The journey from Counsel to Acting Judge

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The journey from counsel to judge is not easy. I say that having done it three times. On the first occasion I wrote an article for the Law Council publication of ***Australian Lawyer****. The whole exercise the first time started with such a rush that I hardly had time to find my feet. I was stunned to find that within 15 minutes I had to make rulings on law. Fortunately this was in personal injury, an area which I knew well. The issue concerned the failure to serve a report. The defence wanted an adjournment. I directed the matter continue and requested the expert attended that afternoon. He did. He gave his evidence and the next day the case settled. Lesson number one, never adjourn a case because parties are not ready. It is amazing what happens when you force them on. I speak as a judge when I say that, not as counsel, for as counsel I take a completely contrary view.*

My second journey to the far side in 1997 involved essentially hearing one case for the whole of my two month period, or at least for six weeks of it. This was a defamation jury case with an unrepresented plaintiff and an unrepresented defendant. Both had been ham radio operators for many years, one in the Blue Mountains and one in the western suburbs of Sydney. For some fifteen years the defendant and a number of other ham radio operators had tried to have the plaintiff prohibited from broadcasting. His licence indeed had been removed but he blamed the defendant and his colleagues for this loss.

The defendant had allegedly written on a number of occasions to the Minister and senior bureaucrats at the Department of Communications. He had also from time to time spoken about the plaintiff on air. The plaintiff had brought a number of previous actions, particularly in the local court alleging a number of different things against the defendant and his colleagues. These had all failed. Eventually the plaintiff sought relief in the Supreme Court by way of defamation. Hence my involvement.

As might be expected I was somewhat apprehensive, trespassing into an area of law which is not my field. And with a jury. And with two unrepresented parties. The only consolation I thought to myself was, that the parties would know less about the law of defamation than I would. I would not be continually made an idiot of by senior barristers expert in the Byzantine intricacies of this law. People talk about the extraordinary complexity and technicality of the law of defamation. Let me assure those who have not been into it that they understate it. This became apparent in 1998 in another case I will discuss at a later date - it is probably now on appeal so I should not comment on it.

Ham radio operators have their own society. They tend to broadcast late at night after their working day and no doubt frequently they are tired. It seems a strangely isolated existence. They also tape record each other's conversations. Vast amounts of tape are used in this exercise. It is used particularly when there is ill feeling between the various operators. I am not aware of the legality of all of this. No one raised it before me and I thought it was better to keep my head down in the trench about it.

The defendant was an entertainer. That was his profession. I do not mean that he was entertaining in court. He was very concerned about what he faced. He could not afford legal representation. The plaintiff was an unemployed aged pensioner. I was to learn very quickly that he knew a good deal more about the law of defamation than I did. The day before it came to me, the matter was called on before the Chief Judge, Hunt CJ. The Chief Judge attempted to talk the plaintiff into dispensing with the jury. I am told that at one stage the plaintiff said to the Chief Judge, "does this judge (that is me) know anything about defamation?" To which the Chief Judge responded, so I am informed. "He knows as much as any other judge about it." I was never quite sure how to take that comment. I suppose in fact that is true. What judge does know anything about this arcane area of law - except the defamation judges in the Supreme Court. Heaven knows what will happen when, (under the new 1994 - 1995 amendments which limit the damages) all these matters will be heard in the District Court under the District Court's extended jurisdiction. It is hard to see any defamation ever being worth any more than $750,000, although, in March a jury did award $2.5M, a record for NSW, the million dollars had only once been broken previously. The 1994- 1995 amendments require the court to take into account awards in personal injury cases. Parliament apparently had the view that it was preferable to reduce defamation verdicts rather than put personal injury general damages verdicts at a just level. I suppose all of this is in fact governed by economic rationalism. The bean counters cry that the country simply cannot afford to pay out reasonable awards for pain and suffering.

To return to the fray. Part of the battle before me was whether the plaintiff had in fact broadcast offensively and insultingly and thus breached the regulations. When pirate ham radio operators broadcast illegally they sometimes do it with false voices. Falsetto is one example. There was a pirate called "the Wombat". They all had nicknames. The Wombat seemed to be the plaintiff. The ham radio community have periodic rallies and meetings for exchange of equipment and for a general get together. The plaintiff had been at one of these gatherings and on his table there had been a sign "the Wombat", or so it was said. However, there appeared to be a number of different false voice offenders. ▶

The defendant alleged that a number of broadcasts of a particularly virulent falsetto was that of the plaintiff. He produced tapes of these. The plaintiff brought forward the tapes of the defendant and his colleagues slagging off at him. The stakes were raised when the defendant alleged that there had been assaults by the plaintiff on departmental officers. The police helicopter and SWOS team had surrounded the plaintiff's house when it had been alleged that he was the family court bomber. Lest I too be sued, I hasten to add that there was no evidence that he was. He was cleared of that.

There were hours of taped broadcasts. There were transcripts of the particular broadcasts which were the subject of the defamation. There were no transcripts of the other tape recordings. There were hours and hours of them. I was faced with that most unpleasant judicial task of sending out the jury, day after day, and listening to tapes without the assistance of a transcript. This was tedious and extremely difficult. If I made a slip, a piece of inadmissible evidence may have gone before the jury. It may only have been technical, but on the other hand it may have been highly prejudicial.

I had taken the view early in the trial that this trial could never be run according to the book. Provided both sides generally had a fair go I though that would be sufficient. I did however attempt to apply the rules of evidence and the rules of admissibility under defamation law taking into consideration such things as the pleadings (which in fact were very good - the plaintiff really knew his stuff) and particulars.

Nevertheless I felt very sorry for the jury. The jury were a delight to work with. They were highly intelligent. The forewoman was from a university. There were two young people, one of whom was a kindergarten teacher. She needed assistance with her employer because the trial went three weeks longer than notified. The fourth person was an older man. He had a hearing aid. The hearing aid, periodically beeped like a little beeping bell. After a while we all got used to it and everyone would smile at him, he would smile back, tap it and it would stop beeping. The other jurors became very protective of him. I could not have asked for a better jury in every sense, particularly the attention they gave to the questions at the end of the day.

The plaintiff, like myself had a beard. Unlike myself his beard was bushy and his hairline receding. He spoke slowly. He moved slowly. Beneath this physical slowness however, there was a quick mind. Not only did he know his law of defamation, but he knew his law of evidence. About two thirds of the way through the trial after a long tussle I decided to admit a piece of evidence over his objection. He turned his head slowly up to me from the bar table and said "Your Honour can't do that" in this deep drawl. I thought about it overnight. Of course he was right, I couldn't do it. Next morning I came on and said "I have given consideration overnight to some of the objections that the plaintiff raised about the admissibility of this evidence and I propose to reject the tender." Nothing more was said. He knew very well he had scored a great victory. This did not bother me. Better to pull back early than leave an error which will lead to an appeal. My policy has always been to "'fess up early and 'fess up often". Particularly as counsel, never let the judge think it is his or her fault, it must always be mine. That is part of the game. Unfortunately I found that I took this with me on to the bench and I had to be careful that I did not take the fault on to myself there. Indeed during more heated exchanges in a later defamation case I actually found myself sitting on the bench and nearly calling a very senior silk "your Honour" and apologising.

The jury had an enormous task. It was extremely difficult. They had to answer questions about whether the imputations arose, whether they were defamatory and whether they were published. They had to answer questions about whether they were true. They had to answer questions about whether the defendant was actuated by malice. I put together a batch of complicated questions for them when they finished all of that about the defence of comment.

They had to deal with each of these questions for each of the imputations. There were ninety two of them. You can imagine the number of pages that were handed to them. The bundle was large. I decided the only sensible way that I could deal with this case was to hand the jury the questions in batches. I asked them to deal with publication, what imputations arose and whether they were defamatory first. Publication was, in general, admitted but there were one or two publications which were open to questions. I had been fortunate to receive from the Chief Judge a bundle of draft directions by way of a general precedent. It took quite a deal of time for me to pull these into a shape where I could use them to direct the jury dealing with the huge number of imputations that were before the court. I do not know how this case was ever allowed to go on with this number of imputations. One would have thought it was an almost impossible job for the jury. I suspect that the various judges who had taken the defamation list had allowed the number because he was unrepresented. He could indeed present a pitiable picture, but underneath that was a sprinting mind. (I had better be careful, or I will be on the receiving end of a defamation Statement of Claim like many of the defendant's colleagues in the case)

I directed the jury on those first questions. They had the written questions with them. They retired to consider their verdict. It took them over a day before they returned. I thought this showed an admirable approach on their part. They clearly spent a great deal of time and attention dealing with the precise questions. When they returned they found that approximately 50% of the imputations did not arise. They found that of the remaining 50% about half were not defamatory. That left us with about twelve imputations to deal with. The defence of justification, ie truth, had been raised. The jury had to decide this for each imputation. If they decided that then I would have to decide whether qualified privilege applied either under the statute or at common law.

The defendant raised malice in reply to qualified privilege. The jury had to answer questions for each remaining imputation about whether the defendant was actuated by malice. The jury went out to consider those two questions. In under an hour they were back, finding that each of the imputations were true. That meant true in substance. This included an imputation which charged that the plaintiff had been charged with fifty criminal offences. The plaintiff had only been charged with something less than half a dozen. It was a

matter for the jury to determine whether the charge was true in substance. They obviously took the view that the difference in number did not change the substance of the imputation and find that it was true. I thought this was a useful illustration of the right of the jury to look at the reality of the imputation, not merely at the technical wording, and find that it was true I thought that in the context they were quite correct. I then had them asked about the questions about malice. Because they had decided truth in favour of the defendant they had not considered malice. I thought it was preferable to have them consider malice so that I could make findings in relation to qualified privilege in case the matter went further on appeal. They did so and found that there was no malice in connection with any imputation. Later that day I proceeded to deliver judgment on the question of public interest for the defence of justification / truth and the defence of qualified privilege on the basis that malice was not made out. I found in favour of the defendant in both of those. There was then a general verdict for the defendant in the light of the answers to all the questions.

It was an exhausting and gruelling process. The plaintiff who was nicknamed "Mountain Man" accepted the verdict without a flicker. The last I saw of him was when he turned and left the court. At that stage he had another three Supreme Court defamations in the pipeline. My case was heard at Darlinghurst and I was grateful to leave there and return to my King Street chambers for the last couple of weeks of my appointment. These were taken up with a period on the Court of Criminal Appeal and a personal injury matter.

Fortunately when you are allocated to the Court of Criminal Appeal you are given a day (if you are lucky a little more) to read all the papers. Each bench may deal with these matters differently. In this case the presiding judge called myself and the other judge together a few days before the hearing to discuss the matters. For the first hearing day there was a conviction appeal and a sentence appeal. On the other day there were five sentence appeals. For the first hearing day the presiding judge allocated to himself the conviction appeal and the sentence appeal to the other judge. We have to be prepared and ready to give extempore judgments. On the second day there were five sentence appeals. The presiding judge took one and I and the other judge were allocated two each. My job was to prepare in advance a judgment so that I could immediately deliver an extempore judgment.

I found this quite an unnerving experience The judges were very tall. I am short. They have been on the bench for many years. I have not. As we stood up in the small ante room to walk into the court it felt like I was surrounded by a couple of Samsons. I thought to myself, "What am I doing here?" As they marched ahead of me they were like a couple of Great Danes and I felt like a small terrier scampering along behind them. The door opened, the court lay in front of me. I forgot where I was supposed to sit. It is the far side by the way. That is the far side of the bench, not the far side of life, although one could be forgiven for misunderstanding.

The first day was not too bad. I did not have to say anything. It gave me time to settle down. The second day was nerve racking. One of the cases which I was supposed to deliver judgment in was a case where I thought the sentence could well be reduced. The appellant was a soldier. It was important for this solider and his career to reduce his sentence. This hearing came on just before lunch time. When we retired I indicated to the others that I thought the sentence should be reduced. The others did not. The presiding judge allocated to the other judge the duty of writing the majority judgment. I said I was going for a walk over lunch and I would think about it. During the course of that walk I thought it was probably correct in law not to interfere, but I still had concerns in my heart otherwise. Nevertheless I was there to administer the law.

When I returned I went to the other judge's chambers, he looked up at me and said "Well, are you going to toss it?" to which I replied "No." He said "Oh well I can stop writing then." We returned to court, I had my notes ready and this was my first judgment in the Court of Criminal Appeal. It was not to be my last, but more of that another time. It is an odd experience, hearing one's own voice delivering judgment - it seems distant, as if it belongs to someone else. It is like presenting an appeal as counsel - but no one interrupts. You wonder if they agree.

I have enjoyed my time on the bench. It has taught me a great deal about myself, about my ability, about my own advocacy skills and about the importance of persuasion. In a case during my third appointment concerning confiscation of assets I had almost firmly made up my mind against the applicant until his counsel took me through all his financial records, which, although there were gaps, led me to a provisional contrary view. Counsel for the Director of Public Prosecutions then took me through the records and showed other matters of record which led me back to where I had started. One must never underestimate the importance of good advocacy. That does not mean the purple passage and flowery language, the dramatic effect, the emotional plea. It does mean pointing to the important, relevant facts which a judge might otherwise miss. Never assume a judge knows all the facts. In a busy schedule it is often likely that he or she will not. As an advocate we are there to make sure the judge does. If I have any lesson from being on the bench, that is it. ■

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APLA Membership at 31 May 1998

NSW	452
Queensland	276
Victoria	210
South Australia	62
Western Australia	31
ACT	17
Northern Territory	16
Tasmania	13
International	51
TOTAL	1,128