MOOTING
THE TECHNIQUES OF PERSUASION AND PREPARATION

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Introduction

The opportunity to participate in the Law School Mooting Competition provides a golden opportunity to develop advocacy skills. The continuing popularity of the Mooting Competition shoes that it can also be fun. The establishment of a separate competition for first year students is an excellent step. I congratulate the organisers on taking it. The tight time frame within which the moots are run puts a premium on the techniques of persuasion and preparation. These techniques are the essential equipment of any successful advocate.

The techniques of persuasion require a consideration of advocacy, the duties of the advocate, behaviour in court, and knowing where one is going. The techniques of preparation require a consideration of the nuts and bolts which are necessary to the development of a capacity to persuade.

Advocacy

Thirty years ago, when first presiding as Chief Justice of the High Court in Melbourne, Sir Own Dixon said:-

> "… the profession of advocacy affords the greatest opportunity of contributing to the administering of justice according to law. There is no work in the law which admits of a greater contribution. The community owes a duty to a Bar composed of men who, being conscious of the dignity of the profession of advocacy and possessing a proper legal equipment, conduct causes before the courts of justice from the very firm ground on which it is the tradition of the independent Bar to stand."

These comments are equally applicable to any budding advocate participating in a law moot.

You will notice that the subject of this lecture is not "The Art of Advocacy". Nor is it "The Art of Persuasion". It is "The Techniques of Persuasion and Preparation". Lord Simon in his Foreword to *First Steps in Advocacy* by Leo Page defined "advocacy" as "The Art of Persuasion", but CP Harvey QC in *The Advocate's Devil* attacked this definition as "vague and specious". He said that it was vague because it drew no distinction between two forms of persuasion – you may persuade someone to believe in a certain state of things or you may persuade him to act in a particular way irrespective of his beliefs. He said it was specious, because "to talk of it as an art suggests, somewhat subtly, that advocacy is necessarily cultured and gentlemanly rather than crude and disreputable." Harvey suggests that a cynic might define advocacy after Steven Potter as "Spokesmanship, or the art of misleading an audience without actually telling lies." There are, however, less cynical views. Lord MacMillan in "The Ethics of Advocacy" in *Law and Other Things* said:-

> "Alike to the citizen seeking justice and to the courts administering it, the existence of a class of trained advocates possessing knowledge of the law, skill in the ordinary presentation of facts, cogency in logical argument, and fairness and moderation in controversy, is indispensable…"

Whether it is an art or not advocacy is a method of persuasion, which involves the use of techniques. Demagogery and salesmanship both use methods of persuasion which are calculated to induce a state of belief as well as a course of action. It is as well to bear in mind that while advocacy may be directed to similar ends, there are restrictions upon the means which may be employed. The demagogue typically appeals to fear, sentiment and prejudice. The salesman normally appeals to greed or sheer commercial gullibility. If has been suggested that the advocate appeals to reason. Judge Parry in *The Seven Lamps of Advocacy* described the advocate as "the priest in the Temple of Justice". To those who find it easy to be persuaded of the distinction between the advocate, the demagogue and the salesman, Harvey, again the cynic, said:-

> "Reason, attended by Mercy and Discretion, may be the presiding deity, but there are a number of less respectable demi-gods or demons, including Fear, Distraction, Sentiment and Prejudice, who are often worth an invocation."

Harvey reminds us that judges and juries are human being who are susceptible to persuasion by techniques whose foundation is not exclusively in logic.

The Advocate's Duty

The duty of the advocate is to say all that can be fairly said on behalf of his client irrespective of his own private opinions. Lord MacMillan sums up the position of the advocate in this way:-

> "In advocacy what the advocate says is not presumed to be, and ought not to be, the expression of his own mind at all, and those whom he addresses are not entitled to believe, and do not believe, anything of the sort. In pleading a case an advocate is not stating his own opinion. It is no part of his business, and he has no right to do so. What is his business to do is to present to the Court all that can be said on behalf of his client's case, all that his client would have said for himself if he had possessed the requisite skill and knowledge. His personal opinion either of his client or of his client's case is of no consequence. It is the business of the Judge of the jury to form their opinion of his client and his client's case. It is not for the counsel himself to prejudge the question at issue. His duty is to see that those whose business it is to judge do not do so without first hearing from him all that can possibly be urged on his side."

Lord MacMillan's views of the duty of an advocate explain why it is that counsel makes submissions to the Court rather than stating his opinion or telling the Court what he thinks or believes. That is why propositions are put by saying "I submit …" or "In my submission …" rather than "I think …" or "In my opinion …" The converse of this is that, while it is perfectly correct for a Judge to probe the advocate's submissions and the arguments he employs to support them, it is not correct for a Judge to try to find out what counsel really does think. Henry Cecil, in *Brief to Counsel*, recounts the occasion when a Judge was considering a difficult point of law in a case in which one of the advocates was of great experience in the particular branch of law concerned. "I wish I could ask you what you really thought", said the Judge.

I have heard a number of people say "I think" or "In my opinion" under circumstances where they appear to treat those words as synonymous with "In my submission". It is the duty of the advocate to make whatever submission can fairly be made, whatever his personal thoughts or opinions. It is very important that this be appreciated as much by the Court as by the advocate. This does not mean that there should not be discussion between Judge and advocate with respect to the merits or otherwise of the submission. This is to be encouraged. There is nothing more frustrating than addressing an argument to a Judge who remains totally silent from beginning to the end. It is even worse when, eventually, you say "I hope Your Honour has followed my submission" and the silence continues without judicial interruption. Fortunately, this is rare but it does occur.

Behaviour in Court

Not so long ago Lord Denning MR retired after a record 38 years on the bench. It is fascinating to think of all the counsel he must have observed appear before him. Nearly 30 years ago when I was a student I went on occasions to the Law Courts in England and was as much struck by Denning's unfailing courtesy to counsel as by the incisiveness of his interventions in the argument. Seven years ago I went again. There was no noticeable change in his demeanour. Every law student has read his judgments. All have become familiar with his short sharp sentences. It is interesting, therefore, to read what Denning wrote in 1979 in his *Discipline of Law* about behaviour in court. He said:-

> "… Whatever the tribunal, you must give a good impression. Your appearance means a lot. Dress neatly, not slovenly. Be well-groomed. Your voice must be pleasing, not harsh or discordant. Pitch it so that all can hear without strain. Pronounce your consonants. Do not slur your words. Speak not too fast nor yet too slow. All these things are common place but they are so often forgotten that I warn you against the mistakes I see made daily. No hands in pockets. It shows slovenliness. No fidgeting with pencil or with gown. It shows nervousness. No whispering with neighbours. It shows lack of respect. No 'er's' or 'umms'. It shows that you are slow thinking, not knowing what to say next. Avoid mannerisms like the plague. It attracts attention. Don't be dull. Don't repeat yourself too often. Don't be long-winded. All these lose you your hearers; and once you have lost them, you are done for. You can never get them back – not so as to get them to listen attentively.
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> One thing you will not be able to avoid – the nervousness before the case starts. Every advocate knows it. In a way it helps, so long as it is not too much. That is where I used sometimes to fail. My clerk – as a good clerk should – told me of it. I was anxious to win – and so tense – so that my voice became too high-pitched. I never quite got over it, even as a King's Counsel. No longer now that I am a Judge. Then tension is gone. The anxiety – to do right – remains."

It is a mistake to think that the advocate who endeavours to make a good impression from the moment he stands up is a mere sycophant. He is using Lord Denning's first technique of persuasion. In this respect, it may only be good manners, but it is a good rule never to speak while the Judge is speaking to you. You should almost never interrupt while your opponent is speaking. Occasionally it may be necessary to interrupt, but it is rare that this need be done in

the middle of a sentence. Unfortunately, one sometimes finds that Judges interrupt counsel in the middle of sentences. They shouldn't, and if they do their example should not be followed.

It has often been said that there are two main ingredients to successful advocacy. They are preparation and presentation. There is only one standard of preparation I have ever employed. One must work towards knowing more about the subject in hand than anyone else in the room. That is one reason why success in the law has often been described as 90% due to preparation.

Sound preparation based upon experience will mean that each sentence must be made to count. It is important to remember that a sentence must have a beginning, a middle and an end. It should be built around a verb. I am told that one of the greatest difficulties encountered by those responsible for preparation of court transcripts is to construct sentences out of the stream of words uttered by some counsel, and even some Judges. A few years ago there was apparently an informal competition conducted by the transcript people in our courts. They made their private awards to counsel and judges based on their ability to construct and finish sentences. Perhaps it would be helpful if their assessments were made known to members of the profession. This might raise the standard of sentence construction. The major obstacle to be overcome in this task is the use of the parenthesis. The following example illustrates the point:-

> "Now your Honour I propose to deal with the evidence of the plaintiff – but before I do so I need to remind you what the defendant said at page 346 of the transcript – I think it was in chief but it might have been in cross examination – and it bears upon the point made in paragraph 4 of the statement of claim – which I told your Honour about in opening at page 12 of the transcript and I don't wish to weary your Honour by dealing with it now – but on second thoughts perhaps again I should just read that passage in the transcript [reads] – and now your Honour I propose to deal with the evidence of the plaintiff etc. …"

Court ritual is sometimes criticised, largely because many of its aspects in terms of clothing and mannerism preserve fashions of the 18th and early 19th century. Hence, the traditional announcement of appearances, "May it please your Honour I appear for the plaintiff". Does it matter whether it pleases him or not? We ought to be happy that it does not displease him. Why address the Judge as your Honour? One might well ask why address the Queen as "Your Majesty" or the Governor as "Your Excellency"? The answer is that rank necessarily carries with it a style and title and an accepted or traditional mode of address. Until all are agreed upon change, the safest course is to follow the convention. After all, you are perfectly entitled to expect that the Court will address you as "Mr X', "Miss Y" or "Ms Z", whichever is the title you have adopted for yourself. Likewise it is in accordance with convention that when the Judge is ready to hear you he will say "Yes, Mr X" (or as the case may be). That is your signal to speak and there is no harm in commencing your address with "May it please your Honour" or what is now becoming more common "If your Honour pleases". The latter, however, was more frequently used in the past either to signal to the Judge that you had concluded your speech or your acceptance, however grudgingly, of a ruling made against you in the course of the case.

Keeping it Short

Judges are always very conscious of time. McCardie J in *The Law, the Advocate and the Judge* tells a story of a northern circuit silk, who on being reminded by the Chief Justice that "time is passing" and that "there are other cases on the list" rejoined with:-

> "Yes my Lord, there are, but not one save this in which my client takes the slightest interest."

These stories make great material for after dinner speeches, but it so rarely pays to have a quarrel with the Judge that beginners are well-advised never to do so. The Judge is often right about wasting time, but not always. When judicial patience wears thin it is necessary to pacify the judge and carry on. Harvey suggests that:-

> "Sometimes this can be done by means of a joke or other diversion but more often than not the only resource for counsel is to apologise more or less abjectly and go off on a different tack in the hope that in a little while there will be a change of wind which will enable him to come back to the point he was trying to make. Of course the ideal is for the advocate to conduct his case in such a way that the Judge never gets impatient. But this is a counsel of perfection which cannot always be applied."

The Judge will often tell you that he has read all the papers. This is often the case in commercial cases where a bundle of correspondence has been provided. In such a case it may be necessary to "remind" the Judge about those aspects of the papers of correspondence which he has read and to which you wish to draw his attention.

One of the most recurring suggestions to advocates is "keep it short". This is applicable to trials but is more relevant in the context of appeals. It is of particular relevance to the compressed arguments required in law moots. There is an inherent tension between the adoption of this suggestion as a guide and ensuring that the court understands the submission which is being made. Sir Robert Menzies in *Afternoon Light* says:-

> "There can be nothing more irritating to a Judge than to have before him an advocate who cannot distinguish good argument from bad, who argues everything, who recognises and concedes no weakness in his case, who goes on and on and finally leaves the court with a confused mess of ideas and arguments from which the Judge must endeavour to extract some relevance and some help. There are some such advocates. Either they have not adequately mastered their case and isolated the points upon which judgment will turn; or they are afraid to exercise their own judgment by discarding bad argument; or they weakly believe that the quantity of their words will, in the ears of their client, make up for the paucity of their quality."

In reality, what must be done is not so much as "keep it short" but give the impression that one is doing so. It is necessary to carry on until the point of the case has been rammed home so firmly that it cannot be dislodged. If this can be done while creating an impression of terseness and brevity well and good. This is where the short sharp sentences come in handy. Most people know that with most Judges it is usually necessary to get the same point across in three different was before it can be regarded as safely home. This is no disparagement upon the receptive quality of Judges. It is probably a reflection of our imperfection of communication. My own experience as a student was that that I could never be sure I had grasped a point until I had read the essentials over three times. The technique of making the same point three times can be traced back almost in living memory to Sergeant Sullivan who

had a rich Irish brogue. Apparently, in the Court of Appeal there developed a judicial convention which permitted him to say the same thing a second time in order to ensure that he had been understood, and then a third time to guarantee that what he had said would not be forgotten.

It used to be said that when Lord Atkin was on the Court of Appeal he would ask, within the first five minutes, counsel "What is your best case?" Lord MacMillan in his *Observations on the Art of Advocacy* says:-

> It is, perhaps, a moot point whether you should state your best point at the very outset – put your best foot foremost … The Judge is always in a hurry to reach the most important point. But I am not sure that he should always be gratified. There is something to be said for keeping your vintage til your guests have been duly prepared for its reception."

The usual method of saving your big point on an appeal is to begin by discussing the argument which succeeded in the Court below and expounding the serious consequences which will follow if that argument were to be generally accepted. There is always a possibility that one of the Judges will interrupt you by pointing out the fallacy of this argument. You may then be tempted to say with just a hint of glee, "Your Honour has anticipated the submission I am about to develop". Avoid the opportunity. Let the Judge bask in the impression he thought of the point. Then you create an even more favourable impression by appearing to develop it spontaneously. This may create an opportunity to make your point at somewhat greater length than might otherwise have been the case. Another approach is to refer to a number of authorities which are not easily reconciled and point out that the help of the Court will be needed to sort them out. Another approach is to think of a particularly bizarre example which illustrates the point you are trying to make and involve the Judge in it personally. "Imagine if your Honour was a class B front end loader driver …" Most of these techniques are but being able to say the same thing at least three times without testing patience.

Knowing Where You Are Going

Whether you are about to stand up and make an opening address, embark upon an examination-in-chief or cross-examination, or embark on upon a closing address, there is little point in starting if you do not have a clear objective of what it is you wish to achieve. This is absolutely essential in a mooting situation. Hence, a prediction must be made about the cardinal points which must be established if the case is to succeed. Every advocate must ask a number of questions. Are they made in the pleadings? To what extent can they be extracted by witnesses to be called on your side? To what extent must they be brought out in cross-examination of the other side? How can the case be best presented to show, or at least to give the appearance that, the "merits" are on your side? Good notes are essential for this purpose. It makes no difference whether the essential points are of law or of fact. In 1917 Richard Muir was the Senior Crown Prosecutor at the Old Bailey. His Notes for the Prosecution of Dr Crippin are a remarkable document published in *The Law as Literature* (Louis Blom-Copper, ed.). They are an extraordinary chronological summary of the essential facts and inferences from them which the jury were invited to accept as the basis of conviction. They illustrate what is meant by "mastering the brief".

While it is of the utmost importance to list the essential points to be made at any stage of the case, so that the advocate always has a clear picture of where he is heading, it is importance to keep an eye on the wind in case of a change of direction. In my view, this is the hardest aspect

of advocacy. It is always easier to see which way the wind is blowing on appeal than at trial. Sometimes the shifts at trial are dramatic but, on the whole, the change is brought about point by point which, unless countered at an early stage, will go so far so that the case is irretrievable. I probably have as much experience at seeing cases slip away as anyone. One mechanical means that I used was to keep checking my list of basic points which must be made good to succeed and, at the same time, to organise the brief on a looseleaf basis so that additional notes could be inserted and comments made on the left hand page of the brief opposite the original notes. Hilbery J having likened the advocate to an actor said:-

> "But he is an actor who creates the part he plays. He must select the words that make his lines … he must be ready in a moment to alter, to cut and to recreate, to suit the sudden and unforeseeable events of the day's hearing, and these changes must make without them being apparent to anyone."

The really great and experienced advocate may be able to do these things on the spur of the moment. Otherwise one must rehearse and go over again and again exactly what they are going to say in any on the possible contingencies. Many of the great English advocates were well-known for the rehearsals which they held in their chambers.

Initial Preparation: Nuts and Bolts

Under the current mooting rules you will have 25 minutes to put your argument. This will require a very concentrated effort. The task is not an easy one. How should you prepare?

Study the facts carefully. Try to identify the legal problem thrown up by the facts. What question or issue will the case turn on? What is required to solve the problem in favour of your client? What points of fact and law must be made good in order that your client may succeed?

Let me illustrate the approach to preparation by reference to a specific example. You are asked to argue the case for the plaintiff. The plaintiff sues on an oral agreement for a lease entered into on 18th March 1988 of a shop known as Blackacre to be used as a fish and chip shop. The lease was to be for a term of two years from 1st April 1988 at a rental of $500.00 per month payable monthly in advance. There is no written evidence of the agreement. The plaintiff was let into possession for 2½ months and paid 3 months rent. Over one weekend the defendant retook possession and put the plaintiff out into the street. The plaintiff has claimed specific performance of the agreement and damages for breach of contract.

The question is whether an oral agreement for a lease which has been partly performed can be enforced by way of a decree of specific performance and/or damages for breach of contract. What are the essential terms of an enforceable agreement to the lease? Any text book on Landlord and Tenant will tell you that the essential points which must be agreed are:-

(a) identity of the parties;
(b) identity of the subject matter;
(c) commencement date and term; and
(d) the rent.

All these points seem to have been covered in the present case. Were there any other matters still the subject of negotiation which the parties themselves in fact regarded as essential? The defendant says it was a condition precedent to the agreement that the tenant obtain town planning consent to the use of the premises as a fish and chip shop. This is denied by the

plaintiff. No such approval was in fact sought or obtained. If there was such a condition precedent, was it waived by the defendant letting the plaintiff into possession?

An agreement for lease is one of those agreements in respect of which writing is required under s.4 of the *Statute of Frauds* and s.34 of the *Property Law Act 1969*. The defendant will no doubt plead the absence of writing as a defence. When you look up these provisions and the relevant authorities you will find that they do not apply where the agreement has been partly performed by the tenant taking possession and paying rent which has been accepted as such. What are the stated facts and the evidence in the present case which are necessary to establish reliance upon the doctrine of part performance to overcome the absence of writing? What are the authorities that you need to cite to support the proposition that specific performance and/or damages may be awarded for breach of an oral agreement for a lease which has been partly performed?

In the present case you will need to look at the authorities on what it required for:-

(a) a concluded agreement and, in particular, the essential terms for a concluded agreement for a lease;
(b) waiver of a condition;
(c) the requirements of writing and the application of the doctrine of part performance; and
(d) damages in addition to or in lieu of specific performance.

Preparing Your Speech

You should then structure your argument on each of the areas on contention dealing with the pleadings, the facts and the evidence and then the law. At the end prepare your beginning. State what the action is about, identify the issues raised and give a summary of what you say about them. How you note these things down is entirely a matter for you. But your notes should enable you to say something along the following lines when you get to your feet:-

> "May it please your Honour. This is an action for specific performance of an oral agreement for a lease which the plaintiff says was partly performed. The plaintiff claims damages in addition to or in lieu of specific performance. The issues which have been raised by the pleadings are:-
>
> (1) Was there a concluded oral agreement in respect of all matters essential for a lease?
> (2) If so, was it a condition precedent to the agreement that town planning approval be obtained by the plaintiff for use of the premises as a fish and chip shop?
> (3) If so, the approval not having been obtained, was the condition waived by the defendant letting the plaintiff into possession?
> (4) In the absence of any evidence in writing of the agreement, was the agreement partly performed?
>
> The plaintiff's case is that on or about 18th March 1988 (on the morning after St Patrick's Day) at Steve McHenry's Nedlands Park hotel the plaintiff entered into an oral agreement with the defendant for the lease of a shop known as Blackacre to be used as a fish and chip shop. It was agreed that

the term of the lease would be for two years from 1st April 1988 at a rental of $500.00 per month payable monthly in advance.

The defendant has pleaded the absence of writing. There was no note or memorandum of the agreement. The plaintiff has met that plea by relying on the doctrine of part performance. The acts of part performance were:-

(a) the defendant let the plaintiff into possession on 1st April 1988;
(b) the plaintiff paid and the defendant accepted rental of $500.00 per month on 1st April, 1st May and 1st June 1988; and
(c) the plaintiff, to the knowledge of the defendant, used the premises as a fish and chip shop.

The defendant has pleaded that the oral agreement was subject to a condition precedent that the plaintiff would obtain town planning approval for the use of the shop as a fish and chip shop. The plaintiff denies any such condition precedent. Alternatively, the plaintiff says that if there was any such condition precedent, it was waived by the defendant letting the plaintiff into possession.

In breach of the agreement the defendant on or about 14th June 1988 wrongly ejected the plaintiff from the premises and refuses to perform the oral agreement.

The plaintiff remains ready willing and able to perform his obligations under the agreement. The plaintiff has lost the profits he would have earned from the business during the period he has been out of possession.

The plaintiff submits that he is entitled to specific performance of the agreement and to damages in addition covering the period from his ejectment until he is able to recover possession. Alternatively, if specific performance is refused the plaintiff claims damages in lieu of specific performance…"

The argument on behalf of the plaintiff should then be developed on each issue in turn. The main propositions of fact and law would be dealt with, supported by authorities where necessary. This means you will need to decide which cases you will rely on. Decide which you need to read from those to which only a reference need be made. Study the facts of each case. Identify the actual point decided. In view of the brevity of your argument it should only be necessary to actually read one or two key passaged from your best one or two cases. Check whether the passages formed part of the *ratio decidendi* or were merely *obiter*. You should write a separate note on each case. Bear in mind the level of the authority. Is it binding on your court or merely persuasive or highly persuasive?

Try to anticipate your opponent's argument. What cases is he likely to rely on? What must he establish in order to succeed? You should try and meet the cases against you in your argument. Can they be distinguished? What can be said against the propositions of fact and law upon which your opponent may rely?

If you are a beginner you may need to write down your whole speech. Some people find it necessary even when they have ceased to be beginners. When you have done that try to get it

into note form with headings and list the relevant authorities for each point. You may need to do several drafts of this summary before you are happy with it. It will get better each time. Try a full dress rehearsal to check the timing. You may even find it useful to do a rehearsal in front of a mirror. Try it on a friend.

Make sure that what you need to say when you first stand up is set down in full just in case you "dry up". People sometimes forget all in the first moment of panic. It will help your confidence if you have the words there in front of you as you begin. You will first have to give your appearance. Say, "May it please your Honour [or "the Court"], I appear for the plaintiff."

When you begin, don't forget to say, "May it please your Honour [or "the Court"]. This is an action for specific performance…" Conclude with, "If your Honour [or "the Court"] pleases, they are the submissions for the plaintiff."

Conclusions

In this very short lecture it is only possible to sketch a very broad outline of the techniques of persuasion and preparation. Good preparation simply requires thorough heard work. Above all, the most effective technique of persuasion is sheer credibility. If one does not deceive or attempt or deceive the Court, or directly or indirectly encourage witnesses to do so, or tell an untruth or even a half truth to one's opponent, there can be satisfaction even in failure. Every now and again one may lose a case and perhaps a client by sticking to these rules. The temptation is sometimes very hard to resist. If you have a case that you think you are going to lose and all attempts at compromise have failed, one still has to fight on, not by mere repetition or taking hopeless points, but hammering away at what you have on your side. Every time one loses a case it is important to try and understand how and why it happened. It is always necessary to be polite to the Judge but it may be equally necessary to be firm. One may have to stand up not only for oneself but above all for one's client. Occasionally a Judge will make an unjustifiable criticism of your client. In such a case counsel should not hesitate to protest firmly but courteously. If he is a good Judge and you are right he will apologise. If he is a bad Judge he won't, but at least you have the satisfaction that you have done your best to protect your client. Lord Birkett, who as Norman Birkett KC was one of the great advocates of this century, said that the ideal of advocacy was that:-

> … the ordinary citizens shall always have at their disposal the man who can protect them, can defend them, who can stand up before arbitrary power from whatever court it may come and assert the inalienable rights of the individual to the eternal freedoms."

Birkett himself knew the virtues of "keeping it short". One of his favourite stories was on the man summonsed to pay a bill who appeared in person and told the Judge, "As God is my Judge, I do not owe the money", to which the Judge replied in the shortest judgment on record:-

> "He is not; I am; you do."