The Young Lawyers' Annual One Day Seminar

Title: Defence Closing Address: The Second Last Word

"Of every 100 cases 90 are won or lost on their own, 7 are lost through bad advocacy and 3 are won through good advocacy." Anon

The closing address to the jury is guaranteed for an accused person under Section 160 of the *Criminal Procedure Act* 1986. As for summary proceedings, the *Act* provides "procedures" under Section 192. In relation to the determination of summary proceedings the Court must determine those proceedings after "hearing the accused person, Prosecutor, witnesses and evidence" in accordance with the Act (s192(3)H)).

I propose to address you in relation to closing addresses from the point of view of a practitioner who has addressed both Juries and Magistrates at the conclusion of a number of trials and hearings, in which 3% of cases I feel I might have made a difference, although having heard me, some of you may be of the view that I made a difference in about 7% of cases.

I am also well aware that at this Conference last year, you were given a paper by Ian McClintock SC on the very same topic. It is a great paper and frankly, I doubt I could improve on it.

I recommend it to you, as a result then I will tend to other matters: two other matters.

Firstly, as the Second Last Word, always bear in mind the nature and content of the "Last Word"- the Judge's Summing up.

Secondly, as the "Second Last Word", consider in a modern context how effective or potent will the summing up and directions be. Bear in mind that the trial process is one part of a Criminal Justice System that may be getting left behind in public opinion and technological persuasion.

The Evidence

Those of you familiar with jury trials know that the Oath that is sworn (or affirmed) by each and every juror, is that they will "Give a true verdict according to the evidence". The same touchstone, although not overtly declared at the start of every hearing and sometimes seemingly forgotten in the hurly burly, applies to Magistrates. This is the first point I want to make about a closing address: that it must, it should deal with the evidence at the beginning, in the middle and at the end.

The issue always is what that evidence means for the decision maker.

What a closing address is not

A closing address is not an opening address. In recent times accused persons have been afforded the opportunity on a Statutory basis to an opening address. Under s159 of the *Criminal Procedure Act* 1986 the limitations on that address are set out. An advocate on behalf of an accused person in that opening is "limited generally" and the matters upon which they can touch are those matters disclosed in the Prosecutor's opening address including those that are in dispute, as well as those not in dispute, and the matters "to be raised by the accused person". An accused person also gets a second chance if they themselves call evidence by way of an opening to the defence case.

In the case of R v MM [2004] NSWCCA 81 the question of Defence Counsel addresses in opening was considered. The case is considered to be an important authority for what can and cannot be done during an opening address. Nonetheless, the determination in relation to the defence opening address arose because one of the appeal grounds was in the following terms:

> *"The trial miscarried because the Crown Prosecutor addressed the jury in a manner that undermined the effect of the directions His Honour gave concerning the need to scrutinise the Complainant's evidence with great care and the problems caused by the very lengthy delay in complaint."*
> - This related to the Counsel's closing address.

Justice Levine considered that the written submissions on behalf of the Appellant were rhetorical and contentious when they asserted that the

Prosecutor had made "an emotional pitch to irrelevant and generalised policy consideration" in his closing address.

Justice Levine was of the view that the Crown's closing address in its tenor was intended to rebut what had been said by defence Counsel in his opening address. In endeavouring to step around this ground His Honour remarked that "even if there may be some basis for saying that the Crown Prosecutor's closing remarks were provoked by an opening remark some days before" he considered that sight had been lost of the limitations upon defence Counsel's opening.

Not unsurprisingly Howie J in his judgment, addressed in some detail what a defence Counsel could and could not do in opening. It is worth having a look at the judgment in its totality, for a variety of reasons, not least because the detail in the second reading speech is quoted therein, into I will not do so here.

It is illustrative to quote paragraph [142] of the judgement in full:

> *"Even making allowance for apparent transcription errors, I have difficulty understanding the point that Counsel was seeking to make in that passage of the address by referring to stepping back in time to the law that existed then or to 'the sort of morality that existed then even in relation to this offence.'"* (The indictment was a historic indictment alleging variously indecent assault on a male person and buggery.) *If he were concerned at the use of the term "buggery" to describe the offence, the proper way to approach the matter was to ask the Trial Judge to say something to the jury about the use of that term in the charge. But, in my opinion, it was completely inappropriate to introduce the topics of morality or a change in the law into the jury's considerations of the issues before them. The defence case was that the allegations were untrue. Questions of morality, of the nature of the offence, or of the differences between the current law and as it existed at some earlier time were completely irrelevant. In any event, it was not a legitimate matter to be canvassed in the defence opening. With respect the Trial Judge should have taken the matter up with defence Counsel to see what, if any, legitimate purpose there was in making comments which, so it seems to me, could only serve to distract the jury.*

Further, the Crown closing was put in further context:

> *"In my opinion it is no business of the Crown to seek to explain the reasons for the giving of directions or warnings by the Trial Judge or what they mean or how the jury is to use them. This is a matter for the Trial Judge: not the Crown Prosecutor. Counsel should understand that their principal function is to address on the facts and not to anticipate directions and warnings to be given by the Trial Judge and to put a gloss on them to assist the case they are presenting to the jury. In particular the Crown should not use the consequences of delay in an attempt to explain or excuse the unreliability of the complainant as was done in DGB and to some extent in the present case."*

Finally, His Honour concluded in this way:

> *"Although leave is not required for defence Counsel to give an opening address to the jury under s159, defence Counsel should similarly not abuse the right given under the section by embarking upon arguments and submissions that are only appropriately made in closing address. As an opening address by the Crown should not contain any argument or submission to the jury as to the validity of the case so 'the matters disclosed in the Prosecutor's address' referred to in the section, cannot be arguments or submissions arising from the nature of the evidence to be called by the Crown. Nor should 'matters to be raised by the accused person' be taken to include defence arguments and submissions based upon the Crown evidence or evidence which may be called in the defence case." (*Para 155).

Before passing from the case of MM which points in an important direction for the purposes of this paper, I should note a view expressed by the third Judge on this Bench, Smart J (at Para 194):-

> *"Despite the Prosecutor's disavowal, he was in fact making a sustained emotional pitch designed to, and having the effect of, encouraging the jury to think that the community had entered an enlightened era in which the jury should convict."*

He then concluded at Para 198:

> *"It is impermissible for a Prosecutor to seek to lessen the impact of the directions of law which the Judge is required to give. The Prosecutor should not have made the statement set out in the passages extracted from his final speech. It is for the Judge to give the directions of law. They are not a matter on which the Prosecutor should address and comment."*

Not unsurprisingly Smart J dissented from the orders proposed by Howie and Levine JJ. This case however, in my view, assists in relation to not only the question of a defence closing address in a jury trial, but also highlights that it is the second last word.

I propose in this paper to deal with just two central issues in the position of the address in the process as the second last word. A process, that in 2010 has some real challenges to face. Secondly, I am going to look at a related issue: the emotional pitch.

The Law

It is an increasingly common practice, for Judges to prepare written directions which they intend to provide to a jury to assist them in their deliberations. Those directions are typically distributed at a time close to the end of the trial to the Counsel and their Instructing Solicitors for comment and correction if required. It is a very important perspective to retain that defence Counsel has the second last word and the Judge will have the final word, not only in terms of directions of law but in endeavouring to assist a jury in applying relevant facts to those directions.

The modern Judge is well aware of s161 of the *Criminal Procedure Act* in relation to summarising the evidence. Of continuing concern on both sides of the Bar table is the application of R v Zorad (1990) 90 NSWLR 91 which indicates in a well known passage that:

> *"A summing up should, in every case, not only include directions as to the ingredients of the offence which the Crown has to establish and an explanation of how the relevant law must be applied to the facts of the particular case, but it should also include a collected resume of the*

> *evidence which relates to each of the ingredients and a brief outline of the arguments which have been put in relation to that evidence."*

Those of us who have sat through the outline of arguments given by various Judges have often been astounded at how articulate the arguments were, or how ignorant and bumbling they seem to be. Opponents have been known to look across the Bar table at each other in astonishment at the submissions that they apparently had made on behalf of the respective cases or shifted in their chairs at the absence of any mention of their biggest point.

It is crucial to a closing address to bear in mind that it is the Advocate's responsibility for ensuring that their 'second last word' is in fact the last word on the arguments important to their case.

It is the view of this commentator in these circumstances, that Justice Howie's exhortations for Counsel not to anticipate directions and warnings to be given and then to put a gloss on them to assist the case they present to the jury, is apt to deflect Defence Counsel from their task and their obligation.

Putting "a gloss" on things inappropriately or improperly will be promptly addressed by a Judge in their summing up. Putting a gloss on things in relation to both a jury or a Magistrate, is apt to ensure that the weight of the argument is diminished, even substantially so. If an advocate is apparently unfair to available argument or misrepresents the true effect of the law which we must all abide by, then the argument no matter how sound or well argued, is prone to be rejected.

Nonetheless, it is crucial to bear in mind that, whilst "It's the facts stupid" is the central issue, the facts as they are applied in relation to the law is what ensures acquittal or conviction. As a result an advocate must always ensure that they have a sound grasp of the relevant laws relating to the offence, the law touching upon the evidence and the law relating to procedure so that they can ensure that it is a repeated theme arising first in an opening address, is seen on display throughout the conduct of the proceedings, being again emphasised and applied in an argumentative context in closing and then, of greatest significance, being repeated with the authority of judicial office in circumstances where a proper application of what His or Her Honour has to say about the law to the facts which you urge the Tribunal to find will inevitably lead to the result for which you contend.

An Ealing Comedy

In October 1966 a dangerous man, the most dangerous double agent in the history of MI6, was locked away safely in Wormwood Scrubs Prison. About six o'clock on Saturday 22 October 1966, a kombi van pulled up outside the prison. The dangerous man slipped through the bars of his cell and went into the yard. There he found a rope ladder dangling from the outside wall and consistent with his reputation took the obvious opportunity to climb it. He escaped from the prison and eventually ended up safely, if not happily, in Moscow. The man was George Blake and he was identified with a coterie of other threats to Western civilisation. He had been tried and convicted of a number of offences of breach of secrecy requirements and had been sentenced to 42 years in jail.

The rope ladder had been put there by two men Pat Pottle and Michael Randle who had been in Wormwood Scrubs Prison because of their conscience related activities at an American airbase and their involvement in a demonstration there.

Blake was hidden in various houses around Hampstead and it is reported that these houses had been borrowed from a sympathetic but somewhat unstable woman while she was away for the weekend. Upon her return she asked whom were the two people who had been brought to the house and whom she thought were hiding in her cellar. She was told one of them was George Blake whereupon she is alleged to have screamed "George Blake? George Blake?"

Apparently she was under psychiatric care and indicated to her psychiatrist that she could not cope. Indeed her husband said that she had told the psychiatrist that George Blake was in fact at her house. The husband indicated this to Blake to which Blake is alleged to have said "Are you saying she told her psychiatrist about us?" The husband is said to have replied "Oh yes, everything. It doesn't work unless she is completely frank." Apparently the psychiatrist's response was not an unfamiliar one and he increased her medication.

After a while hidden in the van, Randle and Pottle drove across Europe with Blake hidden in an area typically reserved for equipment. Children sat on the housing. He was then freed.

Of course, the political response in the midst of the Cold War was that it had been a KGB operation, cunning and audacious.

Randle and Pottle were prominent in libertarian circles both before and after Blake's escape. They continued to actively pursue their ideals and to struggle with the excesses of the British regime as they saw them. Their jail breaking activities were one of the worst kept secrets of the time.

Ultimately their lie was widely exposed. Provoked by a voyeuristic approach from a Murdoch journalist they wrote a book in which they confessed their actions and mounted a moral defence. The book was called The Blake Escape.

Unsurprisingly, although some said an abuse of process, they were charged for their actions.

Thereafter a number of lawyers assisted Randle and Pottle with a number of arguments relevant to stays although unsuccessful (see R v Central Criminal Court ex parte Randle & Anor (1992) 1 All England Report 370). The trial commenced at the Old Bailey and Randle and Pottle elected to conduct their own defence. During the course of the trial it became apparent to the jury that Special Branch had known everything about who had been involved in the escape since 1970 but had taken the decision not to go after Randle and Pottle because they were considered to be small fish. The Prosecutor was Julian Bevan QC. The focus for the trial was of course the Crown case. Randle and Pottle called no evidence and gave no evidence. The only person to address the jury in relation to the position of the defendants was Randle.

It should be noted that consistent with a protocol that existed at that time and for some centuries before at the English Bar, Bevan did not address the jury. It was a protocol that reflected a view that it would be unfair in circumstances in which no evidence had been called on behalf of unrepresented accused for a professional advocate to urge a certain course upon the jury above and beyond the evidence.

It had been apparent from the Judge's approach during the trial and was consistent with his summing up that the jury were told they had only one consideration to deal with and that was Pottle and Randle guilty in law given that it was apparent that there was no contest on the facts. It was thought that they had no other choice but to convict.

In addition a defence of necessity raised by the accused on the basis of a requirement to free a man from an unjust 42 year sentence had been rejected by the Trial Judge and was not before the jury.

I have only read an excerpt from an edited version of the speech at the time whilst I was living and working as a barrister in London. My memory is that the speech from Randle started with the words:

> *"First Ladies and Gentlemen, let's open the windows and blow out all the cobwebs."*

The speech was from the dock and he indicated that:

> *"no Judge, no Prosecutor, no force on earth could stand between English jurors and their conscience."*

He insisted that the jurors were entitled to ask themselves if it was morally right to go along with governments and spies who *"lie cheat and manipulate".* He invited them to acquit.

At the end of his speech it is reported that he turned in the dock and pointed at the steps to the cells below. These cells had been the source of disease in the past and to this day this is remembered by once a year at the Old Bailey there being strewn across the floors and foyers flower petals and when the Judges of the Old Bailey attend on that day they carry with them posies of flowers.

As he pointed to the steps, he said:

> *"They lead to a sewer called the British prison system. To send a man down them for 42 years is a death sentence. I have no apologies to make and no regrets."*

It is also reported that the Court then erupted and the jury acquitted shortly thereafter. Clearly an emotional effect.

It was said at the time in the process, that the jury put justice before the law.

This is a very romantic notion and a very romantic trial but it is a matter of potential relevance in considering the impact of a defence closing address because ultimately that is what was the potent aspect of the trial. As noted, there was no Crown closing address. It was also the second last word in reality, because the last word was from the Judge who directed the jury as he was obliged to do in a manner which rejected the fundamental basis for the accuseds' submissions.

The Relationship

Randle and Pottle is a very clear example of the relationship which has to exist in the conduct of a trial and has to be emphasised in the closing address. That relationship is between the fact finder and the accused. The word "charge" I understand arises because the individual upon arrest is thereafter placed in the charge of the jury.

The importance of the relationship between those who have the burden of conviction or acquittal and the person who will be affected by the verdict is an important point of emphasis and that particular relationship should be the touchstone of deliberations.

Mentioning the accused by name, often by first name, pointing to the individual during the course of trial and submissions, deliberations, insisting that the accused is included in all aspects of the trial, including requiring screens to be turned his or her way, exhibits to be shown etc. is important.

It is also important to humanise in cases where inhuman treatment has been alleged. Consultations in front of the tribunal of fact with the accused, physical proximity between the lawyer and accused in a relaxed and open way, and overt taking of instructions in a manner consistent with the accused' interest in the outcome are all mechanisms for ensuring that the layout of the Courtroom which is so predisposed to alienating the accused from the process and debasing them in the eyes of the jury and the Magistrate is reduced.

In the US, except in the most extreme cases, individuals are dressed like the jury and the Judge (except for the gown) and sit in the body of the Court behind their lawyers in a clear example of the presumption of innocence.

So in an opening to a closing address it is always a good idea to remind the tribunal of the relationship. To strip the impediments to that relationship from their minds by reference to the physical environment and to do so by reference to the personality or humanity of the accused.

Rules

Reminding jurors of some of the basic tenets of the process is also important in what is often referred to by barristers as "a political speech" by repetition of the presumption of innocence, the burden of proof and the standard of proof.

Remember the Judge will have advised the jury in most instances of these ground rules at the start. A fair Crown will have mentioned them in their opening and will have returned to them in their closing. The Judge will again mention them in the last word summary to the jury. Continuing to mention those principles in a closing address is important and it is important to ensure not only that they are clear and that people understand that they are to treat the accused in a way they would expect they themselves would be entitled to be treated but also because it is apparent in 2010 there is less sympathy in the community for these principles. A matter I will turn to later.

Of course it is one thing to state them and another to explain them. It is appropriate and acceptable to talk of the golden thread, talk of the importance of striking a balance and to remind a jury that they are not there to find a person guilty or innocent, just guilty or not guilty. Suspicion, not even the gravest suspicion, is a substitute for proof beyond reasonable doubt and of course an accused has to prove nothing. All of these notions are not something dreamed up by some mendacious defence lawyer yesterday. Such concepts underpin a democracy which has existed on this continent for over two hundred years and has been exported to many other democracies.

Monologue

Of course, a closing address to a jury is a monologue. It does occur to me that in the modern world most people are completely unused to such a situation. Commonly any monologue concludes with an opportunity to question. In the Local Court many monologues do not even commence before questions are asked. The interactive nature of the modern closing address in the Local Court is of course welcome and appropriate clarifying areas of difficulty for a Magistrate, addressing their concerns, arguing against their devil's advocacy is fundamental to a closing address in a Local Court. Indeed, if I can digress in relation to this heading, I would urge people to be prepared to dialogue rather than monologue. Of course the closing address your client can ever hear in the Local Court follows upon the Magistrate saying to you" I don't need to hear from you Mr Turnbull".

It is often an appropriate approach to ask the Bench what matters do they require assistance on. Some less confident judicial officers may respond by indicating that it is your case and that it is a matter for you. I have noted that an appropriate response in these circumstances (and it arises not just in terms of closing addresses but also in sentencing proceedings and other applications) is to indicate that HH would have an obligation, in due course, to raise matters with Counsel in the context of procedural fairness and natural justice. As you are all aware it is completely inappropriate to listen to Counsel addressing wholly irrelevant matters in the mind of the Tribunal and then having heard then not raise their concerns and proceed to do precisely the opposite to that urged.

But to return to the jury, the first thing which can happen in relation to a monologue is that it should not go on for too long. Clearly a closing address should be broken up into bite sized chunks. Whilst the court time table only affords one break officially in the morning, an advocate should ask where an address is going to exceed 45 minutes to have it broken into portions. The luxury of the jury box militates against adequate concentration, as does the time of day and the circumstances of the trial. Most Judges when asked allow for addresses to proceed in steps with appropriate breaks.

It is also the case that you reach the point of monologue after a lot of dialogue. That dialogue has been between the advocates, the advocates and witnesses, the advocates, witnesses and judicial officers. In addition there

would also have been dialogue between the jurors, dialogue which occurs outside the ken of the lawyers and which no doubt arises principally about the trial between people who have never met each other before and may not ever meet each other again. In that context and bearing in mind that the closing address is expected to be an argument drawing together strands with a view to assisting and persuading it does not therefore stick out quite as incongruously.

There is a lot of assertion around about persuasion in a variety of contexts and not just in Courtrooms. The material deals with persuasion principles and one should not be misled by that as a touchstone. Remember that the evidence is the most important thing in a criminal trial. Nonetheless it is appropriate to set out some recurrent themes and I am grateful to Ian McLintock SC for his summary in this regard. He notes that:

(1) persuasion is a gradual process

(2) persuasion is more likely to occur if the people to be persuaded have a liking or respect for the person speaking to them on the point, that excludes people who are untrustworthy and so misstating the evidence or allowing yourself to be undermined in a perjorative way by anyone else in the Courtroom is a problem

(3) a mastery of the evidence, the information and the procedure is very important as is an organisation and structure for the argument of the material to be relied upon

(4) in relation to retention repetition is an important tool

(5) it is said that a well presented analogy would assist in comprehending an argument and that is true from time to time

(6) the manner of speech, the body movement, eye contact and variations in pitch and volume can assist in making the speaker more interesting, therefore the people who are listening are more interested

(7) rebuttal but in a respectful, although from time to time in a direct comprehensible way is always an important aspect of a closing, even if it draws from a vicarious interest in conflict

(8) addressing preconceptions prejudices and emotions not only on the part of the subject being referred to but specifically in relation to the people listening is very important

(9) Of course something entertaining, unexpected, exciting or spectacular helps. Exhibits often provide this opportunity although a unique insight to the evidence disclosed in the closing can also help.

(10) being efficient in the discharge of your obligation is also very important. Short and sweet, sharply focussed all help in getting the points across and having them retained. One should never be deterred however from confronting a mass of evidence but one should adopt techniques that turn it from flour into sliced bread.

Exhibit Speaking for Itself

Consistent with the notion of a modern jury being used to dialogue rather than monologue it is important ensure that what is said is supplemented by visual images which may have a far greater effect and be far more durable and frankly persuasive than verbal images. What one normally has at the end of a trial is a number of exhibits. Those exhibits will be things available to the jury long after you stop talking. They will be items to be taken into the jury room, looked at and scrutinised. That is why the provision of some written document, some aide memoire, some physical object is of real significance in a trial.

It is important to prevent it if you feel it is going to create a forensic disadvantage but have a basis for exclusion or modification.

Law on display

In a recent book by Neil Feignseson and Christina Spiesel consideration is given to the digital transformation of legal persuasion and judgement. The reality of NSW Courtrooms specially where juries sit is that aside from a fairly limited LCD screen there has not been a headlong rush towards technology to assist in the presentation of cases. This may be a resourcing

issue. Nonetheless the reality of the presence of technology in the lives of people means that there is an increasing volume of visual exhibits as well as digital enhancements, computer animations and power point slideshows etc. There is also an expectation that there will be. The challenge is to ensure that words and pictures complement each other. Ideas expressed in words are time based because speech being a linear order of expression means that meaning unfolds during the course of speaking. The same applies when words are read.

It is often said that a picture can replace a thousand words. Of course a thousand pictures is a movie. To that extent pictures are not linear but movies are.

Accordingly in a closing address it is quite often an effective recognition of the power of visual display to ensure emphasis is placed on specific non linear exhibits. It might be a gun, a knife, a photograph or a single document with single content.

The placing and context of words can achieve both an immediate non linear effect and a linear effect. The address can be the context of the persuasion; the exhibit can be the point. A discussion of drugs in a suitcase hidden and deployed in a way which facilitates concealment from all save those who know it to be there can be the verbal context. The picking up and slamming down on the Bar table of a suitcase packed in that way can make the immediate point that there was no capacity for detection on the part of the individual who carried it through the borders.

2010

This is particularly the case in a modern trial where there is a mass of surveillance or intercept evidence. Those CDs tendered by the Crown are played on a computer over and over again, that Record of Interview tendered in the Crown case is played over and over again, those surveillance photographs are looked at over and over again. Make sure that all exhibits are scrutinised well in advance of the trial and that you are familiar with them.

Consider their emotional impact.

Decide whether familiarity is going to breed contempt and if so play them again and again, and play them again and maybe again in the closing address. It breaks up the presentation, it places you in a position adjacent to a thirteenth juror in relation to matters that you cannot hide from because they are tendered in evidence.

In a case in which I was involved where there was an allegation of serious assault leaving a man impaled on a recently pruned rosebush in the midst of a number of rosebushes wherein he was kicked allegedly by a number of people including my client (who was supposedly the ringleader) jeans were in evidence. There was blood on the jeans. The explanation given by the defendant was that it was the blood of the individual because he was the one who attended to the victim after he had been freed from the rosebush and he endeavoured to assist him. A juror told me later that they looked at those jeans with some interest because there was not a single scratch or rip or tear consistent with a man who had been in the midst of rosebushes delivering the kicks which were alleged. If only I had noticed that there would have been a much shorter closing address.

Demeanour

An important aspect in any address is to remind the jury not just of the evidence but the way the evidence was given. It is often good practise to note down in the course of evidence in chief a brief summary of the way the witness gave evidence and their demeanour. Pauses, exasperation, voice tones and even visual cues are all important things when assessing the credibility and reliability of the evidence given by those witnesses. The capacity to remind at least one juror in closing of something that all might have forgotten can be very effective. Even an impersonation of that demeanour can be very effective in closing and a capacity to remember little moments in a trial is enhanced by recording them as they occur so that you have something to go back to when preparing your closing address.

SOMETHING NEW

An important consideration in preparing a closing address for a jury is to recognise that it is the *second last word* from the lawyers. The question of

alertness to and use of legal directions expected and requested has already been touched on. There is another important perspective.

It is a core assumption in a system of justice that jurors not only understand judicial directions, but also apply them. There is a body of research into this notion, principally in America.

The conclusions are that:

1. Judicial directions an procedural issues appear to be effective;
2. Judicial directions to disregard evidence (or aspects of evidence) or to limit the weight of evidence are largely ineffective. (*See* Thompson and Dennison 'Graphic Evidence of Violence: the Impact on Juror Decision-making, the influence of judicial Instructions and the effect of juror biases' in *Psychiatry, Psychology and Law*(2004) 2 :2 pp 323-327)

Emotions

This is particularly the case in relation to graphic evidence of violence. This evidence can be pictorial, aural or oral, in the writer's experience.

The trend in NSW Courts is to tolerate emotional extremity in prima facie admissible evidence and seek to warn and direct jurors as to its use. In fact it has been established that limiting instructions in this context may have a "paradoxical" effect and exacerbate the (unfair) prejudicial influence of certain evidence.

Simply, emotional arousal has an effect on juror's decision making. There is emotional provocation that can lead to negative interpretations. Producing anger has been demonstrated in a number of studies to result in a tendency for individuals to blame others, to be punitive and to interpret ambiguous behaviour negatively.

There is also an important distinction to be drawn between visual and graphic evidence (photo, film , digital sound recordings) and the oral

testimony of witnesses. Photographic evidence "may elicit a different cluster of emotions" than oral testimony in a similar way to the contrasting influence of visual photographs to oral descriptions.

Of additional interest is the capacity of researchers to identify in most jury panels, "prosecution biased" jurors in comparison to "defence biased" jurors.

A closing address must identify and respond to emotions and bias. An advocate must endeavour to identify and address them in the course of argument, confronting and damping down the evident difficulties in a manner unavailable to a Judge. Accepting the legitimacy of the emotions and understanding the provenance of bias and prejudice is a persuasive necessity. Admonitions to "leave emotions outside the court" and to consider the issues "in cold blood" are the likely extent of judicial directions.

Ushering emotion and prejudice into a neutral paddock is often the best that can be achieved. Of course in a cause such as self defence or one in which there is an even bigger criminal than your client giving evidence against him/her harnessing the anger and directing it away from the accused may be a crucial strategy.

Perverse?

In Randle and Pottle (R v Central Criminal Court, ex parte Randle and another [1992] 1 All ER 370) there was an example of another emotion-disagreement with the prosecution – antipathy towards the abuse of authority. It is seemingly safe to assert that in some instances there is a dislike of stigmatising or criminalising people who think and act like the jurors. This can expressly be the core if they would be inclined to act like them. Acting out of a genuine public interest or a genuine belief in the propriety of the action can be an important perspective in any closing.

It has to be said, however that Australians seem to have a lesser capacity to come to "perverse" verdicts of acquittal than apparently the UK or the USA. It seems that penalty rather than acquittal is a more palatable reflection of disquiet with a Prosecution in this jurisdiction.

Newer Ways of Speaking About Justice

Care should always be taken to properly reflect and respond to the political damage to the language of justice both in Parliament and in the media. The enactment of a *Charter of Victims Rights* is an important signpost. The balance between victim and accused is now very fine. It is an error of argument, in a closing where victims are either direct (e.g. murder) or indirect (e.g. fraud) for there to be no mention or allusion to it.
Whilst Judges have historically represented a bulwark between the citizen and Government the reality in today's courtroom is increasingly that Jury's seek to do justice for victims and this can often be at the expense of an accused. Justice for victims is increasingly being seen in a conviction, rather than a penalty following conviction, although the achievement of both is the optimum.

Is serves an advocate well to be alert to social attitudes and perspectives and to take account of available statement of opinion on a wide range of issues. Talkback, tabloids and T.V. exposes, as well as popular reflection of contemporary (often foreign) society, cop shows, soaps, and the like can never be safely eschewed to remain persuasive. This applies as much in a Local Court as anywhere else. Short cuts are available- the ANU has published the 'Australian Survey of Social Attitudes' updated every two years; there are Bureau of Crime Statistics and Research there is 'Packed to the Rafters' or 'RBT'...

Staying in Touch

Age, gender and lifestyle can be in inimical to persuasive insights. Guard against the arrogance that criminal practice as a lawyer provides the deepest social insights as if acting for a defendant somehow allows you to consider having walked in their shoes.

It is called "acting".

Proof of What you Suspected

Which brings us to an uncomfortable reality. The Australian Institute of Criminology in a recent paper "Confidence in the Criminal Justice System" referred to a 2007 study (Roberts, J (2007) 'Public confidence in criminal Justice in Canada: a comparative and contextual analysis. *Canadian journal of criminology and criminal justice* 49:153-184) which provided an international comparison of confidence levels in the Criminal Justice System.

Only 35% of Australians interviewed, indicated a ‘great deal’ or ‘quite a lot’ of confidence in the Criminal Justice System. Australia was ranked 27 out of 36 countries- Denmark was the highest with 79%, Lithuania the lowest with 19%.

Perceptions of ‘the system’ are an important persuasive insight when dealing with jurors and to a lesser extent, magistrates. It is important not just for a closing address to understand the usual pecking order, but also for the entire conduct of the trial.

There is Canadian research that quantifies, in that jurisdiction, the evaporation of confidence, mirrored in the evaporation of trust and respect for different participants in the Criminal Justice System. So in relation to “high levels of trust”, police attracted 72%, Judges 59%, Prosecutors 52% and for defence lawyers 34%.

There are a few interesting charts from recent research. They make a persuasive visual argument.

Out of Step

The conclusion is that members of the public, in the majority, align themselves with the Crime Control Model rather than the due process model. It has been argued that, in essence, the public is much more concerned about the effectiveness of the System in controlling crime and less with legal process, especially the rights of the accused. A guiding principle of the Courts, that it is better to acquit 10 guilty people than convict 1 innocent person is not enthusiastically shared by the public and evidence from the UK and Canada indicates that the public are less than satisfied with the asserted “traditional” legal balance. It seems to be the same here.

In a paper by the Australian Institute of Criminology (Tomison, A, ‘Confidence in the Criminal System’, 17 February 2010) the third conclusion is:

> “The best way to improve the confidence and regard of named citizens to institutions within the Criminal Justice System is to enhance and optimise the perception that the institution is acting on behalf of citizen’s and representing their interests”

It is the inevitability of acquittal arising from that perception that is the aim of a criminal defence lawyer in a criminal trial. Perhaps that is why the accolades given are only warranted in 3% of cases.

Conclusion

Closing address is an opportunity to persuade. It is never the last word, that is the verdict. That should always be borne in mind.

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