LOST IN TRANSLATION: THE JUDGE FROM PROVIDER TO CONSUMER OF LEGAL SERVICES

THE HONOURABLE JUSTICE TONY PAGONE*

Nel mezzo del cammin di nostra vita
mi ritrovai per una selva oscura
ché la diritta via era smarrita.[1]

Dante's *Divine Comedy* begins in the middle of the poet's life journey with his entry into hell. The poet finds himself in a dark wood having lost direction. He laments how hard it is to recount to others of 'that wood, strange and harsh and dense, the thoughts of which' renewed his fears.[2] Many newly appointed judges will have felt the same when, not long after appointment, they find themselves with a great mass of evidence, transcript, submissions and sundry other materials to order, digest and somehow bring together in a reasoned decision.

It is common for those who pass through the gates of judicial office to speak of what they find with as much apprehension as Dante in his journeys. That may come as much of a surprise to the new judge as to friends, colleagues and the public. It may seem curious that a barrister, whose professional life was spent in court appearing before judges (and, therefore, in providing evidence, research, argument and submissions thought to assist judicial decision-making), should be surprised to find how different, and at times unexpectedly different, it is to be the judge. The reality is that the work of a barrister and judge requires 'very different skills':[3] success in one role does not guarantee success in the other. The many skills

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1 Dante Alighieri, *The Divine Comedy* (J D Sinclair trans, 1948 ed) vol 1, 'Inferno', Canto 1, ll 1–3: 'In the middle of the journey of our life I came to myself within a dark wood where the straight way was lost.'

2 Ibid ll 6–7.

3 David Pannick, *Judges* (1987) 51.

developed as a barrister may be useful pre-requisites for the work of a judge, but the role of judge is different from that of advocate.

A consequence of the difference may be some mismatch between what the advocate does (to assist with judicial decision-making) and what the judge needs (as decision-maker). The primary role of the advocate is to present a client's case and to persuade the judge of the outcome sought by the client. To that end, the advocate will present to the judge the issues, evidence, law and argument which, if accepted, should result in success for the client. The primary role of the judge is to decide between competing positions after evaluating the competing evidence, law and submissions. In many cases the role of the advocate and that of the judge will match perfectly: the advocate will have distilled issues (discarding those which are irrelevant or not pursued), will have investigated the facts and supporting evidence (discarding those which need not be proved, or which may not be worth pursuing, bringing to the fore probative and persuasive evidence), will have researched the law (and have identified that which applies to the facts at hand), and will have considered the facts, matters and issues relevant to the decision which the judge needs to make. In some cases, however, the mismatch will leave the judge with a morass of facts, evidence, law and argument which will take time and effort to assemble, sift, digest and bring together in the final product of a decision with reasons.[4]

The importance of matching the advocate's work with the judge's needs becomes acute in large cases where the volume of material (court record, evidence, transcript, law, submissions, etc) can be overwhelming. Many a judge, especially a newly appointed judge, will have felt the need to share with counsel the burden of efficient decision-making in the hope that the materials might all be narrowed, distilled, ordered and presented to make the task of decision-making much easier and more efficient.[5]

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4 See, for example, *Seven Network Limited v News Limited* [2007] FCA 1062 (Unreported, Sackville J, 27 July 2007) [33]–[34].

5 '*S'i' credesse che mia risposta fosse / a persona che mai tornasse al mondo, / questa fiamma staria sanza più scosse; / ma però che già mai di questo fondo / non tornò vivo alcun, s'i' odo il vero, / sanza tema d'infamia ti rispondo*.' Trans: 'If I thought my

The reasons for any mismatch between the advocate's work and the judge's needs in the process of efficient decision-making may be a matter of debate. There is no shortage of criticism of the process by which arbitrated decision-making occurs, and there is no reason to assume that such criticisms are restricted to the adversarial system.[6] Dissatisfaction with the litigation process is deep, widespread and it is focussed on the process of adjudicated decision-making as being costly, inefficient and slow. There has been no shortage of proposals for improvement,[7] and, on one view, some of the improvements may prove to be the cause for further complaints.[8]

An efficient system of arbitrated decision-making needs to have appropriate levels of dissuasion (from litigation) and appropriate occasions for non-arbitrated decision-making (like negotiations, mediations and settlement discussions) before arbitrated decision-making is imposed upon the parties. The design challenge for the law is how to strike the right balance between each of the many competing policy objectives that a public dispute resolution system seeks to achieve: disputes need to be resolved, but not all disputes are worth pursuing; mediation may avoid the cost of court hearings, but the cost of mediations which fail add to the overall cost of disputes; pre-trial processes should be reduced because they add to the cost and time of litigation, but limiting discovery or reducing the time for preparation may lead to wrong or unsound decisions or to a sense of dissatisfaction with the outcome.

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answer were to one who would ever return to the world, this flame should stay without another movement; but since none ever returned alive from this depth, if what I hear is true, I answer thee without fear of infamy': Dante, above n 1, Canto XX VII ll 61–7.

6 See, for example, Giudice Marcello Marinari 'ADR and the Role of Courts'(2006) 72 *Arbitration* 1, 49–52.

7 See, for example, Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008); Justice D Byrne, 'Building Cases – Some Thoughts on Innovation', Supreme Court of Victoria Practice Note 1 of 2008; Justice D Byrne, 'The Building Contractor and Practice Direction 1 of 2008' (Paper presented to the Master Builders Association, Melbourne, 16 April 2008); Paula Gerber and Bevan Mailman 'Construction Litigation: Can We Do it Better?'(2005) 31 *Monash University Law Review* 237–57.

8 Justice T Pagone, 'Litigation and ADR' (Paper presented at the Construction Law Conference, Melbourne, 22 May 2008).

The adversarial system has much that is wrong with it. Lawyers sometimes defend it with unreasonable passion and by reference to high principles that at times seem unconnected to the real world. Impassioned defences sometimes appear to ignore the reality that many civilised, fair and just countries do not base their judicial decision-making on an adversarial system. There is, however, much to be said about the adversarial system as a fair, efficient and practical means for dispute resolution by which the parties' legal representatives actively assist and facilitate the judge or decision-maker's ultimate product of a reasoned decision between competing positions. It may not currently be fashionable to sing the praises of the adversarial system for dispute resolution, but it does have much to offer as a model and as a means of matching the work of the advocate with the needs of the decision-maker. Decision-making by a judge or an arbitrator is necessary where there is a dispute between the parties which they cannot resolve themselves. It is only when the parties have not been able to resolve their differences themselves, or have not been dissuaded from maintaining their differences, that it becomes necessary for a disinterested third party to decide between the competing positions. There is much practical vigour in the adversarial system which enables it to be moulded to assist the judge or decision-maker as the producer of an outcome with the input of the parties' legal services.

The adversarial system gives to the parties the primary role of identifying the issues in dispute between them, the evidence to be relied upon to resolve the dispute and the finding of the legal principles and rules by which the dispute is to be determined. The importance of the parties having actual control of their litigation, and of demonstrably feeling that they are in control of their dispute, should not be underestimated, either for the parties' confidence in particular outcomes, or for the health of a democratic legal system.[9] Judicial management of cases needs to accommodate the parties' entitlement and interest to control their dispute and must also protect the public confidence which comes from unsuccessful litigants feeling that their case was heard fully, fairly and impartially.

9 See M Cappelletti, 'The Law-Making Power of the Judge and its Limits: A Comparative Analysis' (1981) 8 *Monash University Law Review* 15.

Leaving the primary responsibility for the conduct of litigation with the parties can, and should, facilitate the public task of judicial or arbitrated decision-making. The teams of advisers to the respective parties are in a real and tangible sense undertaking the tasks which the judge or decision-maker would otherwise need to undertake to find out what the dispute between the parties is about, to find the evidence in favour of each party to the dispute, to research and identify the law relevant to the outcome, and somehow to test the various propositions of fact and law raised by a dispute before reaching a final decision. The adversarial system places upon the parties the practical responsibility, cost and burden of working out what is relevant to determine the complaint, to find the facts and evidence, and to present that material to the person who must decide.

One of the important tasks left to the parties in the adversarial system which is of great assistance to the decision-maker, and to public confidence in the legal system, is that of testing the evidence relied upon by opposing parties. The parties each have the responsibility of testing the evidence put by their opponents whether by cross-examination or by the investigation and tendering of further evidence. This has the desirable effect of leaving those who know the dispute, and who have an interest in the outcome, with the control of the decision-making process in a real and meaningful way. It is the parties who put forward evidence, who test the evidence put against them, and who have a real and immediate interest in ensuring that the decision-maker reaches the right outcome. This is true of all evidence, including expert evidence which may be sought, at times after detailed and extensive investigations and research, by those with an interest in getting the right information and with an interest in excluding information which may be wrong or irrelevant.

The judge or decision-maker will usually be in no position to know what evidence to seek, who to ask, where to find it, how to test it or how to pay for the cost of acquiring it. The judge or decision-maker who would otherwise have to be the primary investigator would have insufficient time and resources to undertake those tasks thoroughly. It is, rather, the parties' lawyers who do the investigating, checking, testing and analysis which otherwise the judge or decision-maker would have to do. It enables the decision-

maker to undertake the final task of decision-making with reasons without directly incurring the time and costs of investigations. Additionally, and of prime importance, the decision-maker can maintain a real position of impartiality between the parties in every aspect of the decision-making process. That is of fundamental importance to maintaining confidence in the system; that is, in producing a system where adverse decisions are imposed upon litigants by impartial decision-makers who have neither pre-judged the outcome, nor by their own investigations, can be said to have become partial.

In that context the work of the advocate may usefully be tailored to the particular needs of the judge as the producer of a reasoned decision. Greater efficiency in the system may perhaps be achieved by the lawyers seeing the judge or decision-maker as a consumer of their legal services leading to the final product of a decision with reasons. What needs to be provided may vary as between decision-makers,[10] but some broad 'product features' should be relatively common. Each judge or decision-maker will always need to have issues, facts and law identified and narrowed. The advocate presenting a case in court is not the mere mouthpiece for the client but 'is personally responsible for the conduct and presentation of [the] case and must exercise personal judgment'.[11] Judges and decision-makers inevitably rely heavily upon the preparation, work and submissions of those who appear before them. It is the advocate who will have had more exposure than the judge to the facts of any dispute and more time to consider the facts and law before the hearing. It is the lawyers who will have had to make many judgments about and in the preparation of a case along the way which will impact on the case when seen by the judge. Judges and counsel alike may take for granted the extent of reliance which a judge has upon counsel but may not appreciate how great that reliance is, and how important (and inevitable) it is to sound

10 S Dann and S Dann, *Introduction to Marketing* (2004) 90–1.

11 *Halsbury's Laws of England*, vol 3(1) (2005 re-issue) Barristers, 'Barrister's Duties in Court' [550].

decision-making (in an adversarial system), until an advocate becomes a judge.[12]

Litigation lawyers generally, and barristers in particular, gain knowledge and develop skills of critical importance to the efficient processing of issues, facts and evidence. The practice of litigation inevitably sharpens a lawyer's ability to distil issues and to determine what evidence will bear upon an issue and be likely to weigh on the mind of a decision maker. One of the particular contributions to efficient decision making of an experienced and specialist litigation Bar is the ability to predict likely judicial decisions. Indeed, the ability to predict is a fundamental skill which assists in the resolution of disputes before enforced decision making by a judge: it enables lawyers to explain to their clients what a judge is likely to do and thereby advise upon outcomes and choices without the need for actual decision making after lengthy hearing and argument.

Well developed, and predictable, rules of evidence also assist in the litigation lawyer's 'packaging' of materials in a way which should enable quick, efficient and less costly decision making. A significant contribution which experienced litigation lawyers can make to the 'packaging' of material is in reduction of volume. The litigation lawyer should constantly look to how the material can be reduced. The particular skill of the litigation lawyer lies in being able to identify what is 'relevant, necessary and probative'. In the end, the decisions to be made by the judge will depend, and should only depend, upon what is relevant to the decision, necessary to the decision, and on evidence which has probative value. Litigation lawyers, and independent barristers in particular, can add much value to the decision making process, and be of great assistance to the judge or non-judicial decision maker, by seeking to ensure that evidence, law and submissions are relevant, necessary and probative. The rules of evidence are designed to facilitate that process by excluding, for example, 'comment' upon the evidence of others, 'evidence' of documents which 'speak for themselves', and the like.

12 See above n 5.

Elementary principles of marketing and product design suggest that it would be sound practice for counsel to create their product to suit the needs of their consumers.[13] The situation of judge 'will impact on the type of product [he or she] desires' tempered by 'personality and nature'.[14] The fundamental situation of the judge is that of decision-maker having to sift, order and evaluate evidence, law and submissions. What the judge needs is assistance in identifying as precisely as possible what needs to be decided (both facts and law) and where to find the matters (evidence and law) upon which those decisions need to be made. A powerful and useful tool for counsel to give a judge will be a workable road map identifying what needs to be decided with detailed references to where the judge may find the matters upon which those decisions will depend. The personality and nature of particular decision-makers may give rise to variations in product design, but many will find it sufficient and beneficial to have a minimal skeletal structure which does little more than to 'identify' what is to be decided and to 'point' to where the evidence and law may be found. Presumably such structures form the basis of counsel's own thinking and presentation of the case in any event and underlies what interlocutory court rules largely seek to achieve.

Some part of the mismatch between the work of the advocate and the need of the judge may be the cause of the conscientious caution of diligent lawyers which, however admirable the motives, may be ultimately unhelpful to the judge and might not produce quick, efficient and inexpensive decision-making. The natural caution of lawyers may result in more evidence being before the judge than necessary, more objections being taken than necessary, more objections being resisted than necessary, more points of argument being taken than necessary, etc.[15] The large mound of issues to be determined, of facts to be understood, of submissions to be read (and the like), inevitably add to the burden of decision-making and make trials longer, less efficient and more costly. Affidavits, witness

13 Dann and Dann, above n 10, 91.

14 Ibid.

15 Justice G T Pagone, 'The Advocate's Duty to the Court in Adversarial Proceedings' (Paper presented at the Victorian Bar Ethics Seminar, Melbourne, 23 July 2008), also published in (2008) 144 *Victorian Bar News* 45.

statements and court books produced for trial (especially commercial trials) frequently add to the cost, inefficiency and length, both of the hearings and then of the time taken in decision-making. There is frequently included in such materials things which need not be there but which take time to deal with. Court books typically look like the sharing of discovered documents with the court rather than an efficient identification and narrowing of essential documents needed by the judge to facilitate decision-making. Judges frequently face at the end of trials, particularly long trials, the daunting task of assembling a massive amount of material in an efficient order and producing a decision with reasons.[16] At that point the judge's needs will more usefully be met by the work of an advocate in reducing what needs to be decided and in assembling the material in a way that makes decision, and the articulation of reasons, easier. In that task it is heartening to recall that Dante's journey may have begun in hell, but that he made it through to paradise.

16 See *Seven Network Limited v News Limited* [2007] FCA 1062 (Unreported, Sackville J, 27 July 2007) [2]–[6].