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## Lawyers' attitudes in dispute resolution

# The significance of professional attitudes – the positive and negative in dispute resolution

Geoffrey Gibson

### First impressions

When I started reading with Daryl Dawson in 1971, he was working on settling a joint venture agreement. It was for a mining company, and he was being instructed by a well-known commercial solicitor who was on the board of some substantial public companies. I was curious about why a barrister was doing this kind of work. It seemed to me to be the job of a solicitor. I had done articles and spent time at Blake & Riggall. I was aware of the distinction between common law and conveyancing (and probate). Corporate and commercial departments were still in embryonic form; banking and finance even more so.

I thought the Bar was about conflict. I had, after all, landed at Owen Dixon Chambers in some part in response to the taunt of a mate standing outside the Mitre Tavern that I should come to the Bar where 'men are men'. (Women did not then enter the equation.) When I asked Daryl about this he dismissed my apprehension and said that he enjoyed having the chance to be constructive for a change – the work of a barrister can tend to be destructive, and it was good to be positive rather than negative. This observation had a big effect on me, but perhaps not big enough.

When I went back to Blake & Riggall in 1986 as a partner, its major concern was the negotiation of a merger with Dawson Waldron in Sydney. The deal was substantially on the cards when I arrived, and I did not see it as being my place to become a protagonist. It was a curious exercise in negotiation for me to watch. The negotiations were given a certain edge because there were some people in both Sydney and Melbourne who were not

greatly enamoured with the proposal and would not have minded at all if the deal had gone off. For them the 'go home' ultimatum promised a vindication rather than a threat. I became very interested during one tense discussion when one partner said, in response to a suggestion that he was prepared to give away too much, that the object of the exercise was to save the merger. I realised the depth of the gulf between the two sides: the other side thought that the object of the exercise was to sink the merger. But there was somehow, on both sides, a determination to get the deal done if possible. This was novel to me. My *modus operandi* was that of the majority of the Victorian Bar: to inquire if a deal could be done and, if not, slug it out. I became aware that commercial lawyers on the other side of the profession may have a very different cast of thought to the Bar. Perhaps the Bar did tend to be more negative than positive. There was a difference in attitude.

### The mediation influence

The difference became apparent to me as I became involved in mediations, first as representing parties or being a party (for claims against my firm) and later as a mediator. Only after many mediations did it occur to me that I was approaching them in an adversarial (or antagonistic) way and that when I was travelling to the mediation by tram I was, even though subconsciously, wondering how I could best say something to upset or unsettle the other side. This is, I think, a natural product of the adversarial process, and in its place there is nothing wrong with it. On the contrary, counsel may be all you have

left standing between you and a big government or big corporation that the larger firms would prefer not to sue for fear of giving offence. If you have spent a substantial part of your formative forensic life being led by the late Woods Lloyd or Neil McPhee, plotting to get up the nose of the other side becomes instinctive. It can also be entertaining; in the hands of an expert, it can approach the status of an art work. It is considered sporting to do it with a smile; you can then have a laugh about it later over a drink. The sporting analogies are obvious and endless.

But there is something wrong with that approach when the context is based on reaching agreement rather than engaging in conflict. People in business do not generally seek to shirt-front their opposite number for openers. Nor for that matter is it a good idea to show off, as it may lead you to get offside with the judge – that does your client no good at all. If you are engaged in a fight, you may want to serve it up to your opponent either to sidetrack them or to unnerve them. (Jeff Thompson was very good at this.) But when you want to reach agreement with your colleague, what is the point of confrontation? *Cui bono?*

Those who still believe there is a difference between the sexes may think they understand why women are less susceptible to this complaint than men – either because blokes are more subject to the blokieness of the Bar, or because women are by nature better endowed than men at bringing people together. (The blokieness is exacerbated rather than ameliorated by our continuing mimicry of the English public schools' custom of addressing unequals without honorifics – like some judges with prisoners.)

There is no need for trial lawyers to get offended, much less paranoid, about these limitations. If you asked a corporate or banking lawyer to address a jury in a murder trial, or the High Court on a section 92 point [Ed: s 92 of the *Commonwealth Constitution*, regarding free trade between the

States], they would happily acknowledge that their limitations had been transcended; it would be a form of inanity to do otherwise, and not just because capitalism, if not our version of civilisation, is founded on the principle of a division of labour.

### The influence of client outlooks

There is a crude observation to the effect that lawyers catch people on the way up and then catch them again on the way down. Alan Bond was a good example; HIH was not so good an example because it was involved in

whether they are coming together or falling apart – and then they seek to apply their legal knowledge to get the best result reasonably available. Framing a writ to start an action is like framing a constitution to start a company; drawing a statement of claim is like drawing a will; settling a defence of justification in a libel action is like settling a joint venture agreement in the mining industry. It is, I think, important to bear in mind that the intellectual exercise at each end is the same – what varies is the attitude.

Now, assuming they are not breaking the law, people have the right to remain

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taking money from lawyers when going in both directions. There is a more useful distinction that can be made. Lawyers deal with people when they are moving together and when they are moving apart. Examples of coming together include people agreeing to buy or sell land or shares, join a partnership, marry, or even make a trust or a will to confer benefits on others. Examples of people moving apart include disputes about sales, dissolution of partnerships or companies, divorce, or challenging or avoiding dispositions of property to improve their own position.

The outlook of the parties will be different – that of the first parties is positive while the outlook of the latter parties is negative – and this will affect the outlook of their lawyers. This is particularly so if the lawyers habitually act in one kind of matter – if they either do all litigation or none at all. But at the end of the day the forensic process – the intellectual process – is in substance identical. The lawyers listen to what their clients have to say –

in conflict with others if they so wish. People have what might be called a *Magna Carta* right to go to court, although they may come to take the view that we have breached each part of the treble commandment, to none will we deny, to none will we delay, and to none will we sell justice.

Lawyers, it has long been said, are like rhinoceroses: thick-skinned, short-sighted, and always ready to charge. The risks, costs and delays of litigation mean that the interests of the parties may best be served by settling their differences and resolving their conflict. Their lawyers will have an obligation, generally both ethical and legal, to advise them of the possibility of settlement and possible avenues to this result with warnings as to the consequences if the conflict is left to be resolved by others. The trick then is for the lawyers to go from the negative conflict position to the positive settlement position. The end game is different in each case and so must be the approach of the lawyers. As I have observed, people in business do not



enter a meeting in an antagonistic way if the object of the meeting is to get a deal.

### Solicitor and barrister approaches

By the nature of their practice, solicitors, particularly those with a general commercial practice or who engage in front-end work, are likely to have a more positive attitude to

time, even when lawyers have surfaced and litigation has commenced, it is open to parties to talk face to face. Solicitors are likely to be better placed in setting up those discussions, and discussing with the clients what might be said to be the commercial background of the dispute, or the 'political' implications of a proposed form of resolution.

Third, the Bar is a congeries of Lone Rangers; partnership between barristers is banned; independence is prescribed; a degree of egocentricity is ordained. Solicitors, on the other hand, for the most part carry on business in partnership, dependence is inevitable and egocentricity is frowned upon (as being 'unpartnerly'). This difference may be fundamental to the way people see dispute

resolution. Solicitors are daily involved in resolving disputes among themselves which might be said to be legal but where you know you have a problem if someone produces the partnership agreement, where consulting a lawyer means the relationship is at an end, and where litigation is the Hiroshima option – except that destruction is mutually assured at either end.

Indeed, trial lawyers need to be wary of equating being adversarial with being antagonistic. This is not just because antagonism is likely to lead to bad manners and worse judgment. If litigation is negotiation by another name – if the writ is just another calibration of the correspondence, like the service of an industrial log of claims – it may be very wrong for the lawyer to allow the war-making to stand in the way of the peace-making. That would be to forget the object of the exercise, which is to get a deal that produces the best result for the client. How many sane people start litigation in the hope and expectation that they will finish it? How many can afford that luxury, either financially or emotionally? In truth, no rational person believes that war might be an end unto itself.

### Country perspectives

It may, I suppose, be said that the

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negotiations and a less combative manner in pursuing them. There may be at least three reasons for this.

First, solicitors are likely to be used to drafting and negotiating clause by clause more large documents. It is like building a house through a co-operative effort. These negotiating and drafting sessions can seem interminable. But there is a need for co-operation. The lawyers have to do what they can to get the best deal for their client, but they also have to do what they can to get or close a deal. Litigation lawyers can have trouble adjusting to this culture. Lawyers who throw their weight around on each point – who antagonise or engage in brinkmanship on each point – get known for that, and do not ultimately do their client much good.

Second, solicitors are more used to getting their clients to meet directly to settle, whether litigation has been threatened or commenced. Indeed, in many matters, the parties and their lawyers will engage in an elaborate minuet – if necessary, subterfuge – to pretend that no lawyers are involved. (Many in business still believe that it is an act of bad faith for a party to introduce lawyers into a dispute.) A related issue is in determining at what level in a corporation discussions should be opened or closed. But at any

tendency to regard litigation as a function of pathology will depend upon the way that people in a given country look at their lawyers and their courts. The US has more lawyers, many more than any other nation, and they are at best looked at with mixed feelings. But if you tackle a member of the plaintiff Bar in the US you will get a full-on declaration of the constitutional rights of Americans to have their grievances against big government and big corporations tried by a jury of their equals (and not another lawyer in the form of a judge) and the constitutional rights of all lawyers to argue their case before the US Supreme Court, even on day one of their practice. Americans see litigation at least in part as an exercise in social engineering – and, therefore, a good thing. If you study civil procedure at the Harvard personal injury law course and you come to class actions, the professor is likely to seek to allay your suspicion by saying that most such actions are now brought not for damages but for relief from discrimination, particularly against women in the workplace, and that in his view class actions have played a vital part in most of the developments in human rights since World War II.

Other places will obviously pay less heed to lawyers. On the road from Gangtok to Darjeeling there is a sign for the Lok-Adalat People's Court:

For speedy settlement of disputes  
without any cost and delay approach  
your nearest court for full details.

No cost or delay – you cannot help thinking that there may not be many lawyers drawing big fees in the People's Courts up in those Himalayan hills.

When it comes to being a mediator, the lawyer may have to be both positive and negative. Mediators must remain positive about their faith in the process and the prospects of success in any given case. They may, however, particularly in the Victorian model as it is developing, have to be negative in evaluating the case of the protagonists in separate sessions, although even here it is essential for the mediator to be sufficiently positive – the word is

empathy and the model might be Michael Parkinson – to retain the confidence of the parties. Barristers are learning to cope with mediation. They have always been good at settling cases on their own, and they are now recognising the danger signs of their background getting the better of them when they are asked to perform in front of an audience and they feel the need to become the antagonist.

When it comes to hearing and determining cases, the lawyer is neither positive nor negative, but neutral, or, to keep the analogy electrical, earthed. You do not need much experience in hearing cases before you feel the full force of the observation of Sir Owen

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Dixon that experience in forensic contests reveals the truth of the common saying that one story is good until the other story is told.<sup>1</sup> Our system may not in most senses be adversarial any more, but it is still a case of weighing up one version against the other. Judges are not encouraged to pursue a version of absolute truth for fear that they might develop some sort of God complex. As was observed in 1983 by Justice Dawson, as Sir Daryl had become:

A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted, and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the difficulties in the case on either side. When a party's case is deficient, the ordinary consequence is that it does not succeed.<sup>2</sup>

Indeed, in this phase of their career, lawyers go back to the first premise of

an advocate – they are required to suspend belief or disbelief and to avoid being positive or negative and focus on who, according to our procedural rules, has shown the stronger case. Advocates have to change when they become judges – if they still play the part of the advocate on the bench they are unlikely to make good judges. For many, the transition entails a suppression of ego that does not come easily. After all, the part played by an umpire is not as glamorous as that played by a full forward – the umpire normally gets in the press when he makes a mess of it, or puts someone away; it is much more glamorous to be kicking the goals that win the game.

Lawyers, then, may fairly be called on to show a different way of thinking and a different attitude (or state of mind) depending on the job in hand – the task is to know when and how to change. Like every other aspect of the profession, some learn it faster and better than others. In court, you may sometimes see counsel transcending their negative – and very necessary – role of aggressively attacking the other side in the interests of their client to adopt a professional and positive approach of trying to make the system work. Some even claim to have seen the same thing among politicians. ●

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### Endnotes

1. *Pontifical Society v Scales* (1962) 107 CLR 9, 20.
2. *Whitehorn v R* (1963) 152 CLR 657, 682.