

**THE DAME ANN EBSWORTH MEMORIAL LECTURE**

**LONDON, TUESDAY 21 FEBRUARY 2006**

**APPELLATE ADVOCACY - NEW CHALLENGES**

**The Hon Justice Michael Kirby AC CMG\***

**EMBARGOED TO MIDNIGHT AEDT**

**DAME ANN EBSWORTH REMEMBERED**

This lecture honours Dame Ann Ebsworth who died in 2002 of cancer. She was but 64 years of age<sup>1</sup>. I am the inaugural lecturer. For this reason I will record some personal facts, although her memory will be fresh for her many friends.

Ann Ebsworth was born on 19 May 1937. Her father was an officer in the Royal Marines. She was raised a Roman Catholic and derived from her parents and her religion strong convictions and a sense of public service. She read history at the University of London where she was known as a formidable debater. In 1962 she was called to the Bar by Gray's Inn. Her practice, which was in

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\* Justice of the High Court of Australia. The author acknowledges the assistance of Mrs Lorraine Finlay, Legal Research Officer in the Library of the High Court of Australia, in the provision of materials used in the preparation of this lecture.

<sup>1</sup> P Bartle QC, note in *The Circuiter*, Spring 2005, 20.

Liverpool, was predominantly criminal with some family work (which increased) and some civil (which diminished). She rose to be head of her chambers. She was known as a considerable adversary, particularly in criminal cases. She was described as an "effective and formidable advocate, thorough in preparation, lucid and courteous in style and entirely unflappable"<sup>2</sup>.

In 1987 she was appointed to the Northern Circuit Bench. It was at that time that she first met Brenda Hale who had begun training to be an Assistant Recorder in Liverpool. Baroness Hale has told of how thoroughly intimidated she felt, especially because of the daunting experience of lunching with the other judges at St George's Hall. However, Baroness Hale describes how "Ann quietly did her best to look after me and make me feel a little more at home".

After 1978 Ann Ebsworth served as a Recorder in the Crown Court and later as a Circuit Judge. She did not take silk. She was promoted to the Queen's Bench Division in 1993. This was a significant appointment. Dame Elizabeth Lane had become the first woman appointed to the High Court in 1965. She was followed by Justices Heilbron, Booth, Butler-Sloss and Bracewell. However, although at least three of that five were far more familiar with the varied work of the Queen's Bench Division than the work of the

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<sup>2</sup> Address by Sir Mark Hedley at Gray's Inn chapel, 10 April 2002.

Family Division, that was where they were assigned. In Baroness Hale's words, "It was no mean achievement for Ann Ebsworth to become ... the first woman to be trusted full-time with the work of [the Queen's Bench] Division the year before the first, and as yet only, woman was appointed to the Chancery Division ... Dame Mary Arden".

According to Tim Dutton<sup>3</sup>, when appointed to the High Court, Ann Ebsworth suffered as a result of "that peculiarly English combination of snobbery and sexism" at the hands of a male fellow High Court judge, who even refused to talk to her. She later had the last laugh on him when he resigned. The Court of Appeal, allowing an appeal, were critical of the standard of his work. Tim Dutton says that "she was formal and slightly formidable as a judge. She was, he says, a kindly and self-effacing person. She was described as a "model judge who stood no nonsense from unprepared barristers"<sup>4</sup>. She conducted a large number of difficult trials, was rarely appealed and even more rarely reversed.

Ann Ebsworth did not marry. After her mother died, she lived with her father. He died soon after she was appointed to the High Court. She lived for a time in London in the Temple in a flat of Lord

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<sup>3</sup> Communication of Tim Dutton to P M Bartle, shared with the author.

<sup>4</sup> Hedley, *op cit*.

and Lady Mackay. She was made a Bencher of Gray's Inn. She would refer to herself as "a safe pair of hands". But Philip Bartle<sup>5</sup> says that she was "much more than that". She cared deeply about the law, but even more deeply about justice. According to Bartle, "those who appeared before her could not have had a fairer tribunal". Baroness Hale says that Mrs Justice Ebsworth knew how to conduct long and difficult criminal trials firmly and fairly. She also knew how to decide difficult points of law. Reportedly, she had a "wonderful dress sense" and "always looked cool and elegant". She was not a strong supporter of affirmative action for women or anyone else. She had a belief that talent would shine through. At least in her case, it did.

In the latter part of her life, Mrs Justice Ebsworth devoted much time to teaching advocacy. She was always ready and willing to teach for Gray's Inn and for the South Eastern Circuit. The South Eastern Circuit benefited greatly from her involvement in the annual course conducted at Keble College, held over many years for new practitioners. She would join the teachers and students in the evenings, accompanying them to a nightclub whose dubious reputation necessitated an escape plan in case of the arrival of police. The plan never had to be invoked.

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<sup>5</sup> Bartle, above n 1.

In 2000 she was diagnosed as suffering from mesothelioma, a deadly and particularly painful form of cancer. She continued with her work and with teaching advocacy as long as possible, facing her illness, in Baroness Hale's words, "with the same quiet courage and determination that she handled all her professional life". Dame Elizabeth Butler-Sloss has described to me how she fought against her condition bravely, continuing to sit as a judge for as long as she could. Her ambition was to be a good judge. It is a worthy ambition. The inauguration of this series of lectures indicates the opinion of her professional colleagues that she greatly succeeded in her aim.

Dame Ann Ebsworth's funeral was conducted at Gray's Inn on 10 April 2002. Her obituary in *The Guardian*<sup>6</sup>, shortly after her death, said:

"She leaves a lasting mark on the history of the legal world, and in the hearts of those fortunate enough to have known her well".

I am proud that you have called me from a far away place to begin the lecture series that honours Ann Ebsworth's memory and her work within the law. It is fitting, because of her talents and special interests, that the lecture should take a theme centred on

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<sup>6</sup> *The Guardian*, 12 April 2002.

advocacy. Necessarily, I will approach the subject primarily from the viewpoint of my 22 years as an appellate judge in Australia. But because we have copied the common law and the tradition of the English courts, in which Ann Bosworth served with such distinction, most of what I say will surely be relevant for this audience.

### **THE 'RULES' OF APPELLATE ADVOCACY**

Talent in advocacy has traditionally been viewed as a natural gift rather than a skill to be developed. Good advocates were thought to be born, not made. I do not deny that there may be a gene or two in the 36,000 genes on the human genome that is labelled 'top advocate' – 'skills of communication and persuasion'. Such talents may indeed be inherited, at least to some extent. However, in recent decades it has increasingly been recognised that advocacy skills can be improved and sharpened. Formal advocacy training can be an effective way of enhancing the essential skills. The result of this conviction can be seen in the increasing number of legal advocacy courses being offered through law schools, Bar Associations, and other organisations throughout the world. In Australia, we have the Australian Advocacy Institute. The new focus on improving advocacy standards is undeniably a positive development. It can only serve to enhance the administration of justice.

At its heart, advocacy is always about persuasion. Professor George Hampel – himself formerly a leading barrister and judge in Australia – has explained:

"Advocacy – or persuasion – involves creating or changing perceptions to influence the result ... Great advocates are not necessarily better lawyers than others – they are better communicators<sup>7</sup>".

Intangible qualities identify individuals as outstanding advocates. But there is no single objectively correct style of advocacy. Advocates have their individual styles, being a reflection of their personalities and attitudes, their education, family upbringing and hard-to-define elements such as appearance, voice timbre, skills in eye contact, sense of drama and humour and other elusive elements of the art.

For all this it is possible to identify a number of common characteristics shared by effective advocates. So far as appellate advocacy is concerned I have previously collected 10 'rules' – but they are really only suggestions<sup>8</sup>. They are certainly not exhaustive<sup>9</sup>. Nor are they rigid requirements to be obeyed slavishly

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<sup>7</sup> Quoted in K Marshall, "War Crimes Prosecutors set to learn art of persuasion", *Monash News*, December 2002, p.8.

<sup>8</sup> M D Kirby, "Ten Rules of Appellate Advocacy" (1995) 69 *Australian Law Journal* 964.

<sup>9</sup> For other suggested "rules" or "tips" see R H Jackson, "Advocacy before the United States Supreme Court" (2003) 5

regardless of the particular circumstances. They do, however, provide a starting point for advocates wishing to refine their advocacy skills before appellate courts. Different "rules" could be propounded by the intrepid for jury trials, judge-alone cases, multiple-member tribunal hearings, magistrates' courts, professional bodies and so forth. Some of the big 10 suggestions that I have nominated will be equally applicable in every venue – possibly even at the Pearly Gates of Heaven. So it is well that I repeat them now for your consideration:

- Know the court or tribunal that you are appearing in;
- Know the law, including both the substantive law relating to your case and the basic procedural rules that govern the body you are appearing before;
- Use the opening of your oral submissions to make an immediate impression on the minds of the decision-makers;
- Conceptualise the case, and focus the attention of the court directly on the heart of the matter;
- Watch the bench;
- Give priority to substance over attempted elegance;

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*Journal of Appellate Practice and Process* 219; R B Ginsburg, "Remarks on Appellate Advocacy" (1998-1999) 50 *South Carolina Law Review* 567; PM Wald, "19 Tips from 19 Years on the Appellate Bench" (1999) 1 *Journal of Appellate Practice and Process* 7; R B Gilbreath, "Lost Secrets Revealed: The Seven ABCs of Successful Appellate Advocacy" (Winter 2005), *Certworthy* 13; R H Barksale, "The role of civility in appellate advocacy" (1999) 50 *South Carolina Law Review* 573.

- Cite authority with care and discernment;
- Be honest with the court at all times;
- Demonstrate courage and persistence under fire. You will generally be respected for it; and
- Address any legal policy and legal principles involved in the case.

The central aim of advocacy – being to persuade a decision-maker – has remained the same throughout history. It will remain the aim of advocates in the future. The need for advocates to be able to communicate complex ideas and arguments will always constitute the touchstone by which an advocate is judged. In these remarks I am therefore addressing eternal verities. I do so with proper modesty remembering that what impresses me may not necessarily impress others.

In a collegiate court it is common, virtually inevitable, for the judges, on leaving the courtroom, to comment on the performance of the advocates of the day. I regret to tell you that sometimes the comments are less than flattering. One colleague of mine in an earlier time used to keep a list of the "First Eleven" – not the best advocates but the worst. He delighted in promoting new members to his list – and not a few judicial colleagues joined in with enthusiasm. In his day, the list-keeper had been a consummate advocate. So perhaps he could be allowed to keep his list. Yet even he had good and better days. Judges, when appointed, sometimes

forget the stresses and pressures imposed on advocates. I have never done so. We all have good and bad experiences in communication. The object should be to maximise the good and to minimise the bad. Definitely to avoid joining any real or imagined "First Elevens" kept by the decision-makers with their ever observant and critical gaze. Judges should also keep in mind that the odd advocate keeps a list of judicial horrors.

The art of advocacy is changing. Over the past decades significant changes have occurred to the environment in which appellate advocates, in particular, must work. The most noticeable examples include changes to court procedures and the arrival of increasing numbers of female advocates and advocates from ethnic and other backgrounds different from the previous norm. There have also been significant developments in the tools available to assist advocates. Largely these have come about through technological advances such as the internet and other computer technologies. The rate of change will accelerate. The impact that such developments will have on appellate advocacy, and the justice system more widely, remains to be seen.

### **PROCEDURAL CHANGES**

Two of the most significant procedural changes during the past 20 years within appellate courts, including my own, have been the increasing use of written submissions and the introduction of

time limits for oral submissions. These changes have had a significant impact on appellate advocacy. They have changed the environment in which appellate advocate presents the cases. If anything, the changes increase the importance of the basic "rules" that advocates should observe of knowing the court they are appearing before and being aware of the basic procedural requirements that govern the operations of that court. Otherwise, the available time will not be maximized and opportunities for persuasion may be squandered or even lost forever.

Historically, both in England and Australia there has been an emphasis on oral advocacy. Traditionally for us, less reliance has been placed on written submissions than, say, in the United States of America where abundant litigiousness, overlapping jurisdictions and a large population have long necessitated the adoption of written means to maximise the efficient use of the decision-maker's time. We have all experienced the sense of astonishment on the part of American judges and attorneys over what they commonly see as our unduly languid approach to oral advocacy and to that refinement of the issues for decision. Now we are changing, at least in Australian courts, with written submissions assuming ever greater importance both in appeals and also in trials. Even in jury trials in Australia written submissions are now not unknown. Judicial directions to juries are often produced in draft and become the focus of sharply targeted advocacy. Such directions are sometimes real and then given to juries in written form so that they have a written

record of the main legal directions which they are obliged to apply. It is a big change from the conversational style of jury trial when I first went to the Bar.

The primary reason for this shift to writing is the increasing workload placed on our courts. For example, in the year ending 30 June 1998, two years after I joined the High Court of Australia, 358 applications for leave or special leave to appeal were filed. This number has more than doubled in the ensuing six years. There were 729 such applications filed in the year ending 30 June 2004<sup>10</sup>. This trend is not confined to Australia. It is repeated in appellate courts in many jurisdictions in all parts of the world.

The increased emphasis on written submissions has been a somewhat gradual development in Australia. Until 1982 the High Court of Australia relied almost exclusively upon oral argument. Even then, as I remember, some leaders of the Bar braved judicial disapproval and handed up a written précis of what they had said. "They will go away and forget my (oral) submissions", one advocate told me, "but then they will have my summary written in a form that they can pick up and use in writing their reasons. It will be irresistible to them." He was right; but he was ahead of his time. The traditionalists on the bench looked disdainfully at his written

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<sup>10</sup> High Court of Australia, *Annual Report 2003-2004* (2004), p. 8.

efforts when they were offered. Now they are accepted as an essential part of the advocate's role.

In February 1982 the first steps were taken to adopt a universal requirement of written submissions. At first, the Court obliged advocates to hand up a written outline of their main arguments immediately before commencing oral submissions. The requirement of a written list of the principal authorities was introduced in 1984. In 1987, further procedural amendments to the court practice expanded upon these obligations. Parties, by that time had to file detailed written submissions covering all significant points of argument<sup>11</sup>. The written submissions filed by the appellant in a special leave application are now considered by the High Court of Australia to be:

"the principal vehicle for demonstrating that the case is one in which leave should be given<sup>12</sup>".

Special leave is the procedure of the High Court of Australia used to differentiate between the appeals that will proceed to the

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<sup>11</sup> See High Court of Australia, Practice Direction No. 1 of 2000. A R Blackshield, M Coper and G Williams (eds.), *The Oxford Companion to the High Court of Australia* (2001), pp. 197-198; M Groves and R Smyth, "A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903-2001" (2004) 32 *Federal Law Review* 255.

<sup>12</sup> High Court of Australia, *Annual Report 2003-2004* (2004), p. 8.

final hearings from those that will not. Only a small proportion of the cases in which such leave is sought, succeed in securing it. In the average year, the High Court of Australia disposes of about 80 proceedings, mostly appeals. This is slightly more than the House of Lords and the Supreme Court of the United States. It is slightly less than the Supreme Court of Canada and considerably less than the Supreme Court of India with its higher complement of judges sitting in different panels.

New *High Court Rules 2004* commenced operation in Australia in January 2005. These rules give even further emphasis to the importance of written submissions. Under the new rules, special leave applications filed in many cases, including most of those brought by self-represented applicants, are initially considered on the papers by a panel of two Justices. The application may be dismissed without further oral hearing if the two Justices conclude that the application is without merit or otherwise unsuitable for a grant of special leave to appeal. Similarly, if two Justices consider it to be appropriate, *any* application for leave or special leave to appeal may now be determined on the papers without an oral hearing<sup>13</sup>. In such applications, the written submissions obviously become of fundamental importance. Effectively, they become the only opportunity the advocate has to convince the court of the merits of

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<sup>13</sup> Ibid, p.8.

the case, its arguability and importance and the prospect of succeeding after a full hearing to reverse the decision below and, in the process, to establish an important legal principle or cure an injustice.

The adoption of these new rules reflects an attempt by the High Court of Australia to deal with the constantly increasing number of applications filed in its registries. It is too early to comment on the effect that the new rules are having both on the parties filing applications and on the Court itself. However, the emphasis on written submissions is reflective of a trend occurring in many other jurisdictions because of the pressure of cases, the limited time and capacity of the appointed decision-makers and the waste of time involved in oral hearings that are obviously doomed to fail.

This said, the change in the practice of the Court was not achieved without heartburn: at least on my part. Our system of justice has long been one of oral advocacy, performed in open court. This system has many advantages. It ensures that judges are themselves constantly under public scrutiny in their decision-making. It ensures that the decision-makers focus their attention on the issues, even if only for a short time. In Australia, special leave applications that reach a hearing are allowed 20 minutes. Both symbolically and functionally the old system had merits. However, most final courts in the world have now adopted a filter of written

argument. Indeed, many intermediate courts have done so. They have done so simply to cope with the pressure of business. In adopting the new procedures the courts have changed, probably forever, the skills of advocacy that they enlist.

In Australia, even in cases where an oral hearing occurs, the increasing importance of written submissions impacts on the way an appellate advocate typically approaches the task at hand. Oral argument is not designed solely as an opportunity to present submissions already stated in writing. Reading written submissions aloud to the Bench would do nothing to advance the argument – certainly if it went beyond reading a particular passage. It tends to frustrate judges who, for the most part, will already be familiar with the material before them. If the judges are not, they will usually reveal this fact (deliberately or accidentally) obliging adjustment of the advocates' presentation. But, for the most part, oral argument presents a contemporary advocate with an opportunity to focus the attention of the court on the most important aspects of the case. Even more significantly, it provides an opportunity to engage in discussion with the decision-makers about the central issues in the case, and to clarify issues that may be troubling the judges.

A good advocate ordinarily uses oral argument to complement and strengthen written submissions, and not just to state them again in a slightly different way. More discerning advocates will keep in mind that some judges may not have had time to read the

submissions carefully. In the particular case some will be out of familiar legal territory. Even in the age of written arguments, the advocate must tread a careful path between keeping the interest of those judges who are "hot" and those who are not and are not really focusing on what the case is about. It is quite a tall order. The challenge is increased by the trend towards written argument.

In many jurisdictions, the increasing use of written submissions has been accompanied by the introduction of time limits on oral hearings. In the High Court of Australia strict limits were first introduced in February 1994 in relation to applications for special leave to appeal. Applicants and respondents are limited, as I have said, to 20 minutes each for oral submissions. The applicant then has a maximum of five minutes in reply. Green, amber and red lights directly in front of the Bench and Bar table warn of the time advocates have left to complete their oral submissions. The attitude to strict observance of time varies between presiding judges. However, the daily list of cases for hearing usually demands that slippage be limited to no more than an extra minute or so in a given case. Most advocates pace themselves well. They make their submissions in the time allotted. Self-represented litigants find the time limits much harder to observe. Under the new rules providing for disposal on the papers it can be expected that there will be fewer oral submissions by litigants without legal representation than has been the case in my Court in the past.

Generally speaking, the time limits work well in Australia. They require a concentration of mind and focus of advocacy in a way that open-ended time does not. But it also demonstrates that most cases are susceptible efficient presentation, so that their importance in legal and factual terms can be explained to experienced decision-makers in 20 minutes. The need to do this ensures that advocates usually now go directly to the very heart of their case. That is why, when special leave is granted and the appeal proceeds to a full hearing, the first document I always read is the special leave transcript. The need for swiftness of mind adds to the pressures on advocates and judges alike. Not all lawyers (or judges) are at their best in that environment. Some who have the best skills of celerity are not necessarily skilled in explaining complex statutes and authority or in exercising judgment as to the outcome. Some advocates – and some judges – are sprinters. Others are better at running marathons<sup>14</sup>.

Unlike some jurisdictions, notably the United States Supreme Court, the High Court of Australia has not yet introduced strict time limits in appeal hearings. Nevertheless, the duration of oral argument is significantly shorter now than it was at earlier decades. The vast majority of appeals today are listed for hearing on a single

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<sup>14</sup> G D Finlayson, "Appellate Advocacy: An Australian Perspective" (1999) 1 *Journal of Appellate Practice and Process* 27.

day. Only in the most complex appeals will oral argument be permitted to stretch into a second day or further. This contrasts with the 39 hearing days consumed in the *Bank Nationalisation Case*<sup>15</sup> before the High Court of Australia and the 24 days of oral argument in the *Communist Party Case*<sup>16</sup>. The former case, in 1948, went on appeal to the Privy Council. It lasted 37 days. One can only imagine what those distinguished English judges thought of it. Two of their Lordships perished in the course of the proceedings. It is not disclosed if this was the result of the Australian advocacy, natural causes or just sheer boredom. Certainly, boredom can be a peril of unduly prolonged hearings from the point of view of judges and advocates alike. The trend towards shorter oral argument is only possible because of the increased use of written submissions. It reflects the increased case-loads confronting all contemporary courts, and especially final courts<sup>17</sup>. This shifts increasing burdens and responsibilities onto appellate judges.

Procedural changes such as I have described present undoubted challenges for advocates. But it is important to recognise that, no matter what procedural rules are in place, the task of the

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<sup>15</sup> *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.

<sup>16</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

<sup>17</sup> A R Blackshield, M Coper and G Williams (eds.), *The Oxford Companion to the High Court of Australia* (2001), p. 31.

advocate remains the same – to persuade the court. The qualities of good advocacy remain basically the same. It is only the means and duration of delivery that must be modified to adapt to the environment within which the advocate must now commonly operate.

The introduction of written submissions and formal time limits presents challenges for courts too. Increasing workloads are leading appellate courts to seek more efficient methods of managing their case listings. But there are limits. Justice must be done, but manifestly done. Procedural changes must always be evaluated in light of this greater purpose, and not solely through the prism of throughput efficiency<sup>18</sup>. Every reasonable person coming before a court should feel that they will get a fair opportunity to present their case. The pursuit of justice is the ultimate concern of the court. Yet unless the cases can be decided in a timely and efficient way, the result is a species of injustice, apparently of the court's own making.

### **THE ELECTRONIC REVOLUTION**

The development of electronic technology has great implications for the justice system and the shape of advocacy within

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<sup>18</sup> Cf *The State of Queensland & Anor v J L Holdings Pty Ltd* (1997) 189 CLR 146, at 172.

it. Technological change will be drive many of the most important future developments in advocacy<sup>19</sup>. The effects of this 'electronic revolution' are already with us.

One example of an innovation that has had a direct impact on oral advocacy is the introduction of video-link technology in the courts. In a country as large as Australia, having the ability to connect judges and parties at various locations through video link offers a great practical advantage. This technology is now employed by the High Court of Australia for the hearing of special leave applications and the hearing by single judges of motions, as for orders *nisi* for constitutional writs, stays of execution of judgments under appeal, expedition of hearings and so forth. The use of video-link technology allows hearings to proceed as if all parties were at the same location.

The design and use of the technology tends to limit the impact on the style of oral argument. Whilst this technology may present some challenges for advocates, it does not substantially alter the

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<sup>19</sup> A Stanfield, "Dinosaurs to Dynamos: Has the law reached its technological age?" (1998) 21 *UNSW Law Journal* 540; P A Talmadge, "New Technologies and Appellate Practice" (2000) 2 *Journal of Appellate Practice and Process* 363; G Nicholson, "A vision of the future of appellate practice and process" (2000) 2 *Journal of Appellate Practice and Process* 229; F I Lederer, "The effect of courtroom technologies on and in appellate proceedings and courtrooms" (2000) 2 *Journal of Appellate Practice and Process* 251.

nature of advocacy in practice or the application of basic techniques. The human mind quickly adapts to the apparent artificialities of speaking towards a large screen where the listeners can be seen. In a minute or so the advocate forgets the artificialities and engages in communication as if the listener were physically present in the same room. In fact, for a reason not yet clear, advocacy by video-link appears to be a little briefer. Analysis of outcomes has not demonstrated any difference from results derived from hearings in the physical presence of the court. Obviously, the technology makes it possible for parties and others interested to come to the transmitting courthouse and witness the hearing and its outcome. The reduction of court and travel time is significant. Video-links are also used by the High Court judges in Australia to conduct their monthly conferences about cases that have just been heard and which stand for judgment. Such links save the judges the time (and the Court the expense) of travelling inter-State for their meetings.

Taking such technology a few steps further, it is possible to imagine a time when the traditional, physical court-rooms may become obsolete, and be replaced by virtual courtrooms. Rather than sitting in a physical building in Canberra or London or Strasbourg, courts of the future may convene on the World Wide Web, with all participants connected by inter-active video-link technology. The need for such technology in a jurisdiction the size

of England may be less pressing<sup>20</sup>. But in courts of international or regional operation (such as the European Court of Human Rights or the Court of Justice) or courts in a continental or sub-continental country (such as Australia, Canada, Nigeria and India) such links can be extremely efficient. Advocacy quickly adapts to the new environment.

The potential advantages of such developments include obviating the needs to build or maintain some court buildings or facilities in the conventional way. It could reduce the inconvenience and cost of travel for judge and advocate alike. It could diminish the perceived or actual remoteness of higher courts and help bring them to the people. However, such a prospect illustrates the need to think through the implications of adopting technology to this extent within the justice system. The selective use of video technology has undoubtedly enhanced the efficiency of the High Court of Australia. However, the conduct of all proceedings through the World Wide Web could have negative consequences. The existence of physical court buildings and the holding of public proceedings there, in which all participants are physically present in the one place, continue to have important symbolic and practical purposes. The building of the

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<sup>20</sup> In his report *Access to Justice* (Final Report, 1996), 291-292, Lord Woolf M.R. recommended telephone conferencing for case management and foresaw video conferencing as a future prospect.

High Court of Australia in Canberra has, for example, been described as being:

"... a benchmark in Australia for vital architectural expression that deliberately seeks to make the law visible, relevant, and accessible to the public. At the same time, it evokes an entirely fitting sense of monumentality, respectful of the image and also the scale of the law<sup>21</sup>".

The High Court building, and others like it, stand as important symbols of our societies' commitment to the principles of the rule of law, constitutionalism, open justice, public accountability and democracy. They also help to promote dialogue between parties and their representatives and, occasionally, the settlement of disputes. Proximity can also help to promote dialogue between the decision-makers. Appearing in the same place as one's opponents fosters a collegiate spirit amongst specialist advocates. The same advantages are harder to secure in a virtual court-room linking participants who communicate in cyberspace. So I do not see courts disappearing altogether. But they will be modified as will the function of advocates in them.

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<sup>21</sup> A R Blackshield, M Coper and G Williams et al (eds.), *The Oxford Companion to the High Court of Australia* (2001), p. 30. The Duke of Edinburgh was less kind in his comment. Reportedly, he suggested that the building most resembled a power station.

A further example of technology involves the future use of the internet to allow the electronic filing and transfer of court documents, and for the employment of multimedia electronic case management systems. Some courts have already begun trial or pilot programmes in this area. This technology potentially offers advantages in terms of distributing materials to all necessary recipients in the most time efficient manner<sup>22</sup>. At the same time document security, where this is applicable, still needs to be adequately addressed before such technology can be fully adopted. If such concerns can be adequately met, technology of this nature offers potential benefits for advocates by improving the administrative processes of courts and their transparency, to the advantage of all concerned.

Technology is also changing the way in which advocates are presenting information to decision-makers. Electronic hyperlinked briefs, being briefs recorded on CD-ROM and containing not only the text of submissions but hyperlinks to all cited references, are already being filed in the United States<sup>23</sup>. Occasionally (very rarely) such

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<sup>22</sup> *Access to Justice* (Final Report, 1996), 285-287.

<sup>23</sup> The first known CD-ROM appellate brief to be filed by a party was in *Yukiyo v Wantanabe* 111 F.3d 883 (Fed. Cir. 1997). The United States Court of Appeals for the Federal Circuit ultimately struck the brief out on the grounds that the appellant had failed to seek leave from the court before filing the brief. A CD-ROM brief was however accepted by the same Court in the case of *In re Berg* 43 U.S.P.Q. 1703, 1704 (Fed. Cir. 1997) (unpublished). Such briefs have also been accepted in a number of subsequent cases.

CD-ROMs have been offered to the bench in Australia. So far the response has generally been the same puzzlement, and even lack of welcome, that the first attempts, 30 years ago, to hand up written submissions occasioned. However, in large trials and even some complex appeals (for example, dealing with the multiple legal and factual issues such as claims of native title to land) intrepid advocates are beginning the process of educating the judges in the usefulness of such electronic materials. Multi-media briefs open up the possibility that in the near future:

"... a judge need no longer put down a printed brief to pull a law book from a library shelf. No longer will he or she have to dig through a multivolume appendix to find a documentary exhibit or set up a VCR to play a videotaped excerpt of testimony<sup>24</sup>".

The introduction of such multi-media briefs raises interesting questions about the role of appellate courts and the limits to their function. In numerous cases the High Court of Australia has recognised the constraints under which appellate courts operate, particularly in terms of the need to accord respect to the advantage of the trial judge in actually being present throughout the trial<sup>25</sup>.

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<sup>24</sup> F Gindhart quoted in: F I Lederer, "The effect of courtroom technologies on and in appellate proceedings and courtrooms" (2000) 2 *Journal of Appellate Practice and Process* 251, at p. 263.

<sup>25</sup> *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Jones v Hyde* (1989) 63 ALJR 349, at 351-352; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479, 482-483.

Such advantages were traditionally ascribed to the capacity of the judge to assess the veracity of witnesses from their appearance in the witness box. If this consideration is now given less weight because scientific research has cast doubt on its reliability, there remain advantages in the conduct of the trial. These include the observation of all the evidence in sequence with time to absorb and think through the issues. These advantages are commonly replaced in appellate courts by techniques that focus on the issues identified by skilful advocates<sup>26</sup>. Already available technologies may permit appellate courts, where appropriate, to reduce the gap that has hitherto existed between the experiences of the trial judge and those of the appellate court.

An example of this arose *Clark v Her Majesty's Advocate*<sup>27</sup>. That was a decision by the Appeals Court of the High Court of Justiciary in Scotland. The Court quashed the appellant's conviction for assault and robbery after finding that the presiding Sheriff had misdirected the jury. The novel feature of the case was that the misdirection was based not on the words used by the Sheriff in his

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<sup>26</sup> *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 327-331, [87]-[88]; *Fox v Percy* (2003) 214 CLR 118 at 128-129, [28]-[31].

<sup>27</sup> *Clark v Her Majesty's Advocate*, App. No. C/633/99 (Scotland, 26 July 2000). This case is further discussed in G Nicholson, "A vision of the future of appellate practice and process" (2000) 2 *Journal of Appellate Practice and Process* 229.

charge to the jury, but rather on the tone of his voice. The Appeals Court stressed that there was:

"... nothing on the face of the transcript itself which would have justified a finding that the Sheriff had failed to observe the proper balance in presenting the issues to the jury<sup>28</sup>".

Yet, after listening to a sound recording of the charge, members of the appellate court:

"... formed the clear impression that, when posing a series of rhetorical questions, the Sheriff did indeed raise the register which he used and placed the emphasis on certain words in such a manner as to suggest that the answers to the questions would be unfavourable to the appellant. We stress that this was a clear impression which we all formed and that the phenomenon occurred repeatedly<sup>29</sup>".

In the past, advocates have sometimes complained about such phenomena, then ordinarily improvable. In the future, as in *Clark*, advocates will commonly have access to such result-changing data. They will only do so because of advances in technology. The use of technology, in *Clark* (the older technology of a sound recorder) may allow an appellate judge to experience aspects of the original trial almost as if he or she were there. Multi-media briefs, in the future,

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<sup>28</sup> *Clark v Her Majesty's Advocate*, App. No. C/633/99 (Scotland, 26 July 2000), at [6].

<sup>29</sup> *Ibid*, at [6].

may provide an appellate judge with a direct hyperlink to a video-recording of the critical moments in the trial, as opposed to being confined to written references to the transcript page. Such new technology will obviously have an impact on appellate advocacy, providing the advocate with an entirely new range of tools with which to work. But careful judgments will have to be made because of the time implications for the appeal and the occasional risk that the new materials could backfire.

Obviously, the use of multi-media and hyper-linked briefs, video-link technology and electronic document systems is predicated on the relevant technology being available to judges and the courts who have the requisite skills to access them. The courtroom of the future is likely to look quite different from the courtroom of today. The advocate of the future will operate in a somewhat different environment.

Examples of what such courtrooms might look like in a decade or so are being explored in innovative projects such as the University of Canberra's e-court project and the so-called Courtroom 21. Courtroom 21 is a mock courtroom located at the Marshall-Wythe School of Law of the William and Mary College of Law in America<sup>30</sup>. It is described as the world's most technologically advanced

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<sup>30</sup> See <<http://www.courtroom21.net>>.

courtroom. Courtroom 21 experiments with new technologies and seeks to determine how such technologies can best be used to improve the legal system. Features of Courtroom 21 include the SMART Board interactive whiteboard to facilitate multi-media presentations in court, linked LCD monitors allowing advocates to transmit images directly from their electronic briefs to the monitors of the judges – and quite possibly jurors – and a real-time electronic transcription system. Technology such as this is slowly being adopted in courtrooms around the world. Advocates starting today will see these and other wonders.

Today's advocates find themselves in a half-way world of those with and without digital skills. However, some judges in Australia are already set up with keyboard and screens on the bench. Many counsel now appear at the Bar table with these facilities. In Perth, Western Australia, at least one judge, conducting jury criminal trials, uses power point in giving her instructions to the jury. Advocates cannot allow themselves to get far behind such judicial skills. In the High Court of Australia during a large native title appeal, the judges were offered the supply of instantaneous electronic access to the record. By majority, the offer was declined. More recently, in a copyright appeal, the High Court of Australia was shown a Play-Station CD-ROM in operation<sup>31</sup>. The video game was

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<sup>31</sup> *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 79 ALJR 1850.

safely demonstrated from the Bar table by an advocate who appeared to have more than a purely professional familiarity with its operations. He was justly rewarded with silk in the next list.

What does such technology mean for advocates and for techniques of advocacy? Used correctly and skilfully technology can assist an advocate in effectively presenting a case to the court. However, the technology, as such, is no more than a tool to be used. By itself, it cannot transform a losing argument into a winning one. It will not mask or improve factual or legal deficiencies or poor advocacy. Even with the development of technology the basic skills of effective advocacy remain the same as they have always been. A flashy power-point summary of arguments, if permitted, will not hide gaps in logic. Indeed, the technology may make such gaps more visible, more quickly. Yet as judges and jurors increasingly come from generation X (and even later generations) their willingness to sit for hours during tedious oral submissions, unadorned by technical aids and illustrations, will be reduced<sup>32</sup>. Already studies of jury attitudes have shown generational changes to conventional courtroom advocacy. New attitudes will leap ahead as the technology does. Courtrooms cannot be cut off from the skills and interests of the people who serve in them and whom they serve.

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<sup>32</sup> M D Kirby, "Delivering justice in a democracy. III – The jury of the future" (1998) 17 *Australian Bar Review* 113.

Any discussion about technology and the law eventually arrives at artificial intelligence, and the potential of intelligent machines ultimately replacing both advocates and judges. Would it be possible in the future for the tasks of advocacy and judging to be left to machines using artificial intelligence to produce case outcomes based upon the input of factual case data and an analysis performed through pre-programmed precedent databases? Although the idea may seem far-fetched at present, so a few decades ago did some of the technology that courts and advocates now take for granted and readily envisage.

Admittedly, it is difficult to conceive of the practice of law ever being left entirely to artificial intelligence, no matter how quickly technology may advance. Law is as much an art as it is a science. There is an inherent creativity and an essential human element to both advocacy and judging<sup>33</sup>. It is difficult to imagine even the most advanced artificial intelligence technology ever being able to replicate the human element that is essential to our justice system. At this stage, it is impossible to conceive of a machine with a *will* to do justice to human parties. But even if artificial intelligence may not completely replace human advocates and decision-makers, artificial intelligence may well have future

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<sup>33</sup> R Harris, *Hints on Advocacy* (London, Stevens, 1882), 3; L P Stryker, *The Art of Advocacy: A Plea for the Renaissance of the Trial Lawyer* (New York, Simon & Schuster, 1954), 32.

applications to aid advocates and judges. Every advocate of the foreseeable future will have a mobile voice recognition module which can respond to oral commands and produce legal materials, statutory, judicial and academic on demand. Already, artificial intelligence is used to analyse taxation and immigration processes. When the legal criteria are relatively straight-forward, this technology is not far away<sup>34</sup>.

A final development that should be noted is the increasing importance of the internet to the art of advocacy. The most obvious benefit is that the internet has rendered many physical barriers obsolete. Advocates from around the world are now able to communicate easily, share information and learn from each other. Hopefully, this growing connectedness will be used by advocates to achieve the positive result of enhancing and developing advocacy skills.

The internet has also had a large impact on the conduct of legal research. Sir Anthony Mason, past Chief Justice of Australia, looked towards the future in 1984 when he surmised that:

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<sup>34</sup> M D Kirby, *The Judges* (ABC Boyer Lectures, 1983), at p. 77 describing the "TAXMAN" program in the United States. See L T McCarty, "Reflections on TAXMAN: An experiment in artificial intelligence and legal reasoning" (1977) 90 *Harvard Law Review* 837.

"Access to comprehensive library facilities going beyond the mere provision of books is a matter of vital importance to the Bar. No doubt the advent of legal computer services will help to solve this problem<sup>35</sup>".

Twenty years later, he has been proved correct. The use in Australia of internet-based research tools such as AustLII, BAILII, Westlaw, LexisNexis and HeinOnline, to name but a few, has revolutionised legal research. Research can now be conducted more quickly and more thoroughly. The internet provides every advocate and every judge with a practically unlimited pool of information. Indeed, it is the very immensity of the sources that presents a new challenge to the advocate – how to refine the problem; how to conceptualise the issues; how to limit the sources of essential data; how to ensure that enough time is left to think about the problem and its solution; and not to be overly dazzled by the mass of information that is now at our fingertips from so many sources.

Yet legal authority should be cited with care. The internet is of enormous value to an advocate if it is used selectively. It is not so valuable if it is used indiscriminately to generate masses of unread or ill considered material. This point was recently emphasised by Sir Gerard Brennan, another past Chief Justice of Australia. He noted that:

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<sup>35</sup> A F Mason, "The Role of Counsel and Appellate Advocacy" (1984) 58 *Australian Law Journal* 537, at p. 540.

"... technology is but a tool for the well-trained analytical mind<sup>36</sup>".

As today's judges and decision-makers view with mounting alarm the mountains of information provided to courts by advocates to "assist" them in their tasks, a groan can sometimes be heard begging for the return of the days when one of the true skill of the advocate was discernment: the decision to cut away irrelevant or insignificant materials unlikely to help the decision-maker to come to the desired outcome.

### **THE USE OF INTERNATIONAL MATERIALS**

A further development encouraged by the internet has been access to international law to support legal argument. This is another illustration of the way that globalisation is changing the way that advocates and judges approach current issues and problems:

"Once we saw issues and problems through the prism of a village or nation-state, especially if we were lawyers. Now we see the challenges of our time through the world's eye<sup>37</sup>".

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<sup>36</sup> F G Brennan, *Introductory Address*, presented at the Australian Institute of Judicial Administration *Technology for Justice Conference*, April 1998.

<sup>37</sup> M D Kirby, *Through the World's Eye* (2000), xxv.

In Australia, the most contentious debate regarding international law concerns its use in constitutional interpretation, particularly where such law expresses the international law of human rights. This debate has also been particularly public and vigorous in the United States<sup>38</sup>. One recent Australian example of the controversy may be found in the different opinions on this issue expressed by Justice McHugh and myself in *Al-Kateb v Godwin*<sup>39</sup>.

My own view is that international law is a legitimate influence upon domestic legal and constitutional development<sup>40</sup>. Municipal judges ultimately derive their authority from a national Constitution. They are bound to uphold that Constitution. They cannot give preference to unincorporated international law over the clear requirements of their national law, specifically the law of the

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<sup>38</sup> P M Wald, "The use of international law in the American adjudicative process" (2004) 27 *Harvard Journal of Law and Public Policy* 431; J H Wilkinson III, "The use of international law in judicial decisions" (2004) 27 *Harvard Journal of Law and Public Policy* 423; R B Ginsburg, "A decent respect to the opinions of [Human]kind: The value of a comparative perspective in constitutional adjudication", *Keynote address to the 2005 Annual Meeting of the American Society of International Law* 1 April 2005).

<sup>39</sup> *Al-Kateb v Godwin* (2004) 119 CLR 562. The more recent United States examples include *Atkins v Virginia* 536 US 304 at 347-348 (2002) and *Lawrence v Texas* 539 US 558 at 576 (2003). See e.g. H Koh, "International Law as Part of Our Law" 98 *American Journal of International Law* 43 (2004).

<sup>40</sup> M D Kirby, "International Law – The Impact on National Constitutions" (7<sup>th</sup> Annual Grotius Lecture), *Lecture delivered to the Annual Meeting of the American Society of International Law, Washington D.C.*, 30 March, 2005.

Constitution<sup>41</sup>. Within this limitation, however, international law can be an important and persuasive influence. Being exposed to the approaches adopted, and the ideas considered, by judges elsewhere, who have faced similar legal questions, can only expand and enhance judicial thinking. All wisdom is not necessarily local. International material may provide important and persuasive insights into common problems. Ultimately, it is up to the individual judge to decide on the value and usefulness of such material within the context of each case.

The use of international materials by an advocate can enhance submissions and provide a useful point of reference for the reasons of an appellate court. Such materials will become more important in future years. The quickening pace of globalisation makes it inevitable that the law will increasingly become more international. Municipal law will increasingly be influenced by the content of international law. Given, however, the differing views of judges as to the value of such materials in analogous reasoning, advocates contemplating the use of international law materials do well to keep in mind the 'rule' of advocacy commending knowledge of the court and of the judges deciding the case. In a multi-member court, including judges who may hold differing views on such topics,

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<sup>41</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, at 424-426, [169]-[173]; *Al-Kateb v Godwin* (2004) 219 CLR 562, at 625, [179].

discernment is demanded. The advocate must at once secure the agreement of the judge who is interested in, and influenced by, such sources whilst avoiding irritation to the judge who is antagonistic to such materials, regarding them as an invitation to legal heresy<sup>42</sup>.

In the United Kingdom, the enactment of the *Human Rights Act 1998 (UK)* has meant that the use of the *European Convention on Human Rights* and other sources of international human rights law in advocacy are now less controversial. Indeed, it is now virtually required. Being relevant to the duty of judges it is now within the duty of advocates<sup>43</sup>. Books are written to aid the advocate in this new territory<sup>44</sup>. Such books must be in the modern advocate's library.

It is not only in the contentious area of domestic constitutional interpretation that international or comparative law can play a role in

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<sup>42</sup> See eg the views of McHugh J at *Al-Kateb v Godwin* (2004) 119 CLR 562 at 589, [63], declaring as "heretical" the opinion that the Australian Constitution is now to be read in the context of international law, including the international law of human rights.

<sup>43</sup> *A (FC) v Secretary of State for the Home Department* [2005] 2 AC 68 at 109-110, per Lord Bingham of Cornhill at [41] citing *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, per Simon Brown LJ at 746, [27].

<sup>44</sup> A P Lester and D Pannick (eds.), *Human Rights Law and Practice* (2004). See also S Joseph, J Schultz and M Castan (eds.), *The International Covenant of Civil and Political Rights – Cases, Materials and Commentary* (2<sup>nd</sup> ed, OUP, 2004).

the contemporary courtroom. Advocates before the High Court of Australia have often referred to comparative materials from other jurisdictions to advance their submissions. Over the years, the sources of comparative material in Australia have gradually widened beyond the traditional references to English law. They now extend to new sources both in the common law world and beyond. Australian courts are not alone in recognising the potential value of comparative law materials. For example, Lord Steyn recently observed that:

"The Law Lords expect a high standard of research and presentation from barristers ... For example, if the appeal involves a statutory offence we would expect counsel to be familiar with ... comparative material from, say, Australia and New Zealand<sup>45</sup>".

While material from other jurisdictions is not binding on a municipal court it will, in the same way as international law, frequently provide an illuminating point of contextual reference. In the future, with physical distances becoming less relevant to advocacy and the law increasingly international and available on line, we can expect both advocates and judges to refer to authorities from new sources around the world and to do so more frequently.

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<sup>45</sup> Quoted in C Booth and M du Plessis, "Home Alone? – The US Supreme Court and International and Transnational Judicial Learning" (2005) 2 *European Human Rights Law Review* 127, at pp. 133-134.

## THE ARRIVAL OF FEMALE ADVOCATES

I have left to last a development exemplified by the life of Ann Ebsworth. One of the most significant developments in appellate advocacy over the past 50 years has been the arrival of female advocates. It was not until 1905 that Grata Flos Greig became the first woman admitted to legal practice in Australia. It would take a further 52 years before Miss Roma Mitchell, in Adelaide, became the first woman to be appointed as Queen's Counsel. The young Miss Mitchell had earlier become the first female practitioner to be recorded as appearing in the High Court of Australia. She appeared in 1937 as junior counsel in *Maeder v Busch*<sup>46</sup>. It was a patent suit. There was no gender element in the case. In the way of those times, junior counsel for the plaintiff was simply named as Ross. But Roma Mitchell appeared in the glory of her full name - to show that she had arrived. The law reporter was sufficiently surprised, or impressed, by her appearance on the record to draw the distinction. It was not until the following year, 35 years after the first sitting of the High Court of Australia, that a female advocate is recorded as having a "speaking part" in the argument of an appeal. Miss Joan Rosanove briefly addressed the High Court of Australia as junior counsel in *Briginshaw v Briginshaw*<sup>47</sup>. She too appeared in the

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<sup>46</sup> *Maeder v Busch* (1938) 59 CLR 684.

<sup>47</sup> (1938) 60 CLR 336 at 379.

reports in her full name. In Melbourne today a set of counsel's chambers are named after Joan Rosanove. This month the Prime Minister of Australia opened in Adelaide the new Federal Courts Building named for Roma Mitchell.

In many Australian law schools women now account for over half of the graduating law students. For the past few years the majority of legal practitioners being admitted in New South Wales have been women<sup>48</sup>. Women such as Dame Roma Mitchell and Justice Mary Gaudron, to name but two, have made a large contribution to the development of Australian law. The most recent appointment to the High Court of Australia is Justice Susan Crennan, formerly Chairman of the Victorian Bar and later a judge of the Federal Court of Australia. Inevitably such women lawyers become role models for countless women following. Likewise in England, women such as Ann Ebsworth, have been pioneers. They have left a lasting mark on legal practice. They have a place in legal history because they were there first.

Nevertheless, in the sphere of advocacy this change is happening slowly. Whilst the number of female barristers is growing in Australia, there is still a considerable disparity between males and females in terms of numbers at the Bar. In New South Wales, for

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<sup>48</sup> I Taylor and C Winslow, "A Statistical Analysis of Gender at the NSW Bar" (Winter 2004) *Bar News* 20, at p.20.

example, the most populous Australian State, only 14.7 per cent of barristers and 3.2 per cent of senior counsel are female<sup>49</sup>. A recent study in Australia showed that there are considerable differences between male and female barristers in terms of the nature of work undertaken. One of the interesting findings of this study was that male barristers were significantly more likely than female barristers to nominate appellate work as an area of their practice<sup>50</sup>. That self-identification is borne out by my observation.

In the 10 years that I have served on the High Court of Australia, there have been comparatively few female advocates with "speaking parts". The numbers appear, if anything, to be declining. Statistics compiled by the Registry of the High Court of Australia reveal that in 2004 a total of 161 counsel appeared before the Court in appeal hearings. Of these, seven were women. This number increases somewhat in relation to special leave applications, where 51 of the 634 counsel appearing before the Court were female. In 2004, therefore, fewer than seven per cent of the advocates appearing before the Court, in appeals, summonses or special leave applications, were women. One hundred years after the first woman was admitted to legal practice in Australia it is difficult to understand why there is still such a gap between the numbers of men and

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<sup>49</sup> Ibid, at pp. 25-26.

<sup>50</sup> Ibid, at pp. 23-24.

women appearing as advocates before the highest court. The reasons would seem to lie deep in legal cultural and professional attitudes.

The Registry of the High Court of Australia has collected the following statistics as to the number of female advocates appearing in matters heard by the High Court during 2004 and 2005. These figures include women appearing as either senior or junior counsel.

	Male Counsel		Female Counsel	
	2004	2005	2004	2005
Special Leave Applications	634	1027	51	127
Appeals & Single Judge	154	477	7	70
Total	788	1504	58	197

The comparison of the two years shows that there has been an increase in the number of appearances and a near doubling of the proportions from 7.5 per cent to 13 per cent. But the base figure remains low and the statistics do not reflect "speaking parts".

In the 12 years before my present appointment, when I served as President of the Court of Appeal of New South Wales, the position was no better than in the High Court. On an impressionistic basis, proportionately, it was probably worse. It may have improved in that court since 1996. In 1996 there were no women judges of Appeal in New South Wales. Now there are two in a court of 13,

although women judges of the State Supreme Court sometimes participate as Acting Judges of Appeal or in the State Court of Criminal Appeal.

Why is it that senior female advocates are still the exception in appellate advocacy? Justice Michael McHugh explained that:

"The inescapable conclusion is that it is a product of the discriminatory, systemic and structural practices in the legal profession that have been well-documented in recent years and which prevent female advocates from getting the same opportunities as male advocates<sup>51</sup>".

The practices referred to include factors such as the prevailing masculine culture of Bar, the difficulties of reconciling some aspects of life at the Bar with family responsibilities, and the continuing impact of patronage on briefing decisions. These elements combine to produce a sometimes aggressively male environment in which it is not entirely surprising to find a lack of women. It need not be so. As Justice Mary Gaudron used to say, although there may be genetic factors at work in skills of communication, there is no evidence that the relevant genes reside on the Y chromosome.

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<sup>51</sup> M H McHugh, "Women Justices for the High Court", *Speech delivered at the High Court Dinner hosted by the Western Australia Law Society, 27 October 2004.*

The standard response to these statistics, showing continued female under-representation in the top work of advocacy in Australia (reflected also in most other countries of the common law) is simply to counsel the need for patience. Some take the view that it is only a matter of time before women, who have only recently begun entering the profession in numbers equivalent to men, rise through the ranks by virtue of merit. But how much time is required? It is 68 years since the first female appeared in a case before the High Court of Australia. It is 43 years since the first Australian woman was appointed Queen's Counsel. Despite the passage of so many years, here we are in the 21st century still talking about the need for women to just wait patiently for equal opportunity to become a reality advocacy in our courts.

Does this disparity matter? In my opinion, it does. At its most basic level, discrimination of any form should be a matter of concern to every member of the affected profession. When this differentiation is occurring within our own profession the problem becomes even more pressing.

We should be concerned about gender disparity because it does have significant practical implications. Women are not just men who wear skirts<sup>52</sup>. Women bring a different perspective to the

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<sup>52</sup> M D Kirby, "Women in the Law – What Next?" (2002) 16 *Australian Feminist Law Journal* 148, at p. 154. See also, "Will Women ever be Equal?" (November 2004) *The National Jurist*

practice and content of the law. Inevitably it is reflective of their different life experiences. Given the importance of our legal systems to the development of a fair and just society, it is critical that the best and the brightest are encouraged to take up the profession of law. The existence of barriers to participation in the law, based on gender, ultimately has consequences for both the development of the law and society as a whole.

In countries such as Australia and the United Kingdom, where judges are normally appointed from the ranks of senior advocates, the lack of senior female advocates also has important ramifications for the composition of the judiciary. If the number of women appearing as appellate advocates before the most senior courts continues to be so low, it is likely that women will continue to be under-represented in future judicial appointments. This has consequences for public confidence in the judiciary as a branch of government able to make effective and just decisions on behalf of the entire community. It also has consequences for the way cases tend to be viewed in court, for the way courts of justice are perceived, for the insight that women can sometimes give for the resolution of issues in a case<sup>53</sup> and for the perception that women

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18 at 20-21, showing that the picture emerging in Australia is repeated in the United States.

<sup>53</sup> See e.g. *U v U* (2002) 211 CLR 238, per Gaudron J at 246, [28].

often bring to the disadvantages faced by other vulnerable groups in society – such as indigenous people, social minorities, drug dependent people and homosexuals<sup>54</sup>. It is no coincidence, I think, that a recent comprehensive survey of homophobia in Australia revealed that such attitudes are markedly less prevalent among Australian women than they are among men<sup>55</sup> – especially older men of the type who are now occupying, or aspiring to, judicial appointment. I do not know whether the same is true in Britain. However, as a homosexual man myself, and a judge, it is data that makes me sit up and pay attention when I consider the composition of the judiciary.

What can be done to improve the number of women advocates? There is no single, easy solution that will ensure equal opportunities for women as advocates. A number of recent initiatives have been tried in Australia. They address some of the practical issues confronting female advocates. Two examples include the push for equitable national briefing policies in the large legal firms and by government clients and the introduction of an In-Home Emergency Child Care Scheme launched by the New South Wales Bar Association. It is also important to examine practical

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<sup>54</sup> See *A(FC) v Secretary of State for the Home Department* [2005] 2 AC 68, per Baroness Hale of Richmond at 174, [237].

<sup>55</sup> M Flood and C Hamilton, "Mapping Homophobia in Australia", *Australia Institute Webpaper* (July, 2005). Accessed at <[www.tai.org.au](http://www.tai.org.au)>.

ways of modifying the culture at the Bar so that it becomes a more welcoming environment for female advocates. It is sometimes said in the medical profession that surgeons are the least likeable of the specialists – they are commonly regarded by their colleagues as more vain, less communicative and more macho in their attitudes. No doubt this is a stereotype. Yet it is often mentioned. Are advocates the law's surgeons? If so, is there anything that can be done to correct this feature of legal practice? Or do we just have to keep telling female advocates to steel themselves and be a little brutal back? It is a big ask.

The advent of female advocates, and the considerable achievements of some of them like Ann Ebsworth, constitutes a significant development in the practice of appellate advocacy in my lifetime. After all, it has taken centuries to get to the point at which we are now. Addressing the imbalance between male and female advocates, and ensuring that all advocates are provided with opportunities based upon their ability and not their gender, race, age or sexuality will remain a challenge into the future for judges and all members of the legal profession. As much, I suspect, in Britain as in Australia.

### **NEW CHALLENGES IN APPELLATE ADVOCACY**

So this is where we are. Over the past decades there have been many significant changes affecting appellate advocacy. These

include procedural changes as appellate courts strive to cope with increasing workloads, technological developments that have provided advocates with new tools with which to work, and an increasing number of female advocates. As the pace of globalisation and technological developments increase in the practice of law, in Britain and Australia, the future will undoubtedly bring still further challenges in the practice of advocacy.

Despite these future challenges the fundamental purpose of advocacy remains the same. Plato once said that "rhetoric is the art of ruling the minds of men". This holds as true in the modern age as it did in the ancient world, even if today we would include women, as Plato neglected to do. The legal environment in which advocates operate will change. The tools at hand will continue to develop beyond contemporary recognition or imagination. Yet the fundamental challenge of an advocate is constant and never-changing – to persuade the minds of others to meet in agreement with one's argument. The terrors of advocacy, especially for the young or inexperienced, remain the stimulus of each succeeding generation of advocates as they rise to address decision-makers. The joys of advocacy, after a day in court when the tasks have been well and skilfully done, particularly when crowned with success, are greater than virtually any other vocation can promise – a heady mixture of intellect, emotion and drama - sure to get the adrenalin flowing. The challenges of advocacy are greater today than ever –

because of changes in the law, in society, in its values and in technology.

It is timely for us, in honour of Ann Ebsworth, to gather to reflect on these terrors, joys and challenges. She like all of us, knew them all in due season. That we can do this together, as advocates and judges from the opposite sides of the world, and still share so much in common, is a tribute to the barristers and judges of this city over eight centuries. They established a great tradition – the tradition of the English Bench and Bar. That tradition spread until it was shared in the countries in which live more than a quarter of humanity. This is still the case today, long after Empire. It is an enduring legacy. It speaks of the rule of law, of human rights and fundamental freedoms.

We should cherish links between the lawyers of Britain and Australia. We can learn from each other. We can keep and refine the best of the old traditions and skills. And we can make the traditions better, juster and more welcoming to all. It is our destiny as human beings constantly to strive for greater rationality and progress. Advocacy is not only an ancient, honourable profession, venerable with tradition. It is a dynamic, adaptive art and vocation. It aspires to improve itself by adjusting to new ideas about justice, by using new technology to bring justice more efficiently to more people and by adjusting its culture and values so that all with training and talent may share in its exciting opportunities and enjoy

its rewards. For her perception of these truths and for her contribution by example and teaching, we honour a vital vocation by honouring Ann Ebsworth.

**THE DAME ANN EBSWORTH MEMORIAL LECTURE**

**LONDON, TUESDAY 21 FEBRUARY 2006**

**APPELLATE ADVOCACY - NEW CHALLENGES**

**The Hon Justice Michael Kirby AC CMG**