UNSW CENTRE FOR CONTINUING LEGAL EDUCATION

LITIGATION MASTER CLASS

29 MARCH 2007

TOPIC 4: Correcting error – the process of appeal

OVERVIEW

Topic 4 of this seminar examines aspects of appellate process.

This paper is an outline of the matters to be examined in the session scheduled from 12.00 noon to 12.50 pm. It is drafted mindful that the topics in the session are extensive, and with a view to stimulating thought and promoting discussion. Necessarily, the content and detail of the paper is constrained by the time available for this session.

Legal practitioners are cautioned to rely on their own research and enquiries in advising clients, as this paper does not purport to be definitive on the matters examined, and they will also be mindful of the evolving nature of the law, together with the importance of the facts to determine outcomes in individual matters.

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A. Prologue – "lighthouse moments"

"Let me begin this chapter with what is reported to be an actual radio conversation released by US chief of naval operations:

– Please divert your course fifteen degrees to the north to avoid a collision.

– Recommend you divert *your* course fifteen degrees to south to avoid a collision.

– This is the captain of a US Navy ship. I say again, divert *your* course.

– No. I say again, you divert *your* course.

– THIS IS THE AIRCRAFT CARRIER *ENTERPRISE*. THIS IS A LARGE WARSHIP OF THE US NAVY. DIVERT YOUR COURSE NOW!

– This is a lighthouse. Your call."[1]

[1] Dabashi, Hamid, *Iran A People Interrupted*, The New Press, 2007, p 214

B. Introduction

1. The process of appeal refers to the remedy to set aside or vary a judicial or other decision given by one court or tribunal to quell a dispute, by another court possessing jurisdiction to review that decision and to correct error. For convenience, in this paper when referring to courts and tribunals, I shall use the general term courts, in a sense which is broader than usual.

2. In 2007, appeal from a decision which is perceived to be unsatisfactory in the sense of wrong in fact or law is often an accepted, presumed and expected legal right. It has not always been so in our common law jurisprudence (as opposed to civil or code based). Nor does such a right necessarily exist in all cases.

3. The genesis of the right of appeal informs as to the relevant process to correct error.

4. Appeal was not a remedy known to the common law. Its origin is found in Roman/civil law in medieval times. It has been incorporated into common law jurisprudence by gradual and at times erratic changes to substantive and adjectival law during the course of the second millennium AD.

5. One constant which exposes the conceptual underpinning of the process of appeal is the administration of justice according to law as the foundation for the jurisdiction of courts to decide controversies.

6. Thus in the seventeenth century the House of Lords declared that it possessed a limited special jurisdiction as delegate of the Sovereign, to receive and determine appeals to avert “failure of justice in the land”.

7. Other processes akin to appeal, which had developed prior to the Judicature Act in 1875, included the writ of error, and the writ of certiorari. The consequence of a successful outcome on such an application was a new trial. Furthermore, Equity Courts and Admiralty Courts developed a limited appeal process by way of a bill of review.

8. Another was an objection to the verdict of a jury which was made by application to the court *in banco* to have the verdict set aside and for the grant of a new trial.

9. Yet in the absence of statute conferring such a right, there was and still is no basis for an appeal per se from a decision in the common law.

10. In New South Wales Parliament will have created statutory rights of appeal, which are usually found in the legislation conferring jurisdiction on the relevant first instance court or tribunal. There is no common or universal legislative provision, and in determining appeal rights there is no alternative but to examine the appropriate statute, relevant to the matter under consideration, see as an example:

> **Consumer, Trader and Tenancy Tribunal Act 2001 No 82**
>
> **67 Appeal against decision of Tribunal with respect to matter of law**
>
> (1) If, in respect of any proceedings, the Tribunal decides a question with respect to a matter of law, **a party in the proceedings who is dissatisfied with the decision may, subject to this section, appeal to the Supreme Court against the decision.**
>
> (2) ….

11. Separate consideration of the source of and scope of any right of appeal is the starting point of considering any appeal from a decision.

12. As to the method of prosecuting an appeal, process in the sense of how the appeal is to be conducted, is usually prescribed by separate legislation, such the Common Law Procedure Act 1899 during the twentieth century. However for present purposes the passage of the Supreme Court Act 1970 ("**SCA**") whereby the English judicature reforms of 1875 were introduced, is the key event.

13. That legislation included section 75A (and for this topic the equally important Part 7 – Appeal to the Court of Appeal) which in its current form provides insight into the nature and extent of one appeal process, but relevant only to the specific appeals to which it applies, see:

Supreme Court Act 1970

75A Appeal

(1) Subject to subsections (2) and (3), this section applies to an appeal to the Court and to an appeal in proceedings in the Court.

(2) This section does not apply to so much of an appeal as relates to a claim in the appeal:

(a) for a new trial on a cause of action for debt, damages or other money or for possession of land, or for detention of goods, or

(b) for the setting aside of a verdict, finding, assessment or judgment on a cause of action of any of those kinds,

being an appeal arising out of:

(c) a trial with a jury in the Court, or

(d) a trial:

(i) with or without a jury in an action commenced before the commencement of section 4 of the District Court (Amendment) Act 1975, or

(ii) with a jury in an action commenced after the commencement of that section, in the District Court.

(3) This section does not apply to:

(a) an appeal to the Court under the Crimes (Local Courts Appeal and Review) Act 2001, or

(b) to a case stated under the Criminal Appeal Act 1912.

(4) This section has effect subject to any Act.

(5) **Where the decision or other matter under appeal has been given after a hearing, the appeal shall be by way of rehearing.**

(6) The Court shall have the powers and duties of the court, body or other person from whom the appeal is brought, including powers and duties concerning:

(a) amendment,

(b) the drawing of inferences and the making of findings of fact, and

(c) the assessment of damages and other money sums.

(7) The Court may receive further evidence.

(8) Notwithstanding subsection (7), where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds.

(9) Subsection (8) does not apply to evidence concerning matters occurring after the trial or hearing.

(10) The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires.

14. Whilst that provision and other legislation, such as the applicable rules e.g. SCR Part 51, and the Civil Procedure Act / UCPR Part 50 regulate and prescribe procedure for the appeal process, they have nothing to say in providing the right of appeal.

15. Excluding the sphere of stated cases or prerogative review which is not developed in this paper a prudent practitioner will examine the statutory provisions applicable to the specific decision to be challenged from two perspectives:

(a) firstly, to establish the scope of the right of appeal, and,

(b) secondly, to establish the method by which such a right is to be exercised.

16. These considerations apply both to the position of an appellant seeking appellate review of a decision, and a respondent to an appeal who seeks to preserve, or improve upon the status quo.

C. Scope of the right of appeal

17. A decision of a court usually must be obeyed unless and until it is set aside. The belief of a party or a third person affected by a decision that it is irregular or even void is not justification for ignoring the decision and treating it as of no effect or operation in law. Disobedience amounts to contempt, which may cause a court to exercise its powers to protect its processes.

18. The better approach to address any dissatisfaction with a judicial decision or an operative decision of a tribunal perceived to be infected with error is by the process of appeal.

19. The word appeal is a chameleon-like term of wide and changing application. It describes number of different jurisprudential processes which have few unifying characteristics and which vary greatly in extent as to the power of the court of appeal to disturb the impugned decision.

20. The creation of a right of appeal is an act which requires legislative authority. Therefore, when a new court is established and no right of appeal is given, generally no appeal will lie to a higher court. Neither the new court nor the higher court, in the exercise of a power to make rules of procedure, is competent to create a right of appeal.

21. Thus any appeal made to an appellate court absent the existence of a statutory right of appeal is incompetent. The court must take the objection that it has no jurisdiction to hear the appeal. The court is unable to confer jurisdiction upon itself as to do so would be to create, rather than to determine legal rights.

22. The relevant statute will determine the scope of the right of appeal. The right to appeal from a decision in a Division of the Supreme Court to the Court of Appeal is created, and the jurisdiction conferred on the Court of Appeal, by SCA Part 7, (ss 101-110).

23. However, appeals from Associate Judges and others are excluded. Appeal rights from such decisions are found in SCA Part 8, see ss 118(3) and 121(3) to set aside or vary a judgment or order of an Associate Judge or Registrar.

24. Appeals from specified tribunals may be to the Supreme Court. The efficient dispatch of business together with the SCA and SCR will determine whether such an appeal is assigned to the Court of Appeal.

25. Other examples of statutes providing the scope of the right of appeal, together with the requirement of leave to appeal in regard to classes of decision, include:

> **District Court Act 1973 No 9**
>
> **127 Right of appeal to Supreme Court**
>
> **(1) A party who is dissatisfied with a Judge's or a Judicial Registrar's judgment or order in an action may appeal to the Supreme Court.**
>
> **(2) The following appeals lie only by leave of the Supreme Court:**
>
> (a) an appeal from an interlocutory judgment or order,
>
> (b) an appeal from a judgment or order as to costs only,
>
> (c) an appeal from a final judgment or order, other than an appeal:
>
> (i) that involves a matter at issue amounting to or of the value of $100,000 or more, or
>
> (ii) that involves (directly or indirectly) any claim, demand or question to or respecting any property or civil right amounting to or of the value of $100,000 or more,
>
> (d) an appeal from a judgment or order on an application for summary judgment under the rules,
>
> (e) an appeal from an order made with the consent of the parties.
>
> (3) In any other case, an appeal lies as of right.

Local Courts Act 1982 No 164

Division 3 Appeals from Local Courts

73 Appeals as of right

(cf Act No 11 1970, section 69 (2) and (2A))

(1) A party to proceedings under this Part who is dissatisfied with the judgment or order of a Court sitting in its General Division may appeal to the Supreme Court against the judgment or order, but only as being erroneous in point of law.

(2) A party to proceedings under this Part who is dissatisfied with the judgment or order of a Court sitting in its Small Claims Division may appeal to the Supreme Court against the judgment or order, but only on the ground of lack of jurisdiction or denial of natural justice.

74 Appeals requiring leave

(cf Act No 11 1970, section 69 (2B) and (3))

(1) A party to proceedings under this Part who is dissatisfied with the judgment or order of a Court sitting in its General Division may appeal to the Supreme Court against the judgment or order on a ground that involves a question of mixed law and fact, but only by leave of the Supreme Court.

(2) A party to proceedings under this Part who is dissatisfied with any of the following judgments or orders of a Court sitting in its General Division may appeal to the Supreme Court against the judgment or order, but only by leave of the Supreme Court:

(a) an interlocutory judgment or order,

(b) a judgment or order made with the consent of the parties,

(c) an order as to costs.

26. Another consideration is the restriction of the process of appeal, an example is the existence of a privative clause, which proscribes any appeal from the Full Bench of the Industrial Relations Commission, see:

Industrial Relations Act 1996 No 17

179 Finality of decisions

(1) **A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.**

(2) Proceedings of the Commission (however constituted) may not be prevented from being brought, prevented from being continued, terminated or called into question by any court or tribunal.

(3) This section extends to proceedings brought in a court or tribunal in respect of a decision or proceedings of the Commission on an issue of fact or law.

(4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:

(a) the Full Bench of the Commission in Court Session, or

(b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.

(5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.

(6) This section is subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law.

(7) In this section:

decision includes any award or order.

27. After determining the legislative provision conferring the right of appeal, the scope of such right will be apparent. Identifying the scope of the right or the category that the appeal falls within, will assist in determining the proper approach to its prosecution, with guidance from statute and authority. The following passage from the reasons by Gleeson CJ, Gummow and Kirby JJ in the matter of *Fox v Percy* (2003) 214 CLR 118 at 124 para [20] provides helpful guidance as to the various classes of appeal (my emphasis):

> <u>The powers and functions of the Court of Appeal</u>
>
> Appeal is not, as such, a common law procedure. It is a creature of statute. In *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd*, Mason J distinguished between
>
> (i) an appeal *stricto sensu*, where the issue is whether the judgment below was right on the material before the trial court;
>
> (ii) an appeal by rehearing on the evidence before the trial court;
>
> (iii) an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so; and
>
> (iv) an appeal by way of a hearing de novo.

There are different meanings to be attached to the word "rehearing". The distinction between an appeal by way of rehearing and a hearing de novo was further considered in *Allesch v Maunz*. Which of the meanings is that borne by the term "appeal", or whether there is some other meaning, is, in the absence of an express statement in the particular provision, a matter of statutory construction in each case.

D. The purpose and method of appellate review

28. The purpose of a right of appeal may be understood as arising from the dictates of justice which compel the correction of judicial error, tempered by policy considerations, including the public interest in the finality of litigation.

29. The potentially conflicting considerations between the interests of justice to correct error *inter partes*, and the broader public interest in bringing controversies to an end, these matters have resonance with, and will necessarily be subject to, the 2005 reforms to case management introduced by the *Civil Procedure Act 2005* and *Uniform Civil Procedure Rules 2005* .

30. The decision, such as the judgment given by a court, will be expressed in the order which it makes. Reasons for judgment may explain the decision and have value as a precedent but they are not strictly the subject matter of the method of appellate review, unless the statute so specifies. For example in the AAT the relevant statute creates a right of review different to that covering courts as it does attach to the "decision" as defined. For the purpose of appeal from Courts the order, or judgment pronounced by a court and the reasons of the court for the order or judgment must be distinguished[2].

31. It is only from the pronouncement found in the formal judgment or order of a court against which an appeal may be brought. Judgment or order in this context means an operative judicial act. The reasons for judgment may provide scope to identify error in the pronounced order or judgment.

32. A finding or other decision of a court not incorporated in a judgment or order generally may not be the subject of an appeal unless it can be seen that in making the determination the court intended to finally dispose of the litigation or some question in the litigation, although

[2] ***Moller v Roy*** (1975) 132 CLR 622 at 627

interlocutory decisions made in the course of the final judgment may be included in the appeal from the final judgment[3].

33. Answers of a court to questions submitted by the parties for its opinion do not in some circumstances constitute a decision from which an appeal can lie.

34. Further, while the consequences of a decision may suggest an appeal, the subject of appeal is the decision, not the consequences.

35. To repeat this fundamental principle: an appeal may lie from the order, decision or judgment; no appeal lies from the reasons for the decision.

[3] ***Gerlach v Clifton Bricks Pty Ltd*** (2002) 209 CLR 478

36. An appeal is brought by a person (in the broad sense of a legal entity), usually a party to the proceeding, who is adversely affected by the decision below in order to obtain from the appellate court another decision which it will be asserted ought to have been made.

37. If the appeal succeeds but the appellate court itself cannot make the determination sought, either because it does not have the power to do so or in the circumstances that course is not practicable (e.g. the need to make findings of fact or to receive further evidence), the court will remit the matter to the court below to hear and determine the matter according to law, or it will grant a new trial.

38. The grounds of appeal are that the determination was made in error or that the interests of justice require that the determination be set aside.

39. To understand the purpose and method of appeal, another fundamental principle is that error is the basis for an appellate court disturbing the decision below. An appeal normally cannot succeed unless the court of first instance fell into appellable error as to the facts or the law.

40. Identifying and articulating error in the challenged decision with precision and clarity is the most effective means of conducting an appeal. This allows assessment from an early stage as to whether such error requires an appellate court to disturb that decision in the interests of justice.

41. Characterisation of an appeal as in the nature of a rehearing as opposed to an appeal in the strict sense does not necessarily resolve how the appeal will be heard if the appeal raises a question of fact. That process is determined by reference to the statute creating the right of appeal.

42. Furthermore, appeal by way of rehearing does not have a single well established meaning. Primarily, the meaning of the expression is determined by construction of the relevant statute. Any uncertainty will usually concern the extent to which the appeal court is restricted to the evidence given in the court below.

43. A rehearing may be a trial over again based solely on the evidence which was before the lower court or a trial which may include additional evidence admitted by leave of the appeal court essentially to bring the

court up to date, or it may be a rehearing in the full sense of the term, a hearing sometimes described as a "hearing *de novo*", that is, a hearing at which the parties may adduce fresh evidence as of right.

44. An appeal in the Supreme Court is limited in the manner prescribed by SCA s 75A, i.e. such appeals, except as specifically excluded, are by way of rehearing, see SCA s 75A(5).

45. The expression appeal by way of rehearing is ordinarily employed to indicate that the appeal court is not confined to the law and facts at the time the decision appealed from was made and that, in addition, the court has power to receive further evidence.

46. The words of SCA s 75A do not mean that there is in a re-trial of the issues between the parties. It is a common folly by legal practitioners of all levels of experience to attempt to re-run the matter on their first instance merits in an appeal by way of re-hearing, rather than to engage in the process of appeal which requires identification of error in the first instance decision.

47. Courts of authority remind that where an appeal lies on both matters of fact and of law it is the duty of the appellate court to form its own judgment on the facts in issue and to not shrink from giving effect to its own conclusion.[4] However, the pre-cursor to that approach is the identification of error in the challenged decision.

[4] ***Fox v Percy*** (2003) CLR 118 at [29]

48. The following passage from the reasons of Kirby J (agreed in by Gleeson CJ) explains the nature of an appeal by way of rehearing in ***CSR Ltd v Della Maddalena*** [2006] HCA 1:

> 16. *Requirements and limitations*: The form of rehearing so provided "shapes the requirements, and limitations, of such an appeal". The relevant "requirements" are that the appellate court is obliged to conduct a thorough examination of the record and a real rehearing. It is not confined to reconsideration of the record in order to correct errors of law, although that will certainly be encompassed in such an appeal. It is required to consider suggested errors of fact-finding. Experience teaches that many errors of this kind arise at first instance, more perhaps than errors of law. Having conducted a rehearing as so described, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance". This involves, where, as here, there is no jury, conducting a thorough review of the primary judge's reasons and engaging in the tasks of "weighing conflicting evidence and drawing ... inferences and conclusions".

49. Having said that in regard to appeals by way of re-hearing, it is necessary to refer to the actual words of the statute conferring the right of appeal, to determine the scope of the right of appeal, as the existence of error may not be necessary, e.g. where the appeal is in the nature of a rehearing *de novo*, see:

> **Superannuation Administration Act 1996 No 39**
>
> **88 Appeals**
>
> (1) A person aggrieved by a determination of STC or an STC disputes committee under section 67 (relating to determination of disputes) may appeal against the determination to the Industrial Relations Commission in Court Session (the Commission).
>
> (2) The appeal must be made within 6 months after the appellant is notified of the determination or within such further period as the Commission allows.
>
> (3) In dealing with the appeal, **the Commission may exercise any function that could have been exercised by STC or the STC disputes committee, as the case may be, in making the determination the subject of the appeal.**
>
> (4) …
>
> (5) …

(6) The final determination made by the Commission on the appeal is to be given effect to as if it were a determination of STC.

50. If an appellate court has power to conduct a complete rehearing of a matter, (or a hearing de novo), its jurisdiction is in part original.

51. On such hearing de novo the order below is not relevant other than as providing the basis for the appellate court's exercise of jurisdiction. All the issues at first instance must be tried again, and on questions of fact the court will make its own findings upon the evidence introduced before it. The parties start with a "clean slate".

52. Different considerations apply to appeals which seek orders including for a new trial. Avoiding a miscarriage of justice is grounds for a new trial but generally there will be no miscarriage if the court of first instance did not act in error.

E. Grounds of Appeal

53. Drawing the grounds of appeal requires the same focus and specificity as formulating material facts in the pleading.

54. The nature of the alleged error whether of law or fact should be apparent from the formulation of each ground.

55. Further the grounds should not formulate subordinate findings or basic facts as not every grievance is properly characterised as a ground of appeal[5].

56. The grounds should provide a sensible framework for the appellation submissions and if not so drawn they are not proper grounds.

[5] ***Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*** [2002] FCAFC 157

F. Credibility findings and recent perspectives on *Abalos*

57. Findings of fact by the trial judge based on demeanour of a witness or witnesses – sometimes referred to as the trial judges advantage (i.e. compared to the appellate court) – are often referred to as "Abalos findings"[6], and at times said by some to be not open to challenge on appeal.

58. In the reasons for decisions in a series of recent matters before final courts of appeal the proper approach on appeal to findings at trial based on demeanour or so-called Abalos findings has been explained.

59. In ***Goodrich Aerospace Pty Limited v Arsic*** [2006] NSWCA 187, the Court of Appeal set aside a judgment based on a demeanour finding, principally on the ground that the trial judge had failed to examine all material facts relevant to an important issue in the case and there had been fundamental errors in the trial judge's process of fact-finding.

60. In the reasons of Ipp JA in ***Goodrich***, with which Mason P and Tobias JA agreed***,*** there appears, with respect, a most cogent and pithy explanation of the proper approach credibility findings, including by reference to and elucidation of passages from the reasons of the High Court in *Fox v Percy* (2003) 214 CLR 118 and *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458:

> **The power of an appellate court to overturn findings of fact**
>
> 11 **Stern sentinels have long barred the gateway to appellate success against findings of fact substantially dependent on demeanour and credibility**. These formidable guardians are the line of cases epitomised by *Devries v Australian National Railways Commission* (1993) 177 CLR 472 and *Abalos v Australian Postal Commission* (1990) 171 CLR 167. **The opening of the portals is dependent on passwords that, in practice, are rarely invoked successfully. These are: "the trial judge's failure to use or palpable misuse of his or her advantage," or the judge making findings "inconsistent with incontrovertible facts," or acting on "glaringly improbable evidence," or making findings "contrary to compelling inferences". There are signs, however, that entry to the citadel can now more easily be achieved.**

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[6] ***Abalos v Australian Postal Commission*** (1990) 171 CLR 167

12 In *Fox v Percy* (2003) 214 CLR 118 Gleeson CJ, Gummow and Kirby JJ said at 128 –129, [30] - [31]:

> "It is true, as McHugh J has pointed out, that for a very long time judges in appellate courts have given as a reason for appellate deference to the decision of a trial judge, the assessment of the appearance of witnesses as they give their testimony that is possible at trial and normally impossible in an appellate court. **However, it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses** [eg *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348, per Samuels JA.] Thus, in 1924 Atkin LJ observed in *Société d'Advances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* [(1924) 20 Ll L Rep 140 at 152].
>
> **'… I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.'**
>
> Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell the truth from falsehood accurately on the basis of such appearances [See material cited by Samuels JA in *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348 and noted in *SRA* (1999) 73 ALJR 306 at 329 [88]; 160 ALR 588 at 617-618]. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical." (my emphasis)

13 In the same case McHugh J said at 146-147, [90]:

> "It is a serious mistake to think that anything said in *Abalos* or *Devries* necessarily prevents an appellate court from reversing a trial judge's finding when it is based, expressly or inferentially, on demeanour. Those cases recognise - in accordance with a long line of authority - that it may be done. But there must be something that points decisively and not merely persuasively to error on the part of the trial judge in acting on his or her impressions of the witness or witnesses."

14 In *CSR Limited v Della Maddalena* (2006) 80 ALJR 458 Kirby J, with the concurrence of Gleeson CJ, said at 465, [19] that *Fox v*

Percy had brought about "an important change in the statement by this Court of the jurisdiction and powers of intermediate appellate courts". His Honour said that the change "involved a shift to some degree from the more extreme judicial statements commanding deference to the findings of primary judges said to be based on credibility assessments". He went on to say at 466, [23]:

> "It would be a misfortune for legal doctrine if, so soon after *Fox v Percy* corrected the non-statutory excesses of earlier appellate deference to erroneous fact-finding by primary judges, the old approach was restored, as, for example, by reversion to the previous formulae about the 'subtle influence of demeanour' that could have affected the primary judge's conclusion … ."

See further the discussion by Tobias JA in *Walden v Black* [2006] NSWCA 170 at [75] - [85].

15 The degree to which the shift in emphasis has occurred is not yet clear and regard must be had to the fact that in *Della Maddalena* Callinan and Heydon JJ did rely on the trial judge's impression of the respondent in that case. Nevertheless, as Tobias JA points out in *Walden v Black* at [83], their Honours' judgment indicates that **"reliance upon the 'subtle influence of demeanour' requires careful consideration in each case before it is permitted to trump appellate intervention**". (my emphasis)

61. For the purpose of this seminar and to allow a practical consideration of the probative evidence in that matter, I have included the following passages from the reasons of Gleeson CJ, Gummow and Kirby JJ in ***Fox v Percy*** (2003) 214 CLR 118:

> <u>The Court of Appeal made no error</u>
>
> 32 With these established principles in mind, we now turn to the issue presented by this appeal. Under the Constitution, the appeal to this Court is in the nature of a strict appeal. Our sole duty in this case is to determine whether error has been shown on the part of the Court of Appeal. This Court is not engaged in a rehearing. As such, it is not this Court's task to decide where the truth lay as between the competing versions of the collision given by the parties. Nevertheless, in considering the supposed error of the Court of Appeal, it is necessary to understand how, respectively, the primary judge came to his conclusion and the Court of Appeal felt authorised to reverse it.
>
> 33. The Court of Appeal was obviously aware of the principles, established by this Court, controlling the performance of its appellate function. Both Beazley JA (for the majority) and Fitzgerald JA (in dissent) referred to the applicable principles and the governing authorities. In particular, Beazley JA

referred to the most recent, and detailed, analysis of the considerations to be weighed as expressed in this Court's decision in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)*. There, this Court reversed a decision of the New South Wales Court of Appeal which had felt itself precluded from disturbing the decision of the primary judge that, it considered, rested on that judge's evaluation of the credibility of witnesses. This Court unanimously concluded that the Court of Appeal was not so precluded but was obliged, by the proof of objective documentary evidence, to give attention to all of the evidence of the case.

34. In the present case, the majority in the Court of Appeal did not repeat the error identified in *SRA*. **Here, the incontrovertible evidence was not, as such, found in a series of documentary records. However, it was illustrated in an uncontested, contemporary document that verified the police evidence which the primary judge accepted as truthful. This was the evidence, shown in the notebook of Constable Volf, recording that, at the collision scene, he had observed 10 metre skid marks on the road immediately behind the point at which the respondent's vehicle had come to a halt and wholly within the respondent's correct side of the road.**

35. If this objective evidence correctly recorded the trajectory of the respondent's vehicle to the point at which it stopped, it afforded evidence that confirmed the respondent's version of the events immediately prior to the collision and contradicted the evidence of the appellant and Mr Murdoch.

.....

37. In the end, it was not logic and the assessments of probable behaviour in the circumstances that persuaded the majority of the Court of Appeal. Such considerations might not alone have warranted disturbance of the primary judge's conclusion. **It was the objective fact of the skid marks which, to the close of the trial, remained unexplained, or insufficiently explained, by the appellant.**

38. The only explanations offered by the appellant in that regard were, as Beazley JA pointed out, unconvincing. The direction of the skid marks, shown in the police sketch as virtually straight behind the respondent's vehicle, contradicted the only hypothesis offered to this Court to support the final resting place of the vehicle and the appellant. This was that, immediately following the collision, the respondent had corrected the position of her vehicle and returned it to the correct side of the road. If this were the explanation, the skid marks would have shown the angle suggested by such a corrective manoeuvre. They did not. It could not be accepted

that the respondent delayed in applying the brakes causing the skid marks until after she was safely on her correct side. In the agony of the moment, there was no time to think of such things. The skid marks showed objectively the direction of the respondent's vehicle from the application of the brakes to the place of rest at the point of the collision with the appellant's horse. **Alike with Beazley JA, we regard the skid marks as an incontestable fact that rebuts the claim of negligence propounded by the appellant. Clearly, it was open to the Court of Appeal, conducting the rehearing, to reach that conclusion. Once it did so, that Court was bound to give effect to its opinion.**

39. The reasons of Beazley JA, disposing of the contrary arguments are also convincing. The evidence of Mr Murdoch, a friend of the appellant, is inconsistent with the skid marks**. Against his oral testimony, the objective facts speak volumes, even disregarding the matters brought out in cross-examination of him.** The suggestion that Mr Murdoch's horse took him over the embankment and then returned to the road is not, as the primary judge thought, decisive. It is also dependent on the accuracy of Mr Murdoch's recall. In any case, the road was comparatively narrow, the horse would have been extremely frightened and, following the collision, its independent movement could, indeed, have taken it over the side of the embankment.

….

41. Therefore, **the appellant had to rely before this Court on the advantages that the primary judge enjoyed in seeing the parties, and Mr Murdoch, give their evidence and in preferring the evidence of the appellant and Mr Murdoch to that of the respondent**. The Court of Appeal was bound to make due allowance (as it did) for such advantages. The trial judge sat through four days of trial before giving his decision. He did so at a time when the impression made by the witnesses was still clearly in his mind. The Court of Appeal was bound to afford respect to the endeavour of the judge to give the correct and lawful conclusion to the puzzle presented to him. Clearly, the Court of Appeal was right to reject the respondent's belated suggestion of bias, which should not, in our view, have been made. No doubt, the Court of Appeal also took into account the unexpressed considerations that went into the judge's conclusion. No judicial reasons can ever state all of the pertinent factors; nor can they express every feature of the evidence that causes a decision-maker to prefer one factual conclusion over another.

42. Nevertheless, in our view, within the stated principles, the majority in the Court of Appeal did not err in giving effect to the conclusion that they reached. The skid marks on the

respondent's correct side of the road were incontrovertibly established. Their position, length, direction and terminus are inconsistent with the appellant's version of events. Having come to that decision, the majority in the Court of Appeal were correct to give effect to their conclusion and to set aside the judgment in the appellant's favour. In our view, the appeal should be dismissed.

62. In conclusion on this topic and again referring to their Honour's reasons in *Fox v Percy* (my emphasis):

> 25. … Appellate courts are not excused from the task of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect"[36]. In *Warren **v** Coombes*, the majority of this Court reiterated the rule that:
>
> > "[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it."
> >
> > As this Court there said, that approach was "not only sound in law, but beneficial in ... operation"
>
> 26. After *Warren v Coombes*, a series of cases was decided in which this Court reiterated its earlier statements concerning the need for appellate respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not. **Three important decisions in this regard were Jones v Hyde, Abalos v Australian Postal Commission and Devries v Australian National Railways Commission. This trilogy of cases did not constitute a departure from established doctrine. The decisions were simply a reminder of the limits under which appellate judges typically operate when compared with trial judges.**
>
> 27 The continuing application of the corrective expressed in the trilogy of cases was not questioned in this appeal. The cases mentioned remain the instruction of this Court to appellate decision-making throughout Australia. However, that instruction did not, and could not, derogate from the obligation of courts of appeal, in accordance with legislation such as the

Supreme Court Act applicable in this case, to perform the appellate function as established by Parliament. Such courts must conduct the appeal by way of rehearing. If, making proper allowance for the advantages of the trial judge, they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute.

28. Over more than a century, this Court, and courts like it, have given instruction on how to resolve the dichotomy between the foregoing appellate obligations and appellate restraint. From time to time, by reference to considerations particular to each case, different emphasis appears in such reasons. However, the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. **In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.**

29. That this is so is demonstrated in several recent decisions of this Court. In some, quite rare, cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached that the decision at trial is "glaringly improbable" or "contrary to compelling inferences" in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must "not shrink from giving effect to" its own conclusion. **Finality in litigation is highly desirable. Litigation beyond a trial is costly and usually upsetting. But in every appeal by way of rehearing, a judgment of the appellate court is required both on the facts and the law. It is not forbidden (nor in the face of the statutory requirement could it be) by ritual incantation about witness credibility, nor by judicial reference to the desirability of finality in litigation or reminders of the general advantages of the trial over the appellate process.**

63. At first instance, incontrovertible and contemporaneous evidence which tends to weigh heavily against findings of fact based on credibility may often be found in material produced in answer to subpoenas, particularly those issued to third parties.

G. Further evidence and fresh evidence on appeal

64. The interests of justice may require that a new trial be granted despite the absence of error in the court below. An example is the discovery of further, or fresh evidence since the conclusion of the hearing below. One specific example is an assertion that the judgment appealed from was obtained by the fraud of the successful party at the trial, which is considered further below.

65. On such an appeal, the party appealing does not contend that the court below acted in error in the conduct of the trial. The party seeks the intervention of the appellate court on the basis not that if it had been in the place of the court below the outcome would have been different, but that by reason of circumstances existing when the court below gave its decision, and only discovered later, the decision should not in the interests of justice be allowed to stand.

66. As discussed above, a right of appeal is conferred by statute. The terms of the statutory grant determine the nature of the appeal and consequently the right, if any, to adduce further evidence on the appeal. The terms “further” or “fresh” evidence may be unhelpful, absent the use of those words in the statute. Such terms tend to import concepts applicable to earlier procedures for correction of error by common law procedures which improperly confine the exercise of the discretion conferred on the court by statute.

67. Thus different principles apply depending upon whether the additional evidence relates to matters that occurred after the trial (“fresh evidence”) or to matters that occurred before, but were not adduced as evidence in, the trial (“further evidence”). If the evidence relates to matters that occurred after the trial there is no requirement to show special grounds to justify the reception of the evidence.

68. If the appeal is from a judgment given after "a hearing on the merits" then "special grounds" must exist to justify the reception of further evidence, such as SCA s 75A(8). (Subject to any contrary provision where the right of appeal arises under a different statutory provision.)

69. The reasons of Heydon JA (with which Mason P agreed) in ***Nowlan v Marson Transport Pty Ltd*** (2001) 53 NSWLR 116; [2001] NSWCA 346 include the following passages:

> 13 … If the hearing was a hearing on the merits, the usual tests for receiving the evidence are those stated in *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 160. Clarke JA (Sheller JA and Powell JA concurring) said:
>
> > *"Although it is not possible to formulate a test which should be applied in every case to determine whether or not special grounds exist there are well understood general principles upon which a determination is made. These principles require that, in general, three conditions need be met before fresh evidence can be admitted.* ***These are: (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) The evidence must be such that there must be a high degree of probability that there would be a different verdict; (3) The evidence must be credible****."*
>
> It is significant that the only element of those three tests which the respondent contends not to be satisfied is the first.
>
> 14 Those tests stem from High Court cases such as *McCann v Parsons* (1954) 93 CLR 418 and *Wollongong Corporation v Cowan* (1955) 93 CLR 435. Those High Court cases enunciate the powers of court at common law to grant a new trial. They make it plain, as did Clarke JA, that the three criteria commonly relied upon are not exhaustive. Thus in *McCann v Parsons* (1954) 93 CLR 418 at 430-1 Dixon CJ, Fullagar, Kitto and Taylor JJ said:
>
> > *"The grounds upon which the court proceeds in granting the remedy have been settled by practice but they have never become completely stereotyped; they have always possessed some flexibility and have been governed by the overriding purpose of reconciling the demands of justice with the policy in the public interest of bringing suits to a final end."*
>
> The High Court in *CDJ v VAJ* (1998) 197 CLR 172 at 200 noted that passage. In that case the majority (McHugh, Gummow and Callinan JJ) held that the common law tests were not appropriately to be applied to the power to receive

further evidence conferred on the Family Court by s 93A(2) of the *Family Law Act* 1995 (Cth). It is possible that that may in the future invite reconsideration of the application of the *Akins* tests to s 75A(8), though, as the majority noted at 201, the language of s93A(2) is different from that of s 75A(8). But until such cases as the *Akins* case are overruled, they continue to bind this Court.

15 Even if the appellant's submissions in relation to the burden of proof are sound (which they almost certainly are not), even if the hearing before the primary judge was a hearing on the merits, and **even if the three tests stated in the Akins case are applicable and are not satisfied, a question remains: is it just to admit the further evidence in this case?**

70. In the reasons of McHugh, Gummow and Callinan JJ in ***CDJ v VAJ*** (1998) 197 CLR 172 at 197-200 their Honours considered the statutory provision in the *Family Law Act 1975* s 93A(2) which confers a discretionary power to receive further evidence on appeal to the Full Court of the Family Court, (akin to SCA s 75A(7)) and stated:

97. The principles laid down in *Wollongong Corporation* and the similar appeal in *McCann v Parsons* are to be understood by reference to the procedures of the common law courts. Those cases have nothing authoritative to say about the admissibility of further evidence in respect of a statutory power to admit evidence on appeal. They came before this Court on appeal from judgments of the Full Court of the Supreme Court of New South Wales on motions for a new trial in accordance with s 160 of the *Common Law Procedure Act 1899* (NSW), after verdicts given by juries in the trial of common law actions for damages. **Accordingly, the principles with respect to the allowance of a motion for a new trial on the ground of discovery of fresh evidence which were propounded by this Court in Wollongong Corporation and McCann were informed by the position in the English common law courts. In those cases, this Court was not concerned with the terms of any modern statute expressly conferring upon an appellate court a power to receive additional evidence.** To regard *Wollongong Corporation* and *McCann* as defining the jurisdiction or controlling the discretion to admit evidence in statutory appeals is erroneous.

…

102 The question of the circumstances in which the Full Court of the Family Court should exercise its discretion to receive further evidence, in exercise of the power conferred by s 93A(2), is therefore to be determined as a matter of

statutory construction. That matter should not be approached as if the common law procedures which gave rise to the principles laid down in such authorities as *Wollongong Corporation* conclusively indicate the proper construction of the statutory provision.

103 The common law procedures were interlocutory in nature in the sense that they were directed to the issue whether there should be an order for a new trial. They involved the exercise of original jurisdiction**. In contrast, the statutory appeal is directed to whether the orders made below should be set aside and, if so, what orders should be made in their place to determine the outcome of the litigation. An order for a retrial is one, but not the only, order that the appellate court may make. Moreover, such an order is an order of last resort. In that context, the admission of further evidence has to be seen from a different perspective from that which would be appropriate if the statute did no more than repeat the common law procedures.** For example, in a statutory appeal it may be the respondent who seeks to introduce further evidence to buttress the favourable findings already made and to resist the substitution by the appellate court of its orders for those of the trial court.

71. The importance of applying the terms of the applicable statue is evident from the need to consider SCA s 75A as a whole and specially the qualification that ss (8),(9) on ss(7), together with the breadth of (10), see:

> *(7) The Court may receive further evidence.*
>
> *(8) Notwithstanding subsection (7), where the appeal is from a judgment after a trial or hearing on the merits***, the Court shall not receive further evidence except on special grounds.**
>
> *(9) Subsection (8)* **does not apply to evidence concerning matters occurring after the trial or hearing***.*
>
> *(10)* ***The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires****.*

72. The power to admit the further evidence exists to serve the demands of justice. If on appeal it is alleged that the admission of new (in the sense of both further or fresh) evidence requires a new trial, justice will not be served unless the appellate court is satisfied that the new evidence would have produced a different result if it had been available at the trial.

73. Absent such a finding the interests of justice usually will not favour the court of appeal disturbing to the orders made by the trial judge.

74. Considerations of justice and public interest where the unavailability of the evidence at the trial resulted from the misconduct of the successful party, for instance, in failing to disclose on discovery material documents in the possession of the party, and given that the unsuccessful party shows that as a result there was a real possibility of an opposite result at first instance, had the documents been disclosed, will usually compell an order for a new trial.

75. Where damages are an issue in dispute on appeal, the further or fresh evidence must be of such effect that it can reasonably be supposed that, had it been adduced at trial, the damages would have been fixed at an amount substantially more favourable to the party seeking the new trial.

76. The evidence that a judgment is affected by fraud committed at the trial is ordinarily evidence discovered since the date of the judgment, although it does not follow that prior to judgment evidence of the fraud did not exist and could not have been discovered by the exercise of reasonable diligence.

77. Where a new trial is sought simply on the ground that new evidence has been discovered, a case of fraud is not in any special position, and the evidence of fraud which is relied upon for the grant of a new trial will not necessarily be admissible as evidence newly discovered. However if the evidence is not admissible but nevertheless tends to establish that the judgment was obtained by fraud, the court may grant a new trial if the court itself finds the fact of fraud to be proved to its reasonable satisfaction.

78. It is not necessary that the evidence should be evidence that would be admissible on the issues between the parties in the proceeding. The conclusion of the court upon the further evidence before it that the judgment was obtained by fraud is sufficient to justify setting aside the judgment and ordering a new trial.

79. Evidence which indicates fraud, but is not strong enough to establish fraud affirmatively, may nonetheless be sufficient to justify the setting aside of judgment and the grant of a new trial. The appellate court will act on the new evidence, for there can be little, if any, room for doubt that if it had been produced at the trial, and accepted, the trial would have been concluded in favour of the party producing the evidence.

80. If the conditions governing the grant of a new trial on the ground of further evidence are satisfied, there is no justification for refusing the relief because it has not been proved that the party succeeding in the court below was privy to the conduct tending to show fraud.

H. Conclusion

81. Firepower and enthusiasm alone does not ensure a successful outcome to an attempt to disturb a judicial decision. At the heart of the process of appeal are the concepts of error and the interests of justice.

82. Careful consideration of the matters discussed above will assist when advising a client as to the possibility of a challenge to an impugned decision, to correct error by way of the process of appeal, or in the alternative, as to resisting a challenge to a favourable decision.

83. In summary the prudent practitioner will identify:

    (a) what if any is the scope of the right of appeal;

    (b) the purpose and method of any appellate review;

    (c) the error said to infect the decision;

    (d) why the interests of justice require that error to be corrected;

    (e) the poor statistics for a successful outcome on appeal generally;

    (f) the potential exposure to significant adverse costs orders; and

    (g) the prospects of successfully achieving the client's desired outcome.

84. Having determined these matters, an informed decision is able to be made to chart the appropriate course.

85. Finally, my thanks to the University of New South Wales Centre for Continuing Legal Education, its Director, Christopher Lemercier and Dr Deborah Lum, for the opportunity to participate in this seminar, and to fellow participants thanks for your time and patience.

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