A Barrister Never Stops Learning

Final address for Bar Practice Course 70 delivered on 22 March 2018

Introduction

[1] You have just completed an intensive course to prepare for practise as a barrister. There has been a mountain of content you have grasped and you are now thinking that you cannot wait to put it all into practice. The advice that is the focus of this address is that "you will never stop learning". It may be it is better expressed as "you must never stop learning", if you want to excel as a barrister.

[2] As a newly minted barrister, like many of you will do, I called on Judges, but I also called on some senior counsel. One of them, Mr Ted Lennon QC told me something that stuck with me. He said that the early opinions I wrote would be amongst my best work.

[3] How could that be, I thought at the time. For my early opinions, I was researching extensively and writing on areas of law that were new to me. I was agonising over setting out my analysis and advice in the manner in which I had seen other opinions written. At that early stage, I had not yet learnt it did not matter how well you knew the law on the topic that would not win your case, if the necessary evidence was not adduced from the witnesses for the facts to be found that would allow the favourable application of the law.

[4] But the longer I was in practice, I realised that in a way Ted Lennon was right. Those early opinions were written without the same time constraints that applied when my practice got busier. I was able to research the law exhaustively and ensure that all the "i's" were dotted and the "t's" crossed. They were technically good work – if not a little dull. It struck me, though, that what I brought to my later opinions was not the luxury of time to spend on them to make sure they were technically correct, but the experience gained from taking cases to trial or other court appearances that allowed me to use that perspective in expressing my opinion. You will find, if you allow yourself to do so, that you will learn from each foray into court and that your subsequent cases (and clients) will benefit from that.

[5] I therefore propose to give my advice that you will never stop learning, by covering two aspects of the topic:

(a) never assume your knowledge is complete or up to date, and be open to learning about new areas of the law;

(b) learning from experience is invaluable in practising the law.

You never know everything

[6] Nothing is more dangerous than a lawyer who thinks he or she knows everything. The lawyer is a danger to himself or herself, the client, the opponent and the court.

[7] Even in areas of law where you are perceived to be an expert, it always pays to check that the authority you are relying on remains authoritative or has not been overtaken by other developments in the law. When you do your professional reading to keep up to date, such as scanning the most recent judgments delivered in the High Court and the intermediate appeal courts, I suggest you look at judgments that are outside your usual areas of practice. You may see trends, for example, in statutory interpretation, by reading judgments on all sorts of topics.

[8] Who has been caught out by relying on a version of legislation that had been amended in a material way which had escaped you? It can be embarrassing whether you are a barrister or a judge, when you are using a version that differs from what others are using in the courtroom.

[9] Another aspect of this topic is being open to learning about new areas of the law. For those of you who have been in practice as solicitors and developed expertise in particular areas of the law, do not be afraid of branching out and applying your general skills to other areas of the law. It happens compulsorily when you are appointed a Judge to a court exercising in general jurisdiction such as the Supreme Court. I was taken out of my comfort zone of commercial, property and estates matters into the field of criminal law. I describe to people how I was on a steep learning curve when I was appointed 18 years ago, when it came to conducting criminal trials and sentencing, but now even that is within my comfort zone.

[10] When I did my law degree, there was no such subject area in Australia as native title law: the decision of Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 represented the prevailing view that the Crown had the power to extinguish native title if it existed. It was not until 1992 in *Mabo v Queensland* (No 2) (1992) 175 CLR 1 that view was overruled. By the time I was appointed a Judge, a significant proportion of my practice was in the native title area. There are a couple of lessons for new barristers in how I fell into the native title area.

[11] The first lesson is relevant to the topic "you never know everything". One of my early briefs for the State of Queensland was in the *Wik* case at first instance before Drummond J: *Wik Peoples v State of Queensland* (1996) 63 FCR 450. I was briefed as an additional counsel to work on the part of the case that concerned the nature of a lease. I was perceived as having expertise in the area of real property leases, particularly as I had done my dissertation for my master's degree in the area of leases. I did not have a brief to appear as a junior in the entire case, but would turn up when submissions were being made relevant to the area of leases. I enjoyed the experience immensely. It was like no other brief I had ever had, because I was briefed to consider source documents: Orders in Council in Government Gazettes, letters from the Colonial Secretary to the Governor of New South Wales and much other historical material. The first lesson is that the law sometimes develops in a way that you do not anticipate. The appeal was removed directly from the Federal Court to the High Court. To give you some idea of how quickly things moved, Drummond J delivered his judgment on 29 January 1996, the appeal in the High Court was heard on 11 to 13 June 1996 and judgment was given on 23 December 1996. In Australia the High Court has the last word. I was briefed for my knowledge of the law governing the relationship between landlord and tenant derived from centuries of English authorities. The majority in the High Court made it clear in *Wik Peoples v State of Queensland* (1996) 187 CLR 1 that was the wrong approach.

[12] The second lesson about my experience in the native title area is a good one for new barristers. An early brief that I got in that area was one that was taken off another barrister who had sat on the brief for too long. Needless to say, I applied myself industriously to getting out the advice that the client had been waiting on for some time. That ensured I kept getting briefed in that area. My recollection is that the particular barrister from whom the brief was taken did not develop a native title practice the way that I then did.

[13] I used to find that if I did the paperwork and sent back the advice or the pleadings to the solicitors, another brief from the same firm soon followed. I know times have changed, but I am sure that turning over your paperwork still has benefits for your practice other than the fees for the paperwork.

Experience is a great teacher

[14] One of my good briefing solicitors organised a conference for his client to receive my advice on a particular problem. The solicitor was himself an expert in the area of law on which I was asked to advise. Out of curiosity, after the conference when the client had left, I asked him: "Why did you brief me to give that advice, when you could have easily given the client the same advice on the matter?" His response made me appreciate why I was briefed and why many barristers are briefed. He said to me that he knew the law, but I knew the Judges and would be able to predict how receptive they would be to the particular position that his client wanted to take in the matter. The solicitor had previously been unsuccessful in predicting the outcome on an interlocutory matter, where the judge avoided applying the law for the benefit of the solicitor's client at that stage of the proceeding. It was not going to happen to him again. There is another lessen hidden in this story. You should take your time to reflect on what happens when you appear in court and the outcome of your cases to learn not just about the particular area of the law, but what the experience of that particular case has taught you that will affect how you go about your next case.

[15] As a junior barrister, I had first-hand experience of the rule in *Browne v Dunn* (1893) 6 R 67 that I have never forgotten. I was successful for my client, a finance company, at first instance, but the matter went on appeal and one of the grounds of appeal was that I had failed to put to the defendant in cross-examination the proposition that his evidence was not accurate or honest about the critical conversation with the finance company employee. The trial judge had rejected the defendant's evidence. The appeal was unsuccessful, with the court finding that the defendant had been given the opportunity during cross-examination to respond to the proposition. That the ground of appeal was based on the manner in which I conducted the cross-examination made me much more cautious in the future about ensuring that it could never be argued that I breached the rule in *Browne v Dunn* and that I would never be the subject of such a ground of appeal again.

[16] I was always very grateful to the late Mr Justice McPherson who described the whole thrust of my cross-examination of the defendant as being to the effect "he was not recounting either accurately or honestly the substance and effect of the conversation" with the relevant finance company employee. I had not used words that expressly suggested the defendant had "no honest belief in the validity of the claims he asserted he had put forward in [that] conversation", but McPherson ACJ then stated:

> "But to satisfy the requirements of the oft-quoted but constantly misunderstood 'rule' in *Browne v Dunn* (1894) 6 R67, counsel is not obliged to sacrifice the rapier for the bludgeon."

[17] That description of a rapier rather than a bludgeon has remained with me. I can still recall the difficult time I had cross-examining that particular defendant who was described by the trial judge as "garrulous". He launched into such long answers in response to every question I asked, it was difficult to get another question in. If you are interested in reading the case, it is unreported, but it is accessible online: *Finance Corp of Australia Ltd v K J Shaw Pty Ltd* (Sup Court of Qld FC, Appeal No 115 of 1990, 19 August 1991 BC9102953). I should add that after the experience of that trial and appeal, I was careful not to test the limits of "rapier" like cross-examination, but instead felt much more comfortable with cross-examination that was more like a "bludgeon".

[18] So far, I have been concentrating on oral advocacy which is still integral to the practice of a barrister. In modern advocacy, the written outline of submissions is an important tool. I will give you some insights from my perspective as a consumer of written outlines. What you learn from each experience in court is not limited to your oral advocacy, but it should also apply to your written outlines.

[19] The party who sends the written outline to the Judge before the hearing (with the permission of the other party, of course) has already started on the quest of persuading the Judge. It is much easier to absorb the contents of the outline in my chambers than in the pressure cooker of the courtroom with everyone watching as I read. You do not achieve this start in persuasion, if you leave it until 9:55am to finalise your outline.

[20] There are two categories of written outlines – the helpful and the not so helpful. Keep the manner in which you structure your outlines and their length under review and reflect

on whether you could have improved your outline – perhaps to move it from the not so helpful to the helpful category.

[21] How do you know if your outline has been successful? If during the hearing, it is apparent the Judge has missed your best points, it may be a reflection on how quickly the Judge scanned the outline or how well you have managed to hide your best points amongst many paragraphs that would be well placed in a dissertation on the subject, rather than an outline.

[22] If the outline has succeeded in identifying the true issues in the case and shown the Judge the correct path to reaching a decision, you should see those issues reflected in the structure of the judgment. Even if you are on the losing side, that does not preclude proper identification of the issues of fact and/or law to be decided. After a judgment is published or given in a case in which you prepared an outline, compare the structure of your outline with the structure of the judgment. If the process of decision making was not anticipated by your outline, consider why not and whether you could have approached your submissions in a more helpful way. Consider whether your opponent's outline had correctly identified the issues and addressed them in a logical manner and reflect on whether you could have done the same.

[23] Sometimes counsel can recognise large slabs of their submissions in the judgment produced by the Judge. Sometimes a barrister might be too successful in persuading the Judge to adopt counsel's written submissions. Most Judges wish to avoid being in the position of the Judge at first instance in *Crinion v IG Markets Ltd* [2013] EWCA Civ 587. The ground of appeal was that the trial Judge had based his judgment to such an extent on one party's submissions, the trial Judge had failed to address the appellant's case. The trial judge appeared to have used the winning party's submissions as the first draft of his judgment. The appeal was unsuccessful, because the appeal court could detect that the trial Judge did show he brought an independent judgment to bear on the issues in the case, even though some 94% of the words in the judgment were taken from one party's submissions.

[24] My advice to you is that there is opportunity to learn from a Judge's response to your written advocacy.

Conclusion

[25] It is possible some of you may not have needed convincing that a barrister never stops learning – or a Judge for that matter.

[26] I have used my topic to share some of my experiences with you. I hope there has been one thing that I may have said that has struck a chord with you and will assist you as you face the challenges of practice as a barrister.

[27] I look forward to your appearances in my court.

Justice Debra Mullins