

ADVOCACY

The Judge's address to the jury

"Mistakes are the inevitable lot of mankind"

Sir George Jessel

When you have completed your address to the jury and have triumphantly resumed your seat you may feel a natural inclination to relax.

Hopefully you will be quietly congratulating yourself on your compelling argument and your effective presentation.

Alternatively you may be inclined to sit and stew over things that you should have said or castigate yourself for the manner in which you presented the argument. A post mortem should not be held at this point.

Once you have resumed your seat you should then focus your attention upon what the judge has to say. You need to pay close attention to what the judge says in order to ensure that what falls from him or her does not, in the interests of your client, require further explanation, correction or modification in matters of fact or law.

In their work Australian Criminal Trial Directions, Glissan and Tilmouth consider the proper bounds of the summing up by a judge to a jury and identify the following five elements as being essential for the summing up to comply with principle:

- 1) *It should be fair and balanced.*
- 2) *Where the judge expresses views, the jury must be clearly directed that the ultimate decision on questions of fact is theirs.*
- 3) *It is dangerous and unwise for a judge to put forward a basis of liability or explanation of factual material not advanced by either party.*
- 4) *The judge must clearly and fairly put the defence case as a recognisable entity. This duty extends even to putting defences that have not been relied on by counsel for the defence (or even denied by the accused) if there is a factual basis for them in evidence.*

- 5) *The summing up should include:*
 - a) *a succinct and accurate summary of the issues;*
 - b) *a concise and correct summary of the arguments on both sides;*
 - c) *an accurate statement of the inferences the jury are entitled to draw from the primary facts;*
 - d) *reference to the respective role of judge and jury; and*
 - e) *a concise and correct statement of the law to be applied.*

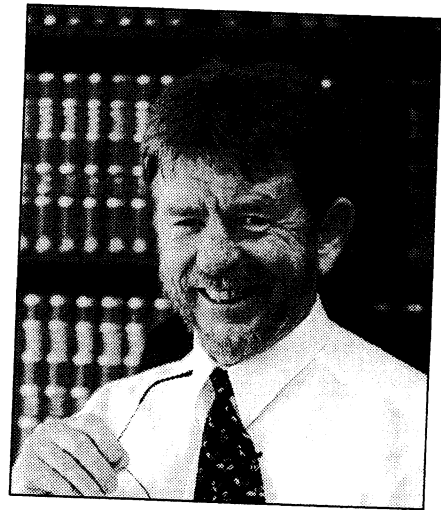
In most cases, prior to the commencement of his or her address, the judge will have provided you with a draft aide memoire in which the applicable law is summarised for the benefit of the jury.

You should pay careful attention to this document and ensure that it fairly summarises the law and identifies the issues.

This is a most important document and will travel with the jury into the jury room. It is likely to play an important part in the process of deliberation by focusing the attention of the jury upon the issues identified in it as being important.

It will be too late for you to complain once the verdict is to hand. If error has occurred it may only be corrected by an appeal and the Court of Criminal Appeal may wonder why it was that you failed to assist the court.

You should also pay attention to the directions provided by the judge to the jury that are not contained in the aide memoire. You need to ensure that the judge does not present a view to the jury that is unbalanced or otherwise deficient. This observation applies to issues of both fact and law. In addition you will wish to



Hon Justice Riley

ensure that the judge has identified and dealt with all of the matters discussed by Glissan and Tilmouth.

Particular attention should be paid to the defences available to the accused whether those defences have been raised by the accused or not.

If you are counsel for the defence you may have focused your attention upon the strongest defences available and deliberately refrained from developing argument in relation to others.

Some defences may not have been addressed because they are inconsistent with your case strategy or with other available defences. This often applies where both self defence and provocation are open to an accused. Whether you appear to prosecute or for the defence it is necessary that you ensure that the judge fairly puts all available defences to the jury.

If you are concerned that you failed to address a particular issue or to draw the attention of the jury to a particular matter in the course of your address, you may wish to raise that with the judge for correction in his or her address. Whether the matter can or should be attended to in that way will depend upon the circumstances of the case.

It is essential that both counsel maintain concentration during the course of the summing up by the judge and take the opportunity to invite the judge to correct any errors or omissions that are identified during the course of that process.

Self congratulation or self flagellation can occur when the jury has retired. ①