HOW TO WIN YOUR CASE –

WHAT THE COURT EXPECTS FROM ADVOCATES

Introduction

Thank you for inviting me to this event held to mark International Women's Day. The subject, which I have been asked to address is what the court expects from those who appear before it. By those I include not only all those with rights of audience, but also those engaged in the preparation of cases behind the scenes; the solicitors, the trainees, the para-legals and others. In the modern era the conduct and preparation of litigation is often a team effort. The finished product will almost always depend in large measure on the diligence and preparation of all of those involved. What I say about "advocates" or "counsel" will be equally applicable to solicitor advocates, and solicitors practising in the sheriff courts. In all areas of practice, and across all courts, the central message that, in this unique jurisdiction of ours, what judges ultimately expect from counsel, and what is likely to advance a party's cause, is assistance and not obfuscation. The courts cannot function without that assistance, not only in ascertaining fact and law accurately, but also in ensuring that all cases are processed efficiently and at a proportionate cost.

I will look at four main areas of practice; that is criminal trials, civil proofs, civil appeals and criminal appeals. Most of my remarks, which are made in the context of one particular area, may apply to other areas. I preface my remarks by

acknowledging the high standard of advocacy which is practised in the Supreme Courts and the efforts which are being made by the profession, especially, but not only, by the Faculty of Advocates, to ensure that its training and continuing professional development programmes maintain that standard.

Criminal trials

The conduct of criminal trials is a subject of considerable public importance and interest. The conduct of the case by counsel can, and does, have an impact on the fairness of the proceedings, which the court must secure, and on the rights not just of the accused but those of witnesses and others. What then is the court looking for? First and foremost, it wants the examination of witnesses to be concise and firmly focussed on the charges in the indictment or complaint. Witnesses know why they are in court, even if they occasionally pretend that they don't. The court wants counsel to get to the point quickly, and once you are on point, do not stray off it.

There is the, no doubt apocryphal, tale from Glasgow High Court of the Advocate Depute examining one of the city's less affluent citizens, who had what he possibly regarded as the misfortune of having witnessed a robbery in the local newsagents. The exasperation of the witness about the time which it was taking for the Advocate Depute to ask a relevant question reached a muted crescendo when, having asked why the witness had gone to the newsagents, he had said, unsurprisingly, that he had gone to buy a newspaper. The following exchange then took place:

"AD: What paper did you buy?
Witness: The Wall Street Journal.
AD: Really?
Witness: Naw."

It was then established that it had indeed been the Daily Record that the witness had been after.

This illustration of irrelevant questioning is problematic. To some it may appear to be a good idea; a sort of a warm up exercise or a knock up at tennis. Trials are not games. Any warm up should occur in the gown room before the diet is called or even earlier. The length at which witnesses are now examined, in chief and in cross, is a cause of continuing concern. It has become commonplace for a complainer to be examined for a day or more. Contrast that with *Moorov*,[1] in which the accused was tried before Lord Pitman and a jury on 21 charges of assault, involving 19 different complainers. The trial heard 32 witnesses for the Crown and 8 further defence. It was completed within 2 days; the jury being asked to retire at 5.25 and returning guilty verdicts on 7 charges of assault and 9 of indecent assault and not guilty on the remaining charges. I am not arguing for a return to halcyon days, which never existed. I do not seek to blame anyone other than the courts for allowing matters to drift quite to the extent which they occasionally have in, and I stress this element, particularly the High Court. I can call on all judges and sheriffs to consider what is proportionate in relation to the areas over and depths to which

[1] *Moorov* v *HM Advocate* 1930 JC 68

questioning is directed. Better still, given this opportunity, I can ask the legal profession to ensure that examination and cross are properly prepared in advance; and for an end to the off-the-cuff approach which some continue to adopt.

The nature of the questioning, as well as its length, ought to be carefully considered. The court has a responsibility to intervene where questioning is being conducted in an inappropriate manner; whether that is because it is prolix and repetitive, or insulting.[2] Cross-examination is an art of precision; not a bluster and ego. It is not acceptable for it to be conducted in a way which demeans, intimidates, bullies or harasses the witness. That is true for both defence and prosecution. Courtesy is a fundamental requirement of effective advocacy, and an element of the professionalism which the court expects from all who appear before it.

Preparation is the key. I become faintly alarmed when I see an Advocate Depute examining witnesses, to the facts of an incident, with only an unannotated precognition in front of him or her. The statements in the precognition will vary in content, quality and accuracy. An examination in chief of several eye-witnesses should be structured and uniform in content, covering (if necessary) the same ground. I am even more alarmed when defence counsel are seen to cross without any notes, and hence clearly, as it very often then appears, no advance preparation. That is all very well for some of our seasoned professionals, but it is not a model which I would encourage in anyone aspiring to be a master of this skill and certainly not those among the junior ranks of the Bar. Do not cross-examine unless it is

[2] *Dreghorn* v *HM Advocate* 2015 SLT 602; *Falconer* v *Brown* (LJC (Macdonald) at (1893) 21 R 4.

necessary to do so. Providing a witness with further opportunities to condemn the accused is usually not the best strategy, but it is one seen frequently in modern practice.

Knowledge of the law, including the rules of procedure, is as fundamental in criminal first instance work as it is in any other area of practice. A submission which is ill-researched and not properly thought through is easily spotted. Awareness of fundamental matters, for example the requirement to have some evidence to support a special defence before it can be considered by the jury,[3] should be at the forefront of all counsel's actions. An experimental approach to see whether the trial judge will permit a certain course of action, or correct or intervene to set matters back on the right course, is not a good stratagem.

Speeches to the jury should be focussed on the evidence which is relevant to the charges. The Advocate Depute, in particular, must concentrate on identifying the testimony upon which he or she seeks a conviction and not on platitudes or aphorisms. There should be no attempt to distort the testimony. No practitioner will wish his or her speech to be interrupted by the judge quietly but firmly saying: "Please do not mislead the jury". There should be nothing said which is designed to play on the sympathies of the jury. The High Court recently required to quash a murder conviction because of the approach of the Advocate Depute in his speech, which appeared to be an attempt at gaining sympathy for the deceased and/or his

[3] *Amir Bakhjam* v *HMA* [2018] HCJAC 11

relatives rather than concentrating on the evidence which justified a conviction.[4] The trial court does not want to be placed in a position where it has to take remedial action to correct inappropriate comments. I am, in light of a number of unfortunate episodes over the last year or so, encouraging trial court judges to take a more interventionist approach with a view to avoiding having to intervene at the appellate stage. I hope the legal profession will continue, and even redouble, its efforts on the training front to ensure that mistakes, apparently of an elementary nature and often by experienced practitioners, are not repeated.

This approach is not to say that a "kid gloves" approach to the presentation of the case by either side is required or desirable. Both prosecution and defence should, in many cases, be robust, although kept within proper bounds. A good speech requires proper preparation, and – harking back to what I have already said – almost always with notes, or at least headings, to remind the speaker of what is, and is not, to be covered. Of course, in both prosecution and defence work, much of what is said to one jury (about the standard of proof or corroboration) may be said to many others. Practitioners are entitled to their rhetorical flourishes. That does not detract from the need to tailor every speech to the particular circumstances. Experience in the appellate court suggests that attempts at busking, or going off script, lead to error, and inaccuracy in what is said.

As a generality, juries have a collective intelligence which ought to be greater than that of a single judge or sheriff. They have their own methods of recognising

[4] *Lundy* v *HM Advocate* [2018] HCJAC 3 [not yet on the web]

when the wool is being pulled over their eyes. They will normally be able to spot when a submission is an example of style over substance, especially when the style is of a rambling or unstructured nature. If the speech is tailored to avoid condescension and concentrates on substance then, assuming that there is substance in what might be said, there is a much greater prospect of it hitting home. A studied combination of brevity, humility and accuracy is what is most likely to win the day.

Civil proofs

In first instance civil litigation, the court has the same expectation of the examination of witnesses and the presentation of submissions as it does in solemn criminal cases. They must be focussed, accurate, succinct and relevant. All of that requires advance preparation.

The court has specific expectations about the form and content of written pleadings, which do not arise in a criminal case. The written pleadings give the first instance judge the first - and often abiding - impression of the case and its prospects. They provide the first opportunity to persuade the judge of the strength of the case. The pleadings should be directed towards assisting the court to come to a correct view of the case, rather than hindering it from doing so. Written pleadings should, above all, be concise and readable, but sufficiently detailed to give the judge a clear steer towards what the case is about. There is an unexpected problem at the

moment, even in commercial procedure, of pleadings being so lengthy, convoluted and diffuse as to serve only to obscure the matters for determination[5].

One of the central skills which the advocate must develop is the effective distillation of complex ideas into simple, concise language. This skill is particularly required in written pleadings. Counsel should use modern, plain English in both written pleadings and oral submissions. The accuracy and clarity of the language, which is used to express ideas, are undoubtedly what will ultimately impress the court and may be decisive in a narrow case. Some judges have, in the past, made life difficult for the economic pleader, but I would have hoped that we have put those days firmly behind us.

I can do no better than ask all those who aspire to being good pleaders to re-read Sir John Lees' Handbook of Written and Oral Pleading, albeit that it was written primarily for use in the sheriff court. The second edition was published almost a century ago, but the pearls of wisdom it contains cannot be bettered even in the modern era:

> "The averments should always be made as clearly as possible. A power of precise expression is the strongest weapon of a pleader, both in written and oral pleading. An ambiguous or evasive statement not only provokes distrust, but occasionally carries with it its own punishment in the injury it may do the case ...
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> A pleading may be guarded in its conception and language, but it should be fair. It must not be self contradictory, neither should it be argumentative; all that needs to be done is to indicate plainly the line of action or defence.

[5] eg *Marine Offshore (Scotland)* v *Hill* [2018] CSIH 9

> Verbosity, tautology, lengthened quotations, and the needless use of irritating language, ought all to be carefully eschewed ...
>
> It is desirable in most cases to use popular, rather than technical, language."[6]

I include the following words as irritating: "Further explained and averred", "hereinbefore" or "hereinafter" condescended upon. The incorporation of reports or sections of them is not irritating, it is usually just an indicator of indolence. Do not aver peripheral matters of evidence out of fear or anxiety. You are all professionals. Back your own judgment. If the Lord Ordinary or sheriff becomes troublesome, there is always the remedy of appeal.

The court expects counsel to proceed straight to submissions at the conclusion of the evidence. Court time is precious and ought not to be wasted. If examination is focussed, as it should be, the evidence upon which submissions are based ought, in the vast majority of cases, to be in a manageable format to allow this to be done without difficulty.

Authorities should be cited only for propositions which are in doubt or dispute. The Court of Session as currently constituted does not require authority, for example, to advise that the sky is, or rather looks, either blue or grey during the day or that it is dark at night. It is aware that the court exercises a supervisory jurisdiction in relation to the acts of the executive and the legislature. If you find yourself having to cite *Donoghue* v *Stevenson,* the judge is likely to think immediately that you must have an exceedingly weak case.

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[6] at para 81

Civil appeals

On civil appeals, once more the state of the written material is of particular concern. What the court expects of counsel and those responsible for the preparation of the case is relatively clearly set out in the rules and the relevant Practice Note, which was heavily reliant on the thoughts and drafting skills of Lord Reed.[7] Grounds of Appeal should consist of "brief specific numbered propositions", stating why the reclaiming motion should be granted.[8] There is no magic to this; the rule means what it says. If matters are not properly focussed in the grounds of appeal from the outset, it can be exceedingly difficult to get an appeal back on track. What is needed are short, clear propositions on, for example, where the court or tribunal at first instance erred. They should not contain a history of the case or an explanation of what facts or law was at issue. Other than in the most complex of cases, the grounds ought to be capable of expression in no more than 2 or 3 sheets of double-spaced A4 and very often in a good deal less space. The court does not require elaboration at this stage, nor does it wish the citation of authority, far less quotation from statute or precedent.

In terms of the other documentation, the points which have been made already about the purpose of these being to assist the court, rather than to obfuscate matters, equally applies. Discretion is required about what documents require to be

[7] PN 3 of 2011: Causes in the Inner House
[8] RCS 38.18(1)

included in the appendix. On a semi-regular basis, the Inner House is presented with hundreds and even thousands of pages of documents, when only a handful are ever referred to either in the Note of Argument or in oral submissions. This should not happen. A properly prepared appendix is one in which only those documents necessary for the presentation of the case are set out. It should not contain reams of peripheral material.

The same is true of the use of authorities. Permission is regularly sought to allow more than the 10 authorities permitted by the Practice Note, with the motion stating blandly that this is necessary due to the complexity of the case or the issues which are in dispute. Very often, no reference, or only passing reference, is made to these authorities at the Summar Roll hearing, usually because, on a proper analysis, they add very little to the determination of the issues or are merely examples of the application of well-known and uncontroversial principles. Sometimes the authorities sought to be used will run into hundreds of pages, in a situation where one isolated sentence from a judge, usually from another jurisdiction, is being founded on in the Note of Argument and not advanced further in the oral submissions. The court recognises the advantages of a Westlaw case search and all that it may spew up or miss. Scots law is not based on precedent. It is based on principle. If an authority is being cited, that ought to be because it vouches a principle. Random examples of the application of a known or undisputed principle, especially from first instance courts, particularly from other jurisdictions, are seldom of substantial assistance. You do not have to prove your worth by identifying every

judge this century who has referred to *Associated Provincial Picture Houses* v *The Wednesbury Corporation*[9] especially when we have our own expression of what is administratively unreasonable[10].

The system of civil appeals requires an outline of the case in written form – the Note of Argument - which is then developed during the oral submissions at the hearing. It is relatively clear that many counsel, and maybe some judges, are uncertain about the form and substance of the Note of Argument. The court is presented with a wide variety of styles and lengths. I accept that the court has been responsible for a lack of clarity in relation to what is needed. It has not yet developed fully fledged ideas on the correct balance between the written Note and the oral argument to follow. The Note should not take the form of a full written submission, unless parties wish the court to decide the case on the basis of such a submission, in which case the time for oral presentation on the Summar Roll will be suitably curtailed. In contrast to the Case and Argument in criminal appeals, the Note of Argument in a civil case is a taster to be sampled by the court in advance of the main course. It should not exceed 10 to 20 pages of double spaced A4 and under no circumstances should it contain footnotes. The Practice Note is not intended to encourage an academic treatise. The Note of Argument should provide the court with clear guidance on the main points of the oral argument to follow. Any statutes

[9] [1948] 1 KB 223

[10] *Wordie Property* v *Secretary of State* 1994 SLT 345, LP (Emslie) at 347

or precedents to be founded on should be cited in normal short form and, especially with authorities, not quoted at length.

Great care is now taken to allocate the judges proportionate reading time in advance of Summar Roll hearings. Judges in the modern era are expected to read the papers in advance. Parties are expected, as a *quid pro quo*, to do their bit by providing Notes of Argument which can be read, along with the pertinent authorities within that time.[11]

The court expects the oral submissions to follow the structure of the Note of Argument. Trying to reconcile a Note of Argument with an oral submission where a completely different approach has been taken, is a time consuming, confusing and frustrating task for the Bench.

Criminal appeals

The opposite approach is taken in the High Court to that which has been adopted in the Divisions. The Act of Adjournal makes it clear[12] that the Case and Argument is to be a succinct and articulate statement of the facts founded upon and the propositions of law being advanced. That is, coincidentally, a fairly accurate description of what a summons should look like. It is to be the principal submission for the appellant, which renders an oral presentation during the appeal hearing often unnecessary, except in so far as it may be necessary to provide an outline of the

[11] *Tortolano* v *Ogilvie Construction* 2013 SC 313, LJC (Carloway) at para 10
[12] Act of Adjournal (Criminal Procedure Rules) 1996, Rule 15.15A and 15.15B

points raised to members of the public or other interested parties present in court. Even then, counsel are expected to follow the contents of the Case and Argument, and do little more than develop the points made, if required by the court to do so, or to respond to the Crown's reply.

I repeat that, at appellate level in both criminal and civil appeals, the modern system is designed to provide judges with the opportunity to read the relevant papers before the hearing. We have moved away from the days when, in civil appeals, the bench would rely on counsel to introduce them into the case, with the result that significant amounts of court time would be spent with junior counsel reading the pleadings, transcripts of the evidence and the opinion at first instance before embarking upon the submission. In reclaiming motions, but not in criminal appeals, the judges of yesteryear were not expected to read any material in advance. They did not discuss the case in advance. Those days are firmly behind us because of the pressures of business in the modern court.

For judges, as for counsel, preparation in appellate work is significantly front-loaded. Whilst there is no pre-judging the case, in the sense of the court reaching a final view in advance of the hearing, it is likely that those judges who have properly read the papers will have discussed the case in advance, usually immediately before the hearing. That is a natural and predictable consequence of the structure of the system that has had to be adopted to meet modern conditions and demands. It requires counsel to focus on the preparation of the written documents.

This system enables the judges to formulate intelligent questions about the material which they ought to have read. Counsel should be able to answer these questions from a bench, which ought to be able to participate at the hearing with a sound, if necessarily incomplete, knowledge of what is in the papers or what they mean. If counsel is asked a question by the court, he or she must answer it. Whilst avoiding the question might seem a clever move to the advocate, it usually serves only to undermine the argument far more than anything that the opposition might say about the issue.

I have to say something about the use of electronic media; notably the USB stick. I recognise that the courts are some way away from being able to present a consistent and united approach the use of electronic documents. The difficulty stems in part from the differing preferences of members of the bench, and from the fact that we have not fully understood when electronically stored documents will or will not make a particular matter easier or more difficult to understand. This will require continuing patience on the part of counsel and, perhaps even more so, the agents responsible for the preparation of this material, until a consistent approach is reached. For that I am grateful.

Conclusion

To conclude, the court expects assistance from counsel in all matters on which there is to be dialogue, both written and oral, between the court and parties. That assistance takes the form of concise and focussed examinations of witnesses at first

instance, and the timeous delivery of legally sound and well-prepared pleadings and submissions at all levels. That is what makes a good and effective advocate in the eyes of the court. When I passed advocate, almost 41 years ago, the Lord Ordinary swearing me – and Lord Malcolm and Lady Clark – in was Lord Ross. He said to us that advocacy was 90% preparation and 10% skill. I agree with that, but, as he also wisely said, it is the combination of both that will tilt the narrow case in your favour.

Thank you.

LORD PRESIDENT
8 March 2018