Raising fresh argument or evidence on appeal

by Richard Douglas SC

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Trials almost invariably follow the delivery of pleadings.[1] Pleadings contain the allegations of fact (and, expressly or implicitly, of law) upon which the parties join issue for trial. Those pleadings set the parameters for reception of admissible evidence and trial disposition.

An appeal is not a hearing *de novo*.[2] Rather, in the federal, state and territory courts, it usually involves a rehearing on the trial record (consisting of pleadings and admitted evidence) to detect and provide a remedy for any error of the primary judge.[3] Such remedy may take the form of substituted adjudication, or the ordering of a new trial.

It sometimes happens that, following trial, due to fresh thought, the endeavours of a newly appointed lawyer, or discovery of further facts, an unsuccessful litigant[4] wishes to advance a new case on appeal.

Under what circumstances will an appellate court entertain fresh argument, or the same (or fresh) argument based on further evidence?

While this article does not refer to specific practice rules of the various federal, state or territory courts, the principles canvassed below are, in my view, uniform across all Australian jurisdictions.

Furthermore, this article considers only the instance of an appeal from a final judgment. Another article in this edition treats the instance of appeal from interlocutory judgment.[5]

TRIAL ISSUES

The jurisprudence of finalising the issues at trial informs the jurisprudence pertaining to fresh argument and evidence on appeal. In *Gould v Mount Oxide Mines Ltd (in liq)*, Isaacs and Rich JJ observed:

> 'Undoubtedly, as a general rule of fair play, and one resting on the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him, *pleadings should state with sufficient clearness the case of the party whose averments they are. That is their function. Their function is discharged when the case is presented with reasonable clearness.* Any want of clearness can be cured by amendment or particulars.'[6]

Failure to amend will not necessarily preclude a verdict upon the facts as they emerge at trial. In *Leotta v Public Transport Commission (NSW)*,[7] there was disparity between the pleadings and the case submitted to the jury. No application for pleading amendment was advanced. Despite the disparity, the High Court, by Stephen, Mason and Jacobs JJ, found that that case was open for disposition both at first instance and on appeal.

In *Maloney v Commissioner for Railways (NSW)*,[8] Jacobs J (the other members of the High Court agreeing) opined that the conclusion in *Leotta* was founded on the fact that the new issue had emerged clearly during the trial, as opposed to being raised for the first time on appeal.[9] That distinction is critical. Only the latter is redolent of injustice.

FRESH ARGUMENT

In *Water Board v Moustakas*,[10] Mason CJ, Wilson, Brennan and Dawson JJ opined:

> 'More than once it has been held by this court that *a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point*, but otherwise the rule is strictly applied: see *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; *Coulton v Holcombe* (1986) 162 CLR 1 at 7–8; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319.
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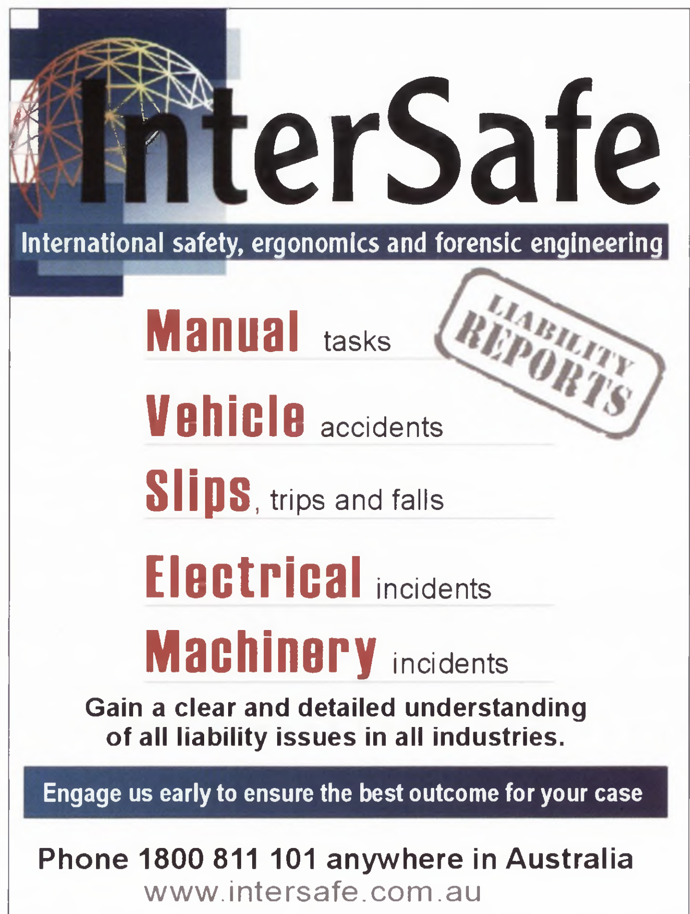
> *In deciding whether or not a point was raised at trial no narrow or technical view should be taken.* Ordinarily the pleadings will be of assistance for it is one of their functions to define the issues so that each party knows the case which he is to meet. In cases where the breach of a duty of care is alleged, the particulars should mark out the area of dispute. The particulars may not be decisive if the evidence has been allowed to travel beyond them, although where this happens and fresh issues are raised, the particulars should be amended to reflect the actual conduct of the proceedings.'[11]

The above principle has been applied recently across the mainland states.[12]

In *Branair v Owston Nominees (No. 2)*, Allsop J (Drummond and Mansfield JJ agreeing) usefully and exhaustively essayed the appellate disposition:

> '[34] The limitations upon what parties can put forward in an appeal court are set out in *Suttor v Gundowda* (1950) 81 CLR 418 at 438, *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8, *University of Wollongong v Metwally* >>



[No. 2] (1985) 60 ALR 68 at 71, *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319, *Water Board v Moustakas* (1988) 180 CLR 491 at 497, *Connecticut Fire Insurance v Kavanagh* [1892] AC 473 at 480, *Crampton v R*, supra [12] – [19], [111] and [147] and *Liftronic Pty Ltd v Unver* (2001) 179 ALR 321 at [44].

[35] In *Kweifio-Okai v RMIT University* [1999] FCA 1686, Dowsett J at [62], in dealing with a fresh issue, there sought to be raised on appeal by the appellant, noted that the issue was *complex and involved significant factual questions which were not addressed in evidence, at least by the respondent, so that it was difficult to see why the Full Court should then entertain it.* Dowsett J referred to the proper approach by an appellate court in such circumstances as being that set out in the judgment of Starke J in *Davison v Vickery's Motors Ltd (In Liquidation)* (1925) 37 CLR 1 at 35, where his Honour said:

> *No one, I suppose, disputes the authority of an appellate Court to consider questions raised, for the first time, before it, but such questions "ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them":: Owners of Ship Tasmania v Smith* (1890) 15 App Cas 223, 225. It is less difficult to induce a Court of Appeal to consider a question of law raised for the first time upon the construction of a document or upon undisputed facts, than a new question of fact. But a party cannot be allowed to take his chance of a finding in his favour upon the fact of an agreement, and then, on appeal, for the first time dispute the authority of the person who negotiated that agreement. Such a party is and ought to be bound by the course of the trial ...

[36] The roles of the trial and the appeal need to be kept distinct. The appeal is not a reworking of the trial taking account of such impediments as are thrown up by the judge's findings which alter the landscape. As was said in *Coulton v Holcombe*, supra at 7:

> *It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.*

[37] It is beyond question that if a new matter is raised and evidence could have been given which by any possibility could have prevented the point from succeeding, the point cannot be taken: *Coulton v Holcombe* supra at 7-8.

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[38] However, to say as much does not exhaust the description of the considerations for an appellate court when faced with a party raising a fresh point. *First, the finality of litigation and the importance of parties being bound to the cases they make at trial should never be overlooked*: Gleeson CJ and Hayne J in *Crampton*, supra at [15] and [157], respectively and *University of Wollongong v Metwally*, supra; see too *JB Chandler Investment Co Ltd (in voluntary liquidation) v Commissioner of Taxation* (1993) 47 FCR 588 per Gummow J at 593G. *Secondly, the difficulty of the party against whom the new point is raised reaching back in time to assess, necessarily hypothetically, how the conduct of the trial would, or may, have been different should not be underestimated*. Such judgments or assessments can require re-agitation or reconsideration of decisions taken before and at trial (which may be privileged) and which can be very difficult to assess and articulate after the event. The entitlement of a party to the benefit of the opportunity of informed and reasonably contemporaneous assessment of relevant evidence, or inquiry, should be respected. *Thirdly, the potential unfairness on counsel conducting an appeal who will be expected to assist the court in respect of the prejudice, or lack of it, to his or her client in the face of such matters being raised should not lightly be brushed aside*. Even when counsel cannot positively say that something in particular would have been done differently, that does not mean that the court will be satisfied of a lack of prejudice. The possibility of evidence or the possibility that the hearing would have taken a different course, if not fanciful, may well suffice to deny raising of the new point. These considerations should not be seen as not requiring counsel frankly and candidly to say that the trial would not have been conducted differently if he or she is of that view. *Fourthly, and in conclusion, before any new point be allowed, the court should be able to be satisfied that the raising of it could work no injustice on the other party and is otherwise in the interests of justice*. The extent of the consideration of "the interests of justice" was discussed by Branson J and Katz J in *H v Minister for Immigration and Multicultural Affairs*, supra, at [8].

[39] Whether or not a point was raised at the hearing should not be decided narrowly or technically. The pleadings and the particulars will ordinarily mark the boundaries of the dispute. Due regard also should be had to the direction of the conduct of the hearing within or outside these marked boundaries: *Water Board v Moustakas*, supra at 497-498.'[13]

In *Whisprun Pty Ltd v Dixon*, Gleeson CJ, McHugh and Gummow JJ observed:

'[51] ... It would be inimical to the due administration of justice if, on appeal, a party could raise a point that was not taken at the trial unless it could not possibly have been met by further evidence at the trial. Nothing is more likely to give rise to a sense of injustice in a litigant than to have a verdict taken away on a point that was not taken at the trial and could or might possibly have been met by rebutting evidence or cross-examination. *Even when no question of further evidence is admissible, it may not be in the interests of justice to allow a new point to be raised on appeal, particularly if it will require a further trial of the action*. Not only is the successful party put to expense that may not be recoverable on a party and party taxation but a *new trial inevitably inflicts on the parties worry, inconvenience and an interference with their personal and business affairs*.'[14]

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Consistent with the authorities canvassed above, the appellate court will give careful attention to the conduct at first instance of the parties seeking to raise a fresh argument. For example, the appellate court is unlikely to allow a fresh argument where the issue was expressly or implicitly conceded before the primary judge.[15]

In two instances an appellate court is more likely to entertain fresh argument:

- where the point does not entail the need for further evidence or a new trial, raising only a point at law[16]; and
- where the appeal is by a plaintiff against whom summary judgment was granted.[17]

Any party successfully raising the fresh argument will ordinarily be penalised by way of a costs order.[18]

FRESH EVIDENCE

Two circumstances ought be addressed. The first is where the matter of evidence occurs prior to the primary judge's decision. The second is where the matter of evidence occurs after such decision. The first is more common.

Reception of fresh evidence on appeal is discretionary but usually (by rule or in practice) resolved upon a touchstone of special reason or special circumstance. Archetypal cases for reception of such evidence are:

- erroneous non-admission of evidence by the primary judge;[19]
- underhanded or 'sharp' conduct on the part of the party below in raising issues clearly in pleading or trial affidavits;[20] and
- the occurrence of events at trial not apparent from the record, which are said to be tantamount to procedural unfairness.[21]

Outside these instances, the reception of further evidence on appeal occurs only in exceptional cases, on the basis that there needs to be a finality to litigation.[22] To succeed, the court ordinarily requires three criteria, set out in *Langdale v Danby*,[23] to be satisfied. They are:

1. The evidence could not have been obtained with reasonable diligence for use at the trial.
2. The evidence must be such that, if given, it would probably have an important influence on the results of the case, although it need not be decisive.
3. The evidence must be credible, although it need not be incontrovertible.

This test for reception of further evidence has been embraced by the Queensland courts.[24]

As to fresh evidence that comes into existence after, or on the cusp of the decision at first instance, a different approach is warranted. The seminal statement of principle is that by Lord Wilberforce in *Mulholland v Mitchell*:

> 'Negatively, fresh evidence ought not to be admitted where it bears upon matters falling within the field or area of uncertainty, in which the trial judges' estimate has previously been made. Positively, it may be admitted if some basic assumptions, common to both sides, have clearly been falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively, too, it may be expected that courts will allow fresh evidence and to refuse it would affront common sense or sense of justice.'[25]

However, discretionary factors may militate against the reception of fresh evidence, whether the evidence comes into existence before or after decision. Examples are:

- where a party has neglected an opportunity to re-open or canvass the matter before the primary judge before judgment has been formally delivered[26]; and
- where there has been delay in furnishing the fresh evidence for examination and consideration.[27]

CONCLUSION

To introduce fresh argument or evidence on appeal, the advocate must persuade the appellate court that injustice will result if that indulgence is not afforded.

While in modern jurisprudence, an award of costs is often the price exacted for curial indulgence, the nature of the adversarial process, coupled with necessary finality to litigation, militates strongly against a party, on appeal, having a 'second bite of the cherry'. ■

Notes: 1 Occasionally, when the issues are in short compass, a court will order trial by affidavit. **2** That is, a fresh hearing of evidence and argument, affording the proverbial 'second bite of the cherry'. **3** *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109 per Dixon J; *CDJ v VAJ* (1998) 197 CLR 172 at [111]. **4** Or successful litigant, but on a notice of contention. **5** See Simon Tisher, 'Appeals from Interlocutory Orders', this edition of *Precedent*, pp14-18. **6** (1916) 22 CLR 490 at 517–18 (emphasis added). **7** (1976) 50 ALJR 666 at 668. **8** (1978) 52 ALJR 291. **9** At 294. **10** (1998) 180 CLR 491. **11** At 497 (emphasis added). **12** *Shaw v Bindaree Beef Pty Ltd* [2007] NSWCA 127; *Reading Entertainment Australia Pty Ltd v Whitehorse Property Group Pty Ltd* [2007] VSCA 309; *Reardon v State of Queensland* [2007] QCA 436; *Russo v Buck* [2007] SASC 423; *Fitzpatrick v Job* [2007] WASCA 63. **13** (2001) 117 FCR 424 at [34] – [39] (emphasis added). **14** (2003) 77 ALJR 1598 at [51] (emphasis added). **15** *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* (1978) 139 CLR 231. **16** *Chalmers Leask Underwriting Agencies v Mayne Nickless Ltd* (1983) 155 CLR 279; *Fingleton v The Queen* (2005) 79 ALJR 1250 (a criminal case where the issue was raised by the appeal court). **17** *Doherty v Murphy* [1996] 2 VR 553. **18** *Wickstead v Browne* (1992) 30 NSWLR 1 at [19]. **19** That example is plain, but often the result will be a new trial rather than fresh appellate adjudication. **20** *Nowlan v Marson Transport* (2001) 53 NSWLR 116. **21** *Stathooles v Mount Isa Mines Limited* [1997] 2 Qd R 106 (judge allegedly falling asleep during critical oral evidence). **22** *Mulholland v Mitchell* [1971] AC 666; *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135. **23** [1982] 1 WLR 1123 at 1133. **24** *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at 408; *Atlantic Three – Financial (Aust) Pty Ltd v Marler* [2004] 1 Qd R 579. **25** [1971] AC 666 at 679-80. **26** *McIntosh v Williams* [1976] 2 NSWLR 237; *Franklin v Rabmusk Pty Ltd* [1991] QCA (17 December 1991); *Stathooles v Mount Isa Mines Limited* [1997] 2 Qd R 106. **27** *Avraam v Constello Constructions Pty Ltd* [1984] 1 Qd R 538.

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