benchtv
a benchmark production

# Précis Paper

## How to Run a Defence in a Criminal Trial

This is a presentation by an Acting Judge of the NSW District Court and a highly experienced criminal practitioner sharing their views and advice on running a defence in a criminal trial.

**Discussion Includes**

- Judge-alone versus jury trials
- Early stages of a criminal trial – the indictment and interlocutory applications
- The importance of facts and evidence
- Opening addresses
- Asking questions of witnesses
- Selecting the jury
- Summing up

# Précis Paper

# How to Run a Defence in a Criminal Trial

1. In this edition of BenchTV, Judge Colin Charteris (Acting Judge, District Court of NSW, Sydney) and Richard Thomas (Barrister, Silk Chambers, Canberra) share their advice on running criminal trials. Both presenters emphasised that personalities are important in criminal trials, and that different practitioners may take different views on some of the issues discussed.

## Judge-Alone versus Jury Trials

2. Before a trial commences, an important first consideration is who is the trier of fact. In many Australian jurisdictions, there is now a mechanism to allow for judge-alone trials and judge-alone trials have become a regular feature of criminal trials.

3. Judge Charteris commented that judge-alone trials place a particular burden on judges, who have to give detailed reasons for their verdicts. It is a big responsibility for a judge alone to decide guilt or innocence in serious crimes. Judge Charteris also noted that it is easier for the judge to concentrate on the legal issues if he or she does not have to evaluate witnesses at the same time.

4. Both presenters were strong advocates of the jury system, and considered that although the jury system has flaws, it was preferable to have 12 community members, who could reflect on their life experience when determining a verdict in a criminal trial than one sole judge. In some cases, there may be a narrow legal issue that it is appropriate for a judge to decide. However generally, Mr Thomas thought that there are significant risks from the accused's perspective in judge-alone trials. Some judges take a broader view of "beyond reasonable doubt" than others, and the importance of having the input of a variety of community views should not be understated. When there was first an outcry about unsigned confessions, for example, juries were the first to have their doubts about them, before judges.

## The Early Stages of a Criminal Trial

5. Sometimes indictments contain far too many charges, and both presenters thought that the Crown should have regard to the burden that will be placed on the jury and on the judge in summing up where there are too many charges on the indictment. It is therefore important for defence counsel to form a view about the evidence, their client, the defence and the indictment early on in the proceeding, to allow time for representations to be made to the Crown where an indictment is overloaded.

6. Ideally, arguments about admissibility of evidence should occur well before the trial starts, however in reality, these arguments often occur on the first day of trial. Nonetheless, it is important to issue subpoenas and engage in the discovery process early on.

7. Further, looking at the details of the case starts at the pre-discovery and pre-trial application stage. Mr Thomas' advised defence lawyers to know more about the facts than the prosecution does and to prepare early. Knowing the facts well is essential to presenting your case to the jury. It is also important to "walk the walk" – that is, go to the scene of the crime or other important locations and understand what is there, the topography, and what is or is not possible to see. Knowing the scene helps an advocate paint the scene for the jury and cross-examine effectively.

8. Judge Charteris also advised lawyers to know the big picture of the case, and not call unnecessary witnesses. The jury likes genuineness from advocates, and want to understand as simply as possible what the case is about and what the issues are, so having a thorough understanding of the case and being able to distill the key issues is crucial for getting the jury on side.

Opening Addresses

9. Historically, the accused was not entitled to deliver an opening address. However, now that an accused has an option of giving an opening address, Judge Charteris indicated that his personal preference would be to not let an opportunity go by to speak to the jury at an early stage.

10. The purpose of the Crown's opening address is to let the jury know what the prosecution's case is, and what the issues are. For the accused, it is equally worthwhile pointing out key issues, such as the reliability of a particular witness. It is also an opportunity to introduce yourself to the jury, and get the focus of the jury on the defence rather than the prosecution. Ultimately, the Crown never abandons the advantage to open the case, and so neither should the defence.

11. Where a defence lawyer does not know in advance how the evidence will fall out, they will be restricted in the way in which they can give an opening address, however this does not preclude giving some early remarks.

12. Although there is an entitlement to a further address by defence counsel prior to them leading evidence (see s 159, *Criminal Procedure Act 1986* (NSW)), it may be preferable to

open after the prosecutor's opening, rather than after the prosecution's case closes and before the defence leads evidence.

Asking Questions of Witnesses

13. There used to be a principle that when examining witnesses, you should never ask a question that you do not know the answer to. However, both presenters considered that it is difficult to practice effectively without breaking this rule, and there will be many occasions on which you will have to ask questions to which you do not know the answer. Mr Thomas indicated that on some occasions, you will get a feeling for the witness and know where they are going, but even if this is not the case, an advocate may still have to pose questions with unknown answers. If the question is not asked, there is a penalty that will paid with the jury, because the jury will want to know and may consider that the defence is avoiding an issue because it suggests guilt if it is not properly examined. Advocates can also take a cue from questions asked by the jury to determine what is on the minds of the jurors.

14. A second rule when examining witnesses is to keep questions to a minimum, and advocates must be careful about asking more questions than are necessary. If care is not taken, the evidence may lead to unexpected areas that may damage the accused's case.

The Jury

15. Jury selection is an opportunity for the advocate to start to form a relationship with the juror and to assess them early on. Judge Charteris commented that the Crown prosecutor often only sees the potential juror as he or she passes the bar table, which gives away an opportunity to assess the witness from the moment they stand up. It is helpful to see the potential juror for as long as possible to assist in forming an opinion about the person and their attitude towards the accused.

16. Mr Thomas advised that if a jury is feeling antagonistic about the court process, they may take their frustration out on the accused. Therefore, it is important not to take points for the sake of taking points. Juries may feel that things are being hidden from them if they are sent out frequently so that legal points can be discussed. Moreover, there will be times when a defence counsel can object to a question asked of the accused, but it is preferable not to because the jury may think that the lawyer is protecting the accused.

Directions and Summing Up

17. Judge Charteris advised lawyers to start thinking about any special directions they may request early on. A practitioner will need to think about getting the evidence before the judge that will justify a special direction, such as a direction about delay.

18. Judge Charteris' position is to only sum up briefly on the facts, as these will be addressed by the Crown and the defence, and the jury will have a copy of the transcript. Throughout the trial, the defence needs to try to keep evidence out, but also to mould evidence to meet its case. Part of the art of advocacy is to identify real issues early, and how to present that issue on behalf of the client. Both presenters considered that there is room for more economy regarding the way in which we deal with juries, and jurors get sick of something being repeated *ad nauseum*. It is therefore more effective to focus on the real issues and not deflect the jury's attention by overly addressing subsidiary issues.

## BIOGRAPHY

Judge Colin Charteris

Acting Judge, District Court of NSW, Sydney

Judge Charteris was appointed Senior Counsel in 2001. As a barrister, he appeared for both the prosecution and defence in many significant criminal trials across all NSW court jurisdictions. Since joining the bench in 2003, Judge Charteris has presided over criminal and civil trials in Sydney, as well as 26 regional District Courts throughout NSW. He is currently an Acting Judge of the District Court.

Richard Thomas

Barrister, Silk Chambers, Canberra

Richard Thomas was admitted as a solicitor and called to the Bar in 1978. He has contributed to many law reports including Australia and New Zealand Insurance Law Reports, Medical Law International and Lexis Nexis. In addition he has written various books and legal articles as well as being the Editor of Benchmark Criminal Weekly review. Aside from the law, Richard is actively involved in equestrian activities.

## BIBLIOGRAPHY

Legislation

*Criminal Procedure Act 1986* (NSW)