Trial Advocacy

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Preface

This book originated as seminars that the Brian Donovan QC gave to young barristers and solicitors who wanted to acquire advocacy skills. The text of these seminars lies at the core of the book. The book originated when at some stage I proposed to Brian the idea of turning the seminars into a book. Brian would write the major part of the book directly on advocacy. I would be general editor and would add some pieces on organising a case and proof of facts. Brian readily agreed to this arrangement.

Unfortunately two forces slowed production of the book. One consisted of the demands that an increasing workload as barrister and later as judge put on Brian; the other was the onset of the illness that eventually took Brian from us. Nevertheless in his final years Brian worked heroically towards finishing his part of the manuscript.

After Brian's untimely death on 6 May 2008 the manuscript was substantially but not completely finished. Moreover it was necessary to check a significant amount of statutory provisions that intruded on the tactical decisions that an advocate makes when conducting a trial. In an act of camaraderie that best characterises the spirit of the bar, Robert Cavanagh of the Newcastle bar came to the rescue. Robert did an enormous amount of work in checking statutory provisions, checking for amendments and writing up the results to guide young advocates.

This book, therefore, is indebted to the personal generosity of spirit of Robert Cavanagh. It is also a standing tribute to Brian Donovan's enormous dedication and efforts in explaining the intricacies of advocacy to novices in seminars over many years. I was honoured to work in such company.

Christopher Enright
25 March 2014

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Chapter 1
Trial Advocacy

Introduction

In its widest sense advocacy is the art of convincing others: it is the art of persuasion. In a general sense it is an accomplishment in many departments of life – from advertising, to labour relations and commerce. In this book, however, we are concerned with a specialised form of advocacy. This is advocacy as it is used for conducting cases in court. This form of advocacy, that is part of the trial process involves a cogent technique, but it also involves significantly more than this. It involves: an understanding and application of high ethical standards; a focus on the best interests of the client; an ability to act without fear or favour; a continuous emphasis on diligence and competence when preparing a case for trial; an understanding of the applicable criminal or civil law; an understanding of the laws of evidence and its onus and standards of proof; and understanding of the rules of the relevant court; and the application of effective advocacy techniques.

Ethical Standards

The ethical standard required of practitioners and some of the difficulties they confront in trying to maintain appropriate standards, is well described by Justice Kirby when he says in an article about ethical issues: 'In a time when so many fundamentals are questioned, doubted, even rejected, it is hardly surprising that the ethics of the legal profession should also be doubted by some of its members and attacked by its critics. It is easier to adopt a purely economic or mercantile view of the law if you have no concept of the nobility of the search for individual justice, of the essential dignity of each human being and the vital necessity of providing the law's protection, particularly to minorities, those who are hated, even demonized, and reviled. Without some kind of spiritual foundation for our society, we can do little else than reach back into the collective memory of our religious past or to rely on consensus declarations as to contemporary human values. … The hope must be that some of the old fashioned notions of selfless and faithful service will survive even in these changing times. In the void left by the undoubted decline of belief in fundamentals, we must hope that a new foothold for idealism and selflessness will be found. Despite the beliefs of some of its critics the Australian legal profession's guiding principles will not be found in economics alone. Still less will it be found in a dogma of free market competition or

the arid language of the Trade Practices Act. Economics simply cannot explain the will to do justice, to be dutiful to courts and honest and dispassionate to clients.'[1]

Many of the fundamental ethical requirements can be found in the rules promulgated by the professional associations of barristers and solicitors. They can also be found by utilising the normal legal research techniques. It is, however, appropriate to emphasise here one of the fundamental ethical duties that begets two requirements – an advocates should not mislead the court and should avoid knowingly promoting lies. In order to assist with maintaining a credible and effective justice system an advocate should be alert to ensuring the highest ethical standards whilst maintaining client privilege, striving to assist with ensuring a fair trial and avoiding miscarriages of justice.

Laws of Evidence

This book draws on the laws of evidence as laid down in the *Evidence Act 1995*, which enacts some common law rules, enacts some common law rules with amendment and enacts new provisions that oust common law rules in some cases and creates new rules in other cases.

There are two fundamental sets of laws of evidence: relevance and proof. Proof has two aspects, burden of proof and standard of proof.

Relevance

The starting point for advocates throughout the trial process must be the requirement of relevance.[2] Relevance is the core concept of the law of evidence. There are two basic rules for relevance: concern relevant evidence and irrelevant evidence.

Basic Principles for Relevance

There are some basic principles about relevance. These are incorporated in the common law rule for evidence and in statutory rules that have replaced the common law rules.

Relevant Evidence

There are two rules about relevant evidence – the first states the general principle and the second states the exception:

1. General Rule. Evidence that is relevant is admissible. Evidence is relevant 'if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings'.[3]
2. Exception to the General Rule. Relevant evidence is not admissible if there is some good reason for not receiving it.[4] The 'reasons for not receiving relevant evidence may either relate to its content, or to the form or circumstances in which it is tendered'.[5]

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1. Kirby (1997)
2. *HML v The Queen* [2008] HCA 16, 4, 5. The following discussion draws heavily on this case.
3. *HML v The Queen* [2008] HCA 16, 5
4. *HML v The Queen* [2008] HCA 16, 4, 5
5. *HML v The Queen* [2008] HCA 16, 5

Irrelevant Evidence
Evidence that is not relevant is inadmissible. There is no reason to particularise this further.

Importance of Relevance
Relevance is a legal requirement – everything at the trial, including the evidence, must be relevant to resolving the issues in the case. By ensuring that they comply with the requirements of relevant an advocate can concentrate on the essentials of a case and ultimately apply their techniques of advocacy to maximum effect.

Statutory Rules for Relevance

Section 55 (1) and (2) of the *Evidence Act 1995* state the major rules about relevance:

> **55 Relevant evidence**
> (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
> (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
> (a) the credibility of a witness, or
> (b) the admissibility of other evidence, or
> (c) a failure to adduce evidence.

Proof

There are two basic rules concerning proof:
1. Burden of Proof. This rule answers this question: Who has to prove each part of the case?
2. Standard of Proof. This rule answers this question: To what degree of certainty must a party who has the burden of proof for part of a case prove that part of the case?

Burden of Proof

Which party has to prove their case? The obligation to prove ones case is known as the onus of proof or the burden of proof. There is a general rule: the burden of proof rests with the plaintiff or prosecutor. There are exceptions: an example is when it is necessary for the court to determine if a particular defence is to be accepted.

Standard of Proof

How certain does proof have to be? The next major point that an advocate needs to consider is the standard of proof that is needed to prove the case and thus succeed in the action. As part of this process it is necessary to know who bears the onus or burden of proof.

Civil Standard of Proof

Rarely could a court be absolutely certain of the facts of a case. For this reason the law does not require an absolute standard of proof. Instead it recognises that there are ‘different degree[s] of certainty which are real, and which can be intelligently stated,

although it is impossible to draw precise lines'.[6] In civil cases the standard of proof is generally proof on the balance of probabilities. This is a common law rule. It has, however, been enacted in s140 of the *Evidence Act 1995*. It states as follows:

> **140 Civil proceedings: standard of proof**
> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
> (a) the nature of the cause of action or defence; and
> (b) the nature of the subject-matter of the proceeding; and
> (c) the gravity of the matters alleged.

Criminal Standard of Proof

In criminal case there is a higher standard of proof required before an accused can be found guilty. The standard of proof is generally proof beyond reasonable doubt. This rule has now been enacted in s141 of the *Evidence Act 1995*, which thus provides statutory authority for this standard. It states:

> **141 Criminal Standard of Proof**
> (1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.
> (2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

The accused may want to know what 'beyond reasonable doubt' means. Unfortunately the practitioner can be of little assistance in this regard other than to say that it has its ordinary meaning and is a higher standard than the balance of probabilities.

In the case of *Underhill* the court made the following comment about this issue: 'There is another ground of appeal that should not be allowed to pass unnoticed. This ground is that the learned judge's directions on the onus and standard of proof were such as to mislead the jury. The summing-up contained what might be described as an expansive excursus on the concept of proof beyond reasonable doubt. His Honour, in a well-intentioned effort to assist the jury in a full understanding of the concept of proof beyond reasonable doubt, devoted a very considerable part of the early portion of his summing-up to a general discussion of the topic of proof.

His Honour gave a number of instances drawn from various aspects of human affairs. His Honour examined with the jury what might be imported by the concept of reasonableness, and he also directed some comments to the proposition that doe not means exactly what it says. This Court has many times emphasised that whilst the accepted form of direction in relation to proof beyond reasonable doubt is neither legally binding nor an essential prerequisite to the validity of a summing-up on this topic, nevertheless the prudent course for trial judges is to conform with the conventional direction. Departure from it is inevitably fraught with a risk of the very

6. *Briginshaw v Briginshaw* (1938) 60 CLR 336, 343-344, per Latham CJ

nature of that which has come to fruition this morning namely, appellate submissions challenging the validity of the summing-up on the topic.'[7]

The conventional form of direction is well-known. As the High Court has said, it is specific and meaningful to laymen. Attempts to analyse the concept of proof beyond reasonable doubt can lead to error in the jury's approach. Attempts, no matter how well-intentioned, by elaboration to assist by references to other situations within ordinary affairs of people can well introduce an element of risk that the jury may not fully comprehend what is an essentially simple and straightforward concept – namely, proof beyond reasonable doubt.

Those general observations are, of course, no more than that – that is to say generalities. It is well recognised that in some circumstances, particularly in the context of what may have been put in counsel's addresses, a trial judge may regard it as necessary and desirable to elaborate a little in order to negative any misapprehension counsel's addresses may have created. So, while the conventional formula is ordinarily to be regarded as the prudent direction, a trial judge's hands are not tied by an inflexible obligation to give either that direction in its conventional terms or that direction and nothing more. It is ultimately the province of the trial judge to ensure that the jury is left with a clear presentation of this essentially commonsense concept of proof beyond reasonable doubt.

Advocacy

Conveniently we can identify two aspects of advocacy underlying two contrasting methods of persuasion that influence a court's decision, reason and rhetoric. These terms are probably not comprehensive, nor should they be seen as totally distinct. Nevertheless they are useful in conveying two major and contrasting strands in the work of an advocate since it has both a persuasive or rhetorical side and a rational side. This distinction actually echoes a number of opposites or contrasts – cognitive functions and affective functions, intellect and emotion, sense and sensibility, head and heart, left brain and right brain, and the thinking human, *homo sapiens* as distinct from the feeling human, *homo sentiens*.

The existence of these two methods of persuasion has a consequence for advocacy – it is both an art and science. These two facets of an advocate's work, reason and persuasion, reflect the two related tasks that an advocate performs for a client. They communicate and they convince. They must inform the court of their client's case, so that the court understands it. This is communicating to the court. They must try to persuade the court that this case is better than that of the other side. This is convincing the court. Their rational task is the logical presentation of a client's case; the rhetorical task is presentation of that case in a persuasive way. By a combination of both aspects an advocate seeks to win a case.

Throughout history there has been argument as to whether advocacy can be taught. In classical Greece the argument raged between those who espoused the view that

7. *R v Underhill* NSW Court of Criminal Appeal, No 30/85, 9 May 1996, unreported.

advocacy and oratory was an innate gift and those who espoused the view that it was a technique that could be taught. This reflects the debate over nature versus nurture which characterises opposing attitudes to a variety of matters. Contemporary approaches to advocacy accept that it can be taught. Indeed, throughout the common law world there has been a flourishing of advocacy institutions and of advocacy teaching.[8] In this spirit, the purpose of this book is to lay down certain fundamentals that will help readers to achieve a level of minimal adequacy and some to achieve excellence. However, it is just a start. A practical skill such as advocacy is not taught or developed merely by lectures and books. It is further taught and developed by doing.

Some of us have a natural talent for advocacy, while some of us do not. Whatever the level of our talent and our innate ability in the art of advocacy, it can be improved, frequently significantly improved, by proper foundation and technique. The technique is something that we can all use. All that said, no advocate, no matter how talented, is good all the time. Some may be adequate all the time and a few reach excellence on occasions.

However, before undergoing this practical training it is important that you know basic rules and basic techniques. This is where the book is relevant. Experience alone is no guide to competence. 'Practice makes perfect' is the conventional wisdom but in modern form the mantra is 'practice makes permanent'. Experience may simply reinforce an advocates bad habits and poor techniques which they have repeated since their early years. To emphasise this, there are senior experienced bad advocates as well as senior experienced good advocates.

Our point is that to learn to be a good advocate you must have a good grounding in the rules and techniques. Then, with supervised practice you can learn the craft. If you are a beginner, you learn how to do it. If you are an experienced practitioner who has not been properly taught, you can be released from past bad habits and bad techniques. You can be taught how to do something differently, and how to do it more effectively and how to do something new.

Perspective

When a case arises a client may be plaintiff or defendant in a civil matter or an accused in a criminal trial. If the client is a plaintiff they have, as they see it, suffered a wrong, and wish for a remedy. To do this they contemplate, and may take, legal action in the courts. On the other hand, if the client is a defendant they have, it is alleged, wronged another person who now threatens or has instituted proceedings for a remedy. If the client is an accused the client needs to deal with allegations of criminal offending brought by a prosecutor. This book describes an approach that can be adopted by all advocates whilst providing examples of distinct duties to the court and clients. In doing this we provide for consideration the logic that underlies advocacy

8. Prominent among them is the Australian Advocacy Institute, which has taught throughout Australia and has conducted workshops for the Scottish Bar at Parliament House, Edinburgh, and for the English Bar at Grays Inn.

and use this to indicate the basic techniques which an advocate needs for their task. It also describes how an advocate prepares a case, presents the case in court and in so doing tries to persuade the court to find in favour of his or her client.

When a case comes to court there are three possible types of issues – issues of law, issues of fact and issues of discretion. Of these, the most demanding for an advocate, and by far the most common, are issues of fact. This book focuses on issues of fact.

Court

An advocate performs tasks before bodies of two major kinds – a court and a tribunal. Some texts use tribunal as a generic word to cover both forums. We use the terms court and tribunal interchangeably, to cover both possibilities.

The forum in which an advocate appears can be conveniently classified and listed in the following ways:

1. A judge sitting alone. Here, obviously, the judge decides everything.
2. A judge and jury.
3. Several judges sitting together.
4. A tribunal.
5. A range of other bodies. These may be a committee of parliament, a royal commission, a board of inquiry, an administrative official or some private regulator such as a Law Society or a Bar Association or the committee of a private club.

Obviously the dynamics of persuasion are different in each case. With just one decision maker, the major interaction for an advocate is between themself and the judge. Where there are two or more decision makers then not only must the advocate concentrate on the individuals, they must take into account how they will influence each other.

General Advice

To conclude there is some general advice on advocacy. First, never state anything in court that you cannot justify. This is really part of a more general piece of advice which is to know and abide by the rules of ethics that apply to an advocate. Second, if you lack confidence on your feet, and even if you do not, there may be some advantage in having voice training. Third, there are both formal and informal ways to develop the skill of advocacy. Formal learning comes from professional training. Informal learning comes from sources such as watching other advocates at work, seeking advice from senior advocates, reviewing your own performance and even, and with caution, seeing portrayal of court scenes in films and on television. Fourth, while it is important to learn the conventional wisdom of how to be a good advocate by absorbing the general rules of good practice, insight and experience will show circumstances when a rule will not serve you best. Fifth, while advocacy is the art of presenting a case in court, remember that good preparation precedes and procures good presentation. Sixth, there are two important pieces of general advice:

1. Brevity. First, be brief. Because you are conveying very complex information by words through ears. This is a poor medium of communication (especially compared to

visual communication). Attention is lost, points are missed. You are conveying very complex information in a court case especially to a jury. The key advice: never more than three points.

2. Plain Words. Use plain words. How did you drive the car? Compare this too: What did you do in relation to the proceeding of the vehicle?

Outline

Chapter 2 provides a theoretical basis, with examples, for organising a case. It provides models showing the causal relationship between evidence, facts and the elements that need to be proved. This is explained using a hypothetical fact scenario involving trespass.

Chapter 3 provides a theoretical basis for identifying issues of fact; focusing of course on issues relating to material facts. The chapter explains these matters by reference to the model discussed in Chapter 2.

Chapter 4 considers a theoretical basis for resolving issues of fact by providing an approach that looks at how versions of the truth, probability of truth and standard of truth interrelate.

Chapter 5 deals with case preparation, case concept and presentation.

Chapter 6 commences the trial. It explains how to develop and deliver an opening address.

Chapter 7 provides a guide to how to take a witness effectively through their evidence-in-chief. It explains this for ordinary witnesses as well as expert witnesses. It also explains how to question in chief on documentary evidence.

Chapter 8 is the first chapter on cross examination. It primarily looks at the general techniques involved.

Chapter 9 extends consideration of cross examination to cross examination of a witness in relation to a document.

Chapter 10 deals with the cross examination of expert witnesses.

Chapter 11 explains re-examination.

Chapter 12 provides an overview of how to object to questions asked at trial by the other side.

Chapter 13 explains how to give a closing address.