A COURT OF APPEAL WITHOUT LAWYERS

Justice Michael Elkaim

Thank you Chris for your kind words of introduction.

As you may have heard I grew up in Zambia and it is a great pleasure for me to be back here in Livingstone.

Almost every day we are confronted with advances in technology. Lawyers, including judges, are notoriously slow to adopt, let alone understand, many of these changes. The use of computers is widespread as is access to the internet.

It is no longer necessary to provide a court with copies of authorities or for judges to assemble authorities in text form after a list has been provided. The authorities are easily accessible on the internet usually within the court's own library which has its resources digitally available. Could we even imagine legal research without research tools, like for example, Lexis and WestLaw?

This use of the internet can have unwelcome results. Advocates not able to find a case supporting their submissions within their own jurisdiction can

search far and wide for a suitable authority so that one might be confronted with a case from very far away and from a place where the laws might be totally different.

This can cut both ways of course because the judge, or his/her research assistant, can equally search the net. This happened to me when, at first instance, I heard a case about a person being injured when stepping off a small plane at a regional airport. I was able to find an American decision with very similar facts which, when I mentioned in court, took the parties somewhat by surprise. Fortunately, because of the adoption of international conventions both in the United States and in Australia, the Warsaw Convention applied to both accidents. (Patterson v Air Link Pty Ltd [2008] NSWDC 241, Girard v American Airlines United States District Court, ED New York, Number 00-CV-4559 (ERK), August 21 2003, US District Court for the Eastern District of New York).

So if we now have the necessary authorities on the internet and if the parties have provided written submissions setting out in detail their arguments then why do we need to hear from them in court? In fact why do we even need the judges to be together?

Most courts of appeal will be constituted by three or more judges. They can communicate over an audio-visual connection, or by a conference call to

discuss the submissions. They can exchange draft judgments by email and eventually reach a final decision or decisions.

In Australia each state or territory has a different system. In some states, like New South Wales, there is, within the Supreme Court, a separate Court of Appeal with its own judges although from time to time a judge who is not a member of the court will be asked to sit on it.

By contrast, in my court, in the Australian Capital Territory, the Court of Appeal is made up of two judges of the Supreme Court and usually a visiting judge from the Federal Court.

In the Federal Court, the judges sit in a full-court on a roster basis. There are not separate judges who only hear appeals.

The Federal Court judges are spread throughout Australia. They come together to hear appeals but could easily do so by various forms of communication if all they were considering was written submissions.

The benefits of oral submissions:

Personally I am against depriving parties of a chance to make oral submissions. This is for a number of reasons:

1. While I accept that some advocates have an uncanny ability to confuse me, in general an advocate will be better able to make their points if he

or she is able to explain them to the court in particular when the court has questions which enable the points to be refined and, in effect, the best points to be made. While I appreciate that lawyers might view their role as pursuers of their clients' success, lawyers must also always remember that their primary duty is to the court and part of that duty is to effectively be a resource to the court.

2. Written submissions can, frankly, be boring. If the whole of the case is put by written submissions, then, depending on the complexity of the case, very lengthy submissions might be required. The trend now is for written submissions to be confined in length. I think it better for written submissions to be concise and if necessary, to be expanded upon orally.
3. Tactful advocates are able to sense the direction of the wind, that is to adapt their case to not only what is emerging from the other side but also what is emerging from the bench. An advocate's best point, as made in written submissions, may seem less strong when confronted with questions from the bench or opposing submissions. If in oral argument an advocate can address the concerns of the Court they may win their argument. As Justice Scalia, former Associate Justice of the Supreme Court of the United States put it, oral argument gives "counsel his or her best shot at meeting my major difficulty with their side of the

case. 'Here's what's preventing me from going along with you. If you can explain why that's wrong you have me."[1]

4. An advocate's capacity to think on his or her feet can be a very successful tool in ultimate success. There are, I accept, cases where the advocate might not help his or her cause. (Cole v The Queen [2019] ACTCA 3).
5. The practice in my court is that the judges will get together shortly before the hearing to discuss their respective views on the appeal. Once the appeal is over the judges again have a discussion arising from the oral submissions. This is an invaluable exercise and often results in a change of opinion following persuasive, or perhaps very unpersuasive, oral submissions.
6. I think that parties, especially where they are not corporations, prefer there to be oral submissions. People want to see their cases put forcefully and to feel that their grievances about the judgment under appeal have been explained to the appellate court. This feeling cannot be achieved by simply showing them written submissions, which quite often will be technical and without the persuasive ingredient found in an advocate's oral submissions.

[1] Stephen M Shapiro, Questions, Answers and Prepared Remarks, LITIGATION, Spring 1989, at 33

7. Courts represent the rule of law, open justice and help promote occasionally settlement of disputes. The same advantages are harder to secure in a virtual court-room.[2]

The benefits of written submissions:

So what are the benefits of written submissions only and why has the Law pursued a path which favours a silent court over robust discussion?

1. There will be a very great saving of costs. Often parties to an appeal will wish to be represented by senior counsel. This means that potentially there can be three people appearing for a party in court, a silk, a junior barrister and a solicitor. This is very expensive.
2. The process is likely to be more efficient carrying with it a capacity for matters to be dealt with in less time. This of course assumes that judges of appeal will take the same or less time to reach a conclusion based on oral submissions alone. I must say for my part I reach a conclusion quicker when I have just heard the arguments and they are fresh in my mind.
3. Another aspect combining both cost savings and efficiency is where the parties do not reside in the city the court is located in. Persons might

[2] Kirby J, 'Appellate Advocacy – New Challenges- The Dame Ann Ebsworth Memorial Lecture' *The Denning Law Journal* (2006) 56-77

need to travel from distant country towns in order to be present during the hearing.

4. Judges are often unwilling to sit for many hours listening to tedious submissions. There is a sterile atmosphere to submissions, especially on appeal, so that the interested parties, for whom the appeal could be very important, may have a sense that there is a discussion happening around them which they do not understand and have no capacity to control.

The future:

So if I like oral submissions but recognise that things could be done quicker and cheaper, what then for the future.

Technological advances are going to dominate the future of appeals, in fact probably the law generally. They will allow oral submissions to remain but not in their current format. Oral submissions will be made with audio-visual presentation by lawyers, possibly present in any number of locations. The High Court in Australia frequently has submissions made by lawyers in different cities.

Documents, and in particular exhibits, will be able to be presented on a screen. The appellate court will not need to see the actual documents or objects that

were tendered in the court below. In addition notations will be made on electronic documents as the lawyers speak about them.

More and more court proceedings are being and will be filmed. Courts of appeal will be able to watch a witness's evidence, for example where there are arguments about whether a judge took proper account of a witness's presentation or even where it is alleged that a judge was unfair to a witness. A transcript alone will not give the flavour of what actually occurred in court.

However, despite all these technological advancements, and many more, I am a little afraid of the limits of technology. I do not think lawyers will ever be replaced by robots. There are too many variations to the legal problems that beset people and corporations and there is too great a need for a lawyer to 'think on his or her feet'.

But what about judges. Why cannot judges be replaced by a computer? Why can an algorithm not be devised to analyse a problem and give a decision based on precedent and current statutory laws?

Artificial Intelligence is already used to do just that. AI programs like Project Watson and ROSS Intelligence are used to analyse documents and data during the legal discovery process, thanks their ability to parse through millions of words faster (and more cheaply) than human beings (see ROSS

Intelligence.com. Project Watson refers to a United Nations committee that tried to decode a mass of algorithms created by a Canadian terrorist, Philip Masse).

However, that is just the beginning of AI's potential impact. Not only can these computing platforms sort through billions of text documents very much faster than humans, they also learn from feedback and get smarter over time. In Canada, Randy Goebel, a professor in the computer science department of the University of Alberta working in conjunction with Japanese researchers, developed an algorithm that can pass the Japanese bar exam. Now, the team is working to develop AI that can weigh contradicting legal evidence, rule on cases, and predict the outcomes of future trials. [3] AI will become more valuable to its users over time, providing much of the heavy lifting that was delegated to lawyers and ultimately to the judges as arbiters of disputes.

Regrettably the technicians only programmed me to run for 15 minutes, so I need to sit down and reboot.

I will leave you with this from Plato; “rhetoric is the art of ruling the minds of men”. This holds as true today as it did in the past. The legal environment will change, yet the fundamental challenges of advocacy to bend the minds of

[3] Logan Kugler, ‘AI Judges and Juries’ *Communications of the ACM* (2018) 61 (12), 19-21.

another, to turn the tide and persuade one's audience to meet in agreement with the advocate's argument, remains the same.