little too close to the sun.

Concluding remarks. Every advocate is different. Not every brilliant speaker is a great advocate. Nor every great advocate is a brilliant speaker. People do not all come from the same mould.

What is important to bear in mind that legal advocacy takes place in circumstances which are relatively constrained, by jurisdictional and procedural provisions. Recognition of those matters enables advocacy within them, and by reference to them, to be at its most successful.

It is a great pleasure to be here on this occasion, in a College of which my sister was a member so many years ago.

It is a great pleasure too to meet so many students who have represented the University in the various mooting competitions. You stand today in the places of those like me, who have gone before. And, with the passage of time, others too will stand in yours.

Thank you all once more.