Bar News Interviews Sir Garfield Barwick G.C.M.G.

Tom Molomby and Paul Donohoe interview Sir Garfield Barwick about his memories of his life at the Bar and advocacy.

SIR GARFIELD: Could I make some prefatory remarks. I have agreed to answer your questions, but I realise only too well that I am out of date. It is now twenty-nine years since I wore my gown as a barrister. That was in 1960 and I then appeared as Attorney-General of the Commonwealth.

Much change has since taken place. The nature of the disputes which are litigated, to some extent the rules of evidence, and the personnel of the tribunals have all changed. So what I answer you may need much adjustment to fit the times in which the advocate now works. But allowing for all this, it may be that some fundamentals remain and of these hopefully some now in practice may profit.

MOLOMBY: *Could we begin by talking about your view of the advocate and the skills and qualities required to be a good advocate? If one were able to take advantage of the benefits of genetic engineering and program a person to be an advocate what would be the qualities that one would be looking for?*

SIR GARFIELD: You'd make an awful mess if you tried to do that because you must have some native wit to work on. An advocate must have very quick cerebration. He must have acute appreciation of the relevance of what he hears or sees. And of course he has to have a very quick recall of whatever he has heard or read. They are qualities which may be improved if you've got the basis for them but you cannot, I think, grow them or engineer them.

How much then do you think those qualities can be improved by attention?

They can be. The would-be advocate can improve his powers of concentration. He can get himself into the situation where the world disappears and he has just something in the focus of his mind or sight. I'm sure you can improve your powers of concentration.

Is that simply an effort of will or is there some sort of system or technique that goes to assist that?

Yes, it is an exercise of will. I don't go along with any sort of gimmick arrangements under which you can contrive it. I think you can improve your concentration by concentrating and learning to concentrate in the midst of music or something that's making a noise or if it's somebody talking you can get yourself to the point of view I think by exercising what powers of concentration you have You can isolate yourself or insulate yourself and thus I think you can improve your capacity in that respect.

There are some humans I think that have little or no capacity to concentrate to any worthwhile extent. Things that happen around such people cause them to deflect their attention.

From the point of view of the beginner at the bar, what would you say are the most important things for a beginner to get a grasp of right from the start?

I think if I were beginning again I would want to go and sit to begin with in a courtroom and listen and observe. I assume that I have learned my law - I mean that I have learned my law. I have learned the principles of it and I've got it clear in my mind and I understand it. That is a prerequisite pre-eminently of the advocate, he has to feel himself quite secure in his own knowledge of the relevant law, whatever the nature of the case that he has to handle.

If he hasn't got it from recollection, he must acquire it by study, as it were, ad hoc for the purpose of the case. So I'd go and sit in the court and listen and watch, particularly during a jury trial.

What would you be attempting to gain from that watching?

I'd watch how my contemporaries or those who are older than myself handle witnesses and build up facts, how they deal with the judge, their approach to the judge, and I'd watch the judge's reaction to what they did and said.

Did you in fact have the opportunity to do that sort of thing yourself in your own career?

Yes, I did. I did, but not as much perhaps as I'm recommending to others because I began just as the depression overturned things and I had to use every spare moment to earn a few shillings which was not so easy in those particular times, but whenever I did have spare moments I didn't spend them playing dominos. I'd go over and watch and listen, choosing a case I'd know from rumour or the lists, a case from which I'd profit by observing.

Does that sort of experience in your view have a value to people who have progressed beyond the beginning stage?

Yes, I do. We used to have marked in the Banco Court in Sydney a group of seats that were "Waiting Barristers". When you go to the old Banco Court there is, or at any rate used to be, an elevated set of seats immediately opposite the judge.

This is the court in St. James Road?

Yes, the Banco Court, it's a lovely little court to work in. The jury box is a bit too high. The barristers would sit in those seats and listen; I've sat there listening both to trial courts and to appellate work.

The prime quality you pointed to when I asked you about the essential qualities of an advocate was really what I think I could summarise as quick wittedness.

Yes, not in the sense of the confidence man, he's got a quick wit of a different kind, but the wit which can recognise the relevance of what you've just heard, how it relates to the task you have in hand, its relevance to the issue to be determined in the trial or the appeal.

There are a lot of other factors that come into the task of course though, aren't there, a lot of things one has to work on and apply oneself to?

Yes, that's right. The advocate has got to be a hard worker. I dislike the word "workaholic". I know people who are workaholics and don't produce anything worthwhile. You've got to be prepared to devote yourself to the particular task you've got in hand, this case. If you want to put it on sort of a moral sense you've got an obligation to the person whose money you're taking and you've got to give him 100 percent service.

That means you've got nothing else to do with your mind but to do the client's case and to work at it in the sense that it doesn't matter whether it takes you until midnight or later to master its facts and the relevant law.

When you received a brief in your early days at the bar did you have any sort of system of approach that you would adopt to preparing the case? Were there certain things, for example, that you did in a particular order?

No, I don't think I ever had a systematic program of that kind. I tried to get to the bottom of the facts of the case. The first thing to know is what facts you've got available, what facts you expect to prove. Then you next go through how you are going to prove them. But you must see the relevance of those facts to the legal cause of action that you are asked to present and succeed.

That's why I emphasised a while ago the idea of relevance, you've got to pick up the relevant facts and material relevant to a cause of action, the proposition which is the backbone of the case.

Because very often your opponent is going to be taking a rather different view of relevance or a different view of the correct way of looking at those same facts. What sort of attention did you give to the way the other side might be going to approach it? Was that something you would speculate about?

Oh, yes, I am conscious of saying to a solicitor who is telling, or his witnesses tell me, what his clients are going to say, and I almost invariably say: "What is the other chap going to say about this, what is the other point of view?"

That is the other point of view on the facts?

Of the facts.

In terms of running the case in court and what the other counsel might do with it?

Yes, you look to see how the case could be put differently from a legal aspect, a legal point of view, using some other legal principle than the one that you are favouring in your approach.

Would your assessment of that vary according to who it was on the other side?

No, I have known men who say - I have had a solicitor say to me: "Don't worry about that, so and so would never think of that." I have never done that. I assume that my opponent is as bright as myself or brighter. That's the only way to approach it, not to assume that he is a fool or that he will miss anything.

When we had a previous discussion you mentioned advices on evidence and that's clearly something you placed some importance on.

I mentioned a moment or two ago that I would consider how I was going to prove the facts that were necessary to make good the cause of action. I would, even if I wasn't briefed to write an advice on evidence. I would myself go through and see how each material fact would be proved, whether I wanted one witness to do it or two witnesses to do it, whether I needed to have corroborative evidence. I'd work out exactly how the case would be handled in matching the facts and the cause of action.

Very often if I did that on a brief to advise on evidence I could subsequently conduct the case looking at my own advice on evidence because in preparing the advice on evidence I would have gone through the whole question of presentation.

There's a certain amount of judgment that comes into that sort of issue, isn't there?

It does into everything, yes, quite right. That's something that you can't exactly genetically engineer either. You can improve your judgment by learning by your mistakes and not make the same mistake twice but you must have some native capacity for judgment.

An obvious issue that comes to mind relevant to what you've just said is, for example, how many witnesses one might choose to lead to prove a particular point.

Yes, it depends what the point is. By and large you would act on the footing that the fewer witnesses you called to prove a fact the better.

What view would you take of it if you knew it was a fact strenuously in issue, and you had, say, five potential witnesses to prove it and you suspected the other side might have as many who would be saying the opposite? Would you run all your witnesses?

Not necessarily.

Does that depend on - -

There is a Latin phrase that says you go by their weight, not their number.

But how do you determine the weight?

That's your judgment, that's right, that's your judgment.

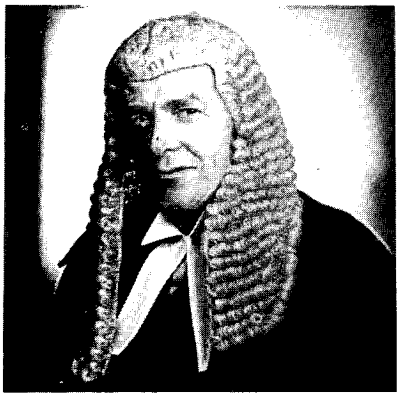
What's the process that one goes through or that you used to go through?

I remember a case where I had a very knowledgeable solicitor brief me and we talked over the identity of the witnesses he would call and the order in which we'd call them because we had one witness whom we thought would be a weak witness. We said we'd call him towards the end of the list and if need be dispense with him. After the case had been going some time I remember feeling that it would be right to call this fellow now and I called him. My instructing solicitor got up behind me and said: "I say, Skipper, why change the batting order?" I said: "I think it will be alright, you leave it alone."

We finished the case at 4.00 o'clock and that witness turned up absolute trumps. The solicitor got up and said: "Blow me down, you send in Arthur Mailey to play out the light and he makes a century." That's right, that's personal judgment and you've got to feel sufficiently sure in your own judgment to do such things.

I imagine you'd had a conference with that witness on that occasion?

Yes, I'd seen the witnesses. I'd seen the witnesses but you misjudge witnesses very often, you know, when you see them in chambers . This chap I misjudged at first but he came good, he was marvellous. That's part of the preparation of the case, to decide which witnesses and when. There is significance in the temporal relationship of the calling of the evidence, not in every case but in some cases.



1941: Garfield Barwick K.C. after receiving silk.

Going back to the start of your own experience, do any particular things come to you as crucial learning experiences that you went through? You mentioned going and sitting in court, for example, which you had a limited opportunity to do, but thinking more of the actual practice of conducting cases were there moments when you thought: "That's something good I've learned there and I'll be sure to do that again" or when you saw somebody else do something and you thought: "That's one I'll do tomorrow"?

I'll give you an illustration about learning. I had a case in which the occurrence that mattered occured to the left of the witness who I was cross-examining and he was giving evidence as to what happened. I perceived that he had very poor sight, he had bevelled glasses on, those heavy glasses. As I watched him - because that's another cardinal rule, never to take your eyes off the witness, watch him all the time - and he, everytime - Bill Owen tried the case in Number Three Court - every time the judge spoke to him, the judge being on his left, he turned right around to look at the judge.

So I brightly thought: "Well, I'll make this point" and I said to the witness: "You've got very weak sight, sir" and he said: "I won't have you making fun of me, young man." I said "I'm not making fun of you", I said "It's a fact, isn't it, that you are weak sighted?" "Yes", he said, "You're right." I said: "Your left eye is so much weaker than your right." "I don't think so", he said.

If I had been a wise man I would have stopped there but I said to him: "As a matter of fact don't you need to bring your other eye to bear over the bridge of your nose to see to the left?" "No, I don't, young man." And then if I'd had any sense I'd have stopped. But I said: "But when the judge speaks to you I notice that you bring your right eye to bear on him." "Nothing of the kind, young man, I'm stone deaf in my left ear." I lost the whole of the effect. Well, I never did the like of that again.

There is an art of knowing when to stop, when you've got enough, enough to make your submission or get your proof. I know people who try to prove too much and ask too many questions to try to get too perfect an answer for their purposes because you all the time have got to be thinking: "How am I ultimately going to put this to the judge or jury as the case may be? Am I fitting what I am getting into that sort of ultimate operation?"

Perhaps we could look at another area and that's the running of appeals. Is there any major difference between preparing a case for trial and preparing a case for an appeal?

Yes, there is, though in one sense all men are jurymen whether they are judges or not. I remember sitting in the Privy Council as a member of the Board and a well known counsel of New South Wales was for the appellant - and he made what was a real jury speech and I thought to myself: "That's not much use up here." I went down to lunch with my companions, we used to have lunch in the House of Lords, and one of them said to me: "My word, that was a very good speech," and obviously he had been influenced by it.

I realised that Privy Councillors are jurymen too. In that sense there is no difference, in that sense. All humans have prejudices, sentiments and attitudes, some of which are common to mankind or they are fairly common and they are present in judges. There are occasions when you can take the judgment of some appellate judges and work backwards as he has done you can see that the reason that the case has resulted in the way it did has less to do with the expressed reasons than with some desire he had to reach its result.

And that desire was founded on human considerations, attitudinal considerations or ideological considerations. So that in one sense there is little difference. On the other hand if you are dealing with a point of law where there is less room for

sentiment in issues of fact there is always some room it seems to me - but if you are dealing with a question of law then there's all the world in difference.

You now have got in one sense to educate your man because as a rule you mustn't too readily assume that your judge knows the law , particularly the point that's material to you. Sometimes you can make that assumption if you know the judge very well, know his background, but otherwise you've got to educate him. But the price of doing so is a delicate one.

Lawyers don't like being educated so that you've got to be careful that you're not teaching your grandmother to suck eggs. The way in which you begin to educate has got to be done with a degree of subtlety and very often indirection.

What is the diplomatic way of embarking on that then?

Well, it differs very much with the man. There was one judge on the Supreme Court, who prided himself in being able to read quickly. I learned this from George Flannery, a very great advocate. George Flannery, if he wanted to educate that judge and read him a certain passage in a case he would not read him that passage. He would read a page or two beforehand and he'd read slowly and the judge would suddenly find the passage and the judge would say: "Oh, Mr. Flannery, you need this passage" and of course he had found it for himself. Vanity is not unknown amongst judges.

If Flannery had read the relevant passage directly to him there would possibly have been a certain ntipathy whereas if the judge found it for himself it became acceptable - I saw George do that, I've done that, read the wrong page sometimes. That is only illustrative of the infinite variety of reactions that you are likely to arouse or induce in the appellate judge.

If, for example, you knew that you were going to be confronted with a judge who was more likely to yield to the sentimental aspects of the case as you have described them, would that make a difference in the way you chose to present the case?

Yes, I'd have to leave room for him, yes.

When you say leave room for him, what does that mean?

I would say something about those elements which may attract his sentimental interest but which wouldn't offend his next door neighbour who was unsentimental. Remember when you've got two or three or five it's much more difficult to tailor your remarks to the individual judges' perpensities as you have conceived them.

Rather like your experience on the Privy Council where you reacted adversely to the speech and somebody else was impressed by it.

Oh yes, impressed by it.

So that's a rather delicate path to walk, isn't it?

Oh, it is. We used to have great difficulty when Starke was on the High Court because Starke was in my experiencewhat you might describe as all wool and a yard wide. He was a tough human being, very direct and hadn't much room for subtlety. He liked things to be very black and white.

To get him on your side too soon you might easily start losing one of the others so you had to - handling him was most difficult, most difficult because he'd barge in and want to have his say and to an extent monopolise your time. Yet you knew very well that there was somebody two doors away that was thinking quite differently. It was a very difficult court to work with at that time.

How did you handle that problem?

I don't know that I can give you the prescription. I had a bit of luck with him. Starke, I got on with ultimately to the point where I could tell him: "If you wait a while I will come to what you want to talk about." I wouldn't say it like that of course but in effect in more delicate language I'd tell him to pipe down while I talked to somebody else. He ultimately - we got on well enough for him to wait for me until I came and dealt with what was troubling him.

Presumably from experience he came to recognise that you were indeed going to come to his point.

Oh, yes, I wouldn't welch on him but he was very difficult to handle; but if you were able to make a point to him he'd understand it. He was a very good lawyer, but of the unsubtle kind. He didn't like undue refinements and subtleties.

How much difference could the composition of a bench make to the way you chose to present a case?

A great deal, a great deal, yes.

What sort of difference are we talking about really?

Differences where you'd lay your emphasis, differences into exactly your process of persuasion or education. You would try to say things that would appeal to the mind of a judge whom you thought would receive it in a particular form and not receive it otherwise. That is very difficult.

From what you are saying there would be some point in studying the form of a judge if you like.

Oh, yes. For a young man the High Court is a terrifying experience. I remember going up to get special leave to appeal - you sent me a copy of Larke Hoskins v. Icher . The Court was siting in Taylor Square. I went up to get special leave. Do you remember Flannery led me and we lost in the Full Court. I went up to get special leave, for a very small fee I may tell you, and

I got up in Court and put the point. I wasn't doing any good at all and I thought to myself: "There is something wrong." I went back to taws and started to work the thing up again.

Suddenly Isaacs said to me: "You didn't say that before." And of course I had to bow and said I had overlooked that. I had said it before but I bowed out. Shortly afterwards I got my leave. The old reporter - there used to be a reporter around the Equity Court and the High Court who had a limp, he had a short leg or something. He walked over to me as I walked out of the court and he said: "Weren't you lucky, young fellow, that you started again?" He had spotted what had happened, that I would not take "no" for an answer in one sense and to go back and start again. Isaacs had apparently missed it the way I'd said it the first time but we got special leave - Larke Hoskins v. Icher - but the thing never went on. I think it was settled or disappeared.

I presume you were involved in a lot of cases where you'd work something up and you were very much looking forward to a certain result and the case disappeared because it was settled.

That's a very bad thing for counsel to get wedded to a case that he really wants to get on for his own sake; if it's settled, that's the client's business and that's all about it. You can naturally feel disappointment that you hadn't a chance to try to resolve some rusty part of the law, but you should never allow that to influence you.

Did you ever find yourself influenced by your sympathy for the client or perhaps on occasions lack of sympathy for the client and sympathy for the other side?

No, I don't think so. I think that's another mistake that counsel wants to avoid, to get emotionally involved at all in a case. That's not always easy. I did have an occasion when I was angry about what I thought was an injustice. What happened was that I appeared before the Privy Council for no fee to put it right. I did that much as I thought the High Court had been most unjust.

Barwick - The Young Advocate

Was it put right?

Yes, it was put right.

What was the case?

It was Leeder v Ellis where there was no sum of money involved really. It was in my view a wicked decision.

Even if there was never a case you lost that you felt you should have won.

Oh, yes, plenty. It's the same way when you sit as a judge in a multiple court when you think that your dissenting view was the right one.

I was referring to your role as counsel, not judge, in that.

It's the same thing in some ways. You are disappointed that you've been convinced of your point of view but it's not been acceptable to others.

I was rather thinking of the other scenario which is winning the case, where you recognise yourself in the end that it wasn't a terribly meritorious case but for one reason or another you'd come out on top.

I was just the same as every other human. You very much like to succeed and the fact that you have succeeded unmeritoriously, if anything, would tend to enhance the feeling of success rather than the other way. I think so. If you get a good verdict, or a good acquittal in a case where you had some doubt as to guilt I think you feel you have succeeded in some way.

You certainly succeeded, but does it ever create a problem for counsel wondering about their own role in the light of objectives of truth and justice, if you like?

There is only one truth and that's the verdict. You see, it's a great error to try to sit in judgment on the verdict. There has been a fair trial and there's a verdict - and that's it. I think that's fundamental to the law. It's all right for the journalist to say: "It's not justice" but it must be. It's the verdict after a fair trial. But if you are asked about the merits of an appeal you can express your judgment on the propriety of the verdict.

I take it then you didn't ever feel inhibited by things like the rules of evidence and procedure in terms of what you could achieve in a case.

I never found them in the road, no. They were part of the tools one had to use.

I would imagine rather the opposite, they were mechanisms there to be taken advantage of if you were skilful enough to.

That's right, if you can that's so but by and large they work out fairly well. I think that the modern tendency to try to widen the material that comes before a tribunal, particularly a tribunal of

fact, is not good. The danger of admitting hearsay evidence is tremendous; you are attributing to the layman the capacity to handle hearsay evidence and I take leave to doubt the capacity of humans to be able to resist the influence of material placed before them.

There is a very recent judgment of the High Court on that.

I know. It should be remembered that these rules are the product of a great deal of wisdom over a long period of time and I don't readily accept the view that all my predecessors were fools. They had good reason for making the rule as a rule. Sometimes you might find the rule was determined by historical reasons which no longer obtain but then that may be different. But when they are dependent upon logical and moral considerations I think they ought to be respected.

We were speaking earlier of the difference it could make to the way you chose to present an appeal as to whether the bench was composed of one group of people or another. If you were embarking on an appeal and all precedent was very heavily against you, which must have occurred to you on some occasions, would that make a difference to the approach you would take?

Do you mean I am then going to try to upset the precedent, say it was wrong?

Yes. Is there an approach for making a court more kindly disposed to considering throwing over the existing view if that is the position you are trying to approach?

Yes, you would attempt a little bit of conditioning. For example, you would try to show either some absurdity to which the existing rule arrives in practice or in fact or in supposed fact or you may take it more directly on and say: "This, while it's here, it has evolved through a series of misunderstandings" - and I'd have to go through them and point them out. And you prepare them to be patient with you.

This is the technique of going back through the historical development of a principle.

That's right.

And showing that if what had originally been said had been viewed a rather different way at different times it could have evolved in another direction.

I suppose an instance that comes to my mind is that the Privy Council, seven of them, decided that a drunk man could have a criminal intent. The High Court decided that he couldn't and the matter turned very largely on the way in which one of the expressions was read in one of the cases. That had to be opened up. I don't remember who argued the case before us but that's a case where if you had that to argue you'd have to go and have a close look at the root of the whole thing and see that it had been misunderstood, that the emphasis had been misplaced, you see.

Are there other techniques for making the bench more prepared to consider departing from established precedent or what they might choose to regard as established precedent?

The first thing you must have is complete frankness. You tell them what you are going to do, and be frank that you're going to ask them to overrule it, depart from it, and you're going to give them reasons why they should, not that they're going to remake the law but they are going to expose the fault that's already been made. Do you follow what I mean?

Yes, I do, yes. Do you recall any cases where you went in knowing that you were going to have to ask them to overthrow the existing wisdom and establish something new and how you tried to chart the way through?

The last case I appeared in was in the Privy Council in the liquor licence case. I appeared as Attorney General of the Commonwealth as an intervenor. I was to argue that Section 74, the inter se section in the Constitution was available in the case of a challenge based on an exclusive power. Sir Owen Dixon had written an elaborate judgment to say it wasn't and he'd said it earlier in the ANA case number two. I thought it was in the nature of a howler to say that. I had to not say it was a schoolboy howler because Dixon's name was something to conjure with. I had to lead the regiment from behind because I was only an intervenor. And I had in front of me Gavin Simmons who was not only a great admirer of Dixon but he had decided the existence of an inter se point both in the Nelungaloo and in the Bank case. I have always been doubtful that there was such a point. The case was - it was extremely difficult to argue in some ways but we succeeded. The Privy Council said that Section 74 was available in the case of an exclusive power. That is the last case I argued.

Do you recall though what the techniques were in more detail which you used to confront that difficulty?

I don't know that I can reconstruct them. I had a very interesting board that included Cyril Radcliffe, a very fine mind, and he ultimately wrote the judgment. So in some sense without letting him think he was the target, I in some ways made him the target because I thought he was the strongest mind there amongst them. I started that case behind the eight ball because it was Dixon's judgment which was against me.

I suppose one factor that must come into the thinking there is that some of the people up there will know what you are doing and will know the techniques you are using, if you like, or recognise them and say: "Ha, ha, I know why he's saying that. He's saying that because so and so down there on my left said that in his judgment three months ago."

In that case I've just spoken of, while I was arguing Cyril Radcliffe said to me: "What about such and such a case?" That case wasn't against me really but to deal with it would have complicated very much the way I was putting the case. So I said to him: "Do we have to bother about that? We've got a good

deal on our plates, you know." That's one thing a barrister has got to do, he's got to be on terms with his court where it's almost man to man. You've got to be able to talk like that to your bench. Do you follow that? I had managed to get myself into such a situation.

I follow that but I'd have thought that's a function of considerable seniority and experience. It's something very difficult for a junior person to ever attain.

No, I doubt that. A youngster's got to watch he doesn't become bumptious, there is no doubt about that, but he musn't get a sort of nervous fear of the judge. After all, he's got to get on speaking terms with the judge. I said that to Cyril Radcliffe - it wasn't hard for me to do it because I knew him personally, I had been his junior and I'd had to do with him and it passed off, you see. Anyhow he wrote the judgment and after he'd written the judgment and it was published he rang me up one day and asked me to come and have dinner with himself and his wife Antonia, so I did.

Over dinner I said to him: "Cyril, why did you try me with so and so during the case". He smiled at me and he said: "I thought I'd let you know I knew what you were at. There were others on that bench that didn't know" which was very revealing. He understood what I was doing because he was a top mind and a splendid advocate. I don't think I ever met a better, a really top mind.

> ***"I had to lead the regiment from behind because I was only an intervenor."***

That relationship with the bench has to be developed by counsel; nothing cheeky, not like that, no presumption about it, but where, after all, you're talking to a lawyer who is not other than your friend. You've got to cultivate that and I did that. A youngster doesn't need to lose the opportunity of meeting the judge socially if he can. That's one reason I favoured the common room at Wentworth Chambers.

I'd hoped very much that the bench would blow in there from time to time. They haven't done it, it's a great pity, because, you see, in the Inns of Court you will sit down and you will hear one say to a Lord of Appeal, anybody: "How did you come to decide so and so" and those present will talk about it. There is no false dignity about it. We've never been able to cultive that. That common room didn't live up to what I wanted it to do.

Another thing I was very sad about, when they let solicitors come in. I would never have done that. I'd have made that very much the exclusive area for barristers, particularly if you're going to get the judges in.

Because the presence of other people would affect the freedom of discussion?

Oh, yes, it would.

One of the aspects of your own practice that's been remarked upon is your use of the reply, especially in appellate work. That involves very special judgment I would have thought.

Yes, very self reliant sort of attitude to take it on because it's got great risks. It has great risks because your court may have formed its view before you reply on the thing you want to reply on.

And it may be too late to budge them?

Too late, it may be too late. So that it's a technique that's got to be very selectively used. I did use it selectively. But where the case clearly - I could put my point of view without trenching on the defence, the opposition to my point of view, then I could leave the reply to the opposing point of view to a reply which is its proper function and that gives the impression very often that you divided the case up and kept the best back, but it can be very effective because you then deal with a thing that your opponent has said and which, as a rule, he can't touch any more.

Whereas if you had put your propositions first your opponent might have dealt with his case more effectively.

That's right, or indeed the bench might have got to it too soon. That's another thing to be taught; when is the right time to make the running. That's a matter of very - I don't recommend that to a youngster. That's something that will come with time if he's a capable man. It's too risky a procedure for a youngster to try, I think.

When you say the bench getting to it too soon, how is it possible for the bench to get to whatever the point is too soon?

Well, if you've got on the bench a very acute mind that can start and deal with your proposition before you've put it which he could do and he could predispose his companions long before you got there. That depends on the line up. I wouldn't give, in some cases, Dixon a chance to get ahead of me like that, because he was a powerful man with his colleagues.

So how would you control that?

I'd watch very carefully in chief that I gave him no chance to cut in on it, if I could, and suggest some line that I wasn't putting, as he sometimes did. That's not easy because you can't be rude and the task of diverting attention away is not easy.

How is it done?

All this, you asked me - it's very difficult to explain almost the subtleties of the exchange between bench and bar, they are very subtle, very subtle, sometimes very coarse I think, with Starke, he could be very outspoken but the others not.

Could we come back to an example of the issue I mentioned just previously, that is the use of reply? Do you recall the case of the Bank of New South Wales v. Laing which you took in the Privy Council? I think that is an example of the particular use of reply.

Yes, that was a case where you could safely reserve what you wanted to say about the opposition's point, save it for reply because the case had been won below on a pleading point. I thought I had the answer to the pleading point. I thought there had been a misconception on the part of both Taylor and Ferguson and I'm sure each of them would roll over in his grave if he heard me say that, they had misconceived it because they were very rapt in it and each has a very good pleader.

I then put the case in chief as a matter of substance, of contract, what was the contractual obligation between bank and customer. The respondent's case depended upon the view that the bank promised to pay back all the money which was deposited with it at any time by the customer. My point of view was that they only had a contract to pay the balance in the account at any given moment when asked.

I had to establish that as the substance of the contract. It was a misconception to think they were promising to pay all the sums that they have already repaid. So in chief I didn't touch the pleading point. The opposition in answer to me said it was a pleading point that they had put my client, the Bank, in the situation where it only had one answer which was payment, payment of all the money that had ever been banked.

Then I dealt with that in reply and showed that there was a fallacy in the pleading point as it was put by the other side. That is an example where - some would say it's a coarse example - where you could really divide up the case into quite distinct plaintiff's cause of action and defendant's defence and deal with the defence only in reply.

It was on that reply point, the pleading point, that the Privy Council decided the case.

They decided it from the point of substance but they did also deal with it with the pleading point. They virtually - now you catch me there because I doubt if I've ever read the judgment they wrote.

I've read it more recently but I confess you probably know the case better.

Yes, but I doubt if I've ever read it because I usually found little time reading what was of no further interest to me. I remember Edward McTiernan one day, as I walked with him from Town Hall Station into the city when I was at the bar, he was on the bench. He said: "Did you read my judgment for such and such a case?" and I said humorously: "I was only paid to conduct the case, not to read what the court happens to say about it."

But seriously, I don't recall I ever read the Privy Council's reasons in Laing v. the Bank of New South Wales.

MR. DONOHOE: On the subject of pleadings, Sir Garfield, you said at the commencement of our discussions how important it was to grasp the material facts in a case and I think you said that at times you were so busy you could only master a case once. In that mastery the drafting of pleadings at common law and the drafting of orders in equity seemed to assume considerable importance as well as the advice on evidence. That seems to still have current importance.

Well, you've lost common law pleading. The advantage of common law pleading was that right at the beginning you had to make up your mind what was the cause of action, what was the relief you were to get. The same is true really still in whatever case it is you must know what is the legal rule that you are hoping to bring you to success and what is the success to be, what sort of an order are you to get.

My view and I did this in practice, I always made up my mind as early as possible once I had mastered the facts what was the cause of action, what was the relief I was to get. I did the same thing for equity as I do for common law, though it was much more easily done in common law because the common law pleading system was stylised, as it were, into particular causes of action.

Although common law pleading has gone and what passes for pleading in equity is only a recital of facts, no attempt to extrapolate a cause of action is necessary, it's still true I think that the first and fundamental task is to know what is your cause of action, what is the legal principle to which you've got to refer your evidence and your proofs, and the orders that you want to get.

You mentioned, and I mentioned a little earlier that an advice on evidence was a very useful mechanism. You then took the case, you examined the facts, you worked out how you were going to prove the facts, what witnesses you would need and how many if it was a matter of number. You would work out the cause of action and indeed in my case I would, if the cause of action had to be made good by reference to authority. I would write down the authorities on the back of my copy of that advice on evidence. That was as good as a brief when the time came. I could pick that up again and I would be right back in the picture again without very much more assistance.

I think that's a good exercise for any barrister to do with every case. Very often if he does it thoroughly he does it once. I know a lot of chaps think: "I mightn't ultimately be briefed in this case, I might be jammed" but I don't think that's any reason for not doing what I've said. When it's all said and done I wouldn't have been above giving my advice on evidence to the chap who ultimately got the brief if that was asked of me.

I don't think your competitiveness has got to go to the point of refusing that sort of comradeship.

Do you recall which cases you regarded as the most challenging at the time?

I think the hardest case to put together was the bank case in the Privy Council. The High Court had made a great number of attempts to find a way of enforcing section 92. Dixon had been the dissenter over a period of time. They had been assisted by three decisions of the Privy Council and I had to have a new and different interpretation of the section or testing of it, whether legislation infringed, that involved persuading minds to adopt that for which I could cite no conclusive authority.

I couldn't say: "The High Court decided this." I could say: "You, the Privy Council, deciding so much but you don't go the whole distance in deciding what I'm putting." Of course I was talking to a group who couldn't believe that the parliament was unable to pass a law to do something as simple as regulating interstate trade. You've got to remember that Dicey's notion of the sovereignty of parliament is a very deeply entrenched notion in the English lawyer's mind. He is unfamiliar really in practice with the idea of an entrenched provision which denies the parliament power. In the case of 92, it denied all parliament's power. The question was as to the extent of such denial.

I think that was a very difficult task to have to put together the necessary argument. I think that was more difficult in my case as I had never worked off a transcript of an argument, I had rarely put an argument down in writing and I very rarely had many notes. I might have a heading or two but not much else so I had to venture myself on a very long argument in a new atmosphere, a very new atmosphere, before people whom I didn't know and who didn't know me.

I remember the first half hour I spent on the opposition to the grant of special leave. I followed Cyril Radcliffe who had been arguing in front of me. He really was tops. The general attitude of those (seven of them) on the other side of the table was: "Why have we got to listen to you?" They had heard England's best. You know, it was very patent. The next morning I got going and Valentine Holmes, who was a good advocate, a very good advocate, always said to me, " You know, I've only seen a few magical moments but", he said" "the moment you cracked a joke with Andrew Uthwatt that morning was magic." He said: "It completely changed their attitude to you."

Do you remember what it was?

No, I can't remember that but I know it happened. Val always said that was a magical moment, it loosened everything. The Bank case was fairly difficult. I don't think I've ever had as difficult an argument. Now of course it's all undone, the High Court, no longer bound by the Council's decisions, have ignored them.

Quite, have you read it?

Yes, I have read it. They've got a magnificent remark in it that the Constitution might provide the text but not the test, so then they proceed to say that what they were worried about at Federation was protection for free trade and what they were intending is that interstate trade should be relatively free, it should be just as free as other trade, but they said absolutely free so you don't take any notice of the text. You find the test is whether the law is passed from a protectionist point of view. It's really laughable. I'd have great fun appealing from that with the Privy Council. Dear me, it's terrible tosh, you know.

That is a remarkable sentence when you analyse it; the Constitution might provide the text but not the test. Very sad. ❑