



After Dinner Address

Young Lawyers' Advocacy Weekend 2009

The Duties of Advocates

The Hon Wayne Martin
Chief Justice of Western Australia

23 August 2008

I would like to commence this evening by acknowledging the traditional owners of these lands, the Noongar people, and by paying my respects to their Elders past and present.

It is an honour and a privilege to have been invited to address this year's gathering of advocacy students and their trainers. All present have agreed to give up their valuable weekend for the purpose of improving the standards of advocacy within the legal profession of Western Australia. That is a very important and, indeed, noble objective which is in the best interests of our profession.

Profession v Business

Those of you who have attended admission ceremonies over which I have presided will have heard me speak on the importance of the distinction between a profession, such as the law, and a business. To those I apologise for repeating the point. But for those who have not heard the proposition before, it is, I think, of sufficient importance to justify repeating it to those who have.

The vital distinction between a profession and a business is that a profession is carried on for the primary purpose of benefiting the

community and not just the derivation of profit for the proprietor. That is not to say that those who practice professions are not entitled to remuneration. Far from it. The vital distinction is that of primary purpose or objective. The primary purpose or objective of the business proprietor is to make a profit. That is not, or at least should not be, the primary purpose or objective of a professional. And if it's any comfort, long experience shows that a professional focus on service to the community will be followed by rewards both financial and non-financial.

Advocacy

So what is the significance of this distinction to your role and function as advocates? The distinction is not entirely unrelated to the differential duties which you owe as advocates. Of course, you owe duties to your clients, who remunerate you for your services. But you also owe important and overriding duties to the court, which, of course, represents the community and the community's interest in the achievement of justice. So the skills you are learning this weekend as advocates must be used not only in the furtherance of your duties to your clients, but also in the furtherance of your duties to the court, and through the court, to the community.

Put more directly into the context of an advocate's responsibilities, the point I am trying to develop is that there is an important distinction between the professional skills of an advocate and what might be called "cute tricks". A professional advocate will hone and use his or her skills in the search for the truth, because ascertainment of the truth is a necessary step on the path to justice. Obviously, a true professional would not use their eloquence, their intellect, their forensic training and skills, or the procedures of the court to obscure or conceal the truth. Most often, advocates will have, by reason of their training and experience, their knowledge of the court and its procedures, or perhaps their general educational background, a distinct advantage over the witness being cross-examined. It is entirely proper to use that advantage in the pursuit of the truth. It is improper to use that advantage to obscure, conceal or distort the truth. These are, of course, fairly basic ethical principles which will be known to you all, but again, because they are so important, it doesn't seem to me to hurt to expressly acknowledge them from time to time.

The Adversarial Model

Of course, the context in which your skills as advocates are to be applied is what is often described as the adversarial model of litigation, which we

inherited from our imperial predecessors. There are some aspects of that model that I think merit consideration when you are giving attention to your professional duties and responsibilities as advocates.

The first point to be made is that the model is based on a premise which is often false. That premise is that the truth is best ascertained by allowing two or more parties with equal access to information and equal capacity to present their argument to present the court with competing versions of the facts and law, which will enable the court to assess the relative merits of each version, and choose that which is correct. Put in those terms, the false assumptions are obvious. They are that each party to a litigation has equal access to information and equal capacity to adequately and properly present that information. Often the resources available to parties to litigation are quite unequal. In that circumstance, the adversarial process has the capacity to exaggerate the inequality of the parties' resources and promote injustice. This is where there is an apparent tension between your duties to your clients, which include utilising all of their available resources in the furtherance of their interests, and your duty to the court. There are no hard and fast rules for the resolution of that tension. The proper course to follow must be a matter for judgment in each case. It is, however, important that you remember that the adversarial process is

premised upon equality, and that utilisation of your forensic skills and resources can result in imbalance and inequality, and cause injustice.

The next point to note about the adversarial process is that it is economically inefficient, because it results in double handling if there are two parties to litigation, or triple handling if there are three and so on. That is because each and every party to the litigation prepares and researches the same issues. The more issues there are, the less efficient the process becomes. The conclusion to be drawn from this observation is that it is in everybody's interests to reduce the number of issues which are prepared for presentation to the court, because that reduces the inefficiency and the cost (and also the time taken by the process).

Which leads me to my third observation about the adversarial process, and that is the very real danger that it can obscure, rather than elucidate the real issues that arise between the parties. That is because adversaries tend to seek out issues which will give them an advantage over their opponent, even if those issues are not the real issues between the parties. This natural tendency exacerbates the risk of multiplication of issues, which in turn multiplies cost, delay and inefficiency. So as professional advocates, with obligations to the court and the community as well as

your clients, you must endeavour to resist that temptation, and focus on the real issues in the case, and only those issues.

The final observation I would make about the adversarial process is that it is antithetical to the fundamental objective which underpins litigation, or at least civil litigation. The objective of civil litigation is to resolve disputes between parties. But the adversarial process promotes aggression and opposition, and is antithetical to conciliation and agreement. This is another aspect of the fundamental inefficiency of the adversarial process.

In the Supreme Court of Western Australia, about 97% of the proceedings that are commenced in the court are resolved some way other than a trial. Most often, those proceedings are resolved by agreement between the parties. But the vast majority of proceedings commenced in the court are managed as if they will lead to a trial, when in fact we know that only about 3% of those cases will go to trial. So what we should be looking for are systems which encourage the parties to reach agreement sooner rather than later, and thereby save themselves the quite unnecessary expense of preparing for a trial that they will never have. I think we need to be much more discriminatory in the processes that are applied to proceedings commenced in the court, with a view to identifying those

cases where there is a real prospect of a trial, to which the full pre-trial management regime can be applied, and those in which the prospect of a trial is remote, where the focus should be on mediation and conciliation, rather than adversarial posturing, and protracted and expensive pre-trial procedures.

These sentiments are embodied in the systems of case management employed in the Supreme Court. We have consciously evolved the notion of a dual stream of case management, so that the mediation stream runs parallel with any directions for preparation for trial. The old practice of leaving mediation until the last thing before the trial has been abandoned. We actively discourage interlocutory disputes, and insist upon meaningful conferral between the representatives of the parties before any interlocutory dispute will be entertained. We have adopted the principle of proportionality, which requires that the cost and delay involved in the resolution of any interlocutory issue be proportional to its contribution to the just resolution of the case. And our pre-trial directions are aimed at ensuring expert evidence informs and enhances the efficient resolution of the dispute, rather than exacerbates and promotes the continuation of the dispute by the engagement of experts who are paid large sums of money to adopt strongly adversarial positions.

Colonial Days

There is a tendency for every generation to assume that it is the first to encounter and resolve problems like the cost and delay of litigation. In order to demonstrate the fallacy of that assumption, and in the hope that it might lighten up my address, I would like to draw upon some of the events from the earliest days of our colony.

The first Judge appointed in the colony was George Fletcher Moore, who was the first Commissioner of the Civil Court of WA. He migrated to the Swan River Colony in 1830, having previously been a member of the Irish Bar. He participated in a number of expeditions of exploration in the Avon Valley and other areas adjacent to Perth, during which he discovered the river which now bears his name.

I digress to observe that complaints about judicial salaries are not new either. Moore's father wrote that his judicial salary was not such as would:

"afford him a horse - not so much as many noblemen in England pay their servants."

But to return to my theme of the judicial pursuit of expedition, let me quote from Moore's diary of February 1832:

"I have already sat four times: the average number of cases has been about 15 each day; some of them trifling, and some important and complicated; the pleadings are oral; the case is heard in a week after its commencement; judgment is given immediately; the costs of court in each case are very trifling, and a man may have his case tried, judgment given and execution and sale within a fortnight."

In order to prove that this is not just another example of judicial breast beating, let me quote from a newspaper of the time which described the court's procedure in these terms:

"The mode of procedure is peculiarly simple and attended with but little expense. 24 hours notice by summons brings a case before the court - plaintiff and defendant usually appear in person. If judgment is given for the plaintiff execution issues against the defendant in five days which has the effect in five days more of bringing to the hammer his property of any description, real, freehold or personal."

From summons to completion of execution in 10 days is pretty slick by any standards.

And Moore had some interesting cases. The first defamation case in the colony, *Lewis v Samson*, was heard in June 1832 and resulted in an award of 39 shillings in damages (the distinction between nominal and substantial damages was then set at 2 pounds). However, the plaintiff in that case, Lewis, was obliged to give up his 39 shillings when that amount was awarded against him as defendant in the next defamation case, which was brought against him by William Nairne Clark, who was a local legal practitioner. Clark complained that Lewis had called him, "A pettifogging lawyer and thief" (a multiple tautology if there ever was one) in the street at Fremantle.

Clark sued again the following year complaining of a notice on the door of a billiard saloon which read:

"If a man named William Nairne Clark wishes to keep good order in society, he will not again appear at this billiard table."

The jury obviously considered that Clark hadn't taken the hint from his previous nominal award of damages, and on this occasion awarded him only one shilling in damages and one shilling in costs.

Clark was a colourful character who went on to publish the *Guardian Newspaper*, which was described by its rival, the *Perth Gazette*, as having:

"Carried on its infamous traffic in personal abuse and slander ... and is made the medium of the editor's own passions, his peaks, personal prejudice and egotism."

Nothing much seems to have changed in the media in the last 150 years or so.

The paper was not a happy venture for Clark, however, and he fell out with his partner, one G J Johnson, which resulted in a dual. Johnson died of his wounds and Clark was tried for murder, but fortunately the jury was more sympathetic on this occasion, and Clark was acquitted.

However, this was not the end of Clark's turbulent career. His wife left him and moved in with his good friend and former partner, William Temple Graham. This moved Clark into the field of law reform because there was at that time no law of divorce in the colony of Western Australia. Clark petitioned the colonial secretary for the passage of such a law, and in due course, his entreaties were answered.

In the meantime, as was perhaps to be expected, there were proceedings in the Civil Court between Graham (the wife stealer) and Clark. Clark won. Graham expressed his view of the outcome in such strident terms that he was fined for contempt of court. Graham also seems to have been a somewhat intemperate character, because a little later he was horsewhipped in a public street by a Mrs Collins, who was later fined 50 shillings for her efforts. However, Graham's popularity in the colony was such that Mrs Collins' fine was paid by a fund created from public subscriptions.

And complaints against Judges are not new either. Later in the life of the colony, in 1886, a Mr Horgan, a legal practitioner, gave a speech in which he called for the appointment of a Royal Commission of Inquiry into the Magistrates Courts which he said would:

"Weed out the corrupt, vindictive, mulishly wrong headed, eccentric buffoons who preside there, and who cruelly and inconsistently torture and punish as their whims incline."

And our predecessors were not averse to hard work, in the form of long sitting hours. One of my predecessors, Sir Edward Stone, records that the criminal court very seldom adjourned before 10 pm. He also recorded that:

"Knowing the late hours kept by the court, the Registrar, who was a very methodical gentleman, always brought refreshments in the shape of sandwiches and a little flask of wine. After a short adjournment, he would partake of this and then indulge in 40 winks."

Somewhat earlier, in 1841, the jury appeared to have adopted the same approach as the Registrar. The *Perth Gazette* reported that:

"Towards the close of the proceedings, about 3 o'clock in the morning, some of the jurymen evinced signs of languor and were awoken by the prisoner, and others, to listen to the defence."

I don't expect our desire for expedition will ever push us to require juries to sit until 3 am in the morning and then wake up to listen to the defence.

But if I continue much longer, I suspect you will suffer the same fate as that jury.