

The Plea - A Reflection

One of the real concerns associated with the practice of criminal law is the belief held by many lawyers who choose not to practice entirely in the jurisdiction that criminal advocacy is relatively straightforward unlike, say, the style of advocacy required in the practice of equity or commercial law.

Of course, any lawyer who has encountered a difficult criminal case would know that to be untrue. However, the prejudice, if that is an appropriate description, survives and no more acutely than in relation to the very specialised area of the criminal plea.

It is not unusual to hear around the courts one lawyer having asked another what he or she has been doing for the morning to be told, "Oh, I had a criminal matter, it was 'just' a plea," or "it was 'only' a plea".

Whenever I hear the plea referred to in such terms, I am reminded of Justice George Hampel's admonition to aspiring advocates that there is no such thing as "just a plea".

Hampel J has always been at pains to emphasise in the advocacy courses which he regularly conducts that a well constructed plea is an essential element in the proper administration of justice. It can also be pretty important to the future and wellbeing of the guilty party.

An anecdote (in law there is always at least one) that describes exquisitely the impact of a well constructed plea comes from the Supreme Court of Victoria. A well-known criminal advocate in the sixties was faced with an extremely difficult plea. His client had yet again been apprehended for burglary. The client had spent many years in prison but always upon release returned to his old trade. His list of prior convictions was a defence counsel's nightmare. Specific deterrence was going to be high on the order of priorities for the sentencing judge. The advocate (whose name, unfortunately, I cannot recall) began his plea before Justice John Starke thus:

"Your Honour, I ask you to look about this great city of ours and to bring to mind its sprawling suburbs and its tree-lined streets, each full of rows of houses and I ask you to pause and consider for a moment just how many of those houses my client has not burgled."

I am told by the usually highly unreliable sources that the plea went very well and although the burglar was ultimately positioned so that those houses on those leafy streets would not fall victim to his trade for a very long time, the result could have been much worse.

Recently Chris Howse of NAALAS was called upon to represent a fellow who had engaged in an extremely bad piece of driving. The presiding Magistrate expressed the view that it was about the worst case of driving he had encountered on the bench. However, Chris had anticipated the bench's reaction might be along such lines. In an inspired piece of preparation, he read an excerpt from Hunter S Thompson's book *Fear and Loathing in Las Vegas*, in which a far worse piece of driving was described in vivid detail. The bench was both intrigued and amused. The penalty was severe but could have been more so.

A good plea, it seems to me, involves an appreciation of the parameters that the facts impose. That means concentrating on the bad bits because if the advocate doesn't the court will. An attempt to anticipate the bench's reaction is always a good idea. That exercise in itself helps the advocate to focus on what realistically may be achieved for his or her client.

Magistrates and Judges can be pretty unpredictable characters but a well prepared plea can ensure that the sentencing discretion is more carefully applied.

Rampant optimism of legal advisers is the thing most likely to cause disaster in the execution of the plea. It leads to advice being given to clients that can result in an unrealistic expectation being held by the guilty party. A client who is told that the circumstances of the offence merely warrant a suspended sentence can become very unpleasant and a tad overwrought as he or she is taken down to begin a six month period of immediate imprisonment.

It is important to round out the personality of the person before the court. That can only be done if time is taken to obtain careful instructions of the individual's antecedents. Consideration should be given as to whether evidence should be called. Courts are often impressed by the calling of evidence. They feel more comfortable relying on facts in mitigation if evidence of some substance has been called in sup-



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port of those facts. Bald assertions from the bar table never have the same impact as a decent witness.

For any lawyer who does not spend a large amount of time in practice doing criminal work it is always advantageous to contact someone who does. It is important to get a feel for the sort of penalty range that is likely to be encountered in a given situation. I have found the views of lawyers with the legal services and the Director of Public Prosecutions to be extremely helpful in assisting to formulate a realistic opinion as to the appropriate sentencing range in a given case. They do pleas every day.

Another general rule that comes to mind is "never pitch the facts too highly". Plenty of advocates have been told by the bench that, "If you want to rely on that submission Mr or Ms So-and-So, you'd better call some evidence."

Sometimes the desire to get a good result upon sentence can tempt advocates to go beyond merely putting a spin on things and enter the realm of misleading the court. If the temptation arises, follow the golden rule and don't do it. Everybody knows why. Every plea, even for the most banal offence, has an angle. The trick is to find it.

Most of the things I have referred to are pretty old hat. Lawyers do them as a matter of course. There are a lot of other important points that lawyers reading this legal blanchmange might think are more important or should have been included. I leave people to look elsewhere for a detailed discussion of the subject.

In conclusion, I think it is worth reflecting upon the fact that the person travelling to prison is unlikely to look upon the proceedings that put him or her there as "just a plea."

Ciao

Jon Tippett