

ADVOCACY-

As viewed from the Bench.....

Introductory remarks: read, if you can, before I begin.

This talk arises out of the Chairman's suggestion to me that you would actually like to hear how a judge feels about what you do for a living – advocacy – and what works, and what doesn't. Alan Smith said he could think of no better topic¹, since "It's what we do", and the die was cast.

It's the sort of talk I can now give without that dreadful feeling I would have had, when an advocate, that everyone was sitting around thinking – "An advocate should be able to speak better than that..." or "That wasn't very funny/clear/educational/incisive". I can give it because I am no longer (I hope) to be judged on my advocacy skills – or lack of them – but on other skills, such as whether I respond to perceived good advocacy and castigate the bad advocate (inevitably said to be a solicitor). Or whether I listen. I am now even in a position when I can make a joke in court, and expect the court to laugh² – as a practitioner, the only safe rule is "never".

The views here are largely personal, though it is uncanny how similar are judges' views of the advocacy before them: this I can gauge from sitting with others in the Court of Appeal (Criminal Division) or Divisional Court, so these views may have a force beyond the purely anecdotal. There is a great risk you will have heard it all before, and may know better anyway: so I shall take the greater risk of inviting questions after 20 minutes of so of expounding on the topic – and you must feel free to disagree with me. After all, these days I have the last word when it matters.....

There is a very serious side to the topic. As Alan said to me, advocacy is what you do. The independence of the Bar, and its continued existence, depends on whether it fulfils a need for which people are prepared to pay, whether collectively through the public purse or privately. It may shock some when I say that the great strength of the Bar is that it is a large pool of temp labour. But it is. It has not only the advantages inherent in temp labour (flexibility; the appropriate person hired for the particular job; enabling the orchestrator of legal services, the solicitor, to operate with a core staff more efficiently), but is a pool of specialist advocates, professionally regulated, and appropriately insured. Specialist nowadays not just in advocacy – but as advocates in a specialist area, such as p.i. If they ever existed, the days are gone when it would be an acceptable answer to the question of the lay client, facing a landlord and tenant case, "How many of these cases have you done before?" to reply: "none, only employment cases, but I'm a specialist advocate". It is the specialist skill – of advocate and pi lawyer combined – upon which, as I see it, the future, let alone the future success, of the personal injury bar depends.

¹ He obviously didn't want yet another talk about periodical payments

² hint

Advocacy is thus vitally important, but not by any means everything. It is, however, the more visible part of the role you perform. But, as I hope to make clear, advocacy is far from just oral.

You are a difficult audience to address on this topic. It is not black letter law. Some of you are so experienced that you will be just as able to talk about advocacy; some may be trainers for their Inns or circuit. Some, on the other hand, may feel it is just another lecture following on from the Council of Legal Education, BVP etc., which you hoped to have left behind a couple of years ago. You know it all – because it is what you do for a living.

I am not, however, going to try to produce a manual to rival or reprise David Napley's "Art of Persuasion" – though I have my own ideas about some of his advice³ – or to repeat what you may teach or have been taught. What I can offer, which no-one can quarrel with, is my own view from the Bench – how some advocacy strikes me. What you will get is a rag bag of ideas, not a manual. Perhaps I can throw out an idea or two which might be provocative – and possibly give some of you some insight into at least how one judicial mind works. Or doesn't.

Since it isn't a formal lecture, but an eclectic arrangement of thoughts, there won't be a handout written as dense text: just a few bullet points, so that if you nod off you can see where you are when you wake up. There's a serious point in that, too – it's not always easy for a judge to concentrate on detailed submissions for any longer than it is for you to listen to a lecture. 10 minutes is the average for a student before he has a nap, albeit a brief one. I don't admit to the same on the bench – after all I am writing down most of what is said to me – but you must be prepared for a judge sometimes to lose the thread because he will have been elsewhere (or, he might say, "reading ahead"). The first throwaway thought is – how can you make it interesting for him?

I shall have a lot to say orally, but if you are to engage with what I say and not to be heads down reading the script⁴ I need to give you just the skeleton argument, and develop it as I go along.. Most effective skellies begin with an overview or main underlying theme – so what is advocacy, in the broad sense, all about?

- Overall purpose: Communication – to whom?
 - How?
 - It is the whole preparation of a case which matters
 - Does not begin and end with oral presentation

³ Such as the idea that you should never ask a question you don't know the answer to: you often have to, and sometimes it cracks the case. Received wisdom is always that you should be most suspicious of...

⁴ Again, a *hint* as to what to avoid when an advocate

- Begins with preparation – to communicate, effectively:
 - o What are you trying to say, and why
 - o How many points are there in a case?
 - Quantum issues may be different
 - o PLEASE focus, and analyse
 - o Does what you have to say make (reasonable) sense? A judge will want to produce a sensible and practical answer that does right..
- Starts at pleadings stage – how to shape a case.
- Realism, and brevity⁵ are watchwords.
- Skeletons (too long: A judge does not want his judgment written for him, despite rumours. He is well capable!⁶). *Don't miss the chance to get your word in to the judge in time. It should be the opening speech (for C.) or the judge's focus of attack (for D).*
- Documents: you are responsible (beware Lord Justice Sedley's Law of Documents.....)
- Cases: repay careful presentation, played to their strengths

Submissions

- Brevity REALLY works (judges have time pressures: understand that they are human beings working in a system, too)
- A judge likes to be able to have confidence in an advocate:
 - o Judge's role.
 - o Wants to see law as a coherent whole.
 - o Is the advocate up to date and frank?
 - o Judgment – can a judge trust it?
- Habits can be off putting (otherwise they rarely matter except to the advocate him/herself). But beware the “James Hunt award”.....
- Reputation.
- Surprised at number of advocates who belie their reputation at the Bar/ either way (some have assumed I know too much; some tried to teach me to suck eggs)

⁵ Please do as I say, not necessarily as I do.

⁶ Usually

- That said, don't forget that the easiest thing to overlook may be the most obvious. And remembering it may provide structure.
- And don't forget time estimates if you want a decent hearing

Dealing with witnesses

- Experts – how best to treat?
- The embarrassing question....
- Don't pussyfoot about.
- Can you train an advocate? How best to do it. Advocacy standards.
- Does specialism work?

And Now:

- Questions.....