A CRASH COURSE IN MOOTING

The following material comprises modified and edited extracts from the Monash Moot Court Manual *by WT Charles and Mr Justice IR Thompson*

(A) Preparation of Counsel's Case for a Moot

Preparation of the argument is seldom an easy thing. It involves firstly making an appreciation of all the points of law which the case raises; secondly making an appreciation of their relative strengths and whether any of them should be abandoned as being so weak as to be untenable. All this calls for the exercise of a sound judgment. With regard to abandoning a point, it is necessary to realize that if the court thinks a point has been wrongly abandoned because it has substance in it, marks will be lost and that, on the other hand, marks will be lost is the court thinks that an attempt is being made to argue what it regards as an obviously untenable point.

Counsel should look for authorities which are against him as well as authorities which support him. The authorities should be considered as a whole with regard to extracting a comprehensive principle of law from them and finding exceptions to them and grounds for distinguishing them. In this way counsel will become thoroughly versed in the relevant law and be in a position to answer his opponent's case, and to deal adequately with questions from the court.

Having done his researches, counsel should re-examine the facts of the case in the light of the knowledge gained: it may be that that re-examination will show the facts in a different perspective or suggest that other facts may be inferred from any facts found by the court.

The preparation of an argument for delivery involves a determination by counsel of the order in which he is going to deal with his points of law, the way in which he is going to develop them, and the authorities to which he is going to refer. It has been said that usually it is sound tactics to deal with the strongest point first and conclude with the second-strongest point, but no absolute rule for guidance in this matter cane be laid down, it also being one for judgment which has to be exercised with regard to the nature of the argument as a whole and the time available for its presentation, which will probably include answering questions from the court. The preparation must allow for adaptation to changing circumstances, as, for example, by opposing counsel conceding a point of law and thereby rendering argument upon the point unnecessary.

In selecting the authorities which he intends to use and the manner in which he intends to use them, counsel should have regard to the following:-

(a) He will not be able to use all authorities which his researches may show support his case. He must therefore be selective in his citation. At the same time he must be prepared to discuss any unselected authority when the course of argument renders such discussion necessary.

(b) An argument on a point of law is not an exercise of which the be-all and end-all is the citation of or quotation from authorities. Such an argument can only be effective when it is developed from and shows an understanding of the authorities.

(c) A previously decided case is only authority for the principle of law which is the basis of the decision in it or the application of which it illustrates. Accordingly, when citing a case, it is necessary to know the facts of the case, the actual decision given in relation to those facts and to understand, in the light of those facts, any reasons which have been given for the decision. While it is not always necessary for counsel to state the facts of a case which he is citing, he should be able to do so whenever requested by the court. It detracts from the court's appreciation of an argument when counsel, on being asked what were the facts in a case which he has cited, has to reveal his ignorance by a flurried reference to the appropriate report.

(d) As a general rule counsel should formulate the principle of law upon which he is relying with reference to the facts of his case and he should state that formulation in argument before citing his authorities in support of it. When citing his authorities he should explain how they support his proposition. If his proposition has been stated adequately for his requirements in a reported judgment, it is proper for counsel to read, and adopt as his own, the relevant passage from the judgment, after proper citation, instead of using a formulation of his own. Care has to be taken in adopting such a course. Merely reading a passage from a judgment may indicate that counsel has not fully understood it or appreciated that it has been qualified in other judgments in the same case or in other cases. It may also give to the court the impression that counsel does not regard his task as involving more than the citation of or quotation from authorities which, with a little bit of luck, may be appropriate.

(e) Cases should not be cited as authority for elementary propositions of law, for example, that offer and acceptance are essential elements in the formation of a contract. The court may be assumed both to know the elementary propositions of law and not to like the contrary being assumed. On the other hand, cases which illustrate an unusual application of even elementary propositions to the case under argument should be cited when the unusual application is in point.

Preparation of the argument may involve a considerable amount of writing, whether it be in the form of notes or a narrative or even as a prepared speech. A rehearsal of his speech by counsel, either before or without an audience, will be found useful, both as inducing to confidence on the "the day" and as showing whether the argument can be presented in the time allowed or needs to be shortened. It is important for a counsel to appreciate, however, that whatever form is adopted he will be expected to address the court with the use of notes only: he will lose marks if he appears to be reading from a set speech or delivering a speech which he has committed to memory, defects which usually manifest themselves once the court starts testing his argument by questions. It follows that the final stage in the preparation of his argument is for counsel to prepare the notes which he intends to use in court. These may take a variety of forms and counsel will choose that which he fins most convenient. One form is the use of a number of cards on each of which is set out one or two headings to serve as aides-mémoire, the relevant authorities being set out under them. It is important that they are written or typed in such a way as to permit of reference to them at a glance. It detracts from an argument to have counsel interrupt his address by becoming lost in his notes. Finally, while counsel's address should not be learnt by rote or read, it si both permitted and desirable, when counsel has taken time in formulating a legal principle, that he records the formula in his notes and that he reads it out to the court. A well-drawn statement of a principle of law

may be of great assistance to the court and the court may wish to take a verbatim note of it and may even use it in its judgment.

Court Etiquette

Mode of addressing and referring to the judiciary

Counsel should address any judge before whom he is appearing as "Your Honour", and any magistrate as "Your worship". He should also stand whenever he is addressing or being addressed by the court. Any ruling or direction given to him by the judge or magistrate should be acknowledged by "If your Honour pleases" or "If your Worship pleases", as is appropriate. Any previous remark or action of the bench in the course of the hearing should be referred to as "Your Honour's …" or "Your Worship's …" While counsel is expected to show respect and due deference to the bench by these use of these phrases, he should not overwork them, for example by prefacing every sentence with "Your Honour". Discretion is required here as in other aspects of advocacy.

When the court is constituted by more than one member it is proper to address it collectively as "the Court" instead of "Your Honours" or "Your Worships". A member when addressed as an individual, for instance when replying to a question from him should be addressed as if he were sitting alone.

Counsel should refer to a judge other than the one he is appearing before by his official title for the first time and thereafter reference may be made in accordance with the way in which he is addressed or referred to in court, so long as confusion between different judges will not result. A judge should not be referred to by the abbreviation which is used in the law reports, even when reading from those reports. Thus a reference in a judgment to Irvine CJ should be read as Chief Justice Irvine, to Smith J should be read as Mr Justice Smith, and to Bacon VC should be read as Vice-Chancellor Bacon. It is to be noted that the prefix "Mr" has been discontinued as part of the title of judges in many jurisdictions, each judge being simply "Justice".

The following are the modes of reference to judges in different jurisdictions:-

> Australia, New Zealand and the United States – "His Honour", "The learned Judge";
> England, Scotland, Canada and South Africa – "His Lordship", "The learned Judge", "The learned Lord Justice", and in the case of England, "The Learned Lord", as is appropriate. A Vice-Chancellor of the old Court of Chancery in England should be referred to as "His Honour", in accordance with the mode of address which prevailed in that Court.

Reference to other participants

Counsel should refer to other counsel in the case as "my learned friend, Mr X", "my learned junior", or "my learned leader", as appropriate: he should not refer to opposing counsel as "my opponent" or "my adversary" or to any counsel as "my colleague".

Mode of prefacing or referring to counsel's own argument

As counsel's argument is by way of submission of it to the court, and not an expression of hi own personal convictions of "feelings" about his case or any aspect of it, he is required to

preface or refer to his argument and parts of it in a manner according with that fact. The following are examples of the appropriate way of doing so:-

> "I/We submit that..." or "It is submitted that…"
> "I/We shall be submitting that…" or "It will be submitted that…"
> "My/Our submission is/will be/has been that…"
> "It is/will be/has been the submission for the plaintiff that…"
> "The submission for the plaintiff is/will be/has been that…"
> "My/Our/The plaintiff's submission really is that…"

Whether counsel adopts a personal or impersonal form of submission, he should use the same form throughout his argument.

It is proper to use the word "respectful" and its variations when persisting in an argument as to which the court appears to be unsympathetic or hostile, as for example, "Nonetheless, I respectfully submit…" or "While accepting your Honour's point that the evidence may not be strong, it is my respectful submission that it does establish a case for the defendant to answer." It must be recognised, however, that the word and its variations should not be used to such an extent as to suggest servility and insincerity.

Citation of authorities

As in the vase of titles of judges, so the use of abbreviations for the reports is confined to citations in writing. Whenever counsel refers to a law report, he should give it its full title, the correct way of citation being for example, "Makin and the Attorney-General fro New South Wales, eighteen ninety-four Appeal Cases, fifty-seven at page sixty-five where Lord Herschell, Lord Chancellor, said…". That form is substituted for the written form, namely *Main v A-G (NSW)* [19840 AC 57 at 65 *per* Lord Herschell LC". It is desirable to give the year of the decision when citing from reports of which the year does not form part of the designation, thus *R v Neal and Taylor* 7 C&P 168 should be cited as "Rex (or "The King") against Neal and Taylor, eighteen thirty-five, seven Carrington and Payne, one hundred and sixty-eight" and should be written with the (1835) preceding the 7 C&P. The reason for this is so that the court will know the year in which the case was decided as that may become a matter of some significance.

Once a case has been referred to, further reference to it may be made by reference to the names of one of the parties who is not the Crown or a public officer, for example, "Makin's case". The further reference should indicate that the case has already been cited, for example, "Makin's case, to which your Honour has already been referred by me (or by my learned friend, Mr X)". When reference is being made to a case which has already been cited, the fact that the case has been so cited and by whom should be mentioned.

Citation of statutes and statutory instruments

If a statute has a short title, it is sufficient citation of it to use the short title together with the number of the relevant section. Thus, the *Colonial Laws Validity Act 1865*, s 5 should be state either as "section five of the Colonial Laws Validity Act eighteen sixty-five" or as "the Colonial Laws Validity Act, eighteen sixty-five, section five". The statement should indicate the Parliament by which the statute was enacted, for example, "the Imperial Colonial Laws Validity Act, eighteen sixty-five"; "the Commonwealth Matrimonial Causes Act, nineteen fifty-nice to sixty-five"; "the Victorian Crimes Act, nineteen fifty-eight". If a statute does not

have a short title, it should be referred to by its long title and date or by its number and year. Imperial Acts, that is, Acts of the Parliament of the United Kingdom, which do not have a short title may be referred to by their regnal years and chapters, for example, "the statute four George the Fourth, chapter ninety-six" of "the fourth George the Fourth, chapter ninety-six" for *4 Geo. IV, c 96*.

Dress

"Solicitors and counsel must be neatly and soberly dressed, men in suits (preferably of dark colour) and ties, and women in apparel that is discreet without being dowdy. The important thing to remember is that the courtroom is not a place for 'haute couture' or for eccentric attire." (Professor Enid Campbell, *A Moot Court Handbook*).

Position

Counsel for the plaintiff/appellant stands to the right of the bar table. Counsel for the defendant/respondent stands to the left.

Commencement of the hearing

The hearing of a moot case is commenced by the names of the parties being called out by an usher. Counsel for the plaintiff (or appellant) will thereupon stand and announce his appearance thus:- "If your Honour pleases, my name is [surname] and I am appearing for the [plaintiff/appellant]". Of course, if there is more than one judge, the correct announcement would refer to "the Court", e.g. "May it please the Court, my name is …" etc.. Counsel for the defendant/respondent then will stand and announce his appearance in a like manner.

In the semi-finals and finals where a party is represented by a senior and junior counsel, the senior counsel announces his junior's appearance as well. Junior counsel remains seated while his senior announces both appearances.

Order of addresses

After counsel have announced their appearances, the judge will call upon counsel who first announced his appearance and that counsel will proceed with his argument. On completion of his argument, his junior counsel, when there is one, will then be called upon and will proceed with his argument. Other counsel are called upon and will proceed with their arguments in the order in which their appearances were announced, junior counsel following immediately after his senior.

Completion of address

Counsel should conclude his argument thus:- "That, your Honour (of "If your Honour pleases"), completes my submission." He should not thank the court for listening to him. Once again, if there are two judges, counsel should refer to the court as "Your Honours" or "the Court".

Presentation of Counsel's Argument

Counsel should try to present his argument in the manner which will be most conducive to persuading the court to decide in his client's favour. Once again, it must be emphasized that persuasion does not include trickery. Judges do not like the "smart aleck" advocate or the representation of a Hollywood portrayal of an American attorney.

Counsel should have regard to the following as assisting in the presentation of his argument in a persuasive form:-

(a) The argument should be stated in clear and comprehensible terms and with sincerity, and without attempted displays of rhetoric and emotion. It is well to remember that when rhetoric and emotion enter into an argument, reason, which is the quality which judges expect, departs from it. Further, the borderline between pathos and bathos is a very fine one, as the products of so many efforts at pathetic acting reveal.

(b) Propositions of law should be stated moderately, not in extreme or exaggerated forms.

(c) The argument should be spoken so as to be clearly audible to the court and with sufficient slowness to permit the court to take a note of it. Audibility, however, is not to be achieved by shouting or ranting. Further, counsel should not interrupt his opponent's argument unless it is imperative to effect a correction at once. Such imperativeness seldom arises. With respect to both those matters, it is necessary to remember that a court is neither a theatre not a legislative assembly, but an institution concerned with the administration of justice according to law, and that its procedure provides for the orderly presentation of conflicting arguments.

(d) Short and familiar words should be used in preference to long or unusual words which, more often that not, are more showy than effective. This, however, does not justify either a departure from the use of words and phrases which are acceptable in the courts as having a legal significance or connotation, or a resort to slang or colloquialisms in preference to proper and polite English.

(e) Words should be used in accordance with their proper meanings and pronounced properly. Any doubt as to the correct meaning or pronunciation of a word should be resolved before a moot case by consulting an authoritative English dictionary, as the *Shorted Oxford English Dictionary*.

(f) A wide vocabulary is a big asset. Wide reading in both legal and general literature will assist in its acquisition. It is important for counsel to remember that words form an essential part of his professional equipment for conveying ideas and as such they should be extensive in their scope, used well and not abused.

(g) A modicum of spontaneous humour is permitted as it helps to leaven the argument, but the leavening should be restricted to a modicum. Again, it is to be remembered that the court is not a theatre.

(h) Questions from the bench are a means of testing the strength of counsel's argument and the extent to which he has made himself familiar with its subject matter, as well as testing his capacity to think quickly on his feet and not to become rattled. Such questions are also of assistance to counsel himself as indicating the extent to which the bench is interested in his argument, understands it and is being impressed by it. Often the answers to a series of questions on a point may for all practical purposes conclude the argument in counsel's favour and leave his opponent without an effective answer.

(i) Counsel should at all times keep his temper under control, whatever provocation may be given by his opponent or by the bench. A display of temper is a display of emotion.

(j) While counsel is to be fearless in his advocacy and not allow himself to be stopped from putting a point of argument which appears to him to be valid, he should couple persistence with tact, politeness and discretion. Often he will find it useful to concede to a degree to an argument from the bench and then to raise further matters as warranting consideration in his favour. Once a point is made to appear to him to be untenable, he should concede it and not persist in arguing it. If a point still appears to be tenable after discussion with the bench, but the bench appears clearly to be against him, he should graciously discontinue his argument on it and at the same time ask the bench to note the point. Thereby the point will be still available to him on an appeal.

(k) All questions should be answered truthfully, and without equivocation, even if by doing so counsel reveals an inexcusable ignorance on the subject matter of the question. This course is not only a duty to the court, it is to counsel's advantage. Remissness in research may be overlooked, but not lack of integrity.

Summary

- Preparation wins cases.
- Don't recite the facts unless they are necessary to your argument.
- Don't read an essay; have notes in point form.
- Don't state your own belief or opinion; submit, suggest or propose only.
- Give an impression of a structure to your argument.
- Remember, you only have 20 minutes, so go for the jugular.