

ADVOCACY

The Conduct of Counsel

“To get the sympathy of the Tribunal for himself ought always to be one of the first objects of the advocate.”

Richard Burdon Haldane

The courts in the Northern Territory are fortunate in that examples of misconduct by counsel are rare. Other jurisdictions have not been so fortunate. Examples of offensive and incompetent conduct by counsel are to be found in the law reports and are the subject of robing room discussion throughout the nation.

There are some people who are simply not suited to the role of an advocate before any tribunal. By their conduct, their discourtesy and their inappropriate professional standards they do harm to the system and, more often than not, to their clients. An unfortunate example of inappropriate behaviour by counsel is to be found in the law reports of last year. In the case of *McIntyre* [2000] 111 A Crim R 211 an appeal was allowed because of the conduct of defence counsel. The report of the case makes for interesting if disturbing reading. A feeling for the attitude of counsel is to be found in the following passages from the report.

Counsel: I am instructed by my client that he feels in no way could he receive a fair trial from you, because he feels strongly that you are totally prejudiced and biased against him, and all of your attitude to everything that took place yesterday. I must say in honesty and fairness, I suppose under the credo of *veritas vos liberat* (?) that I agree with my client.

My friend here thinks this is a big bloody joke, I know, everybody here thinks it's a joke, and I appreciate that both you and my friend are anxious for a conviction —

His Honour: Well I don't think it's a —
Counsel: — at any cost — let me finish. I am sick of this farce of a trial. I've had nothing but opposition from you and

Mr Crown, and it seems to me, I've mentioned it before, you are incompetent to have heard this trial because of your open obvious prejudice and bias against my client, and now me personally, and in favour of the Crown ...”.

There were many more examples of the misconduct of counsel to be found in the report. At one point in the course of the hearing counsel sought an adjournment for medical reasons. The trial judge required “a comprehensive letter from your doctor saying that you are not available on Tuesday and why”. No doubt this requirement followed logically upon the conduct of counsel at an earlier time in the hearing. On the Tuesday counsel attended and said to the court:

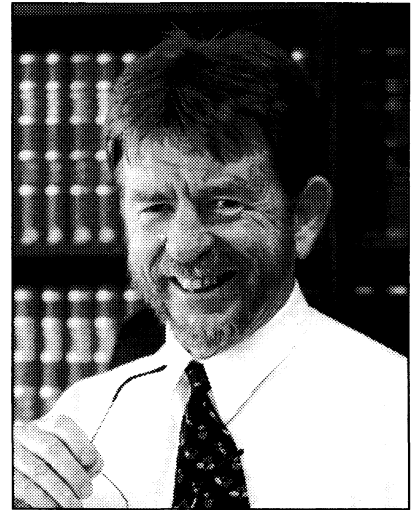
I was not sure how I would feel today, but you ordered me in, in lieu of a medical certificate which I wouldn't give you for all the tea in China. Most of my colleagues in Chambers when I told them about your request for a medical certificate couldn't stop from laughing and thought it was absolutely astounding and obnoxious, as I do and did at the time.

The rudeness of counsel was not limited to the judge alone. His remarks were also directed to the Crown Prosecutor and to various witnesses who appeared to give evidence.

In allowing the appeal *Hulme J* (with whom *Sully* and *Hidden JJ* agreed) observed that the conduct of counsel could be described as “gratuitous rudeness to witnesses, to counsel appearing for the Crown and to the Judge, and the expression of personal views.” His Honour went on to say:

In many of its aspects the conduct was repeated numerous times throughout the trial. It is by a factor of very many, worse than anything I have experienced or heard about in my career. Had I not read a transcript of it, I would not have believed it possible that it would have occurred. In a word, it was appalling.

In allowing the appeal based upon the



Hon Justice Riley

impropriety of the conduct of counsel the court noted that there was nothing in the case that suggested that the appellant himself was a participant in the activities of his counsel. Although a party is generally bound by the way in which counsel conducts the case the circumstances in that case were such as to give rise to a miscarriage of justice. The appeal was allowed because of the conduct of counsel.

This was an extreme case. Had the conduct been less extreme the appeal may not have been successful even though the manner in which counsel conducted himself clearly had an adverse effect upon the interests of his client.

The effective advocate will at all times maintain a high standard of conduct including unfailing courtesy to both the court and his or her opponent. That standard will be maintained notwithstanding the conduct of others in the court. You should not allow the discourtesy of others to influence you to lower your standards. When you respond to discourtesy by like conduct then you have allowed yourself to be influenced by others, you will no longer be presenting your own case on your own terms but rather on terms and in a manner dictated by others. Your case will suffer. Your client will suffer. The moment the misconduct of others causes you to depart from your own standards you allow your ego to interfere with the proper presentation of your client's case. You will then be acting in the shallow defence of your own ego rather than pursuing the interests of your client.