The Appellate Jurisdiction of the District Court:

Making your appeal more appealing

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As is well known, the Magistrates Court of Queensland deals with most of the litigation in the state. In the financial year 2019-2020 there were 110,657 criminal sentence hearings in Queensland. The Magistrates Court dealt with 94.5% of these.[1] In the same period the Magistrates Court dealt with nearly 20,000 civil claims.[2] The Magistrates Court also has jurisdiction to hear and determine matters under the *Domestic and Family Violence Protections Act 2012* (Qld) and *Child Protection Act 1999* (Qld) (in its guise as the Childrens Court). In 2019-2020 the Magistrates Court dealt with more than 28,000 applications for domestic violence protection orders[3] and just over 6,800 child protection matters.[4] In this same period, there were fewer than 90 appeals lodged in the District Court concerning decisions made by Magistrates in civil matters and about 300 appeals in criminal matters.[5] These figures have been relatively constant for a number of years.[6] From them it can be seen that, of the tens of thousands of matters finalised by Magistrates each year, only a tiny percentage of decisions are the subject of appeals to the District Court. In the overwhelming majority of cases the Magistrate's decision is accepted as correct by the parties.

But Magistrates are human too, and no human is immune from error. In a small number of cases there will be grounds for appellate intervention. Even Homer nods.[7]

In this paper I will address the broad topic of appeals to the District Court from a decision of a Magistrate. Much of what I will say is pitched at a basic level. That is deliberate for two reasons. The first is that a "primer" on a topic as broad as appeals to the District Court is more easily addressed to a general audience. The second is that the basics are important. Any time you are considering an appeal to the District Court you must consider, and apply, the basics. If you do not, and the foundation for your appeal is shaky, that will inevitably be exposed during the appeal proceeding. Adopting a general approach means that I am covering a field that has already been well ploughed. Search the internet and you will quickly find dozens of papers about appellate advocacy by authors much smarter and better qualified that I am. A selection of these is listed at the end of my paper to encourage you to read further. I have drawn on these and my own experience in writing this paper.

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1 Queensland Sentencing Advisory Council, Sentencing Trends, https://www.sentencingcouncil.qld.gov.au/research/sentencing-trends/200506-to-201920#:~:text=In%202019%E2%80%9320%2C%20there%20were,to%20104%2C611%20in%202019%E2%80%9320. Accessed 17 March 2022. See also Magistrates Court of Queensland Annual Report 2019-2020, p. 20.

2 Magistrates Court of Queensland Annual Report 2019-2020, p. 24.

3 Ibid, p. 65.

4 Ibid, p. 69.

5 District Court of Queensland Annual Report 2019-2020, p. 14.

6 Except for a dip in both Courts in the second half of 2019-2020 because of the COVID-19 pandemic.

7 Horace, A*rs Poetica*, l. 359, "quandoque bonus dormitat Homerus".

The paper is divided under four headings. First, I will survey some of the history of appeal processes, culminating in "modern" appeal statutes.[8] Next, I will describe the appellate jurisdiction of the District Court by reference to the statutes conferring this jurisdiction. Thirdly, I will talk of how this statutory foundation determines the nature of an appeal and therefore how it is to be approached. Last, I wish to speak of appellate advocacy, or how to make your appeal more appealing, with a particular focus on the preparation of written materials, now an essential component of any appeal.

A brief history of appeals

As you all know, law is not immutable. It does not spring forth fully formed as Athena from Zeus's brow. It is the product of accretion over time, punctuated by occasional attempts by legislators to scrape off the barnacles. The law at any one point in time, whether we are talking about the common law or statute law, is the product of all that has gone before. For this reason, a consideration of any area of law is aided by an understanding of what has driven the law to be how it stands.[9]

In terms of the history of the common law, appeals are relatively recent creatures. Prior to the late 19th century, the law had developed some arcane mechanisms to correct a wrong decision. As long ago as the 13th century, it was possible to challenge the verdict of a "jury"[10] in a civil claim by a process known as attaint. A dissatisfied party could seek a second trial decided by twice as many jurors as the first trial. If the second jury reversed the verdict, the first were subject to the confiscation of their property and imprisonment.[11] The procedure fell into desuetude and was abolished by statute in 1825. By the 14th century the Courts of King's Bench and Common Pleas were well established, the former dealing with cases involving the King and his people and the latter cases between subjects. Each court dispensed the King's justice and over time each arrogated to itself the power to grant new trials from decisions at assizes. The process was akin to that of a prerogative writ (certiorari). An order for a *rule nisi* would be obtained then sought to be made absolute at a hearing before a bench that often sat *en banc*. The power to grant a new trial rested upon the demonstration of error – whether it be error in the inclusion or exclusion of evidence, erroneous instructions to the jury, a verdict against the weight of the evidence or because a new trial would further the ends of justice. The process was little used in criminal cases until the 17th century.[12] Some similarities with modern appellate process may be noted, the obvious one being that the power of the appellate court to interfere with the decision at first instance only arises where error has been shown. But it would be going too far to suggest that modern appeals can be traced directly to the 14th century.

For much of the time until the mid-19th century, the only real means to challenge a verdict in a criminal case was by a writ of error. Such a writ was originally sought in Chancery and, if issued, would direct the lower court to correct its record by setting aside the conviction. There

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8 Some statutory appeal provisions are now more than a century old, but as will be seen they are modern in the sense of their displacement of antiquated methods for challenging decisions at first instance.

9 This consideration of the history of appeal legislation is necessarily cursory. For a more detailed treatment of some aspects, especially concerning criminal proceedings, see Orfield, Lester B, *History of Criminal Appeal in England*, 1 Mo L Rev (1936); Hon Peter McClellan AM, *A Matter of Fact: The Origins of the Court of Criminal Appeal*, speech delivered at the Centenary of the Court of Criminal Appeal Dinner, 3 December 2012; and Sir James Fitzjames Stephen, *History of the Criminal Law of England*, 1883.

10 The juries of the time would be unrecognisable to a modern lawyer. The jurors were rarely independent and more often were closer to witnesses than impartial judgers of the facts. See Sir James Fitzjames Stephen, *History of the Criminal Law of England*, Vol. 1, 1883, Chap. 12, "Description of Modern Criminal Trials".

11 Orfield, n 9, p. 2.

12 Orfield, n 9, p. 3.

was originally little formality to the process. It was used as a method for the Crown to reverse a conviction when it wanted. There was nothing by way of argument in the Court of Chancery – reversals followed because of a concession by the Attorney-General on behalf of the King. But by the early 1700s the process had been refined. In most cases the writ issued as of right (as opposed to requiring the consent of the Monarch) after a conviction and the Court of Chancery judicially determined whether the verdict was affected by error. There remained, however, three serious defects in the process. First, it was available by right only in respect of misdemeanours. A writ of error for a felony conviction could only issue at the grant of the King. Secondly, the process did not include a review of rulings in the trial or directions to a jury. Thirdly, the power of the Court of Chancery was binary – it could only affirm or reverse. There was no power, for example, to modify a sentence.[13]

So things limped along until the mid-19th century, that period of great reform of the law. 1848 saw the establishment of the Court for Crown Cases Reserved, a largely ineffectual body charged with deciding questions of law reserved to it by a trial judge. This body suffered from the same problems as attended a writ of error. The questions referred concerned only questions of law, not the sufficiency of the evidence, and the Court could only quash or affirm a conviction. There was no provision for ordering retrials or for altering sentences. It is unsurprising that very few cases went to the Court – only about eight a year.[14]

As the century drew to a close, things gathered pace and 1873 saw the passage of the *Supreme Court of Judicature Act 1873* (UK) (more commonly called the Judicature Act). This reorganised the entire court structure of United Kingdom, creating a High Court of Justice and, for the first time, a Court of Appeal. The Court of Appeal, sitting above the High Court but still subject to the House of Lords, could hear appeals in civil matters only. It is here that we can for the first time see an appellate process that we would recognise.

But the absence of a proper appeal process in criminal matters continued to cause problems. One famous matter demonstrates both the failings of the system and the fragility of identification evidence. Wilhelm Meyer (also known as John Smith, among other names) was a fraudster and petty thief who plied his trade in London.[15] He approached women, claiming to be a "Lord Willoughby", and with flattery and false promises persuaded them to part with jewellery. Meyer was caught and imprisoned in 1877 but upon his release returned to defrauding women. In late 1895 a wholly innocent Norwegian man, Adolf Beck, was walking down Victoria Street in London. He was accosted by a woman who accused him of tricking her out of two watches and other jewellery. Beck was flummoxed. The woman persisted and police became involved. Other "victims" came forward and many of them identified Beck as their swindler (the line-ups were inherently flawed: Beck was the only one with grey hair and a moustache). Beck's protestations that he was in South America at the time Meyer committed the earlier offences – and so he could not be the same man – fell on deaf ears. At the committal hearing the prosecution called the retired policeman who had arrested Meyer in 1877. The policeman was permitted to testify

> In 1877 I was … in the Metropolitan Police Reserve. On 7 May 1877 I was present at the Central Criminal Court where the prisoner in the name of John Smith was convicted of feloniously stealing ear-rings and a ring and eleven shillings of Louisa Leonard and was sentenced to five years' penal servitude. I produce the certificate of that conviction. The prisoner is the man. ...

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13 Orfield, n 9, p. 7-8, which contains a detailed description of the process for a writ of error.

14 Orfield, n 9, p. 11.

15 See generally McClellan, n 9, pp. 1-6.

> There is no doubt whatever – I know quite well what is at stake on my answer and I say without doubt he is the man.

Beck was duly committed, and his trial held at the Old Bailey in March 1896.[16] The trial judge was Sir Forrest Fulton. In 1877, when still at the bar, Fulton had prosecuted Meyer and was familiar with the man. Fulton was convinced the man in the dock claiming to be Adolf Beck was in fact Meyer. With remarkable sophistry, Fulton refused to allow Beck's counsel to introduce evidence of the 1877 offences, which Beck could not have committed, on the basis that it was not permitted to alert the jury to the prior convictions of the defendant. Fulton would later be criticised for this and other rulings during the trial.

The trial proceeded and despite some of the witnesses expressing doubts, Beck was convicted and imprisoned for seven years. In gaol, Beck was even given Meyer's old prison number and treated as a repeat offender. Multiple petitions for mercy directed to the Home Office were denied. Even when records emerged that showed Meyer was circumcised and Beck was not the Home Office remained unmoved. The case became something of a cause célèbre, with Sir Arthur Conan Doyle among those writing in support of Beck's innocence and calling for legal reform to allow for real reviews of convictions. The protests fell on deaf ears and Beck remained in gaol until paroled in 1901. He was free from prison, but the criminal justice system was not yet done with Adolf Beck.

In March 1904 a woman complained to police that a grey haired, distinguished looking man had confronted her on the street. She said the man paid her compliments before beguiling her and stealing her jewellery. The policeman, familiar with Beck's case, assumed it was him. Beck was arrested and tried a second time. Again, he was convicted. This time the trial judge held such grave doubts about the quality of the evidence that he deferred sentence. For Beck, this was the only stroke of good luck he had seen, for ten days later Meyer was arrested. Some of the witnesses who had identified Beck in his second trial were brought in. Upon seeing Meyer, they admitted their error. Meyer confessed and upon pleading guilty was given another five-year term. Within weeks Beck was pardoned by the King and given £2,000 (later increased to £5,000 after a public outcry about the inadequacy of the amount).

Beck's case, and others like it, gave weight to a growing movement in favour of reform, the aim being to create a proper avenue of appeal in criminal cases. The movement's momentum only increased when a Committee of Inquiry into Beck's case identified its many failings.[17] Finally, in 1907, the *Criminal Appeal Act 1907* (UK) passed the parliament. The legislation introduced what has become known as the "common form criminal appeal statute" which is found replicated in section 668E of our *Criminal Code*.[18] The Court established by the *Criminal Appeal Act* consisted of the Lord Chief Justice and, soon enough, all the judges of the King's Bench Division of the High Court of Justice. A panel of at least three judges would sit on appeal, which lay as of right on a question of law and by leave on a question of fact or of mixed fact and law. And, at long last, the court was authorised to alter sentences as well as set aside convictions, although the court was strangely not given the power to order retrials. This position obtained in England, despite protests from the judiciary and others, until 1964, long

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16 The record of the trial is available online: https://www.oldbaileyonline.org/browse.jsp?id=t18960224-name-287&div=t18960224-277#highlight.

17 Orfield, n 9, p. 11, notes that while Beck's case was doubtless the immediate cause of legislative reform, the way had been paved by 75 years of agitation and no less than 28 separate, and unsuccessful bills.

18 This provision deals with appeals to the Court of Appeal from indictments dealt with in the District and Supreme Court. It is not otherwise relevant to this paper.

after many other jurisdictions had adopted the legislation but added the power to order a retrial.[19]

I will conclude this excursion into history with a mention of the appeal provision with which you would all be familiar, and which is the basis for most appeals to the District Court – section 222 of the *Justices Act 1886* (Qld). The original act was largely the product of that titan of legal codification, Sir Samuel Griffith, who had taken the work commenced by Sir James Cockle and consolidated it. From an early time, the *Justices Act* provided for the review of decisions of justices, but they were technical in nature and by the middle of the 20th century considered inadequate. At the second reading speech of a bill to amend the act, the Acting Attorney-General William (Bill) Power said of the existing power to appeal[20]

> [N]o one of these methods provides machinery for the complete review by the appellate court of the proceedings before justices and the appropriate remedy of any and every mistake or error, whether of fact or law, that may be discovered upon that review.

The bill proposed two methods of appeal. The first, provision for an order to review, was repealed in 1997. The second method, an appeal by way of rehearing to a single judge,[21] remains today. The bill had the support of the opposition, expressed by Charles Wanstall, the member for Toowong, who of course later became Chief Justice Sir Charles Wanstall. The provision, contained in section 222, has been subject to some amendments, but its core remains intact.

With this brief tour of history complete, let us move on to discuss the appellate jurisdiction of the District Court and the statutory provisions conferring this jurisdiction on the court.

The appellate jurisdiction of the District Court of Queensland

As I hope I have made clear, appeals are creatures of statute.[22] The District Court has no general supervisory jurisdiction.[23] It only has jurisdiction to review a decision of an inferior court where that has been conferred by legislation. There are four statutes I wish to discuss that permit an appeal from a decision of a Magistrate to the District Court. The *Justices Act 1886* (Qld), the *Magistrates Court Act 1921* (Qld), the *Domestic and Family Violence Protection Act 2012* (Qld) and the *Child Protection Act 1999* (Qld). Familiarity with these provisions is essential. As the Hon Justice Hugh Fraser wrote in 2012

> It should be emphasised that, in any particular appeal, it is necessary to be familiar with the terms of the statutory provisions conferring jurisdiction, defining the nature of the appeal, and stating the powers of the appeal court. An intimate knowledge of the appellate jurisdiction and powers is essential if the advocate is to frame an effective argument that the appellate court should, or should not, alter the decision of the primary tribunal.[24]

I will discuss each statute in turn.

The Justices Act 1886

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19 McClellan, n 9, p. 14.

20 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 April 1949, 2608.

21 At first this was to a single Supreme Court judge, but this was amended upon the re-establishment of the District Court in 1958.

22 For one of many confirmations of this statement see *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, [8].

23 *Cf* State Supreme Courts: *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

24 The Hon Justice Hugh Fraser, "Appellate Advocacy Revisited", Continuing Professional Development Seminar, 26 April 2012.

I have mentioned above the recent history of the main appeal provision by which an appeal may lie to the District Court – section 222. In its present form section 222 provides

222 Appeal to a single judge

(1) If a person feels aggrieved as complainant, defendant or otherwise by an order made by justices or a justice in a summary way on a complaint for an offence or breach of duty, the person may appeal within 1 month after the date of the order to a District Court judge.

Notes—

1 Under the *Criminal Code, section 669A (6),* an appeal against a decision by a person under this section to a District Court judge is removed directly to the Court of Appeal if the Attorney-General also appeals against the decision under *section 669A*.

2 This division applies in relation to an order made by justices dealing summarily with a child charged with an offence, but appeals must be made to a Childrens Court judge—see the *Youth Justice Act 1992, section 117*.

(2) However, the following exceptions apply—

(a) a person may not appeal under this section against a conviction or order made in a summary way under the *Criminal Code*, *section 651*;

(b) if the order the subject of the proposed appeal is an order of justices dealing summarily with an indictable offence, a complainant aggrieved by the decision may appeal under this section only against sentence or an order for costs;

(c) if a defendant pleads guilty or admits the truth of a complaint, a person may only appeal under this section on the sole ground that a fine, penalty, forfeiture or punishment was excessive or inadequate.

(2A) The Attorney-General may appeal against an order made by justices or a justice in a summary way on a complaint for an offence or breach of duty within 1 month after the date of the order to a District Court judge.

(3) To start the appeal, the appellant must file a notice of appeal in the District Court registry.

(4) For this section, an appellant is taken to have filed the notice of appeal in the District Court registry—

(a) if the District Court registry is more than 50km from the place where the order was made; and

(b) the appellant gives the notice of appeal to the relevant clerk of the court.

(5) Also, for this section, an appellant is taken to have filed the notice of appeal in the District Court registry if the appellant is in custody in prison and gives the notice of appeal to the prison's general manager.

(6) A clerk of the court or general manager of a prison who receives a notice of appeal under subsection (4) (b) or (5) must immediately give the appellant a receipt of the notice of appeal in the approved form stating the date of receipt.

(7) If—

(a) an issue arises in a proceeding about whether the appellant gave a notice of appeal under subsection (4) (b) or (5); and

(b) the receipt under subsection (6) is not produced in evidence;

the onus of proof is on the appellant to prove the giving of the notice of appeal under subsection (4) (b) or (5).

> (8) The notice of appeal must be in the approved form and state—
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> (a) the appeal grounds; and
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> (b) the details required under *section 222C*; and
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> (c) the name and address of the respondent.
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> (9) If the appellant is in custody, the notice of appeal must be filed in the District Court district where the appellant is in custody.

I have set the section out in full because it is important that each time you are considering an appeal you have regard to the entire provision. Otherwise, it may be too easy to overlook some important aspect of bringing the appeal, such as the contents of the notice of appeal or where it is to be filed. Sections 222A to 222E set out some mechanical provisions designed to bring the appeal to the notice of interested parties. Two provisions deserve mention. By section 222A an order for the payment of restitution or compensation is stayed if there is an appeal. And by section 222E the Registrar of the District Court where the appeal is to be heard must give notice to the person who was to benefit from the restitution or compensation order at least ten days before the hearing of the appeal. I suspect that section 222E is often overlooked and experience suggests its implementation can be problematic. My own experience in reviewing decisions of Magistrates suggests that the person to whom compensation is to be paid is not always clearly identified.[25] Orders for compensation or restitution under section 35 of the *Penalties and Sentences Act 1992* (Qld) should clearly identify who is to benefit from the order and include sufficient details for that person to be served in accordance with section 222E, if necessary.

Section 223 requires that the appeal be conducted as a rehearing on the original evidence, with the possibility that a District Court judge might give leave to adduce "fresh, additional or substituted evidence" if there are special grounds for leave. This is an important provision, as it establishes the nature of the appeal hearing. I will discuss further below how this will affect your preparation of the appeal. Section 224 permits a District Court judge to make appropriate ancillary orders, such as extending time within which to appeal or given directions about service or the conduct of the appeal. The power may be exercised at the court's initiative, but only where the judge has directed the parties to attend court.

The powers of a District Court judge upon hearing the appeal are broad. Section 225 allows the judge to confirm, set aside or vary the appealed order or make any other order the judge considers just. In doing so the judge can exercise any power that was available to the Magistrate at first instance. If the order is set aside the matter may be sent back to the Magistrates Court with or without directions for its further conduct. There is power to make an order as to costs as the judge thinks is just – section 226 – but bear in mind that section 232(4) prohibits an order for the costs of an appeal in relation to an indictable offence that was dealt with summarily.[26] Interesting questions may arise where there is an appeal involving some indictable offences and some summary offences, though I have found no case where there has been an award of costs in such circumstances.

Of course, all that I have written concerns the *Justices Act* in its present form. On Saturday 26 March 2022 the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, the Hon Sharon Fentiman, announced

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25 *Owens v Commissioner of Police* [2021] QDC 143, [13]-[16].

26 An argument that the text of the section limited its operation to matters dealt with by justices, as opposed to Magistrates, was rejected by Long SC DCJ in *Tierney v Commissioner of Police (No. 2)* [2020] QDC 33.

the long-awaited review of the Act.[27] The review, to be led by retired District Court Judge Michael Shanahan AM, is expected to be comprehensive and, I suspect, it will be quite some time before any resulting legislation is before parliament.

The Magistrates Court Act

Appeals in civil disputes are governed by section 45 of the *Magistrates Court Act 1921* (Qld).

> **45 Appeal**
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> (1) Subject to this Act, any party who is dissatisfied with the judgment or order of a Magistrates Court—
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> (a) in an action in which the amount, value or damage involved is more than the minor civil dispute limit; or
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> (b) in an action for the recovery of possession of land if—
>
> (i) the value of the land is more than the minor civil dispute limit; or
>
> (ii) the annual rental of the land is more than the minor civil dispute limit; or
>
> (c) in proceedings in interpleader in which the amount or damages claimed, or the value of the goods in question, is more than the minor civil dispute limit; or
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> (d) in a proceeding under the *Property Law Act 1974*, part 19, division 4, subdivision 1;
>
> may appeal to the District Court as prescribed by the rules.
>
> (2) Provided that—
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> (a) where in any of the cases above referred to in subsection (1) the amount, damage or value is not more than the minor civil dispute limit, an appeal shall lie by leave of the District Court or a District Court judge, who shall not grant such leave to appeal unless the court or judge is satisfied that some important principle of law or justice is involved;
>
> (b) an appeal shall not lie from the decision of the Magistrates Court if, before the decision is pronounced, both parties agree, in writing signed by themselves or their lawyers or agents, that the decision of the court shall be final.
>
> (3) Within the time and in the way prescribed by the rules, the appellant must give to the other party or the other party's lawyer notice of the appeal, briefly stating the grounds of the appeal.
>
> (4) Notice of appeal shall not operate as a stay of execution upon the judgment, but the execution may proceed unless the magistrate or a District Court judge otherwise orders.
>
> (5) In this section—
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> **"minor civil dispute limit"** means the amount that is, for the time being, the prescribed amount under the *Queensland Civil and Administrative Tribunal Act 2009*.

The minor civil dispute limit is presently $25,000. It is important to note that where the amount or damages claimed in the original proceeding was less than $25,00, leave of the District Court

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[27] https://statements.qld.gov.au/statements/94812.

is required in order to prosecute the appeal. Such will only be given where "some important principle of law or justice is involved". This represents a significant barrier to appeals where the amount at stake is small. The restriction gives rise to two separate considerations: how is the "amount … involved" to be calculated? And what is required for there to be some important principle of law or justice? The answer to the first question is that the amount involved is usually the total of the amounts ultimately claimed in the proceeding when it stands for judgment, whether by way of claim or counterclaim and whether such claims have increased or decreased since the proceeding commenced.[28] The amount would not normally include legal costs, but sometimes the position may be complicated, for instance where there is a claim for recovery costs.[29] In most cases it will be obvious whether the amount involved is more or less than the minor civil dispute limit. But in cases where the issue is raised, it can quickly become complicated.[30]

If leave to appeal is required, the applicant for leave must show that some important principle of law or justice is involved. This test has been likened to the test for special leave to appeal to the High Court. To involve an important principle of justice, the case must be one of gravity, public importance or be of a very substantial character; or involve some important question of law or affect property of considerable value.[31] Mere error on the part of the court at first instance will not usually be sufficient.[32] It has been said that an important principle of justice requires that there be a question going beyond the consequences of the decision for the immediate parties to the proceedings.[33] From this it may be seen that leave to appeal will not commonly be given.

The powers of the District Court dealing with an appeal pursuant to section 45 of the *Magistrates Court Act* are as broad as those conferred by section 222 of the *Justices Act*. The District Court may[34]

(a) draw inferences of fact from facts found by the Magistrates Court, or from admitted facts or facts not disputed;

(b) order a new trial on such terms as it thinks just;

(c) order judgment to be entered for any party;

(d) make any other order, on such terms as it thinks proper, to ensure the determination on the merits of the real questions in controversy between the parties;

…

(f) make such order with respect to the costs of the appeal or special case as it thinks proper.

An appeal pursuant to section 45 of the *Magistrates Court Act 1921* (Qld) proceeds by way of rehearing. That is because the right to appeal is "as prescribed by the rules", the relevant rules being found in Chapter 18 of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR"). Rule 785 provides that some rules applying to appeals to the Court of Appeal apply, with necessary

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28 *Ramzy v Body Corporate for GC3 CTS38396 & Anor* [2012] QDC 397, [30]; *Graham v Roberts & Muller* [1956] Qd R 459.

29 *Ramzy*, [27]-[28].

30 As the decision of McGill SC DCJ in *Ramzy* demonstrates.

31 *Wanstall v Burke* [1925] St R Qd 295, 297.

32 *Scagliotti v Boyd* [1962] Qd R 481 per Stable J at 486.

33 *American Express International Inc v Hewitt* [1993] 2 Qd R 352.

34 Section 47 of the *Magistrates Court Act*. I have removed a reference to the power to deal with a special case stated by a Magistrate. It is a process only very rarely used and not relevant to this paper.

changes, to appeals from the Magistrates Court to the District Court. One of these is rule 765 which provides such appeals are by way of rehearing.

Domestic and Family Violence Protection Act 2012 (Qld)

There is a power to appeal, as of right, a decision of a Magistrate to make, or refuse to make, a protection order; to vary, or refuse to vary, a protection order; or to refuse to make a temporary protection order. The power is found in section 164 of the *Domestic and Family Violence Protection Act*. The appeal lies to the District Court,[35] which must decide the appeal on the evidence that was before the Magistrates Court, subject to the admission in exceptional circumstances of new or fresh evidence or an order that the matter be heard afresh, in whole or in part, as provided in section 168. This provision has been interpreted as establishing an appeal by way of rehearing.[36] Pursuant to section 169, the District Court may confirm the decision, vary it, set it aside and substitute another decision, or set the decision aside and remit the matter to the Magistrates Court for rehearing.

Some procedural provisions in sections 165 and 166 should be noted. First, the notice of appeal must usually be filed within 28 days of the decision, but the District Court may extend time within which to appeal. The appellant must serve the notice of appeal on anyone else entitled to appeal the decision as well as the Commissioner of Police (whether or not the police participated in the proceeding before the Magistrate). It is, I think, an open question whether a failure to serve the Commissioner is an irregularity that may be excused, or whether it renders the appeal incompetent. A good lawyer would avoid this question by complying with the service requirements. The notice of appeal must also state fully the grounds of appeal and the facts relied upon. Bringing an appeal does not stay the operation of any order, but once an appeal is on foot a Magistrate or District Court judge may stay the order on application or on the court's own initiative.

It is important to be aware that the Act prohibits a further appeal from the decision of the District Court. Section 169(2) provides that "the decision of the appellate court upon an appeal shall be final and conclusive". The result is that no appeal lies to the Court of Appeal from a decision of the District Court deciding an appeal from a Magistrate. That is so even when the decision of the District Court judge is obviously wrong.[37]

Child Protection Act 1999 (Qld)

Section 117 of the *Child Protection Act* permits appeals to the Childrens Court constituted by a judge (the "Childrens Court of Queensland" or "CCQ") in relation to decisions concerning temporary assessment and custody orders, and also court assessment orders and child protection orders (the right to appeal temporary orders is limited to the applicant, the child, and the child's parents).[38] As is commonly the case for appeals, the notice is to be filed within 28 days of the decision, but time may be extended by the CCQ. The notice must fully state the grounds of appeals and the facts relied upon. The CCQ is also given the power to stay orders pending determination of the appeal by section 119.

Section 120 of the act sets out the procedures for hearing an appeal:

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35 Pursuant to the definition of "appellate court" found in the dictionary in the Schedule to the Act.

36 *GKE v EUT* [2014] QDC 248 at [2]-[3].

37 *WBI v HBY & Anor* [2020] QCA 24; (2020) 3 QR 399. It should be assumed, however, that the privative clause in section 169 would not prevent a review based upon jurisdictional error – *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

38 The definition of "appellate court" is found in the dictionary in schedule 3 to the Act.

120 Hearing Procedures

(1) An appeal against a decision of a magistrate on an application for a temporary assessment order or a temporary custody order is not restricted to the material before the magistrate.

(2) An appeal against another decision must be decided on the evidence and proceedings before the Childrens Court.

(3) However, the appellate court may order that the appeal be heard afresh, in whole or part.

By section 120(1) an appeal against a decision of a Magistrate concerning temporary orders is not restricted to the evidence at first instance. This may be a textual indication that such an appeal is a hearing *de novo*.[39] But the nature of an appeal is to be determined having regard to the legislative provisions in their whole context.[40] A hearing conducted by a Magistrate under the *Child Protection Act* is judicial in nature. There are requirements to hear evidence, to keep a record and to give reasons for a decision. Having regard to these indicators it is understandable that section 120(1) has been treated as providing for an appeal by way of rehearing.[41]

An appeal against any other decision is to be decided on the evidence at first instance, subject to the power to admit fresh or new evidence or to make an order the matter be heard afresh. This has been held to involve an appeal by way of rehearing.[42] On hearing the appeal, the powers of the CCQ are the same as those of the District Court hearing an appeal under the *Domestic and Family Violence Protection Act*.

District Court Practice Direction 7 of 2020

Before moving to the next section of this paper, it is necessary to draw attention to District Court Practice Direction 7 of 2020 ("the PD"). The PD applies to all appeals to the District Court, including appeals subject to leave. It sets out comprehensively the requirements for material and outlines and establishes a clear timetable. Any time you are contemplating an appeal to the District Court you should have a copy of the PD handy. The PD is subject to any directions that might be given by a judge in relation to a particular appeal. Some important parts of the PD should be noted.

The PD requires parties to an appeal to file outlines of argument. This is defined as being a "written statement of the issues and arguments". It is to incorporate a "concise logical summary of the submissions" and to set out any factual conclusions that are challenged in the appeal

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39 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616; *Engelbrecht v Director of Public Prosecutions (NSW)* [2016] NSWCA 290, [61].

40 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, 621.

41 For example, *Director of Child Protection Litigation v PAV & HOK (No. 2)* [2016] QChC 14 and *Director of Child Protection Litigation v SP & ZC* [2018] QChC 19. In the latter case Smith DCJA cited *SB v Department of Communities & Ors* [2014] QChC 7 in support of a statement that an appeal pursuant to section 120(1) is by way of rehearing. *SB* was an appeal against a long-term guardianship order (pursuant to section 120(2)) and not against a temporary order, so was not perfectly analogous. In *Jennifer Glover, Separate Representative v Director, Child Protection Litigation & Ors* [2016] QChC 16, Bowskill QC DCJ referred to the judgment of Keane JA in *FY v Department of Child Safety* [2009] QCA 67 as rejecting an argument that an appeal "under s 117" was a hearing *de novo*. That is what his Honour wrote, but there was no argument in *FY* to the effect that the terms of section 120(1) describe a different kind of appeal to subsections (2) and (3). However, the orthodox view is that an appeal governed by section 120(1) is by way of rehearing on the evidence at first instance.

42 *Jennifer Glover, Separate Representative v Director, Child Protection Litigation & Ors* [2016] QChC 16, [73]-[76].

with a "concise logical statement" of why the factual conclusion should be overturned. The appellant's outline must be filed and served on the respondent within 28 days of the filing of the notice of appeal. Within 28 days of service the respondent's outline is to be filed and served. The parties are expected to ensure that the transcript and other relevant documents from the hearing at first instance are produced to the District Court. An appeal will not be listed until a certificate of readiness, containing an estimate of the duration of the appeal, is filed. Such certificates are to be filed within 14 days of the respondent's outline or 42 days of the appellant's if there is no outline filed for the respondent.

There are, of course, some differences in how the District Court lists appeals in different regional registries. If you are bringing an appeal outside of the locality where you normally practice it is a good idea to speak to the Registrar so any regional variations can be considered. Compliance with the PD is mandatory, subject to it being displaced by some statutory provision or direction. I am sure that if you asked any number of District Court judges what the most important part of the PD is, they would each say it was the requirement for concise and logical written submissions. As I will later discuss few things are more likely to sink your appeal than lengthy, discursive, or incoherent written submissions attacking a decision on a panoply of grounds.

Finally, it should be noted that this practice direction is for the District Court. It does not appear to have been replicated in the CCQ to apply to child protection appeals, but it should be assumed that judges conducting such appeals would expect the template established by the PD to be followed.

The nature of the appeal

Each of the appeals identified above creates an appeal by way of rehearing. What does this mean? Appeals can be divided into three categories: appeals in *stricto sensu* (in the strict sense), hearings *de novo*, and appeals by way of rehearing. A court deciding an appeal in the strict sense decides if "the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given". In an appeal *de novo* "the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error". There the court is exercising original jurisdiction.[43] In the third category, appeals by rehearing

> the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error and, in some cases, has power to receive additional evidence decision was given.[44]

The ordinary characteristics of an appeal by way of rehearing are well established. It is necessary for the appeal court to make up its own mind on the basis of the findings of primary fact made at the previous hearing, unless those findings are set aside in accordance with the established principles.[45] It remains necessary for the appellant to show that the decision under appeal was affected by error.[46] Where the appeal is from the exercise of discretion, it must appear that there was an error of principle in the exercise of the discretion, or that the discretion

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43 *Harris v Caladine* (1991) 172 CLR 84 at 96 per Mason CJ and Deane J, 124 per Dawson J and 164 per McHugh J.

44 *Engelbrecht v Director of Public Prosecutions (NSW)* [2016] NSWCA 290.

45 *Warren v Coombes* (1979) 142 CLR 531 at 551; *Fox v Percy* (2003) 214 CLR 118 at [22] – [29].

46 *Allesch v Maunz* (2000) 203 CLR 172 at 180-1.

miscarried, or that the result was unreasonable or plainly unjust.[47] In *Robinson Helicopter Company Inc. v McDermott*[48] the High Court said:

> A court of appeal conducting an appeal by way of rehearing is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings.[49]

Fundamentally, the court on appeal is concerned with whether the decision at first instance was affected by error. This means more than demonstrating some error of fact or principle in the proceeding. It must be shown that the error affected the decision. This is particularly important where there is a complaint that a sentence was excessive. If one looks closely enough at almost any sentencing remarks it would be possible to identify some small fact that has been misstated but which had no effect on the sentence that was imposed. Error itself is irrelevant unless it affected the outcome. If the complaint about sentence is not one of specific error, but that the discretion miscarried to produce a sentence that was excessive, it is necessary to show that the sentence imposed "was beyond the permissible range, not that it was severe, or that a lesser punishment would have been appropriate, or even more appropriate than the one in fact imposed."[50]

Each of the four mechanisms of appeal that have been discussed make allowance for evidence to be admitted in the appeal even if it was not before the Magistrate at first instance. For appeals under the *Justices Act* the power is express and found in section 223. For the *Magistrates Court Act* the power is derived from rule 766 of the UCPR which, as discussed, is picked up by section 45 of that Act. The *Domestic and Family Violence Protection Act* and *Child Protection Act* each contain identical provisions permitting the District Court to "order that the appeal be heard afresh, in whole or part".[51] These provisions have been interpreted as conferring upon the District Court the power to admit evidence that was not before the Magistrate if there are "good reasons" to do so.[52] In at least one appeal under the *Domestic and Family Violence Protection Act* it has been said that

> whether there are good reasons is informed by the common law principles that may apply in a particular appeal, for example, those concerning the reception of fresh or new evidence.[53]

But in respect of an appeal under the *Child Protection Act* it has been said that when deciding whether to admit evidence that was not before the Magistrate

> it may not be appropriate to confine that to the common law rules governing the admission of fresh evidence on an appeal; the exercise of the discretion is appropriately governed by the subject matter, scope and purpose of the provision, within its broader context in the Act under which it is conferred. This would include the need to apply the principle as to the paramountcy

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47 *House v R* (1936) 55 CLR 499 at 504-5.

48 (2016) 90 ALJR 679, 686 – 687; [2016] HCA 22 [43] (footnote references omitted).

49 See also *McDonald v Queensland Police Service* [2017] QCA 255; [2018] 2 Qd R 612.

50 *R v Jackson* [2011] QCA 103, [25].

51 Section 186(2) of the *Domestic and Family Violence Protection Act* and section 120(3) of the *Child Protection Act*.

52 See *HBY v WBI & Anor* [2020] QDC 81, [18]; *Jennifer Glover, Separate Representative v Director, Child Protection Litigation & Ors* [2016] QChC 16, [76], [78]-[79].

53 *HBY v WBI & Anor* [2020] QDC 81, [18].

> of the safety, wellbeing and best interests of the child, in considering the exercise of the discretion.[54]

It may be that any apparent tension between these two passages is explicable by a difference in emphasis. The common law principles that inform the admission of "new" or "fresh" evidence were conveniently summarised by McMurdo P in *R v Spina* [2012] QCA 179 at [32]

> Australian appellate courts have long recognised an important distinction between admitting fresh evidence and admitting new evidence. Fresh evidence is evidence which either did not exist at the time of the trial or which could not then with reasonable diligence have been discovered. New or further evidence is evidence on which a party seeks to rely in an appeal which was available at trial or could with reasonable diligence then have been discovered. The distinction between fresh and new evidence is sometimes blurred but it should remain significant for two reasons. The first is because the community has an interest in ensuring that defendants charged with criminal offences ordinarily have only one trial at which they have an opportunity to put forward all the available evidence upon which they rely. It is not in the public interest for defendants to hold back evidence so that, if they are unsuccessful at trial, they can use the withheld evidence to appeal and obtain a new trial. The second reason is that, where there is admissible fresh evidence, it is equally against the public interest for a conviction to stand as the conviction would not be based on all the available relevant evidence. (Footnotes omitted.)

The admission of such evidence on appeal is exceptional. So much is made clear in the judgment of Phillipides JA (with whom Gotterson JA and Daubney J agreed) in *R v Hodges* [2018] QCA 92; [2019] 1 Qd R 172 at [21]

> In *Ratten v The Queen* and *Lawless v The Queen*, the High Court authoritatively stated the principles to be applied in dealing with an appeal against conviction on the ground that a miscarriage of justice occurred based on further evidence not given at trial. They are:
>
> 1. Firstly, when the *evidence not called at trial* (whether or not it be fresh evidence in the strict sense of that expression), taken in conjunction with other evidence tendered at trial, *shows the accused to be innocent or when it raises a reasonable doubt as to his guilt, the conviction must be set aside outright*.
>
> 2. Secondly, in the case of *fresh evidence only* (being evidence of which the accused was unaware at the time of trial and which could not have been discovered with reasonable diligence), although innocence or reasonable doubt of guilt is not demonstrated, if it "*shows that it is likely that a verdict of not guilty would have been returned* by the jury had it had the benefit of the fresh evidence, the *court should set aside the conviction and order a new trial*".
>
> 3. In both types of cases, the appropriate approach is to consider the proposed evidence in conjunction with the evidence tendered at the trial and whether it reveals a miscarriage of justice because it would be unsound or unsatisfactory to allow the conviction to stand. The miscarriage of justice arises in the first type of case because the appellant *should* be acquitted. In the second type of case (which can only arise where the evidence sought to be adduced is fresh evidence) because "there is a *likelihood that the accused would be acquitted* on a re-trial based on the fresh evidence".
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> 4. Accordingly, in the case of proposed evidence that is *new evidence* (being such as was available or could with reasonable diligence have become available) which "*reveals no more than a likelihood that the jury would have returned a verdict of not guilty*" and thus "falls short of establishing that the accused should not have been convicted", *it is not*

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[54] *Jennifer Glover, Separate Representative v Director, Child Protection Litigation & Ors* [2016] QChC 16, [80].

> *permissible for an appellate court to set aside a conviction*. There is no miscarriage of justice in an unimpeachable verdict of guilty being allowed to stand where the new evidence "leads to the conclusion that the jury could reasonably convict, though it appears to the appellate court that it would be unlikely to do so", the failure to adduce that evidence lying with the accused.
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> (Emphasis in the original, but footnotes omitted.)

Whether or not these principles are the only consideration in deciding whether to admit evidence on an appeal, they are at least relevant, and will need to be borne in mind when contemplating an appeal. They also serve to emphasise the importance of presenting your best case at first instance and placing all relevant material before the Magistrate.

With these things in mind, the following observations may be made. First, the starting point for your appeal is not that you disagree with the decision of the Magistrate. That is just part of litigation and it might be expected that about half of all litigants go away from court disappointed. Merely feeling aggrieved by a decision does not mean you have a basis for appeal. Consideration of an appeal must commence with the identification of error. Secondly, you have 28 days within which to commence an appeal. That means that you should take at least some time to reflect before filing a notice of appeal. This is especially important if the hearing at first instance was especially fraught or argumentative. Decisions made in haste are often rued later. Thirdly, if the decision has been made to appeal be sure to double-check all the relevant statutory provisions and practice directions. Are you using the right form? Are you filing in the correct registry? Have you included all necessary material? Who must be served and when? What is the timetable once the appeal has commenced?

These questions and m0re will be integral to your presentation of the appeal.

Appellate advocacy and the importance of written submissions

Appellate advocacy is unlike advocacy at first instance. At the original hearing of a matter, especially where that hearing involved oral evidence and the cross-examination of witnesses, the adversarial system lives up to its name. Litigation at first instance is usually an argument between two sides, with each side seeking to demonstrate the flaws in their opponent's position. The Hon Justice Pat Keane AC said of the adversarial system

> Apart from the profession of arms, no other professional has to deal with a live opponent determined to confound one's best laid plans. Lord Atkin, that great Queenslander, once said of the Bar that it is the only profession in which one goes to work each morning knowing that your workday will involve a highly intelligent individual doing his best to prove to another highly intelligent individual that you are a congenital idiot.[55]

An appeal can be quite different. On appeal a good argument presented well may have little concern for the points raised by the other side. Often on appeal the argument is between you and the bench, rather than you and your opponent. I mention this because it should shape how you approach the presentation of the appeal. Unlike the hearing at first instance, you are much less concerned with the intricacies of your client's position and the arguments presented to the Magistrate. On appeal you are primarily seeking to persuade a District Court judge that some error was made in the proceeding below and that it affected the decision. As I hope I have made clear, an appeal is not simply a second opportunity for a review of the merits of your case. It is

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[55] The Hon Justice Pat Keane AC, "Toast to the New Silks", Australian Bar Association Dinner, High Court of Australia, Canberra, 3 February 2014.

only after error has been established that it might be appropriate to descend to the merits to argue why you should have orders that favour your client. In an appeal your primary focus must be on the identification and establishment of error that could permit the appellate court to make orders in your favour.

For this part of the paper, I wish to make some observations about how you can best present your appeal; that is, how to make it more appealing. The emphasis in appeals has well and truly shifted to the written submission. There is still scope for effective oral advocacy, but so much of the work in an appeal is done before rising to your feet to speak. For this reason, what I am about to say is focussed on the written material, but good advocacy is good advocacy, and the fundamentals are the same whether one is discussing written or oral advocacy. You must know your brief and you must know the law. The Hon Murray Gleeson AC QC, former Chief Justice of the High Court and regarded as the best advocate of his generation, observed

> To be a good advocate it is necessary to be a good lawyer. Not all good lawyers are good advocates, but an advocate who hasn't taken the trouble to master the principles of law relevant to the contest is like an athlete who can develop a dazzling turn of speed in the course of a race but hasn't taken the trouble to find out where the finishing line is located.
>
> Sir Owen Dixon once pointed out that it is the fundamental ethical obligation of every barrister to have a sound working knowledge of the law. This is both a professional duty and an essential prerequisite of success as an advocate.[56]

Beyond these fundamentals there is advice that I hope will assist in the preparation and presentation of appeals. The headings I have chosen reflect questions you may be asked if your presentation of the appeal falls short of the ideal.

Is that your best point?

Whenever you can, begin at the beginning. The Hon Michael McHugh AO QC wrote in 2012 of the importance of properly identifying your best point (or points) in the notice of appeal. This is the document that, unless amended, frames the whole of the appeal proceeding. McHugh said

> The cardinal rule for drafting a notice of appeal is to be selective. If the appeal notice contains too many grounds, the best points are likely to be hidden in a thicket of weak points. The notice of appeal should identify only those errors of ultimate fact or law which affected the result, and the fewer the better.[57]

The views of McHugh echoed those of Sir Harry Gibbs a quarter-century earlier when he wrote

> Fundamental to success in appellate advocacy is the ability to perceive the point or points on which the resolution of the appeal will depend and cut a path directly to those points, without meandering to explore side issues, however interesting, or worse still, entangling the court in a thicket of irrelevancies of fact or law. The skill lies in discerning what are the critical issues and in distinguishing between what is and what is not necessary to be presented to enable the argument directed to those issues to be properly understood.[58]

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56 The Hon Murray Gleeson AC QC, "Advocacy", Paper to the NSW Bar Association's Bar Practice Course, November 2001.

57 The Hon Michael McHugh AO QC, "The Essence of Appellate Advocacy", Opening address to the 2012 Appellate Advocacy Course.

58 (1986) 60 ALJ 496.

You will find judicial complaint about multiple grounds (or sub-grounds) of appeal a common theme. The refrain is usually that if you fail on your best point you are unlikely to win on your worse. The fear of the advocate lies in not taking a point that the appellate court *might* find persuasive, even though the lawyer thinks it is not. While I guess such a turn of events is possible, it is in my experience unlikely. Rather, the "scattergun" approach to the grounds of appeal will make your good points seem weaker. As Ipp JA has written

> An extravagantly excessive number of causes of action, or grounds of appeal, or particulars of negligence, are often a sign of serious problems with the health of the case being advanced. At the very least, they demonstrate a lack of appropriate consideration in formulating the issues and are obstacles in the path of justice. Apart from causing unnecessary delay and costs, the scattergun approach obscures the true issues, camouflages the pleader's best point, and unnecessarily complicates the task of the judge.[59]

I have placed such emphasis on this point because judges see the fault repeated time and again. The notice of appeal is usually the first thing an appellate judge will read. It is not conducive to the success of your appeal for a judge to see 18 grounds, each expressed in florid language and written to demonstrate not just that the decision at first instance was wrong, but that the decision maker was an irredeemable fool, the likes of which should never have graduated kindergarten, let alone be appointed to the bench. The negative effect on the prospects of the appeal is not the product of some conscious bias on the part of the appellate judge, rather "[i]t is because the cogency and persuasiveness of submissions depends upon the ability of the Judge to follow them and to isolate the critical legal and factual issues upon which the case is likely to turn."[60]

So, to avoid being asked, "Is that your best point?" in a pointed fashion, concentrate your mind on identifying your best argument, and have the courage to abandon those you assess as being of less merit. Remember that your position as an advocate is to be no mere mouthpiece for your client. You are to exercise independent judgment and to faithfully carry out your primary duty to the court and the administration of justice.[61] Inevitably that must involve discarding your weak points in favour of the better.

Where do I find that?

Written submissions are your opportunity to identify for the judge on appeal exactly where the error in the decision is to be found. A judge should never have to ask you, "Where do I find that in the material?" The submissions should contain the necessary references to identify where in the record the matter being discussed may be found. If you cannot locate the part of the record, be it in the reasons or the evidence, which succinctly encapsulates the error you allege affected the decision, you may find it difficult to persuade an appellate court of the strength of your argument. It is not enough to point to a collection of statements of the Magistrate with which you (or your client) disagree. You must be able to point to why it was wrong and how it affected the decision.

An allied aspect of this is the need for your written materials to be structured and logical. A reader unfamiliar with the proceeding at first instance must be able to pick up your outline and

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59 *Ohlstein v E & T Lloyd* [2006] NSWCA 226; (2006) Aust Torts Reports 81-866.

60 Sackville J, *Seven Network Ltd v News Ltd* [2007] FCA 1062, [34].

61 *Australian Solicitors Conduct Rules 2012*, rule 3; *Barristers Conduct Rules*, rule 25.

have at least a general understanding of what happened, why it went wrong, and what you say should be done about it. Employ headings that are related to your grounds of appeal. State your idea or proposition at the beginning of a paragraph before going on to explain why it should be accepted.

Do not fall into the amateur debater's trap of taking words out of context.[62] Isolating some words or a sentence in a manner that suggests error will get you nowhere when your opponent sets them in their full context. Indeed, it may undermine your credibility before the appellate court in a way that harms your prospects of success.

Be very careful before departing from your outline of submissions or the notice of appeal in a manner that introduces a new argument. If you wish to raise a new ground, you should apply to amend the notice of appeal. If you attempt to raise a point not argued below, you may face opposition, especially if the point may have been answered had the other side been given notice at first instance. Perhaps the best argument in favour of sticking to your outline is found in a speech by the Hon Justice Pat Keane AC in 2013

> Today, written outlines are essential to the ability of the court to cope with its workload. In this environment, an advocate who attempts to articulate an argument for the first time in oral submissions should expect an unpleasant reaction from the court. Coherence, which is obviously desirable, will be hard to achieve amidst all the shouting.[63]

This isn't an argument. It's just contradiction![64]

Remember that while lawyers constantly talk of "argument", we mean that in the sense of a "connected series of statements or reasons intended to establish a position", rather than "an exchange of diverging or opposite views, typically a heated or angry one". An argument should not be argumentative. You do nothing to advance your case by making submissions that are no more than bald assertions or which are peppered by epithets. To state a proposition is "nonsense", "without merit", or "incoherent" without first explaining why that is so is meaningless. If you are unable to succinctly explain why the proposition lacks merit, you should not make the assertion that it is. And if you can succinctly explain the absence of merit you have done your job and there is no need for the assertion.

As for peppering your written submission with epithets, intensifiers, adjectives, and adjectival phrases, that is to be avoided. An argument is not usually improved by florid writing. For example, if your position is that a matter raised by your opponent is wrong, state that and demonstrate why. Nothing is added by describing the point as "plainly" wrong. If the injustice done to your client at first instance is so palpable, let the appellate court come to that realisation for itself. The Hon Margaret McMurdo AC has said

> Good advocacy involves objectively and dispassionately arguing the facts and the law in a way that allows the appellate judges to independently become indignant about the injustice done to your client.[65]

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62 *Grills v Leighton Contractors Pty Ltd* [2015] NSWCA 72, [154].

63 The Hon Justice Pat Keane AC, "A View from the Bench: Perspectives on Advocacy", Keynote address to the Queensland State Conference of the Australian Lawyers Alliance, 15 February 2013.

64 With apologies to Monty Python.

65 The Hon Margaret McMurdo AC, "Making Your Appeals More Appealing", Bar Association of Queensland Annual Conference, 7 March 2015.

In my experience, courts are not attracted to exaggeration, overstatement, or hyperbole. Justice Keane, then Chief Justice of the Federal Court of Australia, in a paper on advocacy in 2013 mentioned "the discipline imposed uniquely on lawyers by the pressure of argument in open court where error and hyperbole are quickly corrected".[66] Do not risk distracting from the real merit of your argument by inviting criticism of the way it has been expressed.

It goes without saying that *argumentum ad hominem* has no place in advocacy. Occasionally, the written material filed in an appeal is so focussed on pointing out the personal failings of the other party or the Magistrate that the point of the appeal is missed. Appellate courts are unlikely to be impressed by base tactics of this sort and may wonder if the attack masks an absence of merit in your case.

Of course, the rules of good writing apply to legal submissions as much as to any other writing. Be clear and concise. Write in the active voice. Write in short sentences. Avoid long sentences with interminable exceptions and qualifications. Avoid what McHugh called "legal barbarisms", such as "thereof", "aforesaid" and "hereinbefore". Have access to a good dictionary and style guide like *Fowler's Dictionary of Modern English Usage* or *The Elements of Style*. Read about the notion of "issue framing" as discussed by Professor Bryan Garner.[67] You should wherever possible allow yourself the time after concluding a draft of written submissions to leave it for a day or two before revision. Legal writing is a lot like any artwork: it is never finished, just abandoned.[68] If you can let what you have written settle before revision, you will often find greater clarity and concision may be achieved. Writing for a deadline is not conducive to brevity. Have the courage as well to delete those parts of your writing that are not effective. Be prepared to "kill you darlings". Do not write for the sake of writing. Page limits are just that, not goals to be achieved. In March 2007 Chief Justice John G. Roberts Jr of the Supreme Court of the United States was interviewed by Professor Garner for the purpose of producing educational resources about legal writing.[69] Garner asked Roberts if he enjoyed reading the briefs filed in appeals to the Supreme Court. Roberts replied

> If they're good. … When the case is new, you want to learn what it's about, and there's nothing better than a well-written brief, and it kind of carries you on. You want to learn more. You want to see what the other side has to say.

But he went on to say

> I have yet to put down a brief and say, "I wish that had been longer." So while I enjoy it, there isn't a judge alive who won't say the same thing. Almost every brief I've read could be shorter.

As H L Mencken observed, "So many people write because they lack the character not to."

Have you anything to add?

The practice of law, like any professional endeavour, is sprinkled with vernacular and code. The question, politely posed from the bench, "Have you anything to add?" is often an invitation to finish what you are saying and to sit down. It emphasises the desire for brevity. Brevity is a

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66 The Hon Justice Pat Keane AC, "A View from the Bench: Perspectives on Advocacy", Keynote address to the Queensland State Conference of the Australian Lawyers Alliance, 15 February 2013.

67 A great starting point in exploring the writings of Professor Garner is the paper by the Hon Justice Peter Applegarth, 'Issue Framing in Oral and Written Submissions', presentation at the QLS Modern Advocate Lecture Series, Supreme Court of Queensland, [2017] QldJSchol 32.

68 A statement attributed to a range of persons as diverse as Leonardo da Vinci and George Lucas. Its first undisputed appearance in print was in 1933 in an essay by Paul Valéry in The New French Review about his poem, "Le Cimetière marin".

69 *The Scribes Journal of Legal Writing*, Vol 13, 2010.

desirable aim, but it should not come at the expense of presenting your case on appeal fully and with vigour. In the preparation and presentation of your appeal always be on the lookout for a point you have missed. If necessary, seek the permission of your opponent, and leave of the court, to present supplementary written submissions. But keep in mind that unsolicited written submissions should not be sent to the court without leave.

Finally, after you have prepared your written materials, have one last look. Are they readable? Have you selected a font and formatting that is pleasing to the eye? Where you have cut and paste from another document have you taken the time to match styles? These are small points, but if a judge is presented with two documents – one attractive and easy to read and the other a rat's nest of clashing typefaces – it is obvious which she is going to pick up first.

A final word

I will conclude with some words of Robert H Jackson. Jackson was at various times the United States Solicitor General, Attorney-General, Chief United States Prosecutor at the Nuremberg war crime tribunal and finally an Associate Justice of Supreme Court of the United States. He had much experience as an appellate advocate. Jackson said that each time he appeared before the Supreme Court he had three arguments:

> First came the one that I planned - as I thought, logical, coherent, complete. Second was the one I actually presented - interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.

In the end, there is no substitute for experience. You may expect in your career to be involved in appeals of one kind or another. You will win some and you will lose some. Some losses will be bruising. But each experience will be an opportunity to learn and improve. If you take those opportunities, you know that the next time you can make your appeal that little bit more appealing.

Select Bibliography

M Beazley, "Appellate Advocacy", NSW Bar Association Sydney CPD Conference, 27 March 2015.

H Fraser, "Appellate Advocacy Revisited", Continuing Professional Development Seminar, 26 April 2012.

J Henry, D Morzone, G Lynham, "Appellate Advocacy in Crime", Paper presented to the 2019 NQLA Conference Townsville.

M Kirby, "Ten Rules of Appellate Advocacy" (1995) 69 *Australian Law Journal* 964.

M McHugh, "The Essence of Appellate Advocacy", Opening address to the 2012 Appellate Advocacy Course.

M McMurdo, "Making Your Appeals More Appealing", Bar Association of Queensland Annual Conference, 7 March 2015.