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## Addressing a Jury

### Public Defenders Criminal Law Conference 2009

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#### ADDRESSING JURIES

The right to address juries in all cases has only existed since 1865 (Criminal Procedure Act 28 and 29 Vict c.18 (U.K s.2 "The Prisoner's Counsel Bill")

The creation of this fundamental right was not without controversy. Lord Campbell who was then the Attorney-General was recorded as noting that:

*" I am sorry to say that 12 out of the 15 judges strongly condemned the Prisoner's Counsel Bill , some of them were actuated by the apprehension of the boring speeches they must listen to , and the additional labour which would be cast upon them. Mr Justice James Alan Park wrote me a letter stating that if I allowed the Bill to pass he would resign his office." (The Life of Lord Campbell vol 2 p.106)*

One can still detect in some judges a remnant animosity to the process.

Arguably though the process of addressing juries is the most important part of a jury trial and for an advocate probably the most challenging . Yet in comparison to the wealth of anecdote, and treatises and papers on cross examination, comparatively little has been written in Australia (and elsewhere) about addressing juries.

When I was first approached to do this talk, I understood the topic was to be the "closing address". However when I was formally notified the topic seemed to have "morphed" into the more comprehensive heading "addressing juries".

In some ways this is just as well, as the topic as it is, now reflects the reality of a jury trial - *all* parts of your presentation from the first moment you appear before a jury to the last time they hear you speak should be an "address" - an exercise where every tactical and strategic decision is calculated to win the jury over.

However, the danger in the breadth of the topic is that it could become the unmanageable equivalent of "how to run a criminal trial". I therefore have attempted to restrict the paper to only some limited aspects of addressing and persuading juries.

The general thesis of the paper is that if you have left persuading the jury until the closing address - you've almost certainly lost.

Successful persuasion, and persuading a jury in particular, is usually a gradual process. The general thesis of this talk is that it involves many separate factors and takes time. Preparation should begin with the first reading of the brief and the process may not end until just before the jury decides.

This last point is I think very important - most addresses assume that the jury will largely be persuaded at the moment when the advocate resumes his seat. In reality a good address should contain strategies that arm those jurors who are with you, even if they are only a handful against the crown case, the crown's address, the summing up and the pro-crown jurors.

When jurors are sent out to consider their verdict they begin an argument between themselves. These arguments are often torrid and very basic. If defence counsel has not given his or her supporters in the jury the arguments, the material, the resources, the authority and the capacity to hold out, then the chances of an acquittal are significantly reduced.

What I have attempted to do in this paper, is to outline some of the strategies and some of the tactics I have used, seen, or heard about. The paper is not intended to be a dissertation on the law as it applies to addresses and juries but rather a practical outline for some aspects of addressing for defence advocates early in their career or approaching their first jury trial.

I should perhaps add that a significant number of these are not original. There is unashamed theft and significant plagiarism. Barristers are fortunately free to adapt any technique, process, strategy, tactic or line that works.

### **What Persuades Juries?**

I am aware of no definitive text on addressing juries. However there are a significant number of local and international publications on persuasion, juries, psychology and rhetoric, as well the vast array of blogs and on legal sites about persuasion.

In them the recurrent themes are:

- Persuasion is a gradual process.
- People are more amenable to persuasion if they like and/or respect the person arguing the point.
- If the source is regarded as untrustworthy, the argument is likely to be ignored.
- Mastery of the information is critical.
- Repetition and restatement assists in people retaining information and accepting argument.
- A well presented analogy assists in comprehending an argument.
- Clarity and precision help in the presentation of an argument.
- The way something is said is often as important as the thing being said.
- It is important to try to control the jury's focus of attention on your issues not the prosecution issues.
- The way information is processed depends on the prejudices and emotional state of the receiver.
- Simple rhetorical devices and the use of communication aids make things comprehensible and memorable.

There is very little Australian evidence of the process of jury decision making. Gone are the days when counsel crossed the road and talked to the jury in the Court House Hotel. One useful indicator of the experience of being on a jury appears in the *Law Reform Report on Managing Prejudicial Publicity* Chesterman and others. This was an empirical study which includes observations from jurors about the crime, observations which led to the decision, the influence of publicity, perspectives of judges on the trial and the "reasonableness" of the jury decision.

It is worthwhile reading for any jury advocate.

In Chapter 7 there is a discussion of "Jurors' Experience of the Trial Process". The material outlines that in 61 per cent of cases juries found it "easy" to reach a unanimous decision. In 22 per cent unanimity was reached with difficulty. In these cases there was enormous pressure placed on various jurors by other jurors.

In some cases, the jury remained perplexed by why the accused did not give evidence - even after the standard direction.

In 17 per cent there was an open compromise verdict. None of these was an acquittal. In some the compromise (in multiple counts) resulted in a lesser verdict. But in one the compromise resulted in a trading up of the verdict. In this case eight jurors acquiesced in a more serious verdict than they thought was warranted. One juror in this case commented:

"Some of the jurors believed the (accused's) explanation...There was a lot of discussion about reasonable doubt. A lot of the jurors thought that the (witnesses) were telling lies and that the police evidence ...was unbelievable. There was also heated argument about the points of law as to (different charges). We all went through the evidence and the only way we could resolve the disagreements was to compromise.

Eight jurors thought the (accused) was guilty only (of the least serious of three charges) but four jurors - including me - want to convict on the (second most serious charge) . We realised we would have to compromise if we wanted to get out of there quickly so... we went up to (the more serious charge). We just all had to bargain to reach a decision."

It should be stressed that this was not representative of most juries but it does provide some insight into the process.

This together with other extracts in the Report point to the fact that what lawyers should not take for granted any understanding by juries of even the fundamentals.

The Report points out that some juries had significant difficulty in understanding and applying directions on the law. They had little background information or understanding of their role before they came to court:

“We wanted a definition of reasonable doubt because the jurors didn’t understand its limits, but the guidance from the judge wasn’t really of any use”.

In New Zealand jurors in a sample simply assigned levels of proof in percentage terms to the concept of beyond reasonable doubt these ranged included “100 per cent, 95 per cent, 75 per cent and even 50 per cent”.

The study suggests that the first thing the majority of juries do on retirement is immediately take a vote of who is for conviction and who is for acquittal. This suggests that the minority will immediately be under pressure.

Ultimately though, the study demonstrated that the juries took their role very seriously.

Juries definitely seek to do “real” justice. This may not be according to strict adherence to legal doctrine. The study suggests that most juries believe in the fundamentals of a fair trial and a fair go. Almost all verdicts regarded as “perverse acquittals” by prosecutors can be explained by appreciating these fundamentals.

### **Preparation for the Address**

Bruce Miles was famous for entering court with little more than “The Daily Telegraph” under his arm and a pencil whose sole purpose up until that time seemed to marking the form in the racing section.

In one case he approached John Andrews his co-counsel whilst the jury were being empanelled and asked “Now, young fella, what’s this case about.” He then advised that John should take all the legal points - Bruce would back him up. He then approached the Crown and asked him to open fully.

This is not a thing of the past. I recently heard of a case in which the transcript records counsel, after hearing the opening, seeking an adjournment to advise his client as to plead guilty - from what he had just heard there seemed no other way.

It helps to read the brief.

After you have read it and before you have met your client or read in detail your instructions, note your reaction. This first reaction is often the same reaction as the jury when they hear the Crown opening - but without the sinking feeling of ownership of the client.

Preparation before trial is very important - of course - but in virtually every case you issue subpoenas you come up with a nugget. In every case you interview witnesses you gain an insight and a view is always useful.

Begin the process of preparing your client for appearing and giving evidence.

Interlocutory proceedings can be used to begin undermining the Crown and persuading the trial judge.

Defence lawyers have the benefit of meeting the client and understanding (and often sympathising) with their point of view. By the first trial day the defence lawyer should be familiar with a significant amount of material that is available at that stage only to the defence. This usually will have led to a change from your initial perspective. The targets should be picked and the general strategy should be formulated.

However, as already noted, be aware that all the other people in court (including the jury) will be entirely ignorant of anything or anybody that assists your case. They will start from the general understanding that the accused wouldn’t be in court unless he/she was a nasty criminal who is entirely unlike them.

### **Pre Jury**

Obviously prepare your witnesses and evidence.

Talk to the Crown with a view to finding out how much s/he knows of the real issues, what approach and

tactics will be adopted by the Crown. In some instances, it is useful to attempt to persuade the Crown of the utter futility of their case. Even if it has not been "no billed", a Crown whose morale is undermined or who does not believe in his or her case usually communicates this to a jury.

Attempt to set up a positive and productive atmosphere in court.

Addressing the jury begins by setting up your support group in court. It is important to engage with everybody in court in a way that will ultimately assist your client. When the staff like, trust or respect you it is more than likely the jury will get to know about it. This means your instructing solicitor, the associate, the shorthand writers, the sheriff's officers, the judge and the Crown.

At its extreme this can involve "taking over the court". (Irving Younger)

One bad word from a sheriff's officer about you to the jury in the corridor can potentially undermine all your efforts. A sneer from the associate or an expression of distrust from the judge is not helpful and is often picked up.

The aim is to end the trial with everyone in court convinced of your client's right to an acquittal.

Ego can be useful but a defence barrister should use it as a tool on behalf of the client.

There is a story of a trial in the not so distant past in which counsel cross examining for a great deal of time about apparently trivial and irrelevant matters. Junior counsel for the co-accused approached this senior counsel and politely and deferentially indicated that there may be the "possibility" that the silk was "losing the jury". This was because of some unambiguous body language in the jury box. Senior counsel responded to the collegiate nature of the constructive criticism by advising junior counsel that he had been doing "trials for decades", that he knew exactly what he was doing, if for one moment he thought junior counsel had anything useful to say he might take some notice but in the circumstances the criticism was totally unwarranted - now go away.

The jury then wrote a note - saying that they did not think that the QC was doing anything except wasting their time and was there anything the judge could do to stop him. The judge asked counsel how to reply. The QC said tell them "I have been practising for decades, I know precisely what I am doing, it was for me to ask whatever questions I determine. The jury should be told that it is my responsibility alone for conducting the case - it is none of their business."

He thoughtfully left out the "go away".

This is an example of unproductive ego.

Judges usually approach cases without any real information. They have a natural tendency to look to the Crown for assistance - this must be remedied. If you are the first to speak, the first to characterise the event which is to take place (the trial), you gain an advantage. Subtly weighted characterisations of the facts can influence the progress of the trial.

Open to the judge - makes his/her job easier. And they do like that. Use the opportunity to flag areas of contest, give a real time estimate, if you can outline the issues, insinuate the positive aspects of your case. The natural reaction of juries to judges is one of respect. They look to them for guidance. It helps to try to keep the judge neutral. On your side is better. Although too on your side has its problems.

Very early on you will get a feeling for how the judge will react to the case.

If the judge is going to be antagonistic, it is best to know early so that you will be able to review your tactics and decide how to behave towards him or her in front of the jury. An obviously unfair judge can often result in an acquittal - so long as the jury know about it.

It is often useful to have a legal defence.

If you have one, it is a matter of judgement how much of it you disclose to the court before the case begins.

In some cases, such as assaults where all the participants are in various states of intoxication, the evidence is often likely to get better. Significant disclosure of your defence of self defence is probably not going to do any damage.

On the other hand - in a recent trial in which I was involved - I sought a directed verdict after the Crown opening - only to be met with a new Crown opening and a list of witnesses three times the original list.

### **Jury Panel**

It is helpful to have a very attractive client. This is unfortunately only too rare.

It is also helpful to have an attractive client's partner. In the 1950's in the United States one law firm would apparently recruit attractive "wives" from talent agencies for the purpose of supporting their "husbands" whilst on trial. The process, I understand, was ruled to be unethical.

I have heard of a sexual assault trial in recent times in which a member of the jury indicated that "We couldn't believe he could have done those depraved and despicable acts seeing what an attractive wife she was and seeing her every day coming to court."

The person in question was on work experience.

It is probably true to say that the public, and hence juries, do not have a particularly high regard for lawyers and defence lawyers in particular.

When you enter a court you should probably expect that you will be regarded as something approaching a dishonest mafia lawyer who will rely on any vacuous technicality to get your client improperly acquitted. This is particularly so since the advent of the American crime television series and the rise of shock jock "journalism".

By the end of the ideal case you will have entirely replaced this attitude with one in which the jury trust you and look to you for explanation and guidance.

The process begins with the presence of the panel.

Generally you should take any opportunity to humanise your client in front of the jury. Start by taking the challenges with him or her. It may help in some cases to appear to respectfully consult your client in front of the panel. Later on the client can be consulted at various strategic points during the proceedings.

This process should not be taken too far.

Take the challenges firmly and with authority. Those rejected will soon be forgotten.

### **The Crown and Defence Openings**

The judge will usually introduce the defence opening in terms similar to the following:

"I will now ask Mr Smith to address on the matters raised in Mr Crown's opening address, including those that are in dispute and those that are not in dispute, and other matters that will be raised by the accused. This opening is intended to assist you in understanding the issues in the trial and what the accused might say in answer to the Crown's allegation. Like the Crown Prosecutor's opening address what Mr Smith will say to you is not evidence."

In researching this paper I kept coming across a statistic on an American Internet sites which suggested that 70 per cent of jurors did not change their mind after the prosecution opening statement. The actual percentage claimed varied but was never a minority.

Whether or not such a statistic is true in Australia, it is probably a good idea to an indication of the likely importance to the jury of getting the defence case before the jury early and doing so effectively.

The statistic suggests that the jury regard the introductory remarks as - as good as evidence. An opening may well stop this process from solidifying into conviction.

Not opening means that the Crown's case narrative appears largely unchallenged for the majority of the trial. In most cases it is better to call it only a "case theory" early on.

The law in relation to opening addresses at this stage and before a defence case is contained in s.159 of the

Criminal Procedure Act 1986 (NSW).

## Opening address to jury by accused person

### 159 Opening address to jury by accused person

(1) An accused person or his or her Australian legal practitioner may address the jury immediately after the opening address of the prosecutor.

(2) Any such opening address is to be limited generally to an address on:

- (a) the matters disclosed in the prosecutor's opening address, including those that are in dispute and those that are not in dispute, and
- (b) the matters to be raised by the accused person.

(3) If the accused person intends to give evidence or to call any witness in support of the defence, the accused person or his or her Australian legal practitioner is entitled to open the case for the defence before calling evidence, whether or not an address has been made to the jury.

In *R v MM* [2004] 145 A Crim R 148]NSWCCA 81 Levine and Howie JJ, and Smart AJ 10 October 2003, 31 March 2004 all members of the court commented on the ambit of s.159. Howie J at p.173 notes:

"It is apposite in relation to this ground to draw attention to the fact that defence counsel is **not** at liberty to open to the jury in any way he or she thinks fit."

His Honour then quotes extensively (with approval) from the Hansard Second Reading Speech of Mr Whelan:

"The address of the accused is to be limited generally to all or any of the matters disclosed in the prosecutor's opening address that are or are not in dispute and to the matters to be raised by the defence. The idea is to give the accused the option of identifying, right at the start of the trial, the real issues in the trial. That will be of value to all concerned, not least the jury, who will be able to observe all of the evidence from the very beginning, with the real issues of dispute firmly in mind.

It is important to grasp that it is entirely at the accused's discretion whether or not to make the new address, just as it is currently entirely at his or her discretion to decide whether or not to open his or her case if calling evidence, and whether or not to address the jury at the end of the trial. Furthermore, the making of the new address does not preclude the accused from opening his or her case if calling evidence for the defence. That is appropriate for two reasons. First, the two addresses are rather different in their general natures, though there may be some overlap in practice. One foreshadows the issues in the whole trial; the other foreshadows the evidence to be called by the accused. Second, the exercise of the option of making the new address, bearing in mind that it will be to the benefit of all, should be encouraged, rather than made into something that would only be done by the accused after a tactical cost-benefit analysis.

At p.135 after citing again, apparently with approval, the Law Reform Report on which the reforms were based, his Honour states:

"The purpose of the defence opening address under s 159(2), therefore, is to define, for the jury's benefit, the real issues in the trial and what the accused might say in answer to the Crown's allegation. It is not an opportunity for defence counsel to embark upon a dissertation on the onus and standard of proof, or the functions of judge and jury, or to anticipate the directions or warnings to be given by the trial judge, or to urge upon the jury the way that they should assess the evidence of a witness to be called in the Crown case."

There is precise ambit of the "matters disclosed" in the prosecutors opening and the "matters to be raised by the accused person" has not, so far as I am aware, been defined.

The Law Reform Commission appears to have anticipated that there would be no reference to the evidence in the defence case:

We do not suggest that the defence be entitled to open at this stage, rather they could make a short announcement briefly outlining the issues to be contested *but not referring to evidence*

*proposed to be called.* The purpose of such an announcement, where defence counsel chooses to make it, would be to alert the jury at an early stage of the trial as to the nature of the accused person's defence. In this way the issues in the case could be narrowed and defined. To avoid the disadvantage to the Crown which could arise if the Crown opening were to be substantially separated from the Crown case, the defence outline (or outlines in the case of multiple accused) should not be lengthy or argumentative. Rather this opening should simply outline the issues and identify those matters not in contention.(cited in MM emphasis added).

The section does not say this.

Indeed, it is difficult to imagine how one could open in most cases without some reference to the defence version as this is the only way to define the issues. For instance - where the defence of self defence is raised - the defining of the issues will in many cases deal with the varying accounts of what occurred. Alerting the jury to the issues will necessarily need to focus on what is accepted and what is disputed in the evidence.

Until the precise boundaries of the section are fully understood - it is probably wise (depending on the judge and the case) to alert the Judge that you wish to open and indicate the general nature of the opening contemplated.

This will, at least, save the embarrassment and tactical failure inherent in the judge interrupting or informing the jury that the opening was inappropriate.

Many counsel decide not to open. The most common reasons are:

- They don't quite know what their defence is just yet but know it will come to them later.
- They don't know what their client's version is but that also will come in the fullness of time.
- They don't know whether the crown witnesses and/or the defence witnesses will come up to proof and may lose a tactical advantage thereby.
- The case is one in which the jury will and should discover the defence for themselves.

However, if a decision is made to open, then an attempt should be made to:

- Emphasise boldly and sincerely that there is a defence and summarise it in simple terms.
- Project an aura of reasonableness and certainty.
- Try to commence gaining the jury's trust.
- Ask them to listen carefully to the evidence and keep an open mind.

It is also helpful if the opening has actual drama and content as well.

Graham Turnbull opened in Tony Hines murder case by getting his client to stand in front of the jury and, then pointing at his client, stated "this man killed Tony Hines". The effect was dramatic and he went on immediately to focus the jury's attention on the fundamentals of the case - self defence.

### **Addressing the Jury during the Course of the Trial**

Every opportunity should be taken during the trial process to persuade the jury of the validity of the defence case.

It is not the purpose of this paper to deal with cross examination techniques except to say that cross examination can be used to place the narrative of the defence case before the jury.

*Browne v Dunn* (1893) 6 R 67 requires you to put your case to certain witnesses. This process can be used repeatedly to demonstrate the reality of the defence case and the unlikelihood of the prosecution case.

Styles vary but it is important to convey during the trial your commitment to your client. Studies in the U.S. repeatedly reveal jurors indicating that "That lawyer didn't really seem to care: he was not really committed".

There is nothing more unconvincing than an advocate who simply "puts" various propositions in a dull, half-hearted mechanistic way - the rule should be used as an address to the jury which creates and repeats the message - this is what *really* happened.

People (and juries) have much more difficulty "turning down" someone who is committed and passionate.

Create the impression that you know what is right and you are doing it.

There is nothing wrong in showing passion when the occasion arises. Outrage, disappointment, righteous indignation, disbelief and shock are all part of the armoury of good advocates. In extreme cases anger (controlled) and disgust may also be used.

However - as a note of caution - it is extremely dangerous to manufacture feelings which are insincere or inappropriate. Pompous thespians are usually seen through by juries and do not win cases.

Use objections and responses to objections, to get your case across to the jury. If an objection is taken to relevance, address on your case, take the opportunity to communicate the essentials of your case in front of the jury. Its relevant because "I will be putting to the witness and the jury that this witness is mistaken, the house he says it happened in wasn't even built then."

A lot of good defence lawyers do not take the same objections in front of a jury that they might take in front of a judge. There are good reasons for this and consideration should be given to the fact that taking an objection may often result in a tactical loss.

There are many reasons for this. For example, jurors want to hear the story and may resent your carping interruptions. Secondly, if you lose the objection and in turn, you may lose face and trust in front of the jury. In most trials, at least in the beginning, the jury is likely to trust the judge before you. (With a bad judge this may change).

However, sometimes it is worthwhile for other tactical reasons to behave in a way which may put the jury off in the short term simply because stopping the witness is more important.

When I once remarked to Winston Terracini that the jury might consider his behaviour a *little* excessive, he responded by telling me that they would quickly forget it and, in any event, his address was designed and would totally rehabilitate him.

It did.

However, for lesser advocates, one must bear in mind that the jury may not forgive you your trespasses.

There is a natural corollary in seeking to build up the trust of the jury in you as a reliable source of information and argument during the trial. This is that wherever possible during the trial and during the address the processes and arguments of the Crown should be positively discredited.

I have seen some defence counsel deliberately set out to "pick" the crown. In other words they take every opportunity to positively undermine every aspect of their presentation. There are many stories where this goes beyond baiting them professionally and extends to the personal. It is after all, so it is said, an adversarial process.

An indirect approach is probably less exhausting and in some cases more effective. Get on with the Crown when the jury aren't there and as far as possible ignore them when they are. Don't humanise them in front of the jury. Be opportunistic by taking advantage of blunders and deliberate misbehaviour by highlighting them in front of the jury.

As the trial continues it is helpful to keep notes of what parts of the evidence may be useful in the address. Particular answers and evidence which assist the defence case should be recorded. In long trials, it is sometimes useful to note a physical description of the witness so that, when you come to address months later, they can be reminded. Particular aspects of a witness's demeanour that assist the defence should also be recorded. If a witness hesitates or takes a long time to answer a question to record it as it happens. Similarly if they sneer or are belligerent - record it. Sometimes it is even more effective to get it down on the transcript. Descriptions of a witness's demeanour in an address may alter the perception of the jury of their evidence long after they are gone.

### **Opening the Defence Case: The Second Address**

Potentially under s.159 defence counsel can get three addresses; the first at the start of the trial, the second when calling evidence and the third at the end of the trial.

Sub section 3 (above) saves the traditional address at the start of a defence case and seems to anticipate an

opening in which the defence will go through the process of outlining what each witness will say and differentiate this from the opening at the commencement of the overall case.

As a general rule (and always subject to the nature of your case), it is a good idea to re-open and outline the evidence which you will call. Again this is subject to the qualification that you are reasonably confident what evidence will eventuate and that the witnesses will say what you say.

The effect of opening the defence case can be to get the evidence in twice; once said as a consistent and uninterrupted narrative of each witness's evidence (including the accused) and once as actual evidence.

If the jury know what is going to be said and then hear it said they are more likely to remember it because of the repetition. Minor variations are likely to be ignored. The danger, of course, is that the witnesses do not come up to proof.

### The Third and Final Address

There is a significant advantage in addressing following the Crown address. We should all thank the Criminal Law Review Division for changing this in the early 1980's by s.405(3) of the Crimes Act (now in the Criminal Procedure Act 1986(NSW) s.160). I understand the previous position where the Crown addressed last was much more uncomfortable.

Section 160 provides:

#### 160 Closing address to jury by accused person

(1) An accused person or his or her Australian legal practitioner may address the jury after the close of the evidence for the defence and any evidence in reply by the Crown and after the prosecutor has made a closing address to the jury or declined to make a closing address to the jury.

(2) If, in the accused person's closing address, relevant facts are asserted that are not supported by any evidence that is before the jury, the court may grant leave for the Crown to make a supplementary address to the jury replying to any such assertion.

Prior to the enactment, a Crown prosecutor's address usually consisted of a speech which relied heavily on the destruction of defence counsel's address.

Generally in New South Wales in joint trials the tradition is that counsel call evidence down the indictment and address up. The order can be changed by agreement.

What can you say in a closing address? The question is better asked in the negative - what can't you say?

Defence counsel should not refer to penalty if the accused is found guilty (*R v Hunter* (1999) 105 ACrimR 223). You may expect that if reference is made the judge will immediately stop the address and point out that penalty is none of the jury's business. This can be humiliating for the advocate.

Counsel should not ask for a recommendation of mercy: *R v Black* [1963] WLR 1311. Although one has to ask why any advocate seeking an acquittal would ask for such a recommendation which only follows conviction.

Counsel should not read opinions from textbooks or substantial extracts from judgements or invoke the source of such material such as reference to this being from "the highest court in the land" : *R v Griffin* [1971] Qd R 12. *R v Chandler* 63 Crim App R 1 At 2 CA.

Don't define beyond reasonable doubt: There is longstanding authority for the proposition that, except in certain limited circumstances, no attempt should be made to explain or embellish the meaning of the **phrase** "beyond reasonable doubt": *Green v The Queen* (1971) 126 CLR 28 at 32-33; *La Fontaine v R* (1976) 136 CLR 62 at 71; *R v Reeves* (1992) 29 NSWLR 109 at 117; *Raso v R* [2008] NSWCCA 120. If, in an address, counsel suggests that fantastic or unreal possibilities should be regarded by the jury as affording a reason for doubt, the judge can properly instruct the jury that fantastic or unreal possibilities ought not to be regarded by them as a source of reasonable doubt: *Green* at 33; or as put in *Keil v The Queen* (1979) 53 ALJR 525 "... fanciful doubts are not reasonable doubts". (bold emphasis added).

The question of whether there is a reasonable doubt is a subjective one to be determined by each individual

juror: *Green* at 32–33; *R v Southammavong*; *R v Sihavong* [2003] NSWCCA 312 at [28]. There was no error in *Southammavong* by the trial judge saying, in response to a jury request for clarification, that "... the words 'beyond reasonable doubt' are ordinary everyday words and that is how you should understand them" (quoted at [23]). Newman J said in *R v GWB* [2000] NSWCCA 410 at [44] "... judges should not depart from the time honoured formula that the words 'beyond reasonable doubt' are words in the ordinary English usage and mean exactly what they say."

More of this later.

Don't misstate the evidence.

Do not refer to the possibility of appeal : *Krycki v The Nominal Defendant* (1962) 62 SR 552.

Do not call upon bigotry, prejudice or bias or extraneous or unfair matters which are calculated to divert the jury from their proper task: *Croll v McRae* (1930) SR (NSW) 137.

As to recent cases as to what Crown's should not say see: *Causevic v R* [2008] NSWCCA 238 see also *Livermore* [2006] NSWCCA at 334.

### **What you can say**

Counsel are entitled to address at large subject to the general qualification that every litigant is entitled to have her or his case fairly tried, free from bias and prejudice and free from the intrusion of extraneous matter calculated to divert the jury from their proper task: *Croll v McRae* (above).

Defence counsel is not to be restricted to remarks on the evidence of his witnesses but if anything occurs to him as desirable to say on the whole case, he is at liberty to say it - *R v Wainwright* (1895) 13 Cox 171.

It is generally preferable for a trial judge not to interrupt a closing address: *R v Tuegel* [2000] 2 Cr App R 361 Ca.

In the Canadian case of *R v Rose* [1998] the Supreme Court of Canada noted:

"A closing address is an exercise in advocacy. It is the culmination of a hard fought adversarial proceeding. Crown counsel, like any other advocate is entitled to advance his or her position forcefully and effectively. Juries expect that both counsel will present their positions in that manner and no doubt expect and accept a degree of rhetorical passion in that presentation."

What all this means is that you can refer to just about anything arising out of logic, reason, experience of everyday life, common sense, anything that arises by judicial notice, notorious facts and circumstances, the body of well known literature, films, human nature and human psychology etc etc etc. - so long as it is relevant to the argument being advanced and unrestricted by the other rules.

However, try not to use the first person and do not refer at all to your opinions of the case - they are irrelevant - you are presenting an argument. If you start referring to a personal opinion about the case you almost certainly will be interrupted and corrected.

### **Preparation for the Closing Address**

In long trials it is critical to continue preparation of the address throughout the trial. Database programs such as Filemakerpro can be useful.

In Commonwealth matters the Crown often supplies a detailed Crown Case Statement which if emailed can be broken up into discreet events. A database can be used to divide the issues and witnesses and extract transcript relevant to the issue. Ultimately, a rating can be given to each piece of the transcript on a one to five star basis. A comment can then be added which forms part of the address when referring to the transcript.

The advantage of an electronic database is that it is searchable by a criterion which is included in it and the text extracted from the transcript is similarly searchable.

Similarly - particularly in a long trial - it is helpful to receive the transcript in electronic form (and printable and editable form) and to obtain search software. This makes instantaneous what may take hours or days to

disclose by a manual search.

In addition, a search engine can quickly refer you to the extracts in the transcript on which the Crown address is based. It is regrettably not unheard of that a Crown selectively quotes a passage in which the critical question and answer are missed. An electronic search gives you the instant access to the whole passage.

Whatever the recording mechanisms and aides, by the end of the evidence, counsel should be aware of their argument and what areas of law will require more than the specific directions.

Most judges are more than happy to discuss what specific directions of law are required by counsel in the summing up. It makes their life easier.

Take the opportunity prior to the closing address to ascertain what directions will be given. It is not helpful to address on what the judge "will tell you" to hear "no I won't".

### **Structure of the Address**

Structuring the address is again a matter of personal style.

It is useful to begin strongly. It is useful to relate your opening to your closing.

An example if a conventional structure is:

- Dramatic and short summary of what the case is about with a "the grab line".
- An outline of the topics in the address with a time estimate.
- An attack on the Crown's closing and in particular the misstatements, factual errors and defects in logic and reason which infect the whole exercise. Beware, though of elevating the Crown's case by its repetition.
- A summary of the applicable legal principles making them referable to the role of the jury in this case.
- Reference and discussion of particular issues and particular parts of the evidence and witnesses. Provide page numbers - juries get transcripts.
- Repetition of the main points.
- An indication that you are about to conclude and a strong ending requesting an acquittal.

### **Style**

The style of an address is dictated by the personality of the advocate and the content of the case.

I am told that Bruce Miles in an address relating to some bizarre sexual practices said to have been committed in company on a girl without consent delivered an address which consisted of "Well ladies and gentlemen of the jury, young people today, there's no telling what they get up to."

I understand this resulted in an acquittal.

I have witnessed many Public Defenders and defence barristers address. Their styles varied enormously.

I have heard barristers shout their address and in one case I heard a barrister sing his address. Some barristers are very quiet but authoritative, others animated and loud. Some give an address like a school teacher. Others like a directive aunt. What matters is that it sits naturally with the person giving it.

Recently, I went and saw Winston addressing. I came away, as I always have from a Winston address, impressed, but also with a dramatically increased general knowledge. On this occasion, I learned how to bowl a "wrong 'un" and on a previous occasion, heard the full history of the pharmacology of heroin from its initial discovery, through its synthesis by Felix Hoffman and its naming by Bayer because of its "heroic qualities".

However, whilst some experienced advocates eccentricities are tolerated by judges who have known them for some time and who admire them, more junior advocates should probably take a conservative approach to style and the nature and content of their addresses. An interruption during an address or a disparaging remark in the summing up can undermine a lot of good work.

Other advocates I have seen avoided drama and simply engaged in "fireside chats" which inexorably led to only one conclusion - their client's utter innocence.

It is useful to listen to other advocates addressing and even to read about addresses. However one should bear in mind that addresses are almost certainly, culturally specific and in this regard the "past is another country".

The addresses that occurred at the end of the 19th century in England are utterly inappropriate to an Australian jury in the 21st century. They are usually over sentimental and flowery. The addresses of American lawyers are similarly not easily imported to Australian courts.

I know some advocates attempt to gain support for their argument by appealing to particular aspects of our culture and values. In some cases, addresses should contain material which seeks to make the jury proud of the principles and an attempt to make them personally identify with them. Some advocates appeal to the history of the principles. They refer to the sacrifices which individuals and societies endure without the protection of the rule of law and the rule of our laws in particular. These can be effective.

Again it is sometimes useful to engage loftier ideals - a fair go, the fundamental that our citizens are the judges that matter, standing up for your rights, individual courage etc.

However, in this area one should also bear in mind that Australians seem to retain a healthy scepticism which may undermine the effect of an excessive call to arms. There is also a danger when using patriotism that the jury may regard it as "the last refuge of the scoundrel".

In general, addresses should be made in plain words.

I once heard an address in a receiving case from a Crown prosecutor in which he referred to the "asportation" of the motor vehicle. The jury unremarkably glazed over for the rest of his address.

### **Process**

Do not read your address. A jury address is an interaction between the advocate and the jury. Various public speaking techniques can be adopted: cards, topic headings, etc. It is useful to read texts on public speaking.

There is a lot in American writing about the positive use of body language. This may be more relevant where one can walk around the court. You should try to radiate a relaxed confidence. It is said that you should show your hands.

Since I heard someone else use it, I now incorporate into the address an explanation to the jury about what happens during an address - in the sense that it is not a debate or a discussion; "unfortunately I can't ask you questions about what is concerning you" etc. I think this is useful. Introducing and explaining the process helps.

Being spoken to or at for hour after hour in the manner of a jury address is unheard of in any other situation in our society. The extraordinary nature of the process is heightened by the fact that most people are not used to being asked to digest complicated information, let alone in long uninterrupted sequences.

Most people are rarely asked to think about one concept for any length of time and the process of comprehending many abstract concepts and then applying them is entirely alien. Seek to have breaks as often as possible. Vary the tone, volume and speed of the address to create and maintain interest.

Very few advocates use anything other than their voice and their presence to get the message across. In virtually every other process of communication in our society the process involves other media. The first question I was asked by those actually organising this seminar was -"Will you be using Powerpoint?"

The Courts are now set up for the electronic age. Criminal lawyers just don't seem to have joined it. There is no doubt, that used effectively, pictures, charts, diagrams and presentation software generally drastically increase understanding and the retention by juries of facts and arguments.

With the judge's permission, you could show a transcript on the screens as you read it. Seeing a picture of words, might be worth a thousand words.

At the very least use the exhibits as part of the "colour and movement".

Most of the time, however, the jury will be looking at you. It is surprising how often people ask about eye contact. I have been with an advocate who so intently "eyeballed" the jury, that the jury wrote a note asking

that Mr X stop it and get on with his job.

Eye contact is a matter of personal style but there should be some - a number of advocates scan the jury one at a time. Others address the whole jury. You should not be put off if jurors occasionally look away - this may simply mean they are considering the point you just made.

### **Sum Up before the Summing Up**

At some point in the address it will be necessary to deal with the law applicable to all criminal trials. This is where the balance of advantage is designed to be with the defence. Use it. In some cases these are all you are left with.

Some advocates stress the history and importance of the concepts.

Whatever strategy you adopt it is useful to tell the jury that they are not just here to determine the matter without rules or procedures. They don't have to reinvent the wheel. The rules are the framework in which they to go about their task.

The principles should be given the solemnity, importance and integrity they deserve. Tell the jury that it is an integrated system, each principle part of a system as a whole. The study of juries referred to above suggests that this is little known to juries and less well understood.

The jury should be made to take pride in "our system". It can be contrasted to other systems - how far you go is again a matter of personal style.

But at the very least the jury should be told of the presumption of innocence in no uncertain terms. "Unless and until there is evidence" etc. Undermine the prejudices of the jury against your client. The idea is to undermine the people in the jury who immediately assumed your client was guilty just by being there.

Tell them to start in their analysis from that point.

On occasion it is useful to personalise this presumption. "Many of you may have been the subject of rumours you know to be totally untrue. How can you disprove them. In these courts you are presumed innocent and you are not required to disprove them - the Crown must prove them b.r.d."

It is also useful to get them to at least not regard your client as a complete alien.

You could tell the jury that they are selected because they are the "peers" of the accused and he is entitled to be tried by them. This is unlikely to be helpful.

A better course is to tell them they are selected because they are the "co-equals" of the accused or some other expression which identifies them more strongly with the accused. They are to judge a fellow human being and attempt to understand them on that basis.

I have cited above the constraints on counsel (and the judge) on "defining" the phrase "beyond reasonable doubt". I know of no authority though which says that you can't tell them what it isn't.

The standard summing up often includes the statement that "even the gravest suspicion does not amount to proof beyond reasonable doubt."

If this is acceptable, and it is, then a description of what beyond reasonable double is not is also acceptable. This can be very powerful. Jury studies suggest some clarification is necessary in every case.

In an inspirational cassette which Peter Hamill lent me from a criminal defence lawyers seminar in the U.S. William H. Murphy Jr., a respected U.S. defence attorney outlined what he does when addressing a jury in relation to beyond reasonable doubt:

*"I put it all on them (the prosecution)...I honestly believe that proof beyond reasonable doubt is almost impossible. My job is to convey that and to explain why we exalt proof beyond a reasonable doubt...And I use a chart, ...I say what reasonable doubt is not, reasonable doubt is not a mere suspicion. I put that at the bottom. Proof beyond reasonable doubt is not a suspicion with a reason. Proof beyond reasonable doubt is not the probability of guilt. That's enough to*

*charge somebody - that's enough to charge somebody , and trust me , that's all they got in this case - that's why they charged this man. Probability of guilt. And nor is it, ... by a preponderance of the evidence. That is the standard we use when money and property are at stake. Standard is much higher than that in a criminal case. Nor is it proof by clear and convincing evidence. It is not enough that the evidence is clear and it is not enough that the evidence be convincing. That is the standard of proof we use when a person's reputation is on the line because they have been charged with fraud and money's at stake but not liberty. No proof beyond a reasonable doubt means proof beyond any reasonable doubt. "A" in this equation means any. And why is that - because we are not dealing with money or property, or reputation. We are dealing with liberty. And so we place the bar deliberately higher...It's the highest form of proof ever conceived, ever conceived, in any country in the world because that is how much we say we respect liberty. Do we really respect it that much. That's what we are here to determine. And I know twelve people who do because they were selected because they claim to respect it that much.*

*That's some powerful stuff you all - especially when you put it on that chart and you save it for closing argument. Cause it sets the tone. Now- why do that aside from the obvious reasons. There are some real psychological payoffs to doing it that way. You are pointing at them for the requirements of satisfactory proof, not yourself. You are now in the position of the 13th juror - waiting for them to achieve the impossible. You are now part of that jury process that is helpful to them by bringing out why they can't possibly make that showing in this case. And you are focusing the jury on something abstract away from the gut that says 'Look at that slimy bastard sitting next to defence counsel - I know he is guilty' You are ennobling them , you are asking them to participate in a principled exercise , the likes of which they have never done before."*

I do not suggest this can be copied or should be copied. But it demonstrates how effective a proper and passionate address focussing on the principles could work. In Australia it would be unwise to use the assertion that the test is beyond *any* doubt. This would invite interruption by the judge.

However, as has been discussed the use of a chart is permissible as is the use of other communication aids.

Some addresses approach the beyond reasonable doubt issue by explaining to a jury what the verdict of not guilty means. This technique stresses that whilst some jurors may leave the court convinced of the accused's innocence others may still harbour suspicion etc.

Devices should also be used to encourage jurors to hold out against a majority who want to convict (a kind of pre *Black* direction).

In some cases it is useful to stress that they are there to strictly apply the law to the facts; in others it is helps to appeal to a broader principle of justice and a fair go.

### **Addressing the Specific Case**

The content of an address should be tailored to the specific case.

As mentioned earlier, in the early part of the address the Crown's address should be attacked and an attempt should be made to discredit the propositions advanced. Where the Crown has misquoted or selectively quoted evidence this should immediately be brought to the attention of the jury.

In most cases, there is no use in avoiding the Crown's best points, they should be rephrased to reduce their effect and then negated.

If it is true that most juries do not change their mind after the opening, then juries probably need a real jolt in a closing address so they reconsider the case. "It is only at the moment that you walk out that door that you are finally in a position to truly consider your verdict etc."

Sometimes it is useful to show them how dangerous to objective decision making is the power of suggestion.

The following analogy may help. (It is not appropriate to sex cases):

Imagine you are watching a short film - in the legal section of Tropicfest. The scene is a public park. There is a young child on a swing. She is happily swinging away - the camera focuses only on the long shadow of a man approaching her. The volume of the soundtrack begins to increase. The strings become more insistent etc. You see the man from behind pick up the girl. You will inevitably conclude

that the child is about to suffer a terrible fate. Wind the film back. Now start with it with a happy playful soundtrack - the whole tenor of the facts changes - the old man is probably the child's grandfather. How many facts were there to begin with and what's changed? The fundamental is that what has changed is not the facts but the suggestion.

You realise you could not possibly have drawn the inference without the suggestion.

In a circumstantial evidence case, some judges get quite upset if you steal the illustration of the telephoning a friend at home and the number not answering - what can you infer etc. The trouble is it is a very good analogy of how difficult it is to draw inferences - if a little out of date.

Some counsel use a point summary of their best points as an outline, expand it for each topic when they are dealing with the evidence and then repeat it in short form when concluding the address. "There are nine points which lead to acquittal".

If your client gives evidence make a big deal about it. The Chesterman study (above ) suggests that some juries will be troubled if your client does not give evidence.

If your client (successfully) raises good character again make a big deal about it. Juries probably place more weight on good character than it deserves. Copy and embellish the directions on good character.

### **Rhetorical Devices**

The study of rhetoric seems to be undergoing a revival - witness the book of the lectures to the Bar Association - "Rediscovering Rhetoric" by Justin Gleeson and Ruth Higgins.

Most good jury advocates use rhetoric and rhetorical devices constantly and without specific reference to the ancient art.

The object of a jury address is to be both persuasive and memorable.

Homely examples or parables help communicate a concept and are memorable. People remember narratives or stories. Argument involves analogy and the better the analogy the more persuasive the argument.

Repetition of a theme and alliteration are useful. "Yes we can"; " I have a dream" etc.

It is sometimes useful to give the defence case a very basic theme "If the glove don't fit - you must acquit."

There is story of Clive Evatt Sr. who was appearing in a defamation case for "madam lash". Ms Lash was appearing on television demonstrating how she could whip without injury. The presenter falsely claimed he had suffered an injury. Clive claimed her reputation had been falsely injured. I am told as part of the preparation for the case Ms Lash enrolled in law and quickly and respectably became engaged. During the trial, Junior Counsel was used to demonstrate the benign nature of Ms Lash's flagellation.

At the end of the trial Clive addressed the jury on the basis that his client did not want much money "just a fair crack of the whip."

If there is a way of colourfully summarising your case in a short pithy statement then use it. However, it is important to ensure that it works and that it cannot be quickly turned against you. In general it should also not be puerile or distasteful. If you are not confident that it can be used effectively and with impunity - don't use it.

### **Finishing Off**

Finish off your argument strongly and, if appropriate, passionately.

Summarise your main points. If you have used the "There are nine points" technique repeat them. If you have a good grab line, repeat it.

Indicate that there may be something they consider favourable to your client in the evidence. Tell them to take it into account.

Invite them to acquit, thank them and sit down.

Ian McClintock  
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