BOOK REVIEWS

Advocacy in our Time, by O. C. MAZENGARB, C.B.E., Q.C., M.A., LL.D., (Law Book Co. of Australia, 1964), pp. Price $6.00

Advocacy is for most lawyers, I suspect, rather like good health. If you display it you are unconscious of doing so. If you do not, you constantly search round for a cure. My own shelf of books on the subject is quite considerable. As it shows no signs of ceasing to grow, obviously my defects are by now incurable. Also they are unimportant.

I do not rate Dr Mazengarb's contribution highly among my collection. Perhaps, had it been available forty years ago, it would have found an appropriate place alongside the then modest edition of *Odgers on Pleading.* It would have made that conspicuous essay in the abstract somewhat more concrete, chiefly by its constant reminder that cases are won and lost, and by the satisfying reassurance for the student that his studies are directed to winning them. This, of course, is not the kind of thing which a professor can decently admit. Even if he could it would not be true. But no doubt ambitious and anxious neophytes will gain some comfort from a series of frank confessions that lawyers practise their profession with the object of winning cases. If society is thereby rendered more safe and more stable that is a virtue produced by his happy instrumentality. He may pretend that it inspired his own efforts, but he is unlikely to convince anyone else, least of all his satisfied client!

Dr Mazengarb had his own conception of what was embraced within the concept of advocacy. It commences when the client comes in and explains what he wants. According to some, but not all, textbooks on jurisprudence the answer to this puzzle is—'Justice'. Dr Mazengarb rightly points out that it is more satisfactory to answer—'Damages, a divorce, an apology, or a defence'.

Thereafter step by step the path of the 'advocate' is traced. My own studies to make good the deficiencies, which seemed all too inescapable, led me as many others to the oft-repeated triumphs of the Edward Clarkes, Rufus Isaacs, Edward Carsons, Patrick Hastingses, Norman Birketts *et al.* . . . I agree, however, that the epic significance of a 'notice to admit' (page 112) is also important, if sometimes lacking in drama. I suppose if your opponent were actually to admit anything of significance it would at once become a matter of high drama, throwing your own camp into excited and unwise jubilation. Dr Mazengarb sees, however, a different connection between advocacy and the procedure of securing admissions. 'It [the procedure] is either unnecessary or against the interest of the party who resorts to it'. After all, if this be the true lesson, it is all to the good that it can be learnt from a simple handbook. As it happens, the lesson is not true. But the professional mentality which espouses views to this nature has rendered urgent the development of the whole modern scheme of 'pre-trial procedure'.

Dr Mazengarb pursues his practical way through the course of proceedings up to the judgment. The last two items in his catalogue are 'leave to appeal' and 'plea in mitigation'. The former occupies half a page and the latter three pages. A number of reflections arise from these two items. It would not be completely fair to suggest that the half page allotted to 'applications for leave' arises from the infrequency of the author's resort to this exercise. But I am bound to say that I did begin to wonder from time to time when his pages would record an incident from a case which

he and not his opponent had lost. The realization that individual practitioners actually exist who have themselves virtually never asked the wrong kind of question, suggested the wrong explanation, cited the unconvincing authority, or forgotten the significant detail of evidence, is a salutary if humiliating one.

A further, and additionally humiliating reflection is that advocacy apparently ceases with the application for leave to appeal. I have listened to a few masters of the art exercising it after leave has been granted, including Menzies, Fullager and Barwick on local wickets, and Monckton, Radcliffe and Gardiner where the heavier atmosphere encourages the resort to spin. It is difficult to believe that advocacy ends with the application for leave to appeal. In truth it does not do so.

But surely the application for leave is no different!

There is much useful advice, the product of long years of practice, in Dr Mazengarb's book. It is indeed, a notebook in which step by step the jottings of a working practitioner are recorded. Feeling that perhaps such a record might have an unduly empirical flavour, the author introduced the substance with nineteen pages in which the pattern of the legal profession and its ethics are disclosed. This gave him opportunity for a survey of the Dean—Meagher case, with a criticism of Sir Julian Salomon's famous 'revelation' of Meagher's admission to him of his knowledge of Dean's guilt as 'contrary to the generally accepted ethics of the profession'. In Australia this is not, I think, a 'generally accepted' view. But there are more important considerations, much closer to the subject of advocacy with which the book is concerned. The author describes the repeated failure of Meagher to persuade the judges to readmit him to practice, and finally, his success in mobilising sufficient support to obtain the passage of a special Act of Parliament restoring him to the profession. The author points out the basic significance of this final step by noting: 'The parliament of New South Wales thereby established its sovereignty over the Judiciary which had for more than a decade refused audience to Mr Meagher.'

It is as well that we should not forget how advocacy is related to the fundamental features of our Constitution. It is also worth noting that the advocacy which may fail to carry conviction to judges may nevertheless sway the parliamentary votes of a sufficient number of members of the part to which the advocate belongs.

The real interest in much of what Dr Mazengarb wrote lies not so much in the accuracy of persuasiveness of his comments as in the light which they throw on the processes of our courts, the elements which determine how justice is achieved, and the extent to which unconscious cynicism colours professional activity. A few examples will illustrate these comments.

'When an application was being made for the permanent maintenance of a "guilty wife", the Judge enquired whether she was in court. A pathetic little woman seated behind the rails was asked to stand. The weekly amount allowed to her reflected the Judge's sympathy. A few months later on a motion for committal for failure to pay, another Judge, who did not enquire whether the woman was present, made a drastic cut in the amount awarded by the first Judge.' (page 103-104)

A jurisprudence class normally required at the end of its first term to expound in not more than 1500 words the relation of law and justice might think it worth adding this quotation as a footnote. But whilst judges are equal, some are more equal than others. Dr Mazengarb

followed on this history with a significant lesson for the 'advocate'. He recalls how, in a claim by a widow for damages, he noted his client enter the court accompanied by smartly dressed female friends. At once he rescued her from this embarrassing predicament and isolated her behind counsel's bench so that in his final address, he could safely refer to 'the lonely little figure in the background of the case'. The verdict, as in so many of Dr Mazengarb's own cases, was for the full amount claimed. But the detail of the award, though recorded (page 104), is of limited relevance. It is to the social and sociological significance of the incident that attention should be paid.

The relation of the law to the theatre has often been noted, best of all perhaps by Sir Edward Parry, and at only a slightly lower level in all that has been written of Sir Patrick Hastings; but the mechanics of theatricality have hitherto remained without specific disclosure. Dr Mazengarb reminds us that the plaintiff's counsel should 'contrive to maintain an interest in his client's claim throughout the hearing' (page 106). Thus, 'the frequent mention of a name may arouse such curiosity that members of the public will crowd into Court when it is known that the bearer of the name is about to go into the witness box' (page 107).

Of course it is vital that counsel should contrive to maintain the interest in his client's case and not, for example, in his own reputation.

Let me return to the relation of law and justice. There remains still in a few of the British Colonies (like the State of Victoria) the determination of claims for damages by civil juries. 'If', writes Dr Mazengarb, 'you have a very strong case, take it before a judge alone. In a doubtful case it may be better to apply for a jury (page 116). The student is often taught that perfect solutions in the law must sometimes give way to the claims of certainty. Bearing this in mind he will be disappointed to read the author's *caveat* to the quoted advice 'Although that is generally a good rule to follow there are exceptions to it. Judges have their prejudices as well as juries.' I should add that many-sided as Dr Mazengarb appears to have been, he was never deliberately a cynic.

Sometimes, as he admits, there is more in a case than meets the eye. Justice is perhaps slightly myopic. This he illustrates by the case of the plaintiff who showed a tactless anxiety to settle for much less than his claim. The defendant underwriters dug in and went to trial. Verdict for three times the plaintiff's proposal for settlement. Too late, defendant learned the plaintiff was living in adultery with one of the owners of a car involved in the case. Because all the facts were not revealed justice may have suffered!

I have been concerned to cull these few gems from a handbook on 'advocacy' to remind us that between the law as revealed, for example, by seven concurrent but diverse expositions in the High Court of Australia and the announcement that there will be judgment for the defendant with costs including interrogatories and discovery but not including the costs of *etc. etc.* many factors may intervene. Do these factors ensure that the law as expounded by the highest authorities will be brought nearer to 'justice' or partially distorted from it? It is an everlasting question. Dr Mazengarb's study is interesting because it suggests that the answer to the first query is 'No' and to the second is 'Yes'. These conclusions were not aimed at by the author; but then what IS justice for 'the lonely little figure in the background' or for the adulterer who happens to be under scrutiny because of his association with a motor car and not an erring wife?

I am ready to admit that the answer, whatever it may ultimately prove to be, is not simple.

About 27 per cent of Dr Mazengarb's book deals with the questioning of witnesses. This is not an allocation which I would criticize. I note indeed that in Mr Du Cann's *The Art of an Advocate,* which was published as a Penguin Original in the same year as this volume, consideration of witnesses occupies 39 per cent of the book. If the introductory matter in each volume be excluded the contrast suggested by these figures becomes much more marked. This emphasizes the point that Dr Mazengarb takes a much wider view of the skills demanded of the advocate—perhaps because he was writing for a more dedicated clientele who might be expected to feel something beyond mere curiosity.

Each of these books contains an elaborate attempt to capture the subtle secrets of examination and cross-examination. Most lawyers will consider that exposition as contrasted with actual demonstration to be virtually impossible. The matter has been attempted often enough. Is the subject one which can be 'learnt out of books'? Perhaps the obvious errors can be demonstrated. And even then, it may be doubted whether they will be avoided. Dr Mazengarb lists no less than fourteen 'do-nots' (page 220 ff.). Some of these would not be accepted by the great exponents whom Mr Du Cann calls in aid.

Possibly the average practitioner may be better advised by the mundane guidance of Dr Mazengarb than the tempting examples of Patrick Hastings, Charles Russell or Norman Birkett.

'Do not', says Dr Mazengarb, 'deal with your best points first.' It is a counsel of moderation. Bradman used frequently to hit a boundary off his first ball—but then some of us are not Bradmans. Mr Du Cann properly enough records the famous opening to Rufus Isaacs's cross-examination of the prisoner Seddon. The first ball was just a good length outside the off stump.

'Miss Barrow [the poisoned woman] lived with you from the 26th July till the morning of the 11th September 1911?'

'Yes.'

And then four devastatingly unexpected monosyllables:

'Did you like her?'

It is said that in the excruciating hesitation which followed the noose slid on to Seddon's neck.

Again Dr Mazengarb advises:

'Do not comment on the answers as you go along.'

Certainly if you do so too often, or too clearly, there will be general disapproval. That from your opponent may merely signalize discomfort. That from the judge will be more serious. On the other hand Mr Du Cann informs us that 'it is now the fashion to include comment either direct or indirect in cross-examination. This is largely due to the influence exerted upon all modern advocates by Hastings's style of cross-examination'.

Even so far as the 'do-nots' are concerned there is difficulty in finding consensus. There is of course a simple rule which the merest beginner cannot fail to perceive and put into practice. I cannot believe that it needs setting out, but here it is: 'Don't miss an opportunity to make a telling comment but don't let it ever appear that you are doing so!'

Both these commentators agree upon the advisability of avoiding the fatal 'one question too many'. Dr Mazengarb cites the classical example of Marshall Hall questioning Sir William Willcox about the arsenic

in the extremities of Miss Barrow's hair in Seddon's trial. It was a moment of high drama. Mr Du Cann's example is more likely to remain as a reminder in the mind of the rising junior. The charge was one of carnal knowledge. The Crown relied upon a farmer in the locality who claimed to have been an eye-witness. His cross-examination proceeded as follows:—

Counsel: When you were a young man did you never take a girl for a walk in the evening?

Farmer: Aye, that I did.

Counsel: Did you never sit and cuddle her on the grass in a field?

Farmer: Aye, that I did.

Counsel: And did you never lean over and kiss her while she was lying back?

Farmer: Aye, that I did.

And then the last superfluous 'moment of truth':

Counsel: Anybody in the next field, seeing that, might easily have thought that you were having sexual intercourse with her?

Farmer: Aye, and they'd have been right too.

Every bar dining table has recalled one example of the fatal error—but this seems amongst the very best.

Most of Dr Mazengarb's 'don'ts' are designed to assist the junior to learn quickly. He is less concerned with the prohibitions which are imposed in the interest of the witness. Yet about the permissible traps and stratagems to which the cross-examiner may resort there is more doubt than might be supposed. Mr Du Cann seems to go further in his advice than would be consistent with current practice in Victoria. Thus he says:

> The alternatives of 'I put' or 'I suggest' are also open to objection in that the use of the personal pronoun brings the advocate into the case, and makes it appear that he is giving evidence. This he must avoid as scrupulously as he must avoid voicing his own opinion. For the same reason he must never say in cross-examination to a witness,
>
> 'My client will say . . .' or
>
> 'My instructions are that . . .'.
>
> The first is mere hopeful speculation, and the second is giving evidence.

Dr Mazengarb very rightly recognizes the desirability of giving advice about examination in chief. Indeed he lists a catalogue of 'don'ts' reaching up to number eighteen. It may be doubted, however, whether it is really useful to warn the beginner: 'Do not try to bring out evidence which is inadmissible.'

The reasons which he cites for this rule are clear enough. It would be interesting to know whether he thought there were ethical as well as empirical objections. Who can doubt, however, the practical significance of the warning numbered 16: 'Do not overlook the possibility of an appeal from the decision'?

This is no doubt an essential piece of advice, and not the less so because, to use a modern term, it is 'open-ended'.

Let me assume, however, that the appeal has been heard. You have survived the ordeal and held the judgment obtained below. The reasons for this may be various and curious—though the important thing no doubt is that you have succeeded. Because success is sweet, you may not be greatly concerned that one member of the appellate tribunal found some sentences in a cross-examination in the transcript which seemed to him to have a vital significance for the whole case, notwithstanding that

your own unmistakeable recollection was that the witness had spoken the words recorded in a tone of accentuated incredulity indicating that he denied the assertion now attributed to him by the member of the court of appeal. On the other hand a second member of the court has allowed your success because, though he entertained an almost complete conviction about the evidence contrary to your contentions, nevertheless he is indisposed to substitute his own view of the facts for that of the judge who saw the witnesses. The third member of the court upheld the appeal because he obviously felt, though he refrained from saying, that the supposed legal difficulties explored by the trial judge were entirely imaginary and would have been seen to be so by a junior of twelve months' standing.

This imaginary experience in the courts of appeal provides, no doubt, an exaggerated example of the way in which factors may enter into the determination of a cause which have only a remote relation to justice—and even to justice according to law. In itself there is no great significance in providing such an example. Courts, judges and lawyers are the products of human experience, which is only another way of saying they are not perfect. Sybille Bedforde, who has written one of the very best descriptions of a hard fought modern criminal trial, rightly chose as a title, *The Best We Can Do.* It is interesting to note that the outcome of the trial was a verdict of not guilty. In the same mood of benignant observation she called her survey of judicial proceedings in England, Belgium, Austria, Switzerland and France, *The Faces of Justice.* She did not mean to suggest that Justice was two (or more) faced but that, like other women, she preferred to adjust herself to the taste of the consumers and this was part of her charm. Part of this feminine charm is said to be uncertainty. I am not sure whether men or women first enunciated this theory, and whether indeed it is not now an outmoded Victorian myth. But there can be no doubt that it is no myth when applied to the exalted female with whom we are concerned—namely Justice. It is to one particular aspect of her uncertainty that I invite attention, not suggesting that there are no others, or that they may not be of greater importance. How far are the capricious aspects of the goddess the result of what are described as 'the arts of advocacy'? What I have in mind are the permissible rules or limits within which the art may be employed such as to encourage or discourage the more fanciful appearances of the goddess. Do these rules or guides permit more injustice than a reasonably organized society is entitled to expect?

There is the shrinking figure of the widow, rescued from her wealthy and well dressed friends and exhibited as the pitiable little figure in the background of the case. In Mr Du Cann you will find reference to the 'ruthless and gross discourtesy' of Sir Patrick Hastings in cross-examination. In both books you will find warnings against giving a witness any opportunity to explain away or qualify a damaging admission or concession which you may have extracted from him. You are to be an advocate propounding a cause and not a scientist searching for the truth. Indeed, if you are not an advocate in this sense the individuals who seek representation might be better off, in a sufficiently large number of cases, if they spoke for themselves. But even if we admit that the essential role of the advocate is to speak for someone who may not be able to speak for himself, is it clear that the rules and conventions within which this speaking takes place have gone as far as they may in guarding the interest of society in the promotion of justice—even whilst allowing for everything which

may be urged in favour of freeing the tongue of the inarticulate by paying for another to wag in its place?

As a first impression there is some ground for thinking that extensive public disquiet, if not more definite doubt, is growing up in advanced modern communities. The evidence for this view is to be found in the relatively large number of books dealing with defaults in the judicial process—false verdicts of guilty and other unsatisfactory features of the operation of the law, failure to detect attempts not to blind justice but to take advantage of the all too obvious bandage.

The modern volumes do not *necessarily* point to the rules of advocacy as the cause of the failures, but emphasis on these failures raises the question which must be not far from the surface of this subject matter. In one or two places the question has been more narrowly scrutinized. C. P. Harvey, Q.C., in *The Advocate's Devil* approached so nearly to the essence of the problem as to seem to be laying almost sacrilegious hands on the ark of the covenant—an experiencd advocate actually questioning his art. When he asked Lord Monckton to write a foreword, that very experienced and adroit advocate himself felt called upon to display his own special skills. The result was an exordium which was not so much a commendation as a confession and avoidance. When Harvey Q.C. came to review Mr Du Cann's volume he had in fact moved one more pace to the left, if that is the direction by which you approach to the right hand of the goddess. He asserts that Mr Du Cann 'seems to shy away from the consequences of his own argument.'[1] As for Dr Mazengarb it is fairly clear that (Harvey) thinks that *that* author was unaware that there was any debate on this matter to be either recognized or disregarded. But then perhaps there is no stopping short of the conclusion that the same result would be reached by a very large proportion of work-a-day lawyers, honourable as honest and competent as well as learned.

In various particular forms this controversy has appeared for perhaps as long as lawyers have practised. Everyone has read the interchange of Johnson and Boswell about the rights and wrongs of the barrister defending the 'guilty' client. It is perhaps a mark of the times to find Harvey Q.C. pointing to the unsatisfactory, if self-satisfied, confidence with which the great Doctor disposed of the issue. But concentration upon conspicuous and dramatic examples of this kind may not help to clarify the real issues which lie behind a vast number of ordinary situations of almost daily occurrence. It is the working of the supposed rules in these normal situations which provide the genuine issue between lawyers and society as to whether the law and lawyers promote or inhibit justice.

In truth in many circumstances the rules, or their application, is very far from being recognized or understood. Of course the difficulties will disappear if the rules are stated in very general terms, but then the difficulties are only removed one stage, because it will become less easy to determine in many cases how the rules of such gerenality should be applied.

Take for example the well known dictum of Lord Esher in *Re Cooke*.[2] Speaking of the duty of the barrister he said that '. . . he should not keep back from the court any information which ought to be before it, and that he should in no way mislead the court by stating facts

1 (1965) 28 *Modern Law Review* 731.
2 (1889) 5 T.L.R. 407, 408.

which were untrue. . . . If either a solicitor or a barrister were wilfully to mislead the court he would be guilty of dishonourable conduct'. Obviously this is not language which will withstand very close consideration or semantic scrutiny. 'Misleading the court' is in one sense what every advocate attempts in a hard fought case. Can he not attempt to persuade a court that a witness's recollection or observation is unreliable, even though his own belief would be to the contrary? It is not very helpful to reply that this is not what is meant by 'misleading'. At this point the experienced lawyer and the intelligent layman find they are not talking in a common language. Again what are the facts 'which *ought* to be before the court'? Here the moralist, the logician, the scientist and the lawyer will all follow diverse paths and reach dissimilar conclusions. It may be that the only conclusion which is relevant in this context is that reached by the lawyer. But even this will be a conclusion upon which lawyers may not be unanimous, at any rate so long as their discussions remain private. And perhaps when the conclusion is reached the only justification is that it provides a solution which appeals as being 'practical' or 'decent' or 'generally acceptable'. The moralist may be pardoned for finding the solution merely empirical and the lawyer for finding it pragmatically satisfactory.

Lord Esher indeed used terms familiar to every student of the elementary textbooks. He said that 'How far a solicitor might go on behalf of his client was a question far too difficult to be capable of abstract definition'[3] —this may be the product of unavoidable caution, but it is not a very satisfactory guide. Then his Lordship went on: 'but when concrete cases arose everyone could see for himself whether what had been done was fair or not'.

Is it quite so clear that these problems can be solved by the optimistic reassurance that everyone with the instincts of a gentleman will have no doubt?

No-one can examine the incidents in *Meek v. Fleming*[4] and the events which followed thereafter, without some sense that the solution of the problems, is like the performance in amateur theatricals,—something which will prove 'all right on the night of the play'. Victor Durand was in the first instance suspended for three years by the Benchers of the Inner Temple and, after appealing to the Lord Chancellor, appeared before the Lord Chief Justice and four other judges who reduced the sentence to twelve months. Moreover, in some curious way it would appear—though the hearing was in camera—that the reduced sentence was in part due to the fact that Durand had not intended to deceive the court before which *Meek v. Fleming* was heard. It is not possible, without a full statement of reasons, to understand why his conduct was reprehensible if it were not wilfully deceptive. Can it be that if you deceive without intent you are still guilty of dishonourable conduct? It is true that Durand is recorded to have admitted that what he did (advising his client, who had been an inspector of police but had been reduced to the rank of sergeant for misconduct in a court, to appear out of his uniform, and not to disclose his new and lower rank if this could be avoided) was wrong. It is not clear whether the admission was the result of closer thought on the actual issue or a lively belief, derived from successful practice in the criminal court, that the appearance of regret is invariably calculated to mitigate a

[3] *Loc. cit.* [4] [1961] 22·13·366.

penalty. I leave aside the question as to whether this last is a logical or merely an amiable aspect of human nature.

It is clear from the available facts that Durand deliberated with his junior and his solicitor on his proposed course and that they differed from him. Thus there seems more ground for supposing that the matter was debatable, even though the hazards of an erroneous decision were not inconsiderable.

None of these debates could arise, of course, if professional morality definitely accepted the view that it was the business of the court to ascertain the truth in the controversy before it in order to do justice. It is a melancholy reflection that no-one thinks this simple solution to be a practical one. On the contrary it is said that the proceeding before the court is an 'adversary one'. Each side fights for its own success and the court umpires the contest. But of course you cannot have an umpire without rules. Are these rules merely procedural norms prescribed with some formality by the law and not much concerned with morality? It is said that you cannot go this far in disregard of the goddess. To do so seems too severe, and less than human. Moreover if the non-legal part of society perceived that this was what the law and lawyers was and were doing, it would recoil from the prospect. In the result it views the lawyers with some suspicion which they in turn feel to be unfair. With an attitude of conscious virtue they turn up *Re Cooke* and read the dicta of Lord Esher to the puzzled laymen. If they feel that complete conviction of their virtue has not been established they resort to a little effective 'in-fighting', by convert references to 'directors of public companies' and the standards of morality of the general community.

And this of course does bring us to the heart of the matter. The answer to our problem must be found in a practical balance between more and less which will carry general community approval. My own view is that we should try and err on the side of morality,—that we should hamstring the advocate rather more than we do in the interests of truth rather than free him as a 'skilled' adversary. The rules binding the prosecutor for the Crown (and perhaps those affecting counsel for the Crown on the civil side) illustrate that it is possible to utilize skill, enthusiasm and energy and at the same time limit the advocate in his single minded endeavours. But this is an example merely. It is not necessarily the precise standard to be adopted for all advocates. My real point is that the standards which are adopted change from time to time, that probably over the last hundred years or so they have moved in the direction I would applaud, that we are a little better than in the days of *Bardell v. Pickwick*, and that we should not weary of well doing in this respect. Let us remember, every time some one quotes Brougham's famous description of the role of the advocate, that by the exaggerated reference to his duty to prefer the interests of his client to his duty as a patriot Brougham was delivering carefully considered threats to Wellington and Castlereagh as to a possible attack on the legality of George IV's occupancy of the throne and that the argument was not the less cogent for being covert.

Probably there is no final solution to be held for all time. The temper of society, the actual effects of prevailing practice, and the development of more exacting demands upon lawyers will operate continuously and with varying force. But complete disregard of the importance of the problems, as in *Advocacy in our Time*, is not quite good enough.

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