The Court and the Young Barrister

ABBREVIATED VERSION OF AN ADDRESS DELIVERED IN GRAY'S INN HALL

BY THE HON MR JUSTICE DEVLIN

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In Easter Term 1958 Master Devlin delivered an after-dinner Address to students in Hall on the subject of advocacy. The shortened version below contains the essence of Master Devlin's valuable advice to young barristers on the topics identified by the subheadings. This may be thought as pertinent today as it was then, save that a modified reading of the section on examination-in-chief is necessary in civil cases (where written statements now stand as evidence-in-chief). The full text of the Address can be found in Graya No 48 *(1958), page 66.*

Audibility and opening speech

It is extraordinary how many people come to the Bar without the slightest idea of how to use their voice at all, or without feeling that it is in the least necessary to use their voice. By that I do not mean using tricks of elocution, but merely the capacity of making ourselves heard without difficulty. Far too many barristers operate on what I might call the fringe of audibility. It is not that they are inaudible. They can be heard, but they are not easy to hear, and the first thing you want to do is to make yourself easy to hear.

If you are easy to hear it will make all the difference to how the judge receives your case, for a judge has a good deal to do besides listening to counsel and witnesses. At the end of the case heard by a judge alone he usually delivers his judgment 'off the cuff'. He cannot do that unless he is going through a considerable mental process while he is hearing the evidence and listening to the argument. I will not say he can only give half an ear to what is being said, but it does mean that he cannot attend to what is being said with the facility that one has very often in ordinary

conversation of supplying, by inference, a missing word, when someone drops their voice.

When one's mind is already occupied with something else it is not easy to do that, and judges have necessarily to employ a good deal of physical effort on listening to witnesses who have not been taught to speak. It is really quite intolerable if they must do it as well for members of the Bar, who ought to know how to speak. So the first thing for every barrister is to acquire an easy, clear and distinct speaking voice. You must speak a little loudly until you find out what is acceptable and what is not, so as to make sure that all your points get effectually to the judge.

In an opening speech you should be able to use your voice so that you do not have to trouble about whether you are speaking distinctly or not. You should not have to add to your other worries, which are often considerable, the feeling 'I must be careful not to drop my voice at the end of each sentence'.

Queen Victoria used to complain that Mr Gladstone always addressed her as if she were a public meeting. She may have objected to it, but it is just what you want to do, if you are addressing a judge alone. You must never lose sight of the fact that the judge is the one person whom you must persuade that you are right. So do not address the air in front of you, and above all, do not address the bench below you. The angle of our courts is such that you must look up if you want to speak to the judge, and remember that he is the person upon whom you want your words to take effect.

At the same time, you must be completely impersonal in the manner of your address. You must never say 'I think', 'in my opinion' or 'in my view'. You will hear people saying it, I know, but you must remember that it is wrong. It is wrong for a very good and important reason – what counsel thinks cannot matter. Counsel's opinion is irrelevant. It is the essence of our profession that that should be so, that counsel can undertake any brief for any client, no matter how repugnant the views of that client may be to the barrister. It is not only the barrister's right but, in many circumstances, his or her duty, to undertake it. That is one of the profound principles that underlie the fame of the Bar of England, and inevitably it will go if members of the Bar talk about their opinion, what they feel and what they think. Because if you are entitled to tell a judge what your opinion is a judge would equally be entitled to ask you: 'Mr So-and-So, is that really your opinion in this case? Do you really believe in the case which you're putting forward on behalf of your client?'

It is quite true that, as you go on, you will sometimes hear counsel say as a manner of speech 'I think' or 'I feel'. But a barrister who is starting should keep off it altogether and get into the way of saying simply 'I submit'. It is only when you know a rule and are accustomed to its practice that you can afford sometimes to depart from it with impunity.

Another thing to remember about your opening speech is to speak not only distinctly, but slowly. You may think that the thing is perhaps dragging, and the judge must be bored, but you must bear in mind that the judge is listening to the facts for the very first time, and very often they are quite complicated. Even in the simplest Factory Act case, for example, there is a bit of machinery to explain, something that perhaps puzzled you at first, but because you have thought it out and are now familiar with it, you tend to think someone hearing of it for the first time will also be familiar with it. But, you must remember that what puzzled you at first will probably puzzle the judge too, and you will find that you are much safer in being slow than in being fast.

Examination-in-chief

Everybody will tell you that examination-in-chief is one of the most important things that a barrister has to do because cases are won, at any rate before a judge alone, by evidence and not by argument or oratory. It is the weight of the evidence that you can call that is eventually going to determine the thing either for or against you, and a barrister's business is to let the witness speak in the most effective and convincing way. The task of a barrister is to give him every opportunity of telling his story in the most convincing way possible, and that is what he does by examination-in-chief. Therefore he should ask a minimum of questions and as far as possible allow the witness to tell his own story. Witnesses are much more convincing when they are telling their own story than when they are answering 'Yes' or 'No' to questions put to them by counsel.

It is a barrister's duty, of course, to see that the witness is not allowed to ramble, because if he rambles all over the field, as witnesses may do, he will not tell a connected story. The task of the counsel examining-in-chief is to allow the witness to tell the story with as little intervention as possible by himself. There are obstacles – physical obstacles – in the way of that. One is that nobody has yet devised a court in which the witness-box is conveniently situated both in relation to counsel and to

the judge, and the difficulty you will find yourself in is that the witness naturally tends to answer the person who is asking him questions. It is very difficult to get him out of that, because you want to get him to talk to the judge.

Another difficulty is that the judge is probably taking note of more of the examination-in-chief than any other part of the case. Therefore you have got to give the judge time to get down what he wants to get down. It is possible, of course, to write down the answer to one question while listening to the next, but it is not easy, and you must try and get the witness to adopt the tempo that the judge wants. That is why examination-in-chief is one of the most difficult things to do successfully, though it is perhaps the least spectacular, as well as being one of the most important.

The real vice of the leading question, which you must never ask if you can avoid it, is that it does your case so much harm. The answer 'Yes' or 'No' given to what counsel asks is not going to carry the same conviction with the judge as the witness's own words so you should avoid a leading question wherever you can. So many counsel think they have discharged their duty in examining-in-chief by questioning that comes as near to leading questions as can be done without objection from the other side. But that examination, from the judge's point of view, has been a complete failure.

Cross-examination

Now let me come to cross-examination, which is considered the most spectacular of the forensic arts, but of which I entertain less high an opinion than perhaps I ought to. Its first object is to elicit facts; its second is to shake, if you can, the credit of the witness. Eliciting facts is simple enough if you know what the facts are that you want to elicit. The main thing you have got to avoid is eliciting facts that assist the other side. You will sometimes hear counsel say, in a most aggrieved tone 'But you never said a word of that in-chief' and the witness answers, perfectly correctly, 'I was not asked that question'. That answer is a condemnation of that particular line of cross-examination.

As to shaking the credit of the witness, of course you may have material which enables you to do that: letters and correspondence have been inconsistent, or something of that sort. But, if you have not got such material, shaking the credit of the witnesses, and making them appear

unconvincing, is one of the most difficult things to do. You can by your questioning make the witness appear unconvincing, and that is very valuable to your side. But without material it is very difficult to do, and that is why I say so much cross-examination before a judge alone is just sound and fury and signifying nothing.

I am well aware that young barristers are expected by their solicitor clients to cross-examine witnesses on the other side very severely, and it is clearly too much to expect them to say: 'I'm not going to do any good with this man, so I'm not going to ask any questions at all.' But I am talking of the way it appears to the judge, and it is not an exaggeration to say that 90% of cross-examination is, from the judicial point of view, quite wasted. However, in a case where there is a jury there is often a legitimate object in making points in cross-examination which you may think the judge will already have seen, but which the jury has not, or which they may miss unless you make them.

Re-examination

There are two legitimate objects of re-examination. The first is that it may give you an opportunity of introducing evidence that you could not introduce in examination-in-chief because it was not admissible, but where questioning pursued in cross-examination gives you that opportunity. That is the first and obviously legitimate object of re-examination. The other object is that it gives you a chance of repairing the damage that has been done by cross-examination. Again, that second part is one of the things that calls for the very highest flights of advocacy, and you're much more likely to make things worse than you are to make them better. Therefore, pursue it, if it has to be pursued at all, with the utmost care.

One often finds re-examination used as an opportunity of going over the whole of the cross-examination and obtaining from the witness the same answers as he gave in cross-examination. This sort of thing: 'My learned friend has suggested to you that you were driving at 85 miles an hour. Were you driving at 85 miles an hour?' And a witness who has already said three times that he was driving at 29½ miles an hour says 'No'. But that is one of the lines that one does very often find pursued.

Or re-examination is taken as an opportunity for counsel to make a little speech in which he summarises what he believes and hopes is the effect of the evidence his client has given in cross-examination, and

which he allows to be punctuated by the prophesied 'Yes' or 'No' given by the witness. When his opponent gets up and says 'My learned friend must not lead', sometimes you hear counsel say: 'Well, I thought all this was common ground, anyway.' And it is quite true the witness has already said it, but if he has said it once there can be no virtue in getting him to say it again. There is one golden rule that you may well bear in mind: whether in cross-examination or re-examination do not ask a question to which everybody in court knows what the witness's answer will be.

Final speech

The final speech is an opportunity for marshalling points rather than developing argument. In trial by judge alone you must bear in mind that in the vast majority of cases the judge will be a long way towards making up his mind before the final speeches are made. The most you can do in the final speech is not to repeat argument at length which the judge has already apprehended, but to marshal points so the judge can ensure that he has not missed any. If he has, he will find your marshalling very useful and incorporate most of it in his judgment and perhaps pay you a compliment for doing so. If he is against you, you will be quite certain that he has not made up his mind without appreciating the totality of your case and the weight of your arguments.

That brings me to the end of the trial, with the exception of the judgment, with which you are not concerned. You will note I've not referred at all to the part the judge has played in the trial. I have represented him as an entirely silent being, who has not intervened from beginning to end. I think I will leave you with that impression. But perhaps it is only fair that I should tell you a story that Master McNair told me at dinner. A young counsel found that the judge was not only very much in his favour, but was also taking a very conspicuous part in the conduct of the proceedings. He let this pass for a long time, but eventually felt he had to say something. He plucked up his courage and said: 'My Lord, of course I don't mind your Lordship examining my witnesses, and I have not in the least minded your Lordship cross-examining the witnesses on the other side. I do not mind your Lordship making my speech. But this is my first brief and I do hope your Lordship won't lose the case.'

Edited by Master Peter Birts