ADR Bulletin
ADR Bulletin

Volume 9
Number 10 *Persuasion Part I*

Article 5

9-1-2007

Jury advocacy — the defence approach

Andrew Haesler

ADR Bulletin

Persuasion in criminal advocacy

Jury advocacy — the defence approach

Andrew Haesler

The pursuit of doubt

A jury trial is not a game requiring fair play between two competing teams. It is a system that has evolved to balance the interests of society in punishing and deterring crime and the interests of the individual in not being wrongly convicted and punished.

The roles of a prosecutor and defence counsel are quite different. A prosecutor, on behalf of the state, must call evidence and then, in final address, draw attention to the evidence that proves, beyond reasonable doubt, that the accused committed the offence. A prosecutor must act fairly, and be detached. Their objective is establishing the whole truth. The defence have no such strictures.

The defence task is quite different: it is to raise and maintain a sense of doubt. If there is doubt, our job is done. With a few notable exceptions, the defence do not have to prove anything. While your client may want you to prove her or his innocence this can be an unwanted distraction.

If you have a sound logical defence put it to the prosecution before trial. If it is sound the charges will be dropped[1] or a more appropriate lesser charge offered.

Attempting to prove things at trial can be a dangerous trap for the defence. Where the defence puts up an alternative hypothesis, smart and able prosecutors will attempt to knock down that hypothesis. If they succeed the jury may then say, 'There is nothing else but guilt'.

It is often better to focus on exposing the weakness in the prosecution case rather than to call much evidence for the defence. The opportunities to explore those prosecution weaknesses arise at the opening, when cross-examining the prosecution witnesses, and in the final address. To exploit those weaknesses requires preparation, both of the case and the defence advocate as a performer.

It helps to have a plan. It helps if that plan has a beginning, a middle, and an end. In jury advocacy, the beginning is the opening, the middle is your cross-examination of the prosecutions' witnesses, and the end is your final address to the jury.

The advocate through the jurors' eyes and ears

I have learned a lot over nearly two decades of jury advocacy. Many lessons, I can now say, have been backed by research.[2] They may also help overcome a misconception, fuelled by the media, that all defence advocates are venal or incompetent or corrupt, or venal, corrupt and incompetent.

Juries respond to advocates. They search for clues to fill in the gaps. They search for subtle and not so subtle hints and signs. Jurors want reassurance. They want approval and support. They are both a collection of humans and an entity. They are individuals with individual emotions, prejudices and beliefs and they are a group entity with its own internal dynamic, able to be directed and persuaded as a group.

Jurors want to understand evidence and what motivates the players: the witnesses, the accused, the judge and all counsel. They want to know why things have been done. They will be disappointed if the evidence does not meet their expectations. And they will be disappointed by the defence who often must try and limit the amount of evidence jurors hear.

If given the chance jurors will fill gaps based on their perceptions, emotions, prejudices and beliefs. In the absence of clues from the accused or other defence evidence they will look to them from defence counsel. They are keen to know the following:

Juries respond to advocates. They search for clues to fill in the gaps. They search for subtle and not so subtle hints and signs. They are both a collection of humans and an entity. They are individuals with individual emotions, prejudices and beliefs and they are a group entity with its own internal dynamic, able to be directed and persuaded as a group.

- Does defence counsel believe in the case? If the jury can't empathise with the accused can they empathise with their counsel? How does counsel deal with their client? Is he or she just going through the motions?
- Is counsel sincere? How does he or she present? Does he or she make eye contact?

- Can I trust counsel? Can I believe what he or she says? Are we getting the full story? Is something being hidden?
- If I'm in this sort of trouble I want him or her! Jurors respond well to excellence.

let arguments, cross-examination or addresses go too long. I'm easily bored. I presume the jury are also.

I try to add a bit of spice. In a jury trial you can risk a little flamboyance. You can add some emotion. At the same time it is necessary to retain some gravity,

The rule of the 5 Ps is critical: 'Preparation Prevents Piss Poor Performance' applies to all court appearances.3 Preparation is the key. The aim is to project an aura of competence and control.

- Is counsel committed and competent?
- Is he or she prepared?

However, that the jury respect and believe an advocate means very little if the cause they are advocating has no substance.

Preparation and approach

The rule of the 5 Ps is critical: 'Preparation Prevents Piss Poor Performance' applies to all court appearances.[3] Preparation is the key. It leads to success and the happiness which comes from the avoidance of unnecessary stress.

What is required is some form of order, be it alphabetical, chronological, numerical or some more bizarre and personal system known only to the advocate.

The advocate must know the law. I must also know what my case is about and how I am going to deliver.

I always try to look prepared and not fumble around: I work from chronologies, notes, indexed briefs, coloured folders, tabs, yellow stickers, memory. I try to have everything I need to hand or able to be found quickly.

I try to look and act like I know what I'm doing and where I'm going. I try to look and act like a professional. The aim is to project an aura of competence and control. Regardless of what else is happening (and things will) — in a sea of apparent chaos, you want the juror to ask, 'Who is this lawyer who seems to know what they are doing?'[4]

I don't waste the jury's time. I don't

seriousness and decorum. Above all I try to keep the jury interested and awake.

The trick is to be alert to the jury — always watch and engage them. Ask yourself, 'Are they still interested? Are they awake?' I also ensure that I know the conditions in which the jury deliberates. I always inspect the jury room before a trial. It may have features, such as being cramped, cold, windowless, to which I can refer when talking to them in addresses.

During a trial I continually ask myself, 'Where is this whole exercise heading?' Plans and strategies must be fluid but to have no plan is to admit defeat.[5]

Opening

The opening statement to the jury is limited to a brief exploration of where you agree with the prosecution case, where you disagree with it. An opening should *explain* to the jury the real issues of fact they have to decide. It is *not* argument and it should not contain nor sound like argument.

Many counsel do not open. Sometimes, for good reasons, as they don't yet know what their case is, or they don't know what the Crown's case is. Sometimes they may not have a case and so have nothing to say.

Sometimes I don't want to open, particularly if the prosecution opening has left the jury in tears. But that is the very time a defence opening is imperative. An opening is the first chance to have jurors empathise with my client and me. The jury are already

starting to make up their minds. Once a mind is made up, and committed, it becomes much, much more difficult to turn. The opening is my chance to plant the seeds of doubt. An opening gives me a chance to plant clues to what is to come, so the jury begin to anticipate challenges to the prosecution case, and hopefully react favourably when I deliver what they have been waiting for.

Cross-examination

Cross-examination provides not only a chance to attack prosecution witnesses, but also the vital opportunity to get from those witnesses evidence that assists the defence case and helps to give the jury reason for doubt.

It's here that the dark arts of advocacy can be practised: not the stereotype bullying and badgering of helpless sex assault victims. (It happens but it rarely works.) Rather, what is required is the presentation of the defence case through ordered clear and concise questions, directed again to the only goal: doubt.

Cross-examination must be clinical. It can at times be brutal if, for example, your client says a rape did not occur and the complainant is lying. Questions must then be directed at exposing the lie and introducing the accused's version of events. It must draw the jury's attention not to the plight of the complainant, but to promoting doubt about whether they are accurate, reliable and honest in saying your client did what was alleged. If the seeds of doubt have been sown in the opening they can be watered in cross-examination of the complainant and other prosecution witnesses. It is essential not to allow sympathy to build by extending the ordeal of cross-examination any further than is absolutely necessary. I try to go behind the emotion and expose the lies and inaccuracies in each witness' account. Every question must be directed at creating doubt.

Final address

The final address is a persuasive argument that must have a clear order. The aim is to tell a coherent story: a story that fits the evidence and points to doubt. It does not necessarily need to be logical, but it helps.[6] Helena Kennedy QC suggests[7] this phrase, 'if you find yourself in the jury room saying, "She probably did it" *probably* is not enough'.

Never forget the defendant is a person. Where necessary (and with some of my clients it is very necessary) I try to humanise him or her. In doing so I'll make concessions and face up to the terrible bits and get them out of the way as best I can.

An address is the time for some emotion. The clinical approach can be left to the prosecutor and the judge. The jury have to feel that they are doing the right thing. At best they should be receptive to the concept of your client's innocence. At worst they may believe your client probably did it but they still have a reasonable doubt. They must be persuaded, deep down, that suspicion and belief equals doubt.

The jury need to know why an accused can face trial and still be innocent. They need to know the police and the prosecution are fallible. They need to know that error can creep into the system and that allegations are not proof.

I try to make it easy, both emotionally and within the context of a story consistent with innocence. The jury don't have to wholly believe my story; they have only to believe and accept the possibility of innocence.

If those jurors who are on, or inclining to, the defence side have the ammunition to use in the jury room then they can be my advocates. Jury deliberation is an active process so I give jurors the tools to argue the defence case in the jury room. If the opening and cross-examination have sown the seeds then the initial direction of the jury as a group should be to acquit. The final address is the time to push them further in that direction. I am to make the jobs of those who might want to acquit easier and of those who want to convict emotionally difficult.

I speak simply. I adopt a measured pace. Short sentences are better. Big words and complex sentences usually don't work. Repetition to reinforce a point is a good technique. I aim for clarity and to project an air of sincerity. If I have done my job well the jury will want to acquit. If I have done my job properly I have made it difficult for the jury to conclude the accused did it and made it easier for them to give the accused the benefit of their doubts. ●

Andrew Haesler is a barrister and a deputy senior public defender for NSW. He worked as a solicitor with the Redfern Legal Centre, the NSW Legal Aid Commission and the Aboriginal Legal Service in Alice Springs. Appointed Senior Counsel in 2004, Andrew has a large criminal trial and appeal practice.

Endnotes

1. DPP guidelines encourage defence disclosure in the interests of sensible negotiation toward the dropping or reduction of charges.

2. Published jury studies tell us what juries actually think about defence advocates, their performance, and their effectiveness. See Warren Young, Neil Cameron, Yvette Tinsley, *Juries in Criminal Trial*, Law Commission NZ (1999); Rhonda Wheate, 'Australian juries and scientific evidence', *Australian Journal of Forensic Sciences*, 2006, Vol 38 no. 2, Stephen Dartnell & Jane Goodman Delahunty, 'Enhancing juror understanding of DNA', *Australian Journal of Forensic Sciences*, 2006, Vol 38 no. 2, and Natalie Taylor and Jacqueline Joudo, *The impact of Pre-recorded Video and CCTV* Australian Institute of Criminology Research and Public Policy Series no. 68, 2005.

3. Borrowed from Chuck Knox, a US football coach for the LA Rams. My thanks to colleague Richard Button SC for this reference.

4. There is a danger in taking this approach into the community — examples include the use of power tools and high performance motor vehicles.

5. Attributed to Napoleon.

6. 'The life of the law has not been logic, it has been experience', Oliver Wendell Homes.

7. *Just Law* (2004).

ADR Diary

- **ACDC** is offereing several one-day courses in **Conflict Resolution Dispute Avoidance** in Sydney on 8 November and 29 November 2007.

- **ACDC** is also holding 5-day mediation workshops entitled **Mediation: Skills, Techniques and Practice** with an optional sixth accreditation assessment day. Workshops are taking place in **Sydney** on 3–9 December 2007 with optional Accreditation Day held on 11 December. **Mediation: Advanced Experiences and Review** advanced mediation training courses are also being held in **Sydney** on 30 October (with option additional days on 31 October and 1 November) 2007. For more information or booking visit <www.acdcltd.com.au> or call (02) 9267 1000.

- **ACPACS** will conduct a 3-day intensive **International Commercial Arbitration** course in **Brisbane**. The course will introduce participants to the law and practice of international commercial arbitration, discuss international documents and treaties, such as the UNCITRAL Model Law on International Commercial Arbitration, and cover the recognition and enforcement of foreign arbitral awards. It focuses on practical aspects of international arbitration. The program is accredited by the Chartered Institute of Arbitrators in London. Participants who complete the course can apply to become Associate Members (ACIArb) of the Institute. In addition a certificate of attendance is provided by ACPACS.

- The **Bond University Dispute Resolution Centre (BUDRC)** is running a 4-day **Basic Mediation Course** on the **Gold Coast** from 29 November–2 December. The course also has a Foundation Family Mediation stream, run in conjunction with AIFLAM (Australian Institute of Family Law Arbitrators and Mediators). They are also running a 4-day **Basic Mediation Course** in conjunction with the **Leo Cussen Institute** in **Melbourne** from 18–23 December.

- **BUDRC** are also running a **Family Dispute Resolution Practitioner Workshop** on 3 December on the Gold Coast and 22 October in Melbourne For more information on courses, visit <www.bond.edu.au/study-areas/law/centres/drc/drc.html>.

- **LEADR** Association of Dispute Resolvers will be holding 4-day **mediation training sessions** in Australia and New Zealand. These courses are open to individuals who are keen to add mediation to their professional skill set, in addition to those who are engaged in dispute resolution on a daily basis. Australian courses will take place in **Sydney** on 7–10 November. New Zealand courses will take place in **Auckland** on 7–10 November. Early registration is recommended and can be done at <www.leadr.com.au>.

PUBLISHER: Oliver Freeman PUBLISHING EDITOR: Carolyn Schmidt PRODUCTION: Alex Berthold SUBSCRIPTIONS: $495.00 per year including GST, handling and postage within Australia frequency: 10 issues per annum including storage binder SYDNEY OFFICE: 8 Ridge Street North Sydney NSW 2060 Australia TELEPHONE: (02) 9929 2488 FACSIMILE: (02) 9929 2499 adr@richmondventures.com.au

ISSN 1440-4540 Print Cite as (2007) 9(10) ADR