

SPEECH AT THE SILKS' DINNER*

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Days like today are very special for our profession. By our profession I mean our profession in its grandest sense consisting of the Bar and the judges.

Within the common law tradition, for as long as there has been a Bar, with the peculiar exception of the long-extinct Serjeants, there have only been two ranks of barrister, viz junior and Silk.

This flat structure reflects the egalitarian and meritocratic ethos that, notwithstanding its medieval origins, has characterised the work of the Bar over the centuries of its evolution from its beginnings in the Inns of Court.

Those of you who made your bows this afternoon have crossed the only divide, in terms of status, between members of the bar. You have joined the inner bar which, of course, includes the judges.

And you have crossed that divide solely because it has been recognised by your peers that you belong in the first rank of barristers.

And that recognition has been accorded you, not because of heredity or patronage, because you have friends in high places or even because of long service and good conduct. You are here on the basis of the recognition of your own proven merits as advocates in the administration of justice.

You have met great challenges of personal dedication, integrity and diligence. You have given faithful service to your clients and to the Courts. That service has not only been competent, it has been distinguished.

Proving your merits in the crucible of the adversarial system, is a challenge unique in its level of difficulty among the peacetime professions.

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.

Taking silk is a great achievement for each of you. We judges, and the other old hands here, congratulate you on your achievement.

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Your new dignity means additional responsibility to the public and the profession. You are now, officially, distinguished as learned in the law.

Clearly, the learning we speak of is something more than mere academic knowledge or technical skill. Learning involves a broad understanding of the human condition and of our communities' customs, values and culture. It also involves the ability to exercise sound judgment, and the courage of your convictions once you have made a judgment, either to abandon a point dear to your instructing solicitor and client, or to persist with a point you have decided is worth pursuing even though the Court may not seem to welcome it.

You have now an even greater share of professional responsibility for the administration of justice in the interests of your clients and of the community. You are now leading counsel. It will fall to you to make hard decisions which may have serious consequences for your clients. There will be times when your learning will be called into question most severely; and when your judgment and courage and forensic skill will be of critical importance to your client.

Sometimes the position of leading counsel can be the loneliest place in the world. From time to time, you will have what the French call a "mauvais quart d'heure" – a bad quarter of an hour – where you have had a very hard time at the hands of the court and you look down to your junior or instructing solicitor for comfort, but they assiduously avoid making eye contact, and even shift their seats away to increase the space between themselves and you.

On those occasions your only companions in the whole world will be the beads of sweat running down your back.

And you will also have to deal with the problem of the judge who has become convinced since going on the Bench that, when he was at the Bar, he was the finest advocate who ever drew breath. A judge who suffers from this syndrome tends to feel that he is duty-bound to share that good news with everyone else in the courtroom and especially with new silks who he thinks may benefit from his Honour's advice about aspects of advocacy.

I should say that I speak of male judges because it is my experience that this syndrome is an exclusively male phenomenon.

Today, in fact, the Bar table was graced by two gentlemen who were actually the finest advocates of the Australian Bar, David Jackson and David Bennett. Both are great exponents of the art of oral advocacy. The Court and the country owe each of them a great deal.

Can I trespass on your celebrations for a moment to say something serious about the importance of the core work of the advocate, the presentation of oral argument.

Over the years, I have visited a number of appellate courts in the United States and have noticed that, quite often, advocates seem to be indifferent to the opportunities to persuade presented by oral argument. That is, presumably, due to the perception of the legal profession in that country that cases are won or lost on appeal by the strength of the written brief, and that oral argument is of little importance: that it is just about not giving anything away.

This perception by many American lawyers as to the irrelevance of oral argument is not universal. It is, in my observation, not shared by the US judges themselves.

In the courts in the United States which I visited, it was readily apparent in oral argument that the judges were eager to interrogate the advocates about the issues on which the decision of the case would be likely to turn. Very often, with a handful of honourable exceptions, the advocates were either unwilling or unable to engage at all in a debate with the judges about disputed points of law.

That is a development much to be regretted. The very nature of the adversarial system means that the parties tend to present cases which stand at two extremes. The process of dialogue – thesis, antithesis, synthesis – is rarely satisfactorily accomplished by the exchange of written arguments between the parties.

We do not need to study Derrida or de Saussure to learn that the written word is not a closed, or even a stable, source of meaning.

The limitations of written argument have long been notorious. In Plato's dialogue "Phaedrus"¹, he has Socrates say:

"Writing, Phaedrus, has this strange quality, and it is very like painting, for the creatures of painting stand still like living beings; but if one asks them a question, they preserve a solemn silence. And so it is with written words; you might think they spoke as if they had intelligence, but if you question them, wishing to know about their sayings, they always say only one and the same thing. And every word, when it is written, is bandied about, alike among those who understand and those who have no interest in it, and it knows not to whom to speak or not to speak; when ill-treated or unjustly reviled it always needs its father to help it; for it has no power to protect or help itself."

After the written arguments have been exchanged, the prospect of synthesis between seemingly irreconcilable decisions may be no more than a hazy or blurred prospect glimpsed only in the light of sparks struck by the clash of strong statements in the written brief. It is here that oral argument by skilful advocates can be of most help to the court. But, in the United States, although the judges seek this help, the advocates I have seen appeared to be determined not to provide it.

This is, I think, a problem for the maintenance of public confidence in the performance of the judicial function if it is confined to the evaluation of written arguments in the privacy of the judge's chambers.

The legitimacy of the exercise of judicial power in our tradition depends upon the presentation in public of arguments, and the resolution of those arguments by the obviously impartial and

¹ Plato, "Phaedrus", 275 d-e, Trans H N Fowler, 1914 Cambridge Mass., Harvard University Press.

apparently rational application of the law logically derived from previous decisions to the facts of the case.

To the extent that that process is not open to the public, and to public discussion and criticism, there is a real risk of a deficit in terms of the legitimacy of the outcome and public confidence in it.

Where, as with us, a court is avowedly engaged in actually making the law in its most concrete expressions, as is necessarily the case with the development of the common law of contract, tort and (in some jurisdictions) crime, the legitimacy of the court's function depends upon the public nature of the process.

I would venture to suggest that in our High Court, in the Supreme Court of New Zealand, and in the Supreme Court of the United Kingdom, no-one who attends the argument, whether personally or online, can be in any doubt as to what is at stake or as to the nature of the arguments which bear upon the resolution of those issues. The public nature of this drama is a symptom of a healthy democracy.

While the public drama is, of course, only part of the judicial process – because the judgment writing is yet to come – it is the most direct way of allowing members of the public to see the interplay of competing principles and rules which lead to the resolution of great public controversies.

Even though the likely outcome of the case may not be apparent, those who have attended the argument will have a good idea of what is in contest and why it may rationally and fairly be resolved one way or the other.

When judges throw out questions indicating how they are thinking about the issues and inviting the advocates to tell them why they are on the wrong track, the advocates must be willing and able to be drawn into the debate so that the clash of ideas occurs in public. The very legitimacy of the process requires that the advocates must risk engaging in a debate which might result in a loss of the ground staked out in their written arguments.

The importance of oral argument must not be downgraded so that the interests and claims in issue and the arguments for and against are masked from public scrutiny.

And so you should never become cynical about your role. I can assure you that the judges are not.

May I conclude by repeating that it is a great thing that you have been recognized by the Judges and your colleagues as leaders of the profession. We are sure that you will serve with distinction and hope that you enjoy your service.

Can I ask those present, other than the new silks, to be upstanding and join in the toast. "To the new silks!"