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Advocacy - What is its future?

Advocacy is the epitomy of the image of the English legal system. The origins of the principle of orality stretch back to the beginning of the common law system of trial by jury. Speech is the natural way to present a case to such an audience and, hand-in-hand with the principle of publicity, orality has been a fundamental part of the legal system for many centuries. However, as solicitors and barristers divide up rights of audience, advocacy itself may be threatened, having been under sustained attack for some time.

One of the reasons advocacy flourished under the adversarial system in England is the passive nature of the courts, particularly in civil litigation. The parties themselves formulate the demand for a remedy and can bargain for settlement. The stages of a trial have all been conducted orally, from opening speeches, through examination-in-chief and cross-examination, to argued points of law and summing up before the judgment, which is read out in open court.

For some time much of the discussion on advocacy has centred on rights of audience of solicitors. Appearing in court has in the past, and largely today, been the preserve of the Bar. Solicitors relied on non-contentious work; litigation was, for them, a secondary and less profitable aspect of practice. Recently rights of audience of solicitors have been increased. This, combined with their greater apparent adaptability and increasing economic power seemed to be reducing the difference in prestige between the upper and lower halves of the profession. These changes have caused many commentators to question the future of the Bar. Much less has been said about the decline in the importance of advocacy in the English courts.

There is a variety of reasons why advocacy is under threat. In these days of increasing demand on the limited resources of courts oral proceedings are proving costly. It is also inconvenient for parties, witnesses, judge and lawyers to be tied up for days in a court when they might, instead, read documents in their offices at their convenience.

However, there are parts of the English trial that have been considered to be sacrosanct. The first is the cross-examination of witnesses and the second is argument on points of law. Witness statements are given in writing, typically with lawyers erring more and more on the side of caution and producing long and detailed documents. Judges now often take these written statements as examination-in-chief and move straight on to cross-examination. But even this previously sacred part of the trial in not necessarily safe from attack. The Woolf Report suggests curtailment of cross-examination with the court taking more control. His suggestion is

that cross-examination will be strictly rationed; a somewhat novel idea considering the very passive role that English courts have hitherto assumed. These ideas are more than just proposals. The recent 1995 Practice Direction stated that the court will control examination and cross-examination at trial, as well as oral submissions and reading in court.

The other part of proceedings in which it was thought that advocacy was fundamental, arguments on points of law, may also be threatened. The announcement that skeleton arguments would become compulsory was handed down by Lord Donaldson in a Practice Direction in 1989. In outlining the advantages of skeleton arguments he said that they allow effective pre-reading, allow a realistic time to be set for the trial and promote settlement. The Practice Direction made it clear that "skeletons" are not supposed to replace oral argument. However, it is frequently the case that they are doing so, with judges asking advocates to elucidate only one or two points. The problem is exacerbated by lawyers producing longer and longer documents.

It may be that England is following a track towards the US system of litigation. In cases on appeal each side can have as little as twenty minutes to make their points orally. Oral arguments are most definitely secondary in importance to written briefs. All real argument is written.

To rush down this path without thinking carefully, purely on the grounds of saving time and money, may be to take a rather blinkered approach. Cross-examination should not be curtailed too severely. Wigmore said "cross-examination is the best way of discovering error, confusion, and falsehood". Oral cross-examination promotes the ascertainment of truth, rather than the court having to rely on what might be an overly-long witness statement. Using cross-examination gives a greater chance of uncovering material, and so must increase the chances of arriving at an accurate decision.

It is important that judges come to a hearing in court with an open mind. Arguments must be developed, rather than being a series of attempts to fortify or alter an impression that a judge has already made. If points are merely drawn from pre-read papers, the chances of a properly structured argument are very small indeed.

Another point rests on the importance of the litigants - the "customers" of the legal system - to feel satisfied with justice. The effects of a day or more in court, seeing their arguments put forward and hearing the response to them, although potentially very traumatic, cannot be underestimated in terms of the feeling of culmination or settling of a matter. There is no doubt that litigants become immensely frustrated if they feel that their points are not being put across properly. They will not see the work that the judge has put in beforehand and are likely to feel that their case has not been fully presented.

The importance of courts using money efficiently is obvious. However, both judges and lawyers have an important role in ensuring that the current high standards of justice are maintained. The quality and accuracy of the decision made by courts must not be compromised and it is for this reason that advocacy must continue to be a fundamental part of the English legal system.