THE ESSENCE OF APPELLATE ADVOCACY

OPENING ADDRESS BY THE HONOURABLE MICHAEL MCHUGH AO QC

2012 APPELLATE ADVOCACY COURSE

When I started at the Bar in 1961, the only medium for appellate advocacy was the oral argument. With the introduction of written submissions about 30 years ago, the nature of appellate advocacy has changed dramatically. There is good reason to believe that nowadays the written rather than the oral submissions are the most important component of appellate advocacy. The course you commence today is principally concerned with oral advocacy. I will say a little on that subject, but, in the time allotted to me, most of what I say will be concerned with written submissions in the appellate setting.

However, whether the advocate is constructing a written or oral argument, the essence of appellate advocacy lies in three elements. The first is to have a complete knowledge of the appeal book. The second is meticulous and thoughtful planning of the argument. The third is tailoring your argument, so far as you can, to accommodate the likely reaction of members of the court to your argument.

Preparation

Effective appellate advocacy begins with the drafting of the Notice of Appeal. Unless that Notice has been filed before you come into the case, you should insist on drafting it. It is pointless lodging an appeal unless you know what you want to do and why. The cardinal rule for drafting a notice of appeal is to be selective. If the appeal notice contains too many grounds, the best points are likely to be hidden in a thicket of weak points. The notice of appeal should identify only those errors of ultimate fact or law which affected the result, and the fewer the better. Justice Branson's judgment in *Sydneywide Distributors Pty Ltd & Anor v Red Bull Australia Pty Ltd & Anor* (2002) 55 IPR 354 at 355-356) explains what should and should not go into a notice of appeal.

In drafting a notice of appeal, the first question is, what is the nature of the error? Is it an error of fact or law or discretion? If the only error is one of fact, you have to carefully consider whether it is one which the Court of Appeal is likely to reverse. The prospect of reversal of a finding of fact which depends on the trial judge's assessment of the credibility of witnesses is poor. If the supposed error is one of law, the

prospects of success in the appeal are enhanced. The appellate court is in the same position as the trial judge to determine that issue of law. Misapplication of legal principle and incorrect interpretation of statutory provision are usually the most fertile source of legal error. But they are not the only source of such error. The trial judge may have incorrectly formulated a legal proposition, he or she may have erred in accepting or rejecting evidence or in jury trials in giving directions to the jury. If the error is one of the exercise of discretion, the difficulty of attacking the exercise is high. An appellate court will not interfere with an exercise of discretion unless the appellant can establish one of the grounds specified in *House v The King* (1936) 55 CLR 499 at 505.

One matter that must not be overlooked is whether the error that you now rely on was raised at the trial. An appellate court will allow a point to be raised even though it was not raised at the trial. But it will do so only if it is persuaded that evidence could not "*have been given which by any possibility could have prevented the point from succeeding*" *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438. A final matter which should not be overlooked in determining whether to appeal is whether the error affected the result. Unless it did, the appeal will be denied on the ground that there has been no miscarriage of justice.

The orders sought in the notice of appeal should also be the subject of careful thought and should be drafted with precision. Otherwise you may suffer embarrassment, when the Court points out that what you are seeking is not in your Notice of Appeal. It is surprising how often the orders sought in a notice of appeal do not reflect what the successful party is seeking. Are you seeking the entry of a verdict and judgment, a new trial, a declaration of right or liability, a mandatory order, a reference to a referee or expert or a variation of the orders made in the court below? In framing the orders sought, you should also remember that intermediate Courts of Appeal often have wide powers to end the case without a further hearing. Whether they will do so usually depends on the presence of credibility issues. The court is most unlikely to determine the case itself if it must determine issues of credibility.

Nature of the appeal

An appeal is not a common law right: *Commissioner For Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225. The availability of an appeal depends on statute or Rules of Court. Many rights of appeal are limited by reference to subject matter, the amount involved or in some cases by the identity of the appellant. For example, in criminal cases, the Crown may have no right or only a limited right of appeal. Again many appeals may only be brought by the leave or special leave of the court. This is the case in respect of interlocutory appeals, that is to say, appeals against orders that do not dispose of the case. So it is of fundamental importance to understand what, if any, jurisdiction the Court has to hear the appeal you want to bring.

Standard of review

Before advising the lodging an appeal, it is also imperative that you understand the standard of review exerciseable by the appellate court because the standard of review will be decisive as to whether the appeal will succeed. Sometimes, a statute or rules of court will specify the standard of review but usually it depends on principles worked out in decided cases.

If the case involves a point of law, then the appellate court can do what the trial judge should have done. If the case involves a question of fact, the standard of review is more complex. A finding of primary fact based on credibility of witnesses will be reviewed only where the finding is demonstrably improbable or contrary to other established facts or documents. A finding of fact based on inference is open to review on the basis that the appeal court is in as good a position as the trial judge to make the finding. A discretionary judgment, however, is only appellable in accordance with the principles in *House v The King* (1936) 55 CLR 499 at 505.

The written submissions

No appeal is likely to succeed unless you have done extensive preparation before filing your written submissions. You must master the transcript of the trial or other hearing and the judgment which will be the subject of appeal. You should make a note of every relevant fact favourable or unfavourable to your side. Bear in mind that

to succeed, you must persuade the court that those facts that are, or appear to be, against you are not decisive. You will have to deal with them in your written submissions and at the hearing of the appeal. So make a note of them as well as facts that favour you.

You should also ensure that your research has led you to every statutory provision, case law and secondary materials that are relevant to the appeal. Unless you are a legal genius, you will have to do more than one bout of research, as you think through the law and the facts. If you think you will be relying on a case you find, note it and check its subsequent history immediately. Don't wait until your memory has faded and you have forgotten it. Find out whether it has been followed, criticized, distinguished or overruled?

In the modern era, as I have said, written submissions have become as important, if not more important, than oral argument. Written submissions make the first impression on the appeal court - each judge will read them before the hearing commences. They give the court an overview of your whole case quicker than is possible in an oral argument; they will frequently be referred to when the judges are writing reasons to make sure they have not missed any argument; and, in my experience, they are the last thing that a judge looks at before finalising the judgment.

If you wish to avoid irritating the judges, it is imperative that you read the relevant Rules of Court and Practice Notes concerning written submissions and comply with the directions contained in them. Make sure that the chronology you file is detailed and refers to all relevant matters, and to the evidence including exhibits that relates to them.

Content

Good written submissions will be brief, clear and accurate. They will expound a theory of the case that is based on the evidence, that seems to produce a fair result, that is not inconsistent with accepted law, that is logical and accords with common sense and that explains away any unfavourable facts or opposing legal arguments. You should always attempt to identify the assumptions the judges may make about the case - and your case in particular - so that you can exploit or rebut those assumptions in your submissions. Judges who sit in appellate courts almost always have "*form*" as

evidenced by their previous judgments. Some will be conservative, some will be radical and some will be unpredictable in their approach to deciding cases. When you prepare your written submissions, in most cases you will not know the composition of the court. The High Court is an exception. However, in many, perhaps most, cases, you can make a reasonable guess about the approach of the court. The general approach of the Chief Justice or President or senior members of that court will usually provide a vital clue as to the likely reaction of the court to your submissions.

Remember also that you are in the explanation business. So acquaint the appellate judges with information and arguments – much of which will be new to them - by a step by step process. The greatest sin for a writer is to have the reader feel lost so that he or she must go back and re-read material to understand what you are saying.

Your written submissions should:

- State the issues for decision at the beginning of the written submissions. They should be stated as concretely as possible. ***Stating issues at a high level of generality is seldom, if ever, persuasive. Rather than saying: the issue in this case is whether the trial judge wrongly exercised her discretion by failing to take into account a relevant matter, it is much more persuasive to say, ---the issue is whether the judge wrongly exercised her discretion to extend time by failing to take into account that the evidence showed that two witnesses who saw the collision and would have supported the appellant's version of the accident are now dead. Not only is the latter formulation more informative but its very stating seems to indicate that the judge has wrongly exercised her discretion to extend the time for the plaintiff to sue.***

- State your answers to the issues with a short summary of your reasons for the answers before setting out the argument, so that the court can understand your case in a few sentences.

- Present an Argument broken down with point headings.

It is important that you identify precisely the error which you want to reverse, preferably by a verbatim quote or, if it is too long, by a short summary and always by reference to an appeal book page. It is surprising how often counsel assume that it is sufficient to rely on a statement that the Court below erred on a particular point without showing the Court exactly what the judge said. Too often, appellate judges are forced to say, "*Where do we find that?*"

You should always state your legal or factual proposition before going to the argument in support of it. You should always avoid the court thinking, where is this going or to what issue does this go? If it is a legal proposition, tell the court what it is before you seek to make it good by reference to the interpretation of a statute or decided cases or legal articles. If it is a factual proposition, tell the court what it is before you go to the evidence that shows the proposition is right. And make sure you deal with all cases that arguably support the other side. The best way to deal with unfavourable cases is to argue that the facts of your case are so different that the reasoning in the unfavourable precedent does not apply. You should attack the correctness of an unfavourable precedent only as a last resort. Even the most radical judges will overrule a precedent only as a last resort unless it is demonstrably wrong. In most cases where you must attack the correctness of a precedent to succeed, see if you can show that circumstances have changed since the case was decided and that it would now be decided differently or that its holding has been undermined by later decisions or legislation. Otherwise, you will be forced to criticise its reasoning, which should always be avoided, if possible. Make sure also that you answer the arguments put forward by your opponent. You cannot rely on the inherent strength of your own case.

It is important that the written submissions do not overstate your case. If they do, they:

- Will be a red rag to the Court
- Will be a source of many early questions at the hearing which may be and usually are hostile
- Will produce questions that interrupt the flow of your argument
- Will probably result in your better points being lost in the discussion of your overstated case.

Instead of overstating the case, it is far better to recognise its weaknesses. It is sure to have some. The court will appreciate your candour in recognising and dealing with them in your written argument.

Your written argument should invariably follow a logical order. Your submissions should begin with a **general** but not detailed statement of those facts necessary to understand what the case is about. Those facts, statutory provisions and legal principles dealing with a particular point should be dealt with in the discussion of that point, not in the opening section. Importantly, don't set out statutory provisions or legal principles in the early part of the submissions and then deal with an issue to which they relate many pages later. Appellate judges are busy people, and they do not like to waste time having to turn back to look at and re-study statutory provisions or legal principles which are not firmly in their minds when they come to your argument.

Point headings and sub-headings improve written submissions. They are most effective when they identify the legal propositions for which you contend. They should also identify and incorporate the determinative facts that are essential to your case. They should always be forceful, **argumentative** propositions that advance your argument. You should avoid topic headings such as Negligence, Breach of Duty, Contract and so on. Such headings tell the Court little and do nothing to advance your argument. It is much more persuasive to have forceful, argumentative headings, which taken as a whole summarise your argument.

You should always argue the best points first. If you are for the appellant and begin with weak points, the judges will be wondering whether the appeal is a waste of time. That is not a state of mind that is receptive to allowing an appeal. Each main point in the argument should be the subject of a heading in capitals, and an independent and free standing ground for finding in your favour. The argument in support of each heading should be followed by a series of logical subheadings and sub-subheadings that support the general proposition.

The sub-headings should set out the factual finding or statement of law that you wish to attack together with its Appeal Book reference and a discussion of the authorities or the evidence on which you rely to show the Court that your general proposition is correct and that the trial judge has erred. The written submissions – not the oral argument – are the place for detail – whether it is a discussion of the case law or the evidence on which you rely. To use a painting example, the oral argument is like a

billboard with general statements while written submissions are like a Turner painting of a London harbour scene, full of detail.

In intermediate appellate courts and sometimes in the High Court, it helps to cite identical or analogous factual findings in other cases. This is most effectively done by blending the reasoning and facts of the illustrative case/s with the facts of your case. If there are no such cases, it will probably be necessary to discuss the rationale of the legal proposition for which you contend to show why the factual findings for which you contend are within the rationale. Alternatively, you might show why it is consistent with good legal policy to find that your legal proposition covers your factual contention.

Observe the rules of good writing

You should write in the active voice, as often as you can; passive voice often leads to ambiguities as to who did what. The active voice is more forceful and allows for more concise writing. You can usually eliminate two or three words in a sentence if you change from the passive to the active voice. Writing is most effective when the subject, verb and object of a sentence are close together. Prefer verbs to nouns, particularly weak nouns. Verbs are more forceful. Use concrete nouns – e.g., Holden instead of car, vehicle or conveyance. Avoid nominalizations – verbs turned into nouns. It is much more forceful and shorter to write, "*She resigned*" than "*She submitted her resignation*."

You should use every day words, but avoid slang and jargon. You should keep the sentences short but vary their length. Try to put qualifications, exceptions or modifications in a separate, following sentence rather than loading up a sentence with qualifications, exceptions or modifications. Put main ideas in main clauses and subordinate ideas in subordinate clauses. When dealing with an opponent's argument, it helps to weaken it by putting it in a subordinate clause and your rebuttal in the main clause. You might say, for example, "*Although the defendant says that Dr X said the defendant's opinion was in accord with professional practice, Dr X said that only a minority of doctors would have given such an opinion and that she herself would not have done so.*"

You should also aim to give context to a point or idea before setting out its detail. New information is best put at the end of a sentence after a transitional, contextual introduction at the beginning of the sentence. Try to avoid using adjectives and adverbs, so far as you can. Avoid prepositional phrases introduced by "*of*", "*to*" and "*after*" or "*in relation to*". Adjectives, adverbs and prepositional phrases clutter your sentences with unnecessary words and rob them of vitality. You should seek to avoid clutter by eliminating every needless word. And always avoid using barbarous legalisms such as "*thereof*", "*hereinbefore*" and the word "*said*" when used as an identifier.

Organise your paragraphs so that the first sentence introduces a new point, usually a legal or factual proposition and make sure that the rest of the paragraph develops that point.

Finally, check all your references, legal and factual, and the wording of quotations. **Special leave applications**

The written argument is more important in leave applications, particularly in special leave applications in the High Court, than is the oral argument. In over 90% of cases, the written argument in the special leave application is decisive of the grant of an appeal.

As I said in *Milat v The Queen* [2004] HCA 17 at [29]:

> *"... the written submissions are the primary vehicle for persuading the Court that there is a point worthy of a special leave grant. The 20 minutes allotted for oral discussion are not a substitute or supplement for the written argument. The principal function of the oral argument is to enable the Justices to test the arguments of the parties by a Socratic dialogue, to ensure the parties deal with the key points of each other's case where their written submissions do not do so and to enable parties to emphasise particular points in the written submissions if they wish. Oral argument is not granted to enable a party to introduce new arguments."*

The oral argument of the appeal

Much of what I have said about the written submissions applies to the oral argument on appeal. If you are for the appellant, you should begin your argument with a statement of the issues. Then state the answer to those issues in summary form. Sometimes, instead of beginning with the issues, the case will lend itself to a humorous, moving or exhilarating introduction which is very effective. Walter Sofronoff QC began his successful argument for the Wik people in *Wik Peoples v Queensland* (1996) 187 CLR 1 by painting a moving word picture. He described the Wik people going about their traditional lifestyle in 1915 and 1919 oblivious to the fact that 800 miles away on the same days in those years, events were occurring at the Land Titles Office in Brisbane that concerned their land. At the Titles Office, white Australians were registering leases that the State of Queensland later claimed thereupon extinguished the native title of the Wik people to the land they had lived on and used for hunting and fishing since time immemorial and despite the fact that there was minimal, if any, subsequent "*activity on the part of the pastoral lessees in exercise of their leashold rights*."(ibid at 218). That powerful opening showed the injustice that would be done to the Wik people if Queensland's claim was upheld.

As you develop your argument, make sure you distinguish between good and weak points. Either abandon the weak points or inform the court that you rely on your written submissions in respect of those points.

It is important to tailor the argument, so far as it can respectably be done, to fit in with the perceived approaches of at least a majority of the judges. As Justice Sackville has pointed out, the multi-membered nature of appellate courts (Appellate Advocacy, (1996) 15 *Australian Bar Review* 99):

> *"...means that the members of the court to be persuaded will not necessarily be, and often are, not, of one mind. Part of the advocate's art is to understand, so far as he or she can, the temperament and judicial personality of each member of the court. This task is often more challenging than where the court consists of a single judge. Arguments that are received with scepticism or downright hostility by one member of the court may be attractive (or even, by their very response, become attractive) to another."*

Try to be as brief as you can. But if necessary, do not hesitate to re-state a submission if you think the court has not grasped its import. Counsel will often say, "*I'm not sure that I put that point clearly enough. What I am saying is...*"

Questions from the Bench should be welcomed because it gives you the opportunity to deal with issues that may be troubling the judges. Socratic dialogue is at the heart of the appeal process. Before the hearing, you should spend a good deal of time preparing your answers to the questions you anticipate that you will get from the Bench. It will pay dividends because it gives the Court confidence that you are a counsel who has given careful thought to the case and its problems and that your solution to those problems is probably the best solution. You must expect, as a minimum, questions concerning the other side's case. Solicitors and counsel should work together to anticipate and work out answers to difficulties and potential objections to your argument. Whenever possible, you should try to turn hostile questions to your advantage by using your answer to them as a platform for further elaborating your argument.

If you are for the respondent, you must grapple with the appellant's case as quickly as you can. Sir Anthony Mason has said ((1984) 58 ALJ 537 at 543):

> *"It is vital to make those points which damage that part of the appellant's case which seems to have attracted the Court, and it is important to make those points without delay. There is an element of anti-climax in beginning with inconsequential matters and it may convey the impression that there is no real answer on the critical issues."*

There is nothing more anti-climactic in an appeal, after a persuasive argument by the appellant, than counsel for the respondent rising to his or her feet and saying something like, "*I want to correct the date that appears in footnote 12, the reference in footnote 42 and the quotation in footnote 73*" and then go on to make the corrections. I have seen such occurrences on scores of occasions. Justice Kirby, who used to sit next to me in the High Court, would turn to me and we would shrug our shoulders in bewilderment at the lost opportunity to make an immediate impression on the minds of the judges.

There are some fundamentals that must be observed in arguing an appeal. What I am about to say, I learnt nearly 40 years ago from Frederick Weiner's book, Effective Appellate Advocacy, which is now out of print but which I regard as the best book written on appellate advocacy. They are:

- Speak so that you can be heard.

- Avoid the monotone or mumbling.

- Use the pause when you want to emphasise a point. The sudden silence makes every member of the court sit up and listen to your big point.

- Make your opening effective. If you are for the appellant state the issues in a way that suggests to the judges that law, fact and justice require the appeal to succeed. If you are for the respondent seize upon the central feature of your case and drive it home.

- In explaining the facts to the court, ask yourself: How would I learn them? What would I first want to know? What would I want to know next? Explain the facts of the case in the same way to the court.

- Have the appeal book tabbed with index tabs so that you can readily find any material portion of the record.

- Don't read your argument. Engage with the Court. Prepare a set of notes to guide your argument. They should not be so extensive as to tie you down to a prepared text but they should be extensive enough to state the key points in your argument, with references to the transcript, statutes and cases and case citations.

- Don't let your argument get lost in details. Written submissions are the place for detail. Keep the reading of cases to a minimum and never read more than three or four sentences from a quotation. If you must rely on a long passage, give the court the page references, let the court read the relevant passage and then make any comments you wish concerning that passage. Mr David F. Jackson frequently adopted that technique in my time on the High Court. It is often sufficient to simply refer the court to those parts of your written submissions commenting on the passage in question.

- When you are in Reply for the appellant, go for the jugular and concentrate on the big issues. The Reply is one of the appellant's major weapons. You should never forego the opportunity to make a Reply. It is generally accepted that Sir Garfield Barwick's greatness as an appellate advocate was largely due to the effectiveness of his Replies. A Reply is always more effective if it can be tied to the Respondent's conclusion.

Appellate advocacy is an art. As in other fields of endeavour, some advocates will be better artists than others. But just as the best artists, whether they are painters, architects, musicians or writers, are almost always masters of the techniques of their calling, so the best appellate advocates – whatever their style - are masters of the techniques of appellate advocacy. I hope that what I have said will assist you to understand some of those techniques and thereby improve your art as an appellate advocate.

M H McHugh AC QC

Revised October 2012.