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Some Thoughts on the Differences between Appellate and Trial Advocacy

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SOME THOUGHTS ON THE DIFFERENCES BETWEEN APPELLATE AND TRIAL ADVOCACY

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I. Introduction

Fortunately for lawyers, litigation is not simply a mechanical exercise of applying the law to the facts. If it were, there would be little opportunity for the skills of counsel to have play. In most legal proceedings, there is more than a merely theoretical possibility that the case could go either way, and it is this opportunity to influence the result that is the essence of advocacy.

It is also true that the legal hierarchy is like a pyramid, getting ever smaller at the top. Far more cases go to trial than go to appeal. Correspondingly, except for a few eccentrics who "specialize" in appellate law, most counsel will be far more familiar with the ins and outs of trial work than they are with the nuances of arguing an appeal. The aim of this paper, then, is to highlight some of the differences between trial advocacy and appellate advocacy, for the benefit of that majority of counsel who only occasionally appear on appeals. While all advocacy is the art of persuasively influencing the result, the opportunities for exerting that influence are quite different in the Court of Appeal than they are before a jury.

The important differences between trial and appellate advocacy can conveniently be grouped under four general headings:

(1) Trials are for creating the record; appeals are for interpreting the record.

(2) Trials are about the credibility of the witnesses; appeals are about the credibility of counsel.

(3) Trials are in "real time"; appeals are in compressed time.

(4) Trials affect the immediate litigants; appeals affect future litigants.

As well, we will discuss two very practical considerations that face any trial lawyer who is considering an appeal: (a) should I take an appeal at all, and (b) if so, should I do the appeal or should it be done by other counsel?

While the focus of this paper is criminal law, many of the points may have more general application.

II. The Decision to Take an Appeal

One of the interesting things about litigation is its asymmetry. Each side is not equally in control of the process. An accused does not get to choose whether he or she will be charged with an offence. Once a person is charged, it is the accused, and not the Crown, who chooses whether there will be a trial, as the plea is in the control of the defence. And when it comes to appeals, it is the loser at trial who decides whether there will be an appeal. The winner at trial has no say in the matter.

While this may seem like an obvious point, it is sometimes forgotten. In criminal matters, unlike civil, there is no such thing as an interlocutory appeal. The provisions of the *Criminal Code* preclude it. It sometimes happens that a trial judge will make an interlocutory ruling that either the Crown or the defence dislikes, but the ability to appeal that ruling is contingent on the ultimate verdict of the trial. If the party who lost the ruling wins the trial, they are unable to initiate an appeal.[1] Similarly, if a trial judge reaches a verdict that is favourable to a party, but does so for reasons that the party dislikes, that party may not initiate an appeal, since all appeals are from the result at trial, and not from the reasons for that result.

The Crown is only able to appeal against an acquittal, and the defence is only able to appeal against a conviction. Having said that, it is important to remember that some trial verdicts may contain a combination of convictions and acquittals, raising the possibility of an appeal by both sides. The obvious situation is where the accused is convicted of some counts on the indictment, but acquitted of others. Slightly less obvious is the case where the accused is convicted of an included offence. Thus, for example, if the accused was charged with aggravated assault and the verdict was a conviction for assault simpliciter, the accused could appeal the conviction and the Crown could appeal the acquittal on the full offence of aggravated assault. If the accused appealed and the Crown did not, and if the Court of Appeal ordered a new trial, that trial would only be on the charge of assault simpliciter, since the acquittal of aggravated assault would stand in the absence of an appeal by the Crown.[2]

Assuming that you have a right of appeal, what considerations ought to go into the decision whether to exercise that right? Obviously, the expense and the likelihood of success must be taken into account. But one further point should also be borne in mind. Is it possible that pursuing an appeal could result in an outcome that is worse than that achieved at trial? Surprisingly, the answer may sometimes be yes.

A case that came into our office this year provides an illustration. The accused was charged with first degree murder. Following negotiations, the Crown agreed to accept a plea to second degree murder. Prior to sentence, the accused applied to withdraw his plea. That application was denied by the trial judge. The accused appealed. The Crown then filed an appeal against the acquittal of first degree murder, so that if the defence appeal were successful, the new trial would be on the full offence originally charged. While counsel for the accused expected the Crown to take this step, it illustrates the fact that a party who has achieved partial success at trial (in this case, a conviction of second rather than first degree murder) might put that achievement at risk by taking an appeal (in

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1 This is actually a slight oversimplification. The Supreme Court of Canada created a very narrow exception to the rule against interlocutory appeals in *Regina v. Laba* (1994), 94 C.C.C. (3d) 385 (S.C.C.) and *Regina v. Keegstra* (1995), 98 C.C.C. (3d) 1 (S.C.C.), permitting either Crown or defence to apply directly to the Supreme Court of Canada for leave to appeal from a ruling on the constitutionality of legislation.

2 Note that the time for filing the Crown appeal runs from the date of the acquittal, not the date of sentence on the offense of which the accused was convicted: *Regina v. Czarnecki* (2000), 143 C.C.C. (3d) 179 (Man. C.A.).

this case, if the accused is successful in getting a new trial, he may again face possible jeopardy of being convicted of first degree murder).

Even if a defence appeal does not prompt a corresponding Crown appeal, the accused may still face a possible down-side risk. This occurred in the recent case of *Regina v. Noël* (2001), 156 C.C.C. (3d) 169 (N.B.C.A.). The accused was charged with extortion under s. 346(1) of the Code. The trial judge found that while the accused had tried to obtain money from the complainant through threats, no money was actually obtained. Accordingly, pursuant to s. 660 he declined to convict the accused of the full offence, and instead convicted him only of attempted extortion. The accused appealed that conviction. The New Brunswick Court of Appeal found that the trial judge had misunderstood the legal definition of extortion, which is "by threats, accusations, menaces or violence induces or attempts to induce any person" to do anything. The Appeal Court ruled that the trial judge should, therefore, on the evidence before him, have convicted the accused of the full offence. They amended the indictment pursuant to their appellate powers under s. 683(1)(g) of the Code, and entered a conviction for the full offence of extortion in lieu of the conviction at trial for attempted extortion. All this, on a defence appeal.[3]

A possible down-side risk also exists on sentence appeals. The powers of the Court of Appeal on a sentence appeal are set out in s. 687(1) of the Code, which provides that the court shall consider the fitness of the sentence appealed against, and may either dismiss the appeal or vary the sentence within the limits prescribed by law for the offence. The Supreme Court of Canada has interpreted this section to mean that an appellate court may vary the sentence either up or down, regardless of whether the appeal is brought by the Crown or the defence: *Regina v. Hill (No. 2)*, [1977] 1 S.C.R. 827, 25 C.C.C. (2d) 6. As a matter of practice, however, an Appellate Court will not usually increase a sentence on a defence appeal unless the Crown has put the accused on notice that they will be seeking an increase. The Crown may give such notice by means of a letter, colloquially known as a Hill-letter.

III. Should Trial Counsel be Counsel on the Appeal?

As Yogi Berra might say, there are pros and cons both for and against having trial counsel also act as counsel on an appeal. The main argument in favour of trial counsel doing the appeal is the fact that trial counsel is already intimately familiar with the trial record. This can be a very real advantage, especially when, as is increasingly common, the trial lasted for several weeks. It is a truly daunting task for new counsel to read hundreds or even thousands of pages of trial transcript in addition to all the paper exhibits, such as expert reports. Trial counsel not only already knows what the trial evidence was, but also has an understanding of its significance, that is, how the evidence of one witness fits together with that of the rest. As well, trial counsel already knows what all the issues were at trial, and how the various rulings of the trial judge affected the course of the trial.

Paradoxically, that very advantage may also be a liability. Trial counsel may be so familiar with the record that they are incapable of seeing it through the eyes of someone who was not there. After all, the members of the Court of Appeal were not there, and it can be useful for counsel to be able to see the trial record from the same outsider's point of view. As well, trial counsel is used to seeing

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3 The correctness of the result reached by the New Brunswick Court of Appeal is open to question, since there was no Crown appeal from the result reached at trial pursuant to s. 660. On the other hand, it may be argued that the fact that the language used in s. 660 speaks only of the *conviction* for the attempt, without correspondingly speaking of the *acquittal* of the full offense, supports the result in *Noël*. This is in contrast to the language used, for example, in s. 606(4) and in s. 662(2).

the case in terms of the strategy and arguments that were adopted for the trial, regardless of whether they were successful. New counsel can often be more objective about the trial record, and may more readily abandon arguments that have little prospect of success on appeal.

In addition, there are times when it is useful, strategically, for counsel on the appeal to be able to distance himself or herself from the tactical decisions that were made at trial. This consideration may arise in various ways. First, there is the case where the appellant wishes to raise a new argument for the first time on appeal. This is something which the Court of Appeal is generally reluctant to allow. It is easier, for obvious reasons, for new counsel to take the position that the new argument is something that should have been raised at trial, and that the accused should not be penalized on appeal for the failure of counsel at trial to raise the issue.

Similarly, where the appellant wishes to adduce fresh evidence on appeal, one of the first questions to be addressed is why that evidence was not led at trial. Where trial counsel is also conducting the appeal, the court is likely to take the position that counsel must on appeal live with the tactical decisions he or she made at trial. Finally, it is in rare cases necessary to take the position that the appellant's trial was unsatisfactory due to the incompetence of counsel. This situation obviously requires new counsel on appeal, since it would be unseemly for counsel to plead his or her own incompetence.[4]

IV. Trials Are for Creating the Record; Appeals Are for Interpreting the Record

Perhaps the most obvious difference between a trial and an appeal is that on an appeal the record is fixed, while at trial counsel still has the opportunity of influencing what the record will be. Those who are more used to doing trial work than appeals, may find the inflexibility of the appeal record frustrating. If only that witness hadn't blurted out that damaging remark on cross-examination. If only the trial judge hadn't made that slip of the tongue in her charge to the jury. But it is all there in black and white in the transcripts.

Faced with the fact that the record is fixed by the time of an appeal, some counsel may be tempted to "fudge" in one way or another. This can take a variety of forms. Counsel may try to argue the appeal with limited transcripts, hoping that the court will only find out about that portion of the trial record which is useful to his or her side. Or, even with a complete transcript, counsel may hope that neither the court nor opposing counsel will have read the transcript carefully enough to notice those portions that undermine the arguments that counsel wishes to advance. At worst, and yes, this does sometimes happen, counsel may actually misrepresent in written or oral submissions what is in the trial record.

These tactics are to be avoided. Not only are they unethical, but they are usually ineffective. There is every likelihood that either opposing counsel or a member of the court will discover the omission or misrepresentation, at which point the weakness in your case is substantially highlighted.

A better approach is to adopt the attitude that the fixed nature of the record can be an advantage. While you cannot change what is there, you also do not have to contend with the unpredictability of running a trial. While there may be things in the transcript that pose problems for your case on appeal, at least you know precisely what those problems are, and can take as much time as you like

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4 For more on the relationship between the due diligence requirement for filing fresh evidence on appeal and allegations of incompetence of trial counsel, see: *Regina v. Wang* (2001), 153 C.C.C. (3d) 321 (Ont. C.A.), and *Regina v. Appleton*, [2001] O.J. No. 3338 (QL).

thinking about them, researching the law on them, and crafting your submissions to cast them in the best possible light.

In short, be aware of what is in the transcripts, both that which helps you and that which hurts. Be candid with the court about those aspects of the record which pose problems for your case. The court will appreciate your candour, and you will then be in a position to make the best possible argument you can craft about why your case should succeed notwithstanding whatever the problem is. You may succeed or you may fail, but at least the court will have the benefit of your best submissions on the point. Remember that if you gloss over something in the transcript that hurts your case, even if no one notices this during the oral hearing of the appeal, it may well be discovered by the judges or their law clerks while the case is on reserve. In that event, the court will be left to deal with the point that hurts you without the benefit of your submissions.

V. Trials Are about the Credibility of the Witnesses; Appeals Are about the Credibility of Counsel

This naturally leads into the second point, which is that the credibility of counsel makes a difference on appeals. It is simply human nature that appellate judges make assessments of how trustworthy they think individual counsel are. If you are caught out in a misrepresentation to the court, the remainder of your submissions will likely be perceived with scepticism. On the other hand, if you are frank about acknowledging the shortcomings of your case, the court is likely to have increased confidence that your arguments are worthy of serious consideration.

Candour about the factual record is important, but candour about the law is equally vital. It happens from time to time that counsel try to rely on case authorities that have been overturned on appeal. Nothing could be more damaging to your credibility as counsel. It is almost certain that either the court or opposing counsel will point out that the authority on which you rely is no longer good law. The court will conclude either that you have been dishonest, or that you have not come to court sufficiently prepared. In either case, you have done yourself and your client great harm.

Fortunately, such extreme cases are rare. But there are less obvious ways in which counsel can be either more or less candid with the court. It is good advocacy to be, and be seen to be, candid. For example, if you state a proposition of law in your factum, and then list a series of cases as references, be sure that those cases actually support the proposition in question. I have seen factums in which a list of six or ten cases is given, none of which, on inspection, actually stands for the proposition asserted by counsel. Indeed, when a very long list of cases is given, it may actually lead to suspicion that none of them are truly on point. If you have one or two binding authorities that support the proposition you are advancing, it is usually best to cite only those rather than setting out an exhaustive list of cases. Moreover, you can help the court, as well as helping your credibility, by including in your case citations the specific page or paragraph number where the accuracy of your interpretation of the case can be confirmed. Including such specific references in your factum also makes it much easier for you to prepare for your oral argument.

Finally, if you offer a quotation from a case authority, either in your factum or in oral argument, be sure to include any relevant context. Whatever point you are trying to make by offering the quotation will be lost when a judge on appeal says to you, “But read the next sentence.”

VI. Trials Are in "Real Time"; Appeals Are in Compressed Time

Alfred Hitchcock's movie *The Rope* is interesting to film historians for the fact that it is in "real time," that is, the events that take place in the film occur over the same period of time as the viewer experiences while watching the film. This is unlike most films, which may compress days, months, or years of events into a ninety-minute running time.

Trials may be said to be in "real time" in this sense: counsel and the court experience everything that happens in the trial at exactly the pace at which it occurs. If a witness is on the stand for two days, everyone in the courtroom experiences the testimony for that length of time and at that pace.

Appeals are not in real time. The events of trial are severely compressed on appeal. A trial which lasted weeks may occupy only a few hours of hearing time in the Court of Appeal, and even less in the Supreme Court of Canada.

One obvious consequence of this for appellate advocacy is that counsel must, even more so than at trial, plan to use what limited time they have wisely. In the Court of Appeal, a conviction appeal is generally set for only half a day, that is, two hours. Unusually complex cases or cases where there are interveners may be set for a full day. Requests for more time are generally scrutinized carefully by the court. Many counsel find these time constraints frustrating. They should not be. It is in the nature of appeals that a case should become more distilled and focused as it moves up the appellate ladder. It is rarely good strategy to try to reargue every issue that was litigated at trial. The time limits imposed on appeals should be seen as an advantage, since they force upon counsel the discipline of honing their arguments to the sharpest possible point. Remember that the narrowest point is often the sharpest point. This holds true not only for oral argument, but also for the factums. The thirty-page limit (forty pages in the Supreme Court of Canada) is the written equivalent of the time limits for oral argument. While the court may in exceptional circumstances give counsel leave to file a factum in excess of the limit, the result is often that the lengthy factum is less persuasive than a more concise written argument would have been.

Another consequence of the fact that appeals are in compressed time is this. At trial, counsel may be fairly confident that the judge is aware of all the evidence and all the legal argument, because counsel and the judge were there listening to the proceedings together. On appeal, counsel has no simple mechanism for determining what the court knows and what it does not know. The mere fact that the transcript of the entire trial has been filed does not guarantee that the appeal judges will be aware of all that is in the transcript. Usually, the judges will have read both factums and the trial judge's reasons for judgment or charge to the jury, but even this may not be a certainty. Ask any counsel who has appeared often in the Court of Appeal, and they will tell you stories about times when a member of the Court has announced, "Counsel may assume that we have read the factums," although questions from that same judge make it clear that they have missed significant points that should have been obvious from reading the factums. This poses a problem for counsel. On the one hand, it is a mistake to repeat in oral argument everything that is in the factum. This is especially true of the statement of facts. On the other hand, counsel must try to ensure that the court does not misapprehend important aspects of the trial record. The only real solution to this dilemma is for counsel to emphasize the parts of the record which are truly important, and to be vigilant during the oral hearing to notice any questions or comments from the court that suggest that they have misapprehended some aspect of the trial record.

VII. Trials Affect the Immediate Litigants; Appeals Affect Future Litigants

In *Regina v. Potvin* (1993), 83 C.C.C. (3d) 97 (S.C.C.) McLachlin J., as she then was, observed at 120: "In addition to reaching the just result in the case before it, an appellate court has a duty to settle and articulate principles of law which transcend the needs of the particular case." That fact has profound implications for appellate advocacy. Counsel's submissions on appeal must take account of the fact that whatever result the appeal court reaches will bind lower courts and will not merely affect the appellant and respondent in this case. Thus, if your client's case is sympathetic, but the result of ruling in your favour would be to create an unpalatable precedent, you have a problem, and you must try to offer the appeal court a solution.

More generally, the fact that appeal decisions affect future cases means that appellate courts are often more interested in the policy reasons for or against your position, and less interested in the case law which supports you. The higher the level of court, the more particularly this is true. Thus, in the Supreme Court of Canada, the mere fact that previous decisions of that Court support your position is no guarantee that you will prevail. For example, in *Regina v. Feeney*, [1997] 2 S.C.R. 13, the Supreme Court of Canada created a requirement for the police to obtain a warrant before entering a dwelling to effect an arrest, notwithstanding that in a series of previous cases, no such requirement obtained: see *Eccles v. Bourque*, [1975] 2 S.C.R. 739, *Regina v. Landry*, [1986] 1 S.C.R. 145, and *Regina v. Macooh*, [1993] 2 S.C.R. 802. In short, when arguing appeals, you should be prepared to argue not only on the basis of *stare decisis*, but also on the basis of policy. You must try to convince the court that your client's case should prevail not only on the basis of what the law has been, but also on the basis of what the law should be.