



ARISTOTLE AND THE THREE PILLARS OF ADVOCACY OR A FEW THOUGHTS ON ADVOCACY FROM THE COAL FACE

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THE THREE PILLARS

1. We teach advocacy using the Hampel method. It is a supremely effective and invaluable tool.
2. We should not however forget the ancient principles of Rhetoric in the teaching of advocacy. Rhetoric is the art of persuasion. Together with Grammar and Logic or Dialectic, it is one of the three ancient arts of discourse. Aristotle defines Rhetoric as the *“faculty of observing in any given case the available means of persuasion”*.
3. The three pillars of advocacy or persuasion or modes of proof are described by Aristotle:

“Of the modes of persuasion furnished by the spoken word there are three kinds. The first kind depends on the personal character of the speaker (ethos); the second on putting the audience into a certain frame of mind (pathos); the third on the proof, or apparent proof provided by the words of the speech itself (logos). Persuasion is achieved by the speaker’s personal character when the speech is so spoken as to make us think him credible”.

4. Fleur Kingham the President of the Land Court of Queensland in her lecture “Maximising your Impact as an Advocate: A view from the Bench” said:

“Logos targets the brain; it is the logical rational aspect of argument. Pathos is about the heart; moving the listener to want to accept the proposition. Ethos appeals to the gut – the instinctual response to the person – that sense of whether we can trust what we are being told”.

5. It is said that modern advocacy focuses more on the rationality based form of discourse than ethos and pathos as juries become more sophisticated than the audience assumed by Aristotle to be an audience of *“untrained thinkers”*.
6. Oliver Wendell Holmes asserted: *“the life of the law has not been logic: it has been experience”*. McCormack (Ethos Pathos and Logos: The Benefits of Aristotelian Rhetoric in

the Courtroom) continues: *“experience in all of its plasticity and subjective bases, necessitates a hard look at the capability of the human race as a whole as well as jurors, judges, and litigators themselves to utilize logic consistently and similarly over time. While this seems possible to a certain extent based on the influence that the reliance on logic and rational decision making has had on trial procedure, it does not eliminate the need for or the benefits that may be derived from the use of an attorney’s appeals catered toward the other two modes of proof, ethos and pathos”*

ETHOS

7. Ethos is about making the advocate credible or apparently credible as a source (persuader credibility). It is designed to make the audience unconsciously or consciously feel that they trust the advocate. To that end the advocate must demonstrate practical intelligence, a virtuous character, reputation and good will, honesty and candour.
8. Aristotle held that *“we believe good men more fully and more readily than others. This is true whatever the question is and absolutely true where exact certainty is impossible and opinions are divided”*. In Richard II, Thomas Mowbray is accused of treason and says of his distress, *“The purest treasure mortal time afford is spotless reputation; that away, men are but gilded loam or painted clay”*. It is Aristotle’s view that *“character may almost be called the most effective means of persuasion (the advocate) possesses”*
9. Ethos encompasses (1) bodily eloquence including posture, gesture, facial expression, eye contact, body language and movement, proxemics (space between the advocate and the audience) and (2) the use of the voice and how we say the words used. The whole provides a collective signal to the jury.
10. The voice conveys elements of ethos. It involves pitch, speed, volume, tone and rhythm. It permits the advocate to convey emotional intention. Pauses are crucial. They can be used as thinking pauses or pauses to raise tension.
11. One of the social aspects of ethos or credibility is about identity and membership of the group. Research suggests that that the speaker must portray himself as belonging to the group rather than above it.
12. Ethos is transmitted through the advocate’s self portrayal. It includes the advocate’s clothes, vocabulary, hints at social rank. The advocate can use statements to suggest social hierarchy, preferences and distastes.
13. Ethos will involve practical intelligence in the sense of choosing the most credible arguments making sensible and reasonable concessions.

PATHOS

14. Pathos encompasses emotional influence the advocate has on her audience. It is necessary to put the audience in the appropriate emotional state. Norbert Schwarz (Emotion, Cognition and Decision Making): *“Our everyday experiences leave little doubt that our*

emotions can influence the decisions we make, much as the outcome of our decisions can influence the emotions we experience". Aristotle: "Our judgments when we are pleased and friendly are not the same as when we are pained and hostile". Uffelman (Hamlet was a Law Student. A Dramatic look at Emotions Effect on Analogical reasoning): Emotion is "what releases the legal imagination to see relevant similarities and therefore permits the final leap to judgment".

15. Pathos permits the audience to place itself in the shoes of the litigant. That is not to say that emotion is to be overdone. Juries are directed to judge a case on the evidence and not emotion. Thus the pathos element of advocacy in jury trial must be finely judged. As Uffelman said: *"If the ultimate goal of the legal process is justice then....we should desire the most sensitive understanding of the intersection of emotion and reason in order to maximise the breadth and depth of the (audiences) imagination in conceiving justice"*
16. Thus: *"The emotions are all those feelings that so change men as to affect their judgments and that are also attended by pain or pleasure. Such are anger, pity, fear and the like with their opposites. We must arrange what we have to say about each of them under three heads. Take for instance, the emotion of anger: here we must discover (1) what the state of mind of angry people is (2) who the people are with whom they usually get angry and (3) on what grounds they get angry with them"*.
17. Pathos requires the audience to identify with the advocate. It requires the advocate to know the audience, its value and belief systems. The advocate has techniques and styles which create or enhance emotions which impacts on the critical faculty of the audience. It is the emotional influence of the speaker on the audience. The advocate achieves this in part by the correct use of figures of speech, putting content and arguments in the fore or background, clarity in the sense of intellectual comprehensibility and propriety where the style is appropriate to the issue and context. Brevity is important but not so as to limit clarity.
18. Story telling is used to give a personal touch and create curiosity in the audience. The story allows the speaker to raise emotion and link with eg childhood memories.
19. Pathos may bite at the beginning and end of the speech grabbing the attention of the audience and leaving them with conviction.

LOGOS

20. Logos: *"Thirdly persuasion is effected through the speech itself when we have proved a truth or an apparent truth by means of the persuasive arguments suitable to the case in question"*.
21. There are different forms of proofs: the natural and the artificial/ technical proof. Natural proofs are those that are based on data, testimonies etc. Artificial or technical proof are those created with a combination of information, hints, examples and the art of logic.
22. Logos deals with content, structure and argumentation of a speech in contra distinction to style and expressive qualities. It is the relationship of facts with reality. It is the appeal to logical reason. The argument must appear sound to the audience. The advocate will express

information, argumentation and structure clearly and explicitly so that the audience is able to follow his reasoning. The structure of the speech supports the listener to understand and enjoy the content of the speech, to memorise and process the information given.

COGITATION

23. So what does this mean for the criminal practitioner? Caldwell (Primacy, Recency Ethos and Pathos. Integrating Principles of Communication into the Direct Examination): *“In the courtroom the advocate must inform and persuade; he must respect the cumbersome rules of the court but still present the facts in a memorable and compelling way. That is the advocate’s message must be accurate, factual and legally adequate but also absorbing, captivating and emotionally forceful. Similarly the advocate as messenger must not only be lawyerly making sure that all the “Is” are dotted and “ts” are crossed but also credible and likeable. Both message and messenger play critical roles in the communication process”*.
24. Scharffs (The Character of Legal Reasoning) summarised the Aristotelian theory as accounting for both practical wisdom in that it *‘imbues craft with a moral dimension that it otherwise lacks’ by mandating the use of logic and rational arguments through logos as well as the existence of a goodness in the persuader through ethos* (McCormack).
25. A few thoughts whether prosecuting or defending:
 - i. When defending I get to know the client perhaps more deeply than he/she has ever known. Gone are the days when Leading Counsel did not see her client. By getting to know our client well we are able to identify with him/her. We are able to glean tiny but precious parts of his character which we can then adduce before the jury. In one case it was weeks before we established that a man on trial for an associated role in a gang execution with a substantial criminal record, translated books for children into braille and worked in prison as a Samaritan whilst at the same time describing himself as a *“scroat”*. When prosecuting the victim is not just a name. He or she is a person and the jury is entitled to know how he or she appeared in life.
 - ii. I structure my examination in chief or cross examination (normally in writing and contributed to by Junior Counsel and Solicitor) and when defending make sure that the client understands exactly what we are seeking to elicit from him in the witness box. If the client is not prepared then the entire case can be lost by reason of this gross disservice. The client and the advocate will lose all credibility or ethos.
 - iii. Whatever the time available I spend it on the case, thinking, working on cross examination, theories, speech. I always visit the scene of a murder to get a feel for the place. Whatever the detective work we may see something no one else has seen – rarely but it may happen.

- iv. Even if interviews are “no comment” interviews someone on the team listens/watches them both for the defendants and any ABE. We may get a feel for the characteristics of the individual
- v. More important than anything is to be able to “*tell them (the jury) the story*” as the old barrister in *Brothers in Law* advised.
- vi. Successful advocacy requires mastery of the brief, consideration of every and all permutations of fact and inference, rigorous analysis, time to reflect, revise and where necessary to delete.
- vii. I seek to establish Ethos from the beginning, the first moment when introduced to the jury. That means appearance must attract. The uniform is there for a purpose. We use it. Our collars must be clean. More than that I may be seen outside court as the jury arrive or leave after the court day. If I am scruffy, if I am not wearing my collar and tie even in the heat, the jury will see.
- viii. The entire trial is founded or predicated on the speech. Every question must be asked for the purpose of the speech. We do not ask anything, do not say anything unless it is to be used for the speech.
- ix. The jury will see interactions with the judge and any opposing counsel. Whatever the provocation, the jury will be far more impressed by an advocate who is polite and reasonable. Rarely have I found that interjections assist the speech unless absolutely necessary. The purpose of the advocate is not to disparage ones opponent and turn the jury away from the other side but rather to bring the jury onto his client’s side.
- x. When it comes to the speech, I write it out word for word unless I consider myself a natural orator (of whom there are few). Most of the great orators I have known have sweated blood over their speech.
- xi. I build the speech on the principles of ethos pathos and logos but directed towards the essence of the case being presented.
- xii. I seek to know my speech so well that I can read it without looking at the notes. Thus I will always be able to look the jury in the eye. If we have the written speech we can, should the whim or audience reaction provide the opportunity, fly from it knowing that we can return to the safety of the structure of the nest without faltering. I read the speech again and again and revise it time and again before I deliver it. I read it aloud in the privacy of my study

or hotel room, to get every tone of voice, every turn of phrase perfect. A prolix, rambling and obtuse speech will not persuade.

- xiii. Before delivering the speech, I prepare by standing at the lectern before the court assembles; I judge the distance between me and the jury; I make sure they can all see me and just as important I can eye ball each of them.
- xiv. I empty my pockets. I do not want anything to detract from me, the advocate which will surely happen if I am jangling keys.
- xv. When delivering the speech I do not rush, I stand straight, I look at the jury. I do not drop my eyes to the page as I make the crucial point. To do so will suggest that I do not believe in my own argument.
- xvi. Where sensible, I have every single exhibit or page of the jury bundle available for reference unless it is easier to quote in the speech in which case I type it out word for word so that there is no stumbling.
- xvii. I monitor speed of delivery. I sometimes try to inject some humour but am very careful - humour is difficult in a gait execution but even there it is possible.
- xviii. I try to use some local knowledge so as to get close to a local jury. In a recent murder trial in Chapeltown Leeds, when defending I was able to use the following:

“The Ralph Thoresby School is in Cookridge. Ralph Thoresby was an 18th century antiquarian and merchant. He described Chapeltown as “well situated in pure air upon a pleasant ascent which affords a prospect of the country for 10 or 12 miles”.

Chapeltown Moor was the site of one of the first Yorkshire cricket matches between the gentlemen of Chapeltown and the gentlemen of Sheffield.

It remains an area where as (the police intelligence officer) described most people play out their lives in a decent and respectable way.

It has beautiful parks and well stocked children’s playground.

It is however plagued by those who mercilessly lacerate it with their drug dealing and associated violence”.

- xix. I embrace Ethos. I make myself known to the jury. I open myself up. I never speak down to the jury. I am never pompous. I always defer to the jury. I make them feel as they are, significant. I have used an introduction, again when defending:

"I am acutely aware that although I am older than each of you, together you are collectively far older than I. I have some experience of life but together you have more experience than I could ever hope for. I have my trade. You have or have had yours whether paid or unpaid. Thus you have more knowledge of work whether in the home, with children or beyond. You have suffered life's tragedies, you have experienced life's many joys. It is that experience of life which you will obviously bring to bear on this case as you follow your own lines of logic.

One thing I can be fairly sure of is that you have not experienced what you are now experiencing in this court. But even there I could be wrong. You may be lawyers, judges, police officers, I do not know.

And so do not blame me if I address you on matters which you may well know. Please forgive me if individually or collectively you consider that anything I might say makes little or no sense"

- xx. I look at the entire jury ranging from 1 to 12. If necessary and I need a friendly face I turn to the juror who I rightly or, in my sense of delusion, believe to be on my side.
- xxi. I do my best to follow this advice.

26. Sometimes, just sometimes when defending I may be able to tell the jury about Aristotle and turn it towards the defendant. In a gangland execution case where there were cut throat defences, having dealt with the usual burden and standard of proof, I intended to say:

Our case depends on three things: what you think of (the defendant) when you see him and hear him, a logical analysis of the prosecution case and the incoherence of the case for the other defendants.

I have my own rules in criminal trials based on what those of us who are rather ancient were taught when learning our trade. They are based on the great Greek philosopher Aristotle, who taught that the art of advocacy is built on three pillars - logos (the logic or reasoning supporting the speaker), ethos (the credibility of the speaker) and pathos (emotional appeal of the speaker).

And so I look for the logic of a case, the credibility of the defendant and any emotional aspects of the case which I may be able to suggest goes to support the defendant.

In this case the three pillars are built:

- a. on the notion of (the defendant) being the spotter as so lacking logic as to be absurd;*
- b. the defendant himself when examined and considering his flaws and defects and criminal past is not in truth the sort who would become involved in this horrendous execution committed by a gang;*
- c. the last interview where he describes his terror of those of whom he was to tell the truth.*
- d. Bound up in that analysis and part of the logic is the bewildering lack of integrity of the gang members and in particular the case for (the co-defendant)”.*

27. My far wiser Junior advised against it. She was right to do so in that case but I have used the device but once!

28. I appreciate that many will have their own experiences and principles of advocacy and may well hold that my ideas are insignificant or worse. I just thought I might provide a little of my experience.

29. McCormack says, *“the intersection of Aristotle’s three modes of proof is what creates true, beneficial and just persuasion in the courtroom. A trial attorneys appeals to logic after carefully considering his position and thoroughly researching his topic can be considered by his audience, the judge and jury in their deliberations of the case. Such appeals also lend themselves to the judge and jury members perception of the attorney’s credibility as a well-researched well prepared attorney particularly one who can communicate his position with confidence, is in all cases more trustworthy than one who cannot and does not have full command of the relevant law”*

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