LAW SOCIETY OF TASMANIA WINTER CRIMINAL LAW CONFERENCE 2025

FROM THE BENCH: AVOIDABLE PITFALLS IN CRIMINAL ADVOCACY

Bail Applications

McHugh J in the High Court in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, 223 CLR 1, [113] said:

> "Thus, in many situations arising in the conduct of litigation, the common law requires an advocate to act contrary to the interests of his or her client. I doubt if there is any other profession where the common law requires a member of another profession to act contrary to the interests of that person's client …"

Bail applications, above many areas of criminal advocacy, exemplify this duty.

Bail applications in my experience are sometimes run by criminal advocates, at the apparent insistence of the client, in unarguable cases.

An applicant for bail will not succeed where s 12 of the *Family Violence Act 2004* is engaged, physical violence is alleged, and the proposed bail address is in Glenorchy and the victim's address is in Rosetta.

An applicant for bail will not succeed where s 12 of the *Family Violence Act 2004* is engaged, physical violence is alleged, and the only feature of the application addressing s 12 is that the police family violence order that was breached, has now been replaced by an interim family violence order.

I can cite other instances.

Counsel must make a sensible assessment of the application. It is not enough that your client wants you to "give it a run".

I know that frequently your client will file his or her own bail application and put your name on it, so that you end up appearing when the matter is listed and it has no chance. Well, this is one of those painful situations where counsel's duty to the Court trumps his or her duty to the client.

Let the client run their own application if they want to. Do not tarnish your reputation before the Court.

If you have decided that the bail application is arguable, even though it is likely to fail, then make sure you do not make one or more of the common mistakes.

Make sure that the application for bail is filed in relation to *all* complaint numbers and/or Supreme Court file numbers in relation to which he or she is in custody. This will avoid the situation where your client is granted bail, the Court adjourns and the judge goes home, and then the cells or the prison refuse to release your client because the bail order does not cover all matters for which he or she is being detained.

Make sure that your client's application has been brought within time and is otherwise within the jurisdiction of the Court.

On applications under s 23 of the *Bail Act 1994*, make sure you properly consider the principle extemporised by Green CJ in *Trotter v The Queen* (Unreported, Supreme Court of Tasmania, Green CJ, 2 August 1977); [1977] Tas SR 75.

The principle is applied with such frequency in bail applications in the Court, that its name is rarely, if ever, remembered. Extraordinarily, the reasons for decision were pronounced orally in court, no doubt much to Mr Trotter's dismay, given their complexity.

Mr Trotter had been convicted of wounding and had appealed against that decision to the Court of Criminal Appeal. He made five successive applications for bail pending the hearing of the appeal, to five different judges of the Court. He was unsuccessful on the first four occasions, and on the fifth he came before the Chief Justice. In a learned judgment canvassing English and Australian case law, Green CJ held that, although there may well be a special exception in the case of writs of habeas corpus to the rule against making successive applications in respect of the same matter, there were other well-reasoned authorities that should be applied so as not to extend that exception to bail applications.

Thus, the rule that extends to all bail applications, and is sometimes forgotten by counsel appearing before judges of the Court is, as was stated by Green:

> I hold that when an application for bail under s 415 of the Code has been refused after a hearing on the merits, this Court has no power to entertain a second application on the same grounds. However, *if the circumstances relevant to the exercise of the discretion on the second application are different* from those which applied when the first application was determined, I think the applicant would be entitled to have his second application determined de novo as *it could not be then said that the second application raised the same issues as the first*. (My emphasis.)

In my view, circumstances are not different simply because an accused's trial has been adjourned, unless the proximity of the trial date to the date of the first application was a determinative issue in the first refusal.

Make sure you do not put up a supervisory surety (as opposed to a financial deposit surety), who has a record of prior conviction similar to, except longer than, your client's.

Make sure you do not stand up and say:

> "The proposal is that my client will live at 1500 Brent Street Glenorchy with his partner who will be his surety, and he will report to the Glenorchy Police Station Monday, Wednesday and Friday."

You have not got bail yet, and such an introduction sounds presumptuous and is thus, poor advocacy.

Commence by saying that you understand the application is opposed and wait for the judge to call upon the State. Then, when you respond, do not start by giving the judge your client's life history. Address the issue at the heart of the opposition to bail – s 12 of the *Family Violence Act 2004*, public interest, the strength of the State's case, the nature of your client's defence and so on.

By all means, have your proposed bail conditions prepared but have them in soft copy so you can send them to the judge's associate by email if bail is to be granted and thus save court time.

The presumption of innocence remains core to the right to bail but public interest is a powerful incursor. If your client has numerous alleged bail breaches and numerous new offences allegedly committed

while your client was already on bail, then the public interest in the form of the risk of further offending will preclude bail, notwithstanding pleas of not guilty have been entered. These are what might be termed "the straw that breaks the camel's back cases".

Under the proposed new Bail Act, the concept of unacceptable risk will, I suspect, result in more bail refusals. The key provisions about the granting of bail will require an approach to bail which is new.

Clause 5 is central to the Bail Bill 2024. It defines when someone is an "unacceptable risk". Clause 15 governs the granting of bail by courts and employs an unacceptable risk test. A Court is to grant bail unless the court is satisfied, on reasonable grounds, that the person poses an "unacceptable risk".

The Bill sets out when a person poses an "unacceptable risk" and provides for a comprehensive list of factors that may be taken into account in determining this question.

Significantly though, the list also includes factors such as whether there are conditions that may be imposed to mitigate risk and other public interest considerations, such as whether the applicant will have difficulties in preparing his or her defence, and whether time in custody may exceed any sentence imposed.

Appeals against conviction

Criminal appeals based on the ground that the jury verdict was unsafe and unsatisfactory may also be unarguable and raise the question of counsel's duty to the Court.

In his article entitled *The Ethics of Independence: Running your own case* published in the October 2015 issue of *Brief* magazine, Craig Colvin SC, a former President of the Western Australian Bar, notes that sometimes your clients want to take a highly active role as to how their case is to be conducted, but he warns, the overriding legal principle is that:

> All clients are entitled to express their wishes about the conduct of a case and have them considered by their lawyers. They are also entitled to an explanation as to what is being done and why. However, it is improper for a lawyer to act as the mere mouthpiece of a particular client in court. It is up to the lawyer to decide what is to be said and done in court. The same goes for all written submissions and other documents filed in court.
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> All decisions about how to run a court case must be made by the lawyer and not by the client … All these forensic decisions are matters for the lawyers responsible for the conduct of the case in court. It is an important responsibility of lawyers to make their own independent decisions about how to run the case. Those decisions must be guided by the duties of lawyers as officers of the court, not by instructions from the client.
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> Sometimes this obligation may be difficult to communicate to a client. However, it is of fundamental importance. The court process is part of the government of a civil society. Judges depend upon lawyers fulfilling their duties as court officers to be able to conduct court proceedings that are fair and efficient. The duty of lawyers to the court is paramount and must be performed even if the client gives instructions to the contrary.

In my view, this obligation is determinative of the question of whether the lawyer should agree to act in the proposed proceeding at all. The client may pursue a hopeless bail application or a hopeless appeal against conviction or sentence, but counsel may not.

As was said by Davies JA (with whom Williams JA and Philippides J agreed), in *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 683 at [24]:

> I would prefer to say that it is one thing to present a case which is barely arguable (but arguable nevertheless) but most likely to fail; it is quite another to present a case which is plainly unarguable and ought to [appear] so to the lawyer who presents it. In my opinion, with respect, it is improper for counsel to present, even on instructions, a case which he or she regards as bound to fail because, if he or she so regards it, he or she must also regard it as unarguable.

So, a self-analysis of that sort is required in every case that may possibly meet the description of "obviously unarguable".

As our Court of Criminal Appeal had occasion to remark recently, in the case of *PAC v State of Tasmania* [2024] TASCCA 12*,* an appeal brought against conviction on the ground that the jury verdict was unsafe and unsatisfactory, at [35]:

> The refusal of leave to appeal in this case should be seen as an expression of the Court's view that the proposed appeal against conviction was wholly unarguable. Appeals so brought, unnecessarily tax judicial resources, as may be seen from the long and detailed reasons for judgment required of Wood J in *AWK* [2024] TASCCA 5. Care must be taken by counsel, as officers of the Court, to identify arguable grounds of appeal.

Appeals on the ground that the jury verdict was unsafe and unsatisfactory require considerable care.

The law in relation to a ground of appeal of this nature was recently encapsulated by Pearce J in *Aliano v Tasmania* [2025] TASCCA 4 at [25]-[26] as follows:

> 25 The assertion that a verdict is unsafe and unsatisfactory finds statutory expression in this State in the Criminal Code, s 402(1), which provides that the Court "shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence." The approach that an appellate court must take when addressing "the unreasonableness ground" was authoritatively stated in the joint reasons of Mason CJ, Deane, Dawson and Toohey JJ in *M v The Queen* [1994] HCA 63; 181 CLR 487 at 493. The court must ask itself:
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> > 'whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'.
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> 26 As explained in *M,* and restated in *MFA* v The Queen [2002] HCA 53, 213 CLR 606, and in *Pell v The Queen* [2020] HCA 12, 268 CLR 123 at [43], the question does not depend on whether, as a matter of law, there is evidence to support the verdict, but rather whether the evidence required the jury, acting rationally, to have entertained a doubt as to the appellant's guilt. An appellate court must conduct an independent review of the evidence, but making full allowance for advantages enjoyed by the jury, including from having seen and heard the witnesses. Because of the central role of the jury in the administration of criminal justice, this Court is not to substitute trial by an appeal court for trial by jury: *R v Baden-Clay* [2016] HCA 35, 258 CLR 308 at [65]-[66]. *The court must proceed on the basis that issues of credibility and reliability of oral testimony are matters primarily for the jury*. The function of this Court is then to examine the record to see whether, notwithstanding that assessment, either *by reason of other evidence, inconsistencies, discrepancies, or other inadequacy*, the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt: *Pell* at 145 [39]." (Emphasis added.)

To make out this ground on appeal it is not enough simply to point to the same litany of minor and non-determinative inconsistencies between the accounts of prosecution and defence witnesses, or within individual testimony, that was urged on the jury by defence counsel in his or her closing address, and then to argue on appeal that a reasonable doubt was thereby compelled, and that thus the verdict was unsafe.

A jury is at liberty to assess the credibility and reliability of the witnesses' oral testimony, including any imperfections in that testimony, including prior inconsistent statements, and/or anomalies between their evidence and the evidence of a witness or witnesses on the opposite side.

A jury is entitled to accept all or part of a witness's evidence and is entitled to arrive at common sense explanations for many inconsistencies. Such accommodation is likely in many cases to be by way of attributing the anomaly to mistaken memory or lack of overall significance.

As was said by Wood J in *AWK v Tasmania* [2024] TASCCA 5 at [278]-[280]:

> 278 At times, there was an invitation to the jury to speculate about matters on which there is a body of knowledge and research. I have already mentioned the matter of why the complainant did not make a contemporaneous disclosure. Additionally, the contentions concerned notions about what the complainant would remember if she had been subject to the incident of abuse alleged. There were contentions propounded on behalf of the appellant that if her account was true, then realistically the jury could expect that the complainant would not forget or make a mistake about certain details, often matters of context peripheral to the sexual conduct. These same contentions were then pressed before this Court on appeal. This approach can be seen in a number of the submissions made, such as in relation to occasion one, two and seven and how the complainant did not have a memory of putting on her shoes before going to the shed where the alleged abuse occurred, her failure to mention the lock on the shed, and her lack of evidence about sensory perceptions such as pain and smell.
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> 279 The nature and operation of human memory is an area of extensive scientific psychological research: Goodman-Delahunty, J, Nolan, M A, & Van Gijn-Grosvenor, E L (2017) *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence* Royal Commission into Institutional Responses to Child Sexual Abuse. Furthermore, scientific findings do not align, at least in some key respects, with "common sense" notions held within the community about memory. Memory is not like a video tape which accurately records all details of a particular event in sequence and which can then be played back years later.
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> 280 While defence counsel may be given considerable latitude by a trial judge in a closing address, on appeal, counsel can expect the Court to be cautious about such contentions and to resist invitations to speculate and to fill gaps in the evidence with counsel's version of common sense or intuition. Counsel should expect the Court to be conscious that memory is a field of expertise and specialised knowledge, to be alert to the risk or reality of counsel propounding erroneous beliefs about memory, and to be aware that there was no expert opinion before the jury to support defence contentions made about memory. This observation, of course, applies with equal force to the State and contentions it may make if it is suggested that matters of specialist knowledge are matters upon which the jury or the Court on appeal may speculate.

So something more than pointing to inconsistencies needs to be demonstrated. Something more is required than pointing to those imperfections and anomalies. What is required is some "*other* evidence",

or "*other* inconsistencies", or "*other* discrepancies" or "*other* inadequacy" which points to irrationality in the jury's reasoning is required. That is the takeaway from the cases from *M* to *Pell.*

To see just how difficult this task is in practise, see the decision of our Court of Appeal in *Paite v Tasmania* [2019] TASCCA 5. In that case, compare my approach to the evidence and that of the joint judgment of Pearce J and Martin AJ, who looked at all of the anomalies to which I had pointed and in essence said "it was open to the jury to consider the evidence about these matters *in a number of ways*." One of them being of course – in accordance with the evidence of the victim. Or alternatively, the jury may not have been able to resolve the particular issue, but it was not determinative and did not compel a reasonable doubt.

Now, as is obvious from my dissenting judgment, I am not suggesting that *Paite* was an unarguable appeal. But you do need to ask yourself in such cases, whether there is any hope of a successful outcome if it can be said of the asserted inconsistencies that it was *open* to the jury to accept the impugned evidence. And that can be said in almost all cases absent some additional consideration.

As was stated by Hayne J (with whom Gleeson CJ and Heydon J agreed) in *Libke v The Queen* [2007] HCA 30, 230 CLR 559 at [113]:

> But the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must, as distinct from might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which *might* have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard. (My emphasis.)

Pleas in mitigation

I have seen too many examples of lacklustre advocacy in pleas in mitigation that come before me.

First of all, make sure that your plea is actually ready before you signify that a sentencing hearing may be listed. The time for discovering disputed facts is not when counsel for the State is halfway through publishing the Crown facts.

Decide whether you want reports and, if so, whether your plea in mitigation is best made before or after the judge hears the Crown facts and your plea in mitigation. Bear in mind it will be two months after the sentencing hearing before the reports are received. Do you want the judge to sentence two months or more after having the benefit of your advocacy?

How do written outlines of your plea submissions play into this? Is it better for the sentencing judge to have your submissions in writing – whether the sentence is passed on the day of the hearing or after receipt of reports? Is it better for the judge to have a Word version of your plea submission or to try and find the essential points you made by trawling through a PDF transcript which will set out your plea much more discursively because it was delivered in a conversational way and was broken up by interchanges with the Bench?

When you do come to present your plea, do not just stand leaning over the lectern with your head down, reading your written outline or your notes.

No, address the judge and make it interesting. Mix it up. You do not need to commence with your client's background and personal circumstances. You can, and should, in my view cut to the best point you have to make.

To do that you need to find a “hook”. What is your strongest argument? Try putting a mental headline on your facts. "Too young for prison." "Man's amazing turnaround since isolated mistake".

Always bear in mind the responsibility on the sentencing judge. Subtle references to it can be powerful advocacy. The great American advocate Clarence Darrow in his plea for two youths, Leopold and Loeb, for whom the State of Chicago sought death by hanging in 1924, for the murder of a boy named Franks, said in his famous three-day address to John R. Caverly, the Chief Justice of the Circuit Court of Cook County:

> I know perfectly well that where responsibility is divided by twelve, it is easy to say, "Away with him." But, your honor, if these boys hang, you must do it. There can be no division of responsibility. You must do it. You can never explain that the rest overpowered you. It must be your deliberate, cool, premeditated act, without a chance to shift responsibility.

I do not suggest that you need to go that far (or that long), but you can be powerful as an advocate without being loud or overly dramatic. Draw inspiration from Darrow, who also said in his plea:

> I can picture them, wakened in the grey light of morning, furnished a suit of clothes by the State, led to the scaffold, their feet tied, a black cap drawn over their heads, placed on a trap door, and somebody pressing a spring, so that it falls under them, and they are only stopped by the rope around their necks. It would surely expiate the placing of young Franks, after he was dead, in the culvert. That would bring immense satisfaction to some people. It brings a greater satisfaction because it is done in the name of justice.

Identify the sentencing outcome you are arguing for. Tell the judge. Identify the sentencing principles that are to the fore. Address them, without lecturing on the well understood principles themselves. And do not forget that as well as other sentencing options, there is always scope for a fine in the Supreme Court, in an appropriate case. It does not hurt in such cases to say "the defendant would have the capacity to pay a fine if that was considered an appropriate penalty your Honour, or part of an appropriate penalty".

And do not wait until the appeal against sentence to rely on sentencing data. In appropriate cases it does not hurt to remind the judge of outcomes in similar cases. Just because the State is hampered by what the High Court said in *Barbaro v The Queen* [2014] HCA 2; 253 CLR 58, does not mean you are.

Find your hook, make it interesting, mix it up, identify the outcome you seek and make a difference.

Oh, and one last word on pleas. If you are going to rely on the *Verdins* principles – get the principles right and identify clearly how they are engaged. If they are not engaged – if for example there is no causality identified by the material upon which you rely – then do not call them up. Psychiatric or psychological conditions and disorders are relevant in their own right without *Verdins* in appropriate cases. And remember that the engagement of the *Verdins* principles do not automatically result in a modified or moderated sentence.

Jury trials

Let's begin with defence openings. As you know, they are limited by law and judges often tell juries that because of that, defence counsel sometimes choose not to open and to save their arguments for their closing address.

Should you open? Yes – every time. The reason being that juries do not understand why you would not wish to avail yourself of an opportunity to tell them about the accused's case. It does not matter what judges tell them; they will think it odd. Even in the rare case where you have no defence, and the State is being put to proof, show your face. Tell them about the importance of listening carefully to the evidence of the State's witnesses in order to be able to answer that crucial question, “does the evidence satisfy me to the highest standard known to the law? "

The next important stage in the trial, after listening carefully to the evidence of the State's witnesses and not just assuming it will be as per the proofs, is cross-examination.

In a paper I first wrote in 2013, which is published on the Court's website publications section under the title *Cross-examination a Science not an Art*, I drew attention to Francis Wellman's 1904 book *The Art of Cross-Examination.*

Wellman divides his criticisms of cross-examiners into the manner of cross-examination and the matter of cross-examination. To understand his criticisms, you need to bear in mind the purpose of cross-examination, which is;

- to obtain from the other side's witnesses, admissions favourable to your own client's case; and
- to discredit the evidence of the other side's witnesses.

So, the first question always is whether to cross-examine at all. Wellman says:

> In discussing the methods to employ when cross-examining a witness, let us imagine ourselves at work in the trial of a cause, and at the close of the direct examination of a witness called by our adversary. The first inquiry would naturally be, *has the witness testified to anything that is material against us*? Has his testimony injured our side of the case? *Has he made an impression with the jury against us*? Is it necessary for us to cross-examine him at all? (Italics added.)

If you decide to cross-examine, be careful of your manner. Wellman says:

> The counsel who has a pleasant personality; who speaks with apparent frankness; who appears to be an earnest searcher after truth; who is courteous to those who testify against him; who avoids delaying constantly the progress of the trial by innumerable objections and exceptions to perhaps incompetent but harmless evidence; who seems to know what he is about and sits down when he has accomplished it, exhibiting a spirit of fair play on all occasions – he it is who creates an atmosphere in favour of the side which he represents.
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> On the other hand, the lawyer who wearies the court and the jury with endless and pointless cross-examinations; who is constantly losing his temper and showing his teeth to the witnesses; who wears a sour, anxious expression; who possesses a monotonous, rasping, penetrating voice; who presents a slovenly, unkempt personal appearance; who is prone to take unfair advantage of witness or counsel, and seems determined to win at all hazards – soon prejudices a jury against himself and the client he represents.

I could not agree more – although I must say I do not see much slovenliness these days.

And, assuming you have decided you need to cross-examine, then consider the matter of your cross-examination – do not merely "interview" the witness. I see this far too often. It is appalling advocacy. Wellman says:

> What shall be our first mode of attack? Shall we adopt the fatal method of those we see around us daily in the courts, and proceed to take the witness over the same story that he has already given our adversary, in the absurd hope that he is going to change it in the repetition, and not retell it with double effect upon the jury? Or shall we rather avoid carefully his original story, except insofar as is necessary to refer to it in order to point out its weak spots?

Cross-examine only for only what you need. Consider the witness's competence and credibility.

Competence

- Lack of perception – capacity to perceive – opportunity to perceive – quality of recall of the perception.
- Lack of accurate recall.
- Lack of narrative ability.

Credibility

- Bias, interest, prejudice.
- Prior convictions.
- Moral character, disposition and mental condition.
- Previous inconsistent statements.

Lack of perception involves questions going to the capacity of the witness to observe the matters in respect of which he or she has given evidence. That is to say, whether there is anything about the five senses used to perceive those matters upon which the witness can be impeached.

This rubric also includes a lack of opportunity for the witness to perceive properly that which he or she has given evidence about, and would involve questions related to aspects such as position, visibility, time, date, day, distance, speed and so on.

Thirdly, under this heading there is the question of the quality of the witnesses' recall. How clear is the recollection, is there any reason to recall well, etc?

Lack of accurate recall involves not so much the quality of the recall but objective considerations which reflect on accuracy, such as how long ago it was, whether the witness is relying solely on memory, or has notes or diagrams or photographs.

Lack of narrative ability is whether the witness is giving his or her own evidence or has been coached or has rehearsed his or her evidence, or is relying on a statement largely prepared by someone else. You might even see the witness consulting his or her statement in the witness box.

The days of Clarence Darrow and Max Steuer are over but we can still learn from them. Steuer's most famous cross-examination was in the litigation over the terrible Triangle Shirtwaist Factory fire: see https://www.famous-trials.com/trianglefire/973-excerpts

The fire in the Greenwich Village neighbourhood of Manhattan, a borough of New York City, on Saturday, March 25 1911, was the deadliest industrial disaster in the history of the city, and one of the deadliest in U.S. history. The fire caused the deaths of 146 garment workers – 123 women and girls and 23 men – who died from the fire, smoke inhalation, or falling or jumping to their deaths. Most of the victims were recent Italian or Jewish immigrant women and girls aged 14 to 23.

The factory was located on the 8th, 9th, and 10th floors of the Asch Building, which had been built in 1901. Later renamed the "Brown Building", it still stands at 23–29 Washington Place near Washington Square Park, on the New York University.

Because the doors to the stairwells and exits were nailed shut, a common practice at the time in sweat shops to prevent workers from taking unauthorized breaks and to reduce theft, many of the workers could not escape from the burning building and jumped from the high windows. There were no sprinklers in the building.

In her evidence in chief, a young girl employed at the factory, Kate Alterman, said as follows:

> Between the machines and between the examining tables, I noticed afterwards on the other side, near the Washington side windows, Bernstein, *the manager's brother throwing around like a wildcat at the window,* and he was chasing his head out of the window and pull himself back. *He wanted to jump, I suppose, but he was afraid*. And then I saw the flames cover him. I noticed on the Greene street side someone else fell down on the floor and, the flames cover him. And then I stood in the centre of the room, *and I just turned my coat on the left side with the fur to my face, the lining on the outside*, *got hold of a bunch of dresses that was lying on the examining table* not burned yet, covered my head and tried to run through the flames on the Greene street side. The whole door was a red curtain of fire. *A young lady came and she began to pull me in the back of my dress* and she wouldn't let me out. *I kicked her with my foot,* and I don't know what became of her. I ran out through the Greene Street side door, right through the flames on to the roof.

Kate was then cross-examined by the famous attorney, Max Steuer, in a quiet and friendly manner as follows:

"Q You never spoke to anybody about what you were going to tell us when you came here, did you?

A No, sir.

Q You have got a father and a mother and four sisters?

A Five sisters. I have a father; I have no mother - I have a stepmother.

Q. And you never spoke to anybody else about it?

A No, sir…

Q They never asked you about it?

A They asked me and I told them once, and then they stopped me; they didn't want me to talk anymore about it.

Q You told them once and then they stopped you and you never talked about it again?

A I never did.

Q And you didn't study the words in which you would tell it?

A No, sir.

Q You remember that you did get to the centre of the floor, don't you?

A Between the machines and the examining tables, in the centre.

Q *Now tell us from there what you did; start at that point now instead of at the beginning*.

A In the beginning I saw Bernstein on the Washington side, *Bernstein's brother*, *throwing around like a wildcat; he wanted to jump, I suppose but he was afraid*. And then he drawed himself back and the flames covered him up. And I took my coat, *turned it on the wrong side with the fur to my face end the lining on the outside*, *got hold of a bunch of dresses from the examining table*, covered up my head, and I wanted to run. And *then a lady came she began to pull my dress back*, she wanted to pull me back, and *I kicked her with my foot* - I don't know where she got to and *I ran out through the Greene Street side door*, which was in flames; it was a red curtain of fire on that door to the roof.

Q You never studied those words, did you?

A No, sir…

Q Can you tell that story in any other words than those you have told it in?

A *In any other words? I remember it this way, just exactly how it was done.*

Q Will you please answer my question? *Could you tell it in any other words than the words you have told it in here three and half times.*

A *Probably I can*...." (Italics added.)

The point I want to make about this cross-examination, whilst it might have won the case when Steuer sat down on that last answer, and while Steuer was extremely astute to pick up on recurring words and phrases in Kate's evidence, he was also very lucky. You cannot plan for cross-examinations like that, and you rarely get manna dropped in your lap like that. However, it shows us, as I have already noted, the importance of listening to the evidence as it is given and to the answers to your cross-examination as they come. Do not start to mentally frame your next question while the witness is answering your last one.

Jury dynamics

I would like to commend to every one of you in this room, a book called *Dice* written by Claire Baylis and published in 2023. It was written as part of a PhD in creative writing from the International Institute of Modern Letters at Victoria University of Wellington and was included on the Dean's List for being of the highest academic excellence. Claire studied law and lectured in it for twelve years at Victoria University before moving to Rotorua where she worked as an interviewer and researcher for the Trans-Tasman Jury Study.

As such, she conducted the first level of analysis of all the 45 trials for the New Zealand part of the study. During this research, she noticed how jurors sometimes had different perspectives of what happened in their deliberations and also how difficult some of the sex offence trials were for juries. She had always been interested in fiction where events were told from multiple perspectives, so it was a natural progression for Claire to write a novel about a fictional trial told from the perspectives of different jurors.

In the novel, Claire was keen to explore both how the jurors' life experiences and backgrounds impacted the trial and how the trial impacted their lives, so it was very important for her to choose the characters who ended up on the jury. She wanted some of the characters to encounter different aspects of what can make jury service difficult to fit into jurors' lives – for example, for parents who need to balance childcare demands, or for those who are self-employed or those who need to keep working while serving on a jury.

But she was also keen to explore how difficult some people find it listening and understanding the oral evidence and procedural and legal rules, as well as the potential triggering effect of some evidence for those with a traumatic background. In addition, she was interested in exploring some of the dynamics that occur in any jury due to social and educational disparities between jurors.

The book had a profound effect on me. No doubt sourced from her research; Claire brings to the fore the difficulties that jurors experience in understanding how a trial works, in so many ways. Those jurors, despite what they are routinely told, are left wondering what evidence is and what it is not, why they have been told certain things but not others, what will happen next, will they hear from a witness again, and how they are to approach their task.

Dice should make us all more careful not to make assumptions about what jurors are taking in, and to be aware what we, who are involved in trials regularly, take for granted and say without explanation, things that are entirely foreign to them. Overall – without being patronising we all need to be more careful to take jurors with us every step of the way in the trial. For example, we need to make sure that jurors understand the difference between examination in chief, cross-examination and re-examination. We need to speak more plainly and to explain, where appropriate, as we go.

Closing addresses

I think that my critical observations of closing addresses by defence counsel began in earnest after reading *Dice.* It occurred to me that if the real-life accounts of over 500 jurors led Dr Baylis to the view that jurors did not understand as much as I had assumed, then great care needed to be taken in the most crucial phase of the trial.

Language and manner of delivery of the address are critical to the absorption of concepts by the jury.

You need to keep your voice down and remain calm, engaging, and matter of fact. In my observation jurors are visibly annoyed at being harangued or shouted at. Do not insult their intelligence with your imitation of Matthew McConaughey in *A Time to Kill*. Theatrics do not work.

Do not assume that the jurors understand anything. Do not patronise them but take them to your case theory in simple steps, using simple language. And be very selective in the points you make and explain each one carefully. I see no need for long traverses of the evidence. The State will have done that.

And, do not usurp the judge's function with long explanations about the law. It is just something else to confuse them when listening to you. By all means say that the judge will tell you that an assault is not unlawful if it was done in self-defence. But do you really need to try and explain the two-stage test for self-defence to them when at that time what you really need to do is to persuade them to accept the fact that your client genuinely felt that he or she was in danger? Can you not rely on the judge to put that fact into its legal framework?

Also, in my experience, juries look for case theories. They can be told about credibility and reliability and warned about essential witnesses' evidence, but they like to know the *why* of it all.

If your client's defence, however, is simply that the complainant is lying and the offending did not occur, and you can point to no reason for the complainant to lie, then your job is harder. In such cases you will most likely be forced to rely solely on inconsistencies and anomalies in the complainant's evidence, demeanour and so on. But if that is the case then remember the "infection theory of advocacy". Your bad points infect your good points.

Inconsistencies can be great and of determinative importance, but they can be trifling and understandable and of no real consequence. I see juror's eyes roll when counsel go into these minor inconsistencies. One things jurors do understand, in my view, is that differences between statutory declarations given by witnesses to police and testimony in court are frequently because the statutory declarations were not given verbatim or made in the witness' own words, but rather, as a result of a question and answer process with the statement taker paraphrasing the witness' answers.

If you think there is value in exposing every inconsistency to the jury, be they great or small, then one credible way of doing it would be to say "There are so many inconsistencies between the various accounts that the complainant has given in this case that I am not going to take up your time going through them all. You will remember this one and that one and this one. They all add up and I would ask you to remember them all, but I just want to focus in a little detail on some that I say are fatal to the complainant's truthfulness and reliability, namely …"

And why use the word "credibility"? I do not believe that jurors understand that word. I would much prefer to point to a witness' lack of *truthfulness* and *reliability*. Similarly with the word "demeanour". Why not just say, "you are entitled to take account of the way the witness came across to you when he or she gave evidence. Did he or she appear to you to be telling you the truth. That is evidence you can use. Did he or she come across to you as reliable. You can use a witness's appearance when giving evidence as evidence itself. The judge will tell you that that is the law."

I would suggest that you look at your retinue of jury terms and simplify them. I would suggest that you seriously consider whether there is any point in haranguing the jury about the presumption of innocence and reasonable doubt and if you decide there is – do it at the end of your address not as a pipe opener. And speaking of pipe openers, do not say "Members of the jury, this is the stage of the trial where I get to speak to you". Start in an interesting way – and not with a joke or a football or movie analogy. Why not start by telling the jury what your client's defence is? If you are going to persuade the jurors of it, you need to start by articulating it.

Justice Stephen Estcourt AM

18 July 2025