

2534

DIFFERENTIAL
ADVOCACY BEFORE
APPELLATE COURTS

Article for *Australian Law Journal*
2011

The Hon. Michael Kirby AC CMG

**DIFFERENTIAL ADVOCACY BEFORE APPELLATE
COURTS***

The Hon. Michael Kirby AC CMG**

ABSTRACT

The author notes the large number of books and essays on advocacy today, including a number he has himself written. However, the topic of differential advocacy is the subject of very little analysis. The essay begins with a description of the complex task facing advocates when judges in multi-member appellate courts suggest different approaches to the facts and, even more so, to applicable legal doctrine. Because the advocate does not know the final conclusion of the judges, it is dangerous to assume that any are ultimately against the arguments being advanced. In areas where the law is developing, the advocate must become familiar with differing approaches in the Court and seek to hold on to support from whatever quarter. The notion of appealing as such to the views of a potential dissident may be appropriate in an intermediate court; but rarely, if ever, in a final court. The advocate must also be ready to argue any new theories of the case advanced for the first time in the appellate court. Several cases are cited to illustrate the themes advanced in this article. So are a number of opinions on the topic expressed by advocates, based on their experiences.

* Based on an address delivered to a conference on advocacy organised by the University of Adelaide and held in Adelaide on 4 February 2011.

** Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96). The writer acknowledges the assistance with materials of Lisa Ziegler, Crown Solicitor's Office, Adelaide and of unnamed barristers whose comments were used in the preparation of this paper.

QUARTER-CENTURY THOUGHTS

For more than 25 years, I sat in appellate courts. In the 1980s I participated in the Full Court of the Federal Court of Australia¹ and wrote opinions for that Court, including that in *Hodges v Frost*² which was to prove influential. Then, for more than a decade as President of the Court of Appeal of New South Wales³, I presided in that busy court and in the Court of Criminal Appeal of that State. Concurrently, I served with Australian, New Zealand and Papua New Guinean judges as President of the Court of Appeal of Solomon Islands⁴. I concluded these functions shortly before commencing 13 years of service on the High Court of Australia⁵. Day by day, I heard and read the arguments of advocates and watched their efforts at persuasion.

Over the years, as payback, I made various attempts to collect the ‘sins’⁶, ‘rules’⁷, prognostications⁸ and hints⁹ about techniques of appellate persuasion. As an ultimate gift, I even suggested ways by which advocates could imagine the judicial ‘moment of decision’, so that they could target their persuasion at it¹⁰. As a kind of bonus, I threw in some reflections on the changing features of addressing juries of younger citizens, from the X and Y generations and beyond¹¹. Given

¹ Between 1983-4.

² (1984) 53 ALR 573 (with the concurrence of Gallop J and Morling J); cf *Kars v Kars* (1996) 187 CLR 354; *Grincelis v House* (2000) 201 CLR 321.

³ Between 1984-96.

⁴ Between 1995-96.

⁵ Between 1996-2009.

⁶ Kirby, M.D., “The Seven Deadly Sins of Appellate Advocacy” in New South Wales Bar Association, *Bar News*, Winter 1985. See also *Bar News*, Summer 2010-11, p.36.

⁷ Kirby, M.D., “Ten Rules of Appellate Advocacy” (1995) 69 ALJ 964.

⁸ Kirby, M.D., “The Future of Appellate Advocacy” (2006) 27 *Australian Bar Review* 141.

⁹ Kirby, M.D., “Maximising Special Leave Performance in the High Court of Australia” (2007) 30 UNSWLJ 731; Kirby, M.D., “Precedent, Law, Practice and Trends in Australia” (2007) 28 *Australian Bar Review* 243; Kirby, M.D., “Ten Years in the High Court – Continuity and Change” (2005) 27 *Australian Bar Review* 4.

¹⁰ Kirby, M.D., “Judging: Reflections on the Moment of Decision” (1999) 18 *Australian Bar Review* 4.

¹¹ Kirby, M.D., “Delivering Justice in a Democracy III: The Jury of the Future” (1998) 18 *Australian Bar Review* 113.

that today judges, like police constables, are looking younger, it must be anticipated that some of the lastmentioned remarks will soon have relevance to the persuasion of judges. One would have thought that my contributions to this *genre* had been well and truly exhausted.

Then came a joint request of Justice T.A. Gray of the Supreme Court of South Australia and Professor John Williams of the University of Adelaide, asking me to address the issue of differential advocacy before appellate courts. It was a novel topic, a fact borne out by a futile search of the literature for analysis specifically addressed to the theme. This was itself somewhat surprising, given that articles on advocacy, both oral¹², written¹³ and hybrid¹⁴, are now so numerous that, simply by the laws of chance, one would have thought that a judge or an advocate would have ventured upon it. Not so. Accordingly, once again I embark on virgin territory.

PERRE'S CASE AND THE SEEDS OF THE TOPIC

As I will show, there are particular reasons why Justice Gray was interested in the topic. He was appointed a judge in 2000, a few months after a successful outcome in his last appearance before the High Court of Australia in *Perre v Apand Pty Ltd*¹⁵. There I witnessed his forensic skills in gaining the reversal of the orders of the Full Court of the Federal Court of Australia¹⁶.

¹² See e.g. Engel, A.J., "Oral Advocacy at the Appellate Level" 12 *Toledo Law Rev* 464 (1981).

¹³ Pagone, G.T., "Written Advocacy: Writing with Effect and Persuasion" Hirton, M, Caruso, D., and Belperio, E., (Eds) *Advocacy* (Uni of Adelaide Press, Adelaide, 2011) (forthcoming). McHugh, M.H., "Preparing and Arguing an Appeal" NSW Bar Association *Bar News* 85 (Winter 2010).

¹⁴ Perry, M., "The Art of Persuasion Through Written Word in Appellate Advocacy" (2007) 28 *Adelaide L Rev* 139.

¹⁵ (1999) 198 CLR 180.

¹⁶ *Perre v Apand Pty Ltd* (1997) 80 FCR 19.

Perre is famous (some might say infamous) amongst the decisions of the High Court in which I participated for presenting several competing holdings upon which to sustain the Court's majority opinion¹⁷. This was that Apand Pty Ltd owed a duty of care, in the circumstances, to the members of the Perre family (for whom Mr. Gray QC appeared), not to cause economic loss as a result of its supply of an infected variety of potato seeds to a neighbour of the Perres. They were operating a short distance away, vulnerable to the air-borne spread of the disease carrying such a defect.

Scholars who have devoted a lifetime of study to the law of negligence, and of tort doctrine generally, have rarely experienced such delight as on receiving a decision with so many differing permutations and computations of often incompatible opinions. The case, as I have been assured, is a joy for law teachers to teach. Not only in explaining the Australian law of negligence, as it was then evolving; but also for its use in courses on judicial practice, the law of precedent, jurisprudence and (in those rare places where they still exist) legal history¹⁸. *Perre* is one of those cases that can illustrate to law students, preferably in their first year of study of law, the complexities of the discipline, the subtleties of its distinctions and the fine talents of the judges of the nation's highest court: blessed with rare gifts at drawing subtle lines and then expounding and applying them.

Professor Horst K. Lücke, for a long time a faculty member of the law school of the University of Adelaide, even chose the *Perre* case, with all its fascinations, as the topic of detailed judicial analysis in *Aufbruch nach*

¹⁷ McHugh J and Hayne J (dissenting).

¹⁸ Kirby, M.D., "Legal History as Ancient History" (2009) 81 ALJ ???.

*Europa*¹⁹. His contrast between how the courts of Switzerland would have approached such a case²⁰ and how the High Court of Australia did so, reveals that he was so successful in his analysis as to be rewarded by its inclusion in a *Festschrift* which celebrated the 75th anniversary of the *Max Planck Institut für Privatrecht*. One can only imagine the pleasure of the German-speaking lawyers of Switzerland, and beyond, on learning about the differential judicial reasoning in Australia that won the case in *Perre* for the then advocate, Thomas Gray.

So I was not particularly surprised to receive the assignment of such a topic for this contribution. I hope it does not sound ungracious for me to say that I remember the way in which, as an advocate, Tom Gray proceeded to his triumph. It involved deploying a technique, by no means unique in that tribunal. Skilfully, he reminded the Bench of the critical facts in the evidence that tied the wrong-doing of Apand into a physical and moral proximity to the poor Perre family. He showed that Apand must have known that the Perres would have been grievously damaged by what Apand was up to. Having thus thrown the ball of advocacy onto the field, he stood back and had only briefly to interrupt the hours of discourse that followed between the advocacy of the several judges; each urging the respective merits of his or her own approaches. I confess that I was not backward myself in urging on everyone in the courtroom the approach that was attractive to me.

A plurality of the Court (together with two dissentients) suggested that the considerations upon which the existence of a duty of care depended

¹⁹ Lücke, H., “Deciding Cases Without the Guidance of Statute or Precedent” in *Aufbruch nach Europa* (Mohr Siebeck).

²⁰ He points out that the Swiss Federal Court, in a recent decision, confessed to having been influenced by the *Zeitgeist* [spirit of the times].

were to be found in a combination of factors (in later authorities to be called [unhelpfully in my view] “salient features”²¹), which together combined to demonstrate the existence of the legal duty. This was how the plurality found that the first requirement for the tripartite tort of negligence (duty, breach and consequential damage) was established. Justice Gaudron adhered to an earlier doctrine reliant on a special qualifying relationship of “proximity” or “neighbourhood”, drawing on decisions laid down in the Court during her service in the Mason years²². I persisted with my then recent embrace of the generic approach to the resolution of such problems that had been adopted in the three stage test expressed in England²³. I had endorsed that approach in earlier cases²⁴. I was to persist with it in later decisions²⁵. Although the same approach had been followed in other common law countries, it never ultimately secured a majority in the High Court of Australia²⁶.

In advocacy in *Perre*, the judges, (occasionally interrupted by counsel²⁷), attempted to persuade each other about the correct approach. Getting the approach right was important, certainly to me. Otherwise, the Court would not be fulfilling its duty to give guidance to trial and intermediate courts of Australia. It would simply be continuing, in the particular area of “pure” economic loss, the “dark and uncertain formulae”, with empty labels of no content, with which the relevant law had been repeatedly

²¹ *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49]. Cf. Mendelson, D., “Torts”, Chapter 32 in Freckleton, I. and Selby, H. (Eds.), *Appealing to the Future: Michael Kirby and his Legacy*, Law Book Co., 2009, Sydney, 817 at 821 ff; Witting, C., “The Three-Stage Test Abandoned in Australia – Or Not?” (2002) 118 LQR 214.

²² (1999) 198 CLR 180 at 201 [38].

²³ Especially *Caparo Industries Plc v Dickman* [1990] 2 AC 605. See Mendelson, D., *The New Law of Torts*, OUP, Melbourne, 2007, 391-2.

²⁴ See e.g. *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 419.

²⁵ See e.g. *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 520 at 626 [238]. See also Mendelson, above n21, 824.

²⁶ Mendelson, above n21, 821-825.

²⁷ Cf. *Federal Commissioner of Taxation v Hofnung & Co Ltd* (1928) 42 CLR 39 at 62, per Starke J.

and rights castigated²⁸. Not only would other judges not know the governing rule. Nor would legal practitioners or citizens. Nor, indeed, would the High Court itself.

From the point of view of Mr. Gray (possibly even then knowing that he was soon to be released from such toil), it did not particularly matter what the rule was, so long as he won the case for his factually meritorious clients. I can still remember the look of bemusement that came over his face as he watched the ball of victory, that he had so deftly thrown to the judges, pass backwards and forwards from one to another: the permutations complicated by the differing views held by those of the majority approach concerning the application of their opaque principle to the evidence at the trial.

Little wonder that, throughout the ensuing decade, Justice Gray was lying in wait for an opportunity to relive the forensic triumph that he so enjoyed in *Perre*. Yet was his victory truly the product of his advocacy? Certainly, it required him to lay the foundation of merit *in the facts*: elaborating, without unduly repeating, the emphases outlined in the written submissions. Of course, he had to be careful not to engender a feeling that the facts of his case (so special for the plurality's view) were so very special as not to yield any legal elucidation and thus to risk the revocation of the grant of special leave.

In short, he had differentially, if you like, to argue his case on alternative hypotheses, sniffing the wind of the "salient features" school favoured by the plurality; but without losing (if he could avoid it) the support of Justice Gaudron's adherence to the "proximity" approach or my own attraction to

²⁸ See the epithets collected in *Perre* (1999) 198 CLR 180 at 262-263 [230].

the *Caparo* three way test, gradually finding favour in Canada and New Zealand, as well as Britain. A good advocate in his position would guard these flanks and then encourage the individual judges to apply their differing approaches in such a way as to favour the outcome that would produce the orders sought by his client.

To be successful with such differential advocacy, counsel must, in part, be fortunate. He or she must preferably be advancing arguments with a precise knowledge (to be derived from the cases) of the current doctrinal position adhered to by each of the participating judges: tapping their differing approaches and struggling to show how all of them leads ultimately to the desired outcome.

This is true of intermediate courts as well as of a final court. However, the rule is somewhat more difficult to deploy in intermediate courts, at least in Australia. This is because, in such courts, typically, only three judges participate (and now increasingly two). Therefore the full range of the opinions in the court may not be on display. They may not even be known, because the pressure of dispositions in intermediate courts is such that fewer multiple opinions tend to be written. The small bench of two or three justices for special leave applications in the High Court likewise makes it more difficult to play the game on those stressful occasions that Justice Gray did so well in *Perre*. Still, in principle, the needs are the same. To know the differentiating judicial approaches, interests and concerns. And then to utilise them in such a way as to hook their respective protagonists, without offending or irritating their opponents.

Such skills in differential advocacy tend, in my experience, to appear best in those advocates who keep abreast of all of the opinions of the appellate courts before whom they appear. Only then will they be fully aware of the sometimes almost imperceptible shifts of doctrine held by the several appellate judges concerned.

In intermediate courts and in the High Court of Australia (the latter ordinarily constituted by five of the seven Justices), the challenge of differential advocacy will often be heightened by the common practice in Australia of not revealing the names of the participating judges until either the afternoon prior to the hearing or, indeed, until the judges actually appear in the court room. This adds a further ingredient of advantage in advocacy to the advocate who keeps abreast of the judicial opinions (and any extra-curial writings) of each of the judges who will decide the case. To say this is to acknowledge the role that judicial approaches, interests and attitudes play, at the critical margins, in influencing the outcomes of cases. These are not illegitimate influences. They are part of the realities of any system of law and justice dispensed by human actors.

TARGETING A DISSENTER?

But in considering differential advocacy, should a professional advocate in Australia ever address arguments in a collegiate court to a potential dissenter? The answer to that question is that no advocate, in my experience, ever enters upon the challenge of appellate advocacy, aiming to lose the case; only to salve the wound by gathering up one or more dissenters whose opinions will demonstrate the errors of their colleagues and the correctness of the advocate's propositions.

It is true that advocacy, involving as it does both intellectual and dramatic qualities, tends to attract to its ranks strong personalities, exhibiting self-confidence and ego. However, to be successful, these qualities must normally be deployed with subtlety. If too much assertiveness is on display, it may irritate, or even threaten, the judicial decision-maker or needlessly upset his or her cultural expectations or notions of due modesty. Skills in jury advocacy, which may sometimes call for the exhibition of forensic flair and dominance, tend to be less on display in Australian appellate courts. There the dialogue (especially in intermediate courts) is generally more in the nature of a conversation between Bench and Bar. An advocate “showpony” who overrides judicial questions or talks down to the judges and simply seeks to stroke his or her own ego, will quickly come to be known as such. Courage in an advocate, in the cause of the client, is a vital ingredient. The very art of advocacy or persuasion is generally aimed at “creating or changing perceptions to influence the result”²⁹. That result is success for the client, either total or partial, as the circumstances permit. It is not to settle for defeat; nor to accept such an outcome, in a contested matter, until it is finally and definitely determined by the orders of the court.

There are, however, cases where, depending on the court concerned, the state of binding authority may mandate a particular outcome in a case before that court. In such an instance, both in written and oral submissions, the advocate may have eyes on a further appellate challenge, hoping to reach a court with the jurisdiction and authority to reverse the adverse holding and to substitute a statement of the law that will result in orders favourable to the client. Many a time, sitting in the

²⁹ Hampel, G. in Marshall, K., “War Crimes Prosecutors Set to Learn Art of Persuasion” *Monash News*, December 2002, 8.

New South Wales Court of Appeal or Court of Criminal Appeal, I observed counsel of high talent submitting that a principle of law, binding on my Court, and applied below, was wrong and asking that a submission to that effect be noted so that it could be reserved as an issue for later argument before the High Court. Doing this is entirely consistent with directing advocacy towards influencing the *ultimate* result, favourable to the client.

Sometimes in a court of appeal, the state of the law on a particular subject will be unclear or uncertain. In such a case, it would, in my view, be entirely proper for an advocate, contemplating a further appeal, to seek to strengthen the client's hand by endeavouring to persuade one (or more) of the intermediate judges to express a view different from the majority. Before me, in the Court of Appeal, this happened on many occasions – as in a case concerning the right to reasons for administrative decisions at common law³⁰; a case concerning the principles applicable to patient access to their own medical records³¹; and a case involving a claim for damages for so-called “wrongful birth”³².

In each of those cases, in the Court of Appeal, one judge was persuaded to dissent and to express his dissent forcefully. The existence of a dissent in the intermediate court is undoubtedly a factor that can prove relevant to the consideration by the High Court panel of whether to grant, or refuse, special leave to appeal. Special leave was granted in each of the foregoing cases. In one of them, the Court of Appeal was reversed³³. In another, it was confirmed on different

³⁰ *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 477 (CA) (Glass JA dissenting).

³¹ *Breen v Williams* (1994) 35 NSWLR 522 (CA) (Kirby P dissenting).

³² See e.g. *C.E.S v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47 (CA) (Meagher JA dissenting).

³³ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.

grounds³⁴. And in the third, the matter settled, but the Court of Appeal's approach was later effectively upheld by a majority in the High Court in another case³⁵. In each instance, and many more that could be mentioned, the advocate, addressing attention to the *ultimate* outcome of the contest, would certainly conform to duty to the client by seeking to gather up the majority, or if not, at least one judge who would express reasons explaining why the case was important for legal principle or doctrine and why the majority opinion was wrong as a matter of authority, principle or policy.

But what of the High Court? If, unlike the relative plain sailing that Tom Gray enjoyed in *Perre*, the writing quickly appears on the wall of the Number 1 Court suggesting that the numbers are stacked against the advocate, should he or she search out the lonely dissenting voice, as an 'appeal to the future' for the ultimately correct evolution of sound legal doctrine? In short, should the advocate, in such circumstances, take eyes off the interest of the client (which is to win) and address the larger and more elusive (arguably noble) target of a correct or preferable statement of the law?

Given that, from first to last, the duty of an advocate of our tradition is to advance the lawful interests of the client (consistent with duties owed to the court itself), there are still, in my view, difficulties in suggesting a residual obligation to the state of the law. In a well-known article on appellate advocacy written in the United States of America, Judge Albert

³⁴ *Breen v Williams* (1996) 186 CLR 71.

³⁵ *Cattanach v Melchior* (2003) 215 CLR 1.

J. Engel³⁶ cautioned advocates always to remember the part they play in assisting the judicial process³⁷:

“Speak to your client, if you wish to please him and increase your fees. Speak to posterity, if you want to run for Congress or to have your words chiselled in marble. But speak to the three judges who will be deciding your case if you want to win it. To achieve a successful result, it is vitally important to consider who these judges are and what their particular problems may be in deciding the appeal.”

Because no cause is ever lost until judgment is delivered and the orders are pronounced, an advocate should not, in my view, ever abandon the client’s interests. These are to persuade all of the judges (or at least a majority) to favour the client’s propositions. Sometimes judges change their mind between oral argument and disposition. To the end of the advocacy, the persuader should be seeking to demonstrate the problems of authority, principle or policy³⁸, that stand in the way of the opponent’s submissions.

During the heat of argument, the advocate may suspect the coming outcome. He or she may foresee the adverse orders of the collegiate court. However, certainty is all but impossible. Either the judges or some of them may still be undecided. Or they may be decided then but later alter their conclusion.

The latter happened to me on many occasions during my judicial life. Often it was as a result of re-reading the record of oral advocacy in transcript and realising an insuperable difficulty for the hypothesis that I had initially embraced.

³⁶ Circuit Judge, United States Court of Appeals, Sixth Circuit.

³⁷ Above n12, at 467.

³⁸ *Oceanic Sunline Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 211.

A good illustration is *Minister for Immigration and Multicultural and Indigenous Affairs v B & Anor*³⁹. That was an appeal to the High Court of Australia from the Full Court of the Family Court of Australia⁴⁰. That court had upheld a submission that it had jurisdiction under the *Family Law Act 1975* (Cth), s67ZC or s68B, to direct the Minister for Immigration to release two children held in immigration detention, on the basis that their detention was harmful to their welfare. In argument, it was pointed out that such detention was contrary to Australia's obligations under the United Nations *Convention on the Rights of the Child*. Under that Convention (to which Australia is a party), detention of a child "shall be used only as a measure of last resort and for the shortest appropriate period of time"⁴¹. Under the Australian *Migration Act*, such detention was effectively required to be automatic, immediate and where necessary, prolonged.

Because of my respect for the principle that Australian domestic law should, where possible, be interpreted so as to conform to universal human rights norms⁴², particularly where the international law has been accepted by it (through ratification of the relevant treaty), I was at first inclined to uphold the decision of the Full Court. I departed the oral hearing convinced that such would be my outcome.

However, in considering the full submissions in the case, I came upon two impediments, which loomed like great icebergs in the way of such a conclusion. The first was the detailed demonstration, in the written and

³⁹ (2003) 219 CLR 365.

⁴⁰ *B v Minister for Immigration* (2003) 199 ALR 664.

⁴¹ *United Nations Convention on the Rights of the Child*, Art.37(b).

⁴² See e.g. *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 42 per Brennan J.

oral submissions, that the disparity between the treaty requirement and the provisions of the *Migration Act* had been expressly and repeatedly drawn to the notice of the government and the Parliament by departmental officials. This was not therefore a case where an Act might have infringed one of Australia's international obligations accidentally⁴³.

Secondly, the record of argument and written submissions drew attention to specific provisions of the *Migration Act* relating to the search of children in detention. These made it impossible to read down the general provisions for detention, so as to be applicable only to adults⁴⁴. Faced by these obstacles, my conclusion was changed. I was required to uphold the submissions of the Minister. Objectionable though I considered mandatory detention of children to be, as a matter of principle or policy, the statute and its history obliged me to uphold its application, no argument as to its constitutionality having been advanced.

Cases of this kind happen all the time in appellate hearings. Differential argumentation in the High Court should rarely, if ever, give up on persuading the judges or settle for some lesser prize of dissenting vindication.

I asked an advocate with experience in the High Court whether he thought it would ever be justifiable to target, and possibly to stimulate, a dissent. His answer was in point:⁴⁵:

⁴³ (2004) 219 CLR 365 at 423-425 [162]-[172].

⁴⁴ (2004) 219 CLR 365 at 422 [156]-[159].

⁴⁵ Email dated 30 December 2010 on file with the author.

“I cannot imagine what you are on about. Frankly, this is ego-mania territory. The advocate has one purpose and one purpose alone: to advance his/her client’s cause by every legitimate means. Along the way, some interesting law may be raked over. But getting to a win is what matters. Counsel do not turn up thinking, well, I’d better run an argument for [Justice X’s] sake in case I can’t get any of the others and [X] will give me a nice dissent. One can make mistakes in not trimming an argument more in tune with past dissents. But that course runs the obvious problem of offending and alienating other members of the court. ... The law is not only hierarchical but very clannish. At the end of the day, the greats in this game (and Sir Maurice Byers was the greatest of my lifetime) managed to synthesise the various views as they come tumbling off the Bench, so that the entire Bench feels as though it is being looked after and given The Answer, as each member is looking differently at the problem. That “political” ability to be appealing to all is probably the magic art at its finest.”

HANGING ON WITHOUT UPSETTING

In these last remarks lie the germs of an important idea for differential advocacy before multi-member appellate courts. Similar ideas were expressed earlier, with larger delicacy, by Sir Anthony Mason, writing in 1984 in the context of oral advocacy⁴⁶:

“The able appellate counsel, alive to the possibility that he may need to adjust his case in light of the Court’s reaction to his argument, preserves some degree of flexibility in the expression of his submissions, knowing that what attracts one judge may repel another.”

This very point can be illustrated by reference to the two cases already mentioned, namely *Perre* and *MIMA v B*. In the first case, advocates at the bar table knew, from earlier authority, that I was attracted to the *Caparo* formulation on the duty of care, also being embraced overseas. But they equally knew that it had not proved attractive (even if not by then been rejected) by the other members of the High Court of Australia.

⁴⁶ Mason, A.F., “The Role of Counsel and Appellate Advocacy” (1984) 58 ALJ 537 at 540. See also *Perre*, above n15, 143.

To the majority, this may have seemed simply my undue fascination with legal concepts. This, it might be thought, probably derived from my time with all those academics in the Law Reform Commission. It was out of keeping with the plurality's view of the practical, and basically factual, analysis necessary to resolving negligence questions. It smacked of a civilian, even conceptual, approach.

For Mr. Gray, in argument, to spend too long advancing the *Caparo* approach (in order to demonstrate that it could be applied favourably to his client) might have been perilous for the good humour of the plurality. I would therefore be the first to understand that he could not do this. At least not for long. But his argument had to provide (as it did) a reference to my theory which, after all, had very distinguished overseas judicial support which once would probably even have been imposed as binding on Australia. During argument, he was not to know how many of the plurality he would win. In the event, he won support from five of the Justices on the plurality's legal principle; but lost two on its application to the facts. For all he then knew, he could have lost more. He therefore needed to hang on to my vote, based on a different legal approach.

Likewise, in *B's Case*, counsel for the Minister would have known, from reading earlier and contemporaneous cases⁴⁷, the attention I often paid to the state of universal human rights law, both in expressing the common law⁴⁸ and in construing ambiguous legislation⁴⁹.

⁴⁷ See e.g. *Behrooz v Secretary, Department of Migration, Multinational and Indigenous Affairs* (2004) 219 CLR 486 at 529-534 [125]-[139].

⁴⁸ *Mabo v Queensland [No.2]*, above n42.

⁴⁹ *Daniels Corp International Pty Ltd v ACCC* (2002) 213 CLR 543 at 580-582 [155]-[159].

An informed advocate would, however, have known (or could have discovered from even superficial research) the disagreement, even hostility, felt towards this approach on the part of other Justices of the Court. In due course, that disagreement was to boil over into the *coda* alleging “judicial heresy”, appearing in the reasons of Justice McHugh in *Al-Kateb v Godwin*⁵⁰ and then in the strongly expressed dissents of Justice Hayne⁵¹ and Justice Heydon⁵², responding to the majority reasoning in the prisoners’ voting case of *Roach v Electoral Commission*. In that case, reference had been made in the majority’s reasoning, to analogous decisions based on treaty and other human rights law overseas⁵³.

The advocate, confronted by such strongly felt disagreements about basic notions of legal doctrine within the court, is confronted by a serious challenge. It is one that the judges themselves fully understand, or should. They cannot expect the opinions of judicial colleagues to be ignored by an advocate performing his or her duty. It would be the antithesis of judicial open-mindedness to attempt to stop arguments being advanced which might have foundations in earlier judicial opinions or the views of current judges. Every judge, by the time they reach an appellate court in Australia, will have a full awareness about the way the law evolves, often building on dissenting opinions sometimes written long ago⁵⁴.

⁵⁰ (2004) 219 CLR 562 at 591-595 [66]-[73] per McHugh J; cf at 617-629 [152]-[190] per Kirby J.

⁵¹ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 220-222 [163]-[174] per Hayne J.

⁵² (2007) 233 CLR 362 at 224-5 [181] per Heydon J.

⁵³ (2007) 233 CLR 162 at 177-179 [13]-[18] per Gleeson CJ; and 203-4 [100] per Gummow, Kirby and Crennan JJ.

⁵⁴ See generally Lynch, A., “Dissenting Judgments” in Blackshield, T., Williams, G. and Coper, M. *The Oxford Companion to the High Court of Australia* (OUP) 2001, Sydney, 216.

Generally what is involved in the determination of most ordinary cases is simply a differing view about the constitutional text, about a statute or of the principles of the common law. Upon such matters, the higher one moves in the judiciary, the more readily is it seen that judges can approach the same problem, with the same materials, yet reasonably arrive at different conclusions. In the High Court of Australia, this is especially so since the advent of universal special leave and the abolition of appeals as of right.

The grant of special leave generally means that a panel of the court has accepted that competing arguments exist. It should therefore not be a matter of surprise that they surface at the special leave stage; are sharpened in the oral hearing of the appeal; and frequently emerge fully formed when the final reasons are published, supporting the reasoning favoured by the participating members of the Court. In the context of the inevitability of the disagreement over particular cases, most oral argumentation in appellate courts in Australia is combative but not unduly unpleasant. That, at least is as it should be. It is how I always endeavoured to make it. I always regarded personal unpleasantness, directed at an advocate (or a colleague), as a betrayal of the professional and judicial duty⁵⁵.

⁵⁵ Another commentator from the Bar made some useful practical suggestions. Apart from the obvious need to 'know the Bench', and to be aware of its members' approaches to cases, feelings and inclinations, he emphasised the necessity to "try to appeal to all members equally". This includes "eye contact which should not be confined to the presiding judge". (Email on file). Another mentioned, tellingly, the requirement to "try not to be hated". He recounted perceived prejudice by one judge that, he felt, was virtually impossible for him to overcome; rudeness and discouragement from other judges; and even cold, mocking on the part of colleagues at the Bar. Members of multi-bench courts do not see, face on, complained-of rudeness by their colleagues: face grimaces, hostility and sneering, back-turning, prolonged private conversations and even sleeping spells. It should not be thought that these are confined to lower courts. Another barrister cautioned me that "one in a thousand might come through as happily as you"; but idealism and pursuit of *pro bono* causes, he suggested, can have a tendency to cause hostility on the part of some judges that is barely disguised and profoundly discouraging. (Email on file). These remarks are recorded here as a reality check. Perhaps appellate judges should be obliged, annually, to watch film of themselves in action for an hour, given that differential advocacy is necessarily addressed to differentiated judges.

To the end, the task of a good advocate is to attempt to hang on to the vote (and thus the reasoning) of as many judges of the appellate court as possible. At least sufficient of them to ensure success in the outcome of the proceedings. One advocate, with a large practice in the High Court in criminal appeals was Paul Byrne SC, who died in May 2009. In a tribute to his skills in differential advocacy, published as an obituary⁵⁶, I described the way he deployed his talents in the appeal in *Smith v The Queen*⁵⁷, decided in 2001.

The case could not have been more ordinary, except for those involved in deciding it. Mr. Mundarra Smith was indicted on a charge of robbing a bank. There was little evidence of his involvement, except for some indistinct video film, still photographs of the robbers and the oral testimony of two police officers. They were permitted, at the trial, over objection, to say that they had previously dealt with Mr. Smith on a number of occasions and that they recognised the person depicted in the photographs as him.

As originally argued in the trial, in the Court of Criminal Appeal of New South Wales and before the High Court, Paul Byrne's submission challenged the admissibility of the oral evidence of the police officers on the footing that it amounted to opinion evidence, not a statement of fact. As an opinion, it had failed to conform to the requirements for the reception of opinion evidence laid down in the *Evidence Act* 1995 (NSW), s76. The object of the submission was to keep the evidence out of the trial. The Crown accepted that, without the evidence of the police,

⁵⁶ "Paul Byrne SC, Former General Editor of the Criminal Law Journal" (2009) 33 *Criminal Law Journal* 227.

⁵⁷ (2001) 206 CLR 650; cf *Evans v The Queen* (2007) 82 ALJR 250 at [55], [80], [102].

it would be difficult for the prosecution to sustain the link between the masked man depicted in the film and photographs, and the prisoner whom the jury had found guilty.

In my tribute to Paul Byrne, I went on to describe the challenge of differential advocacy that was suddenly presented to him in the course of presenting his argument⁵⁸:

“At the beginning of Paul Byrne’s submissions, he was beset with questions from the Court addressed to why the evidence of the police was not inadmissible for a completely different reason, not earlier argued. This was that the evidence was irrelevant and hence inadmissible in accordance with the fundamental rules of evidence law and s55 of the Act.

My view was that the evidence of police officers who knew the accused was relevant, even perhaps too relevant, and so could afford the linkage required on that basis. I thought there was more in the opinion point. But as the argument unfolded, the Court grew more and more attracted to its own theory. This, as you know, sometimes happens. Paul Byrne’s challenge, looking at us with his thoughtful eyes, was to hold on to me, whilst embracing enthusiastically the arguments that seemed to be carrying the day with my colleagues.

In the end, Paul Bryne won us all. It was triumph of differential persuasion. Not an easy task for an advocate to run inconsistent and even contradictory arguments. Only a specialist in forensic persuasion can do this with ease. Paul Byrne was such an expert. He won the appeal.

I can still see him accepting my analysis and then, without a blush, turning to accept the analysis urged on him by Justice Hayne.”

⁵⁸ (2009) 33 *Criminal Law Journal* 227 at 229.

AN END TO FAIRY TALES

One could comb through the decisions of the High Court of Australia since 1903, other Australian appellate courts and indeed courts throughout the common law world, and find many similar instances of differential argumentation, skilfully deployed. Because the advocate does not know the outcomes of pre- and post-hearing conferences of the judges and post-argument consideration in the privacy of each judge's contemplation, the advocate can never be certain as to how the cards will fall out, prior to the announcement of orders⁵⁹.

Holding on to any judges who favour the outcome sought is the ultimate challenge for the advocate. For the judges, the challenge is more complex. It is to work within the bounds set by applicable considerations of authority, principle and policy and then to explain how, doing so, supports the orders ultimately proposed by the judge. Although some judges cultivate skills as "judicial politicians", negotiating compromises and securing concurrences to win the precious majority vote in the court (Justice William Brennan in the Supreme Court of the United States was reputedly famous for this⁶⁰ and in the House of Lords, Lord Diplock was described as mesmeric⁶¹), the judicial obligation is basically a lonely one, mapped out by integrity, conscience, learning and sheer hard work. But the advocate is the voice of the litigant. The task of the advocate is to persuade, so as to influence the ultimate result of the hearing. Talk of advocates' settling for a dissent or arguing for self-vindication is erroneous, certainly in the ultimate court. There, it would represent a

⁵⁹ Sackville, R., "Appellate Advocacy" (1996) 15 *Australian Bar Review* 99; McHugh, above n13, 85.

⁶⁰ "William J. Brennan Jr." in C. Cushman, *The Supreme Court Justices*, Congress Qtly, 1995, 446 at 449-450.

⁶¹ By Lord Wilberforce, himself no slouch, in Sturgess, G. and Chubb, P., *Judging the World* (Butterworths, Sydney, 1988), 275. See also Paterson, A., "Does Advocacy Matter in the Lords?" in Lee, J. (Ed.) *From House of Lords to Supreme Court* (Hart, Oxford, 2011) 256 at 257.

fairy story. And we no longer encourage fairy stories in the world of appellate judging or in the lives of its advocates⁶².

⁶² Lord Reid, "The Judge as Lawmaker" (1972) 12 *Journal of Public Teachers of Law* 22. See Kirby, M.D., *The Judges* (ABC, Boyer Lectures, 1983), 59.