

THE PILGRIM FATHERS LECTURE 2013
THE ART OF ADVOCACY
The Right Honourable the Lord Judge
7 November 2013



It is a privilege to be giving this 20th Annual Lecture, not least because I am following in some very distinguished footsteps.

But to the heart of advocacy. Can we go back to 1588 when Francis Drake and the brave men of the West Country got into their wooden boats and sailed off against the Invincible Armada. We know that the Armada was defeated, but that was not how Drake and his men would have seen it at the time.

Queen Elizabeth I made a speech to her troops at Tilbury. It was not made here, but it infused the entire resistance to the invasion. It is persuasive, gripping, and addresses the fears of the audience. And perhaps you should not overlook that in 1588 a female monarch was unusual, a female leader into battle was remarkable. I want to point out some features of the advocacy.

“My loving people.

We have been persuaded by some that are careful of our safety, to take heed how we commit our selves to armed multitudes, for fear of treachery; but I assure you I do not desire to live to distrust my faithful and loving people. Let tyrants fear, I have always so behaved myself that, under God, I have placed my chiefest strength and safeguard in the loyal hearts and good-will of my

subjects; and therefore I am come amongst you, as you see, at this time, not for my recreation and disport, but being resolved, in the midst and heat of the battle, to live and die amongst you all; to lay down for my God, and for my kingdom, and my people, my honour and my blood, even in the dust. I know I have the body but of a weak and feeble woman; but I have the heart and stomach of a king, and of a king of England too, and think foul scorn that Parma or Spain, or any prince of Europe, should dare to invade the borders of my realm; to which rather than any dishonour shall grow by me, I myself will take up arms, I myself will be your general, judge, and rewarder of every one of your virtues in the field. I know already, for your forwardness you have deserved rewards and crowns. But we do assure you in the word of a prince, they shall be duly paid you.... we shall shortly have a famous victory over those enemies of my God, of my kingdom, and of my people.”

Now, the subtlety of the advocacy is important. Notice she begins royally, using “We”, but with remarkable skill she becomes entirely personal, just a fellow human being, but nevertheless a leader, “I assure you.... I am come amongst you”... And she offers to die among them all. She then reduces it further to how she knows she has the body of a weak and feeble woman, but having hit what to her contemporaries would have seemed her low point, she then turns upwards, and higher, and higher, nevertheless remaining personal; she will be their general. She will reward their virtues. She scorns Parma, an individual, then Spain, the entire Armada, and then any prince of Europe. And she ends by returning to the royal “We”. “We do assure you in the word of a prince”. You have to imagine the impact of such a speech at such a time of desperate national need. For my own part I believe that the ghost of Queen Elizabeth I sat on the shoulder with Winston Churchill as he led the nation into survival in 1940.

The focus of this lecture is advocacy, and in particular, advocacy and the courts. In fact, as we shall see, advocacy is happening all the time. At almost every turn someone is trying to persuade someone else of something. On the television we see politicians persuading us of their profound wisdom and the inexhaustible folly of their opponents. The technique is to attack critically, and not to answer questions that are difficult. Largely it is not very good advocacy. We see small pressure groups seeking our support, in order that they may become larger. In your local supermarket you will be encouraged by large notices to buy, and to buy again, and you have offers to buy 3 for the price of 2, when you do not need 3. Your teenage son or daughter will try and persuade you that they should be allowed to stay out later than you wish, and you will try to persuade them to make their beds. We are being subjected to persuasion all the time, and we are all trying to persuade others.

This evening I want to talk about the law. You do not have to be an advocate to become a successful solicitor, and very many of them are not advocates at all. You do not have to be an advocate to become a successful barrister, some of them do no advocacy, at any rate in advocacy taking the oral forms. Yet the need for highly skilled advocates is as urgent as it is always has been, particularly in this jurisdiction where we believe in an adversarial system in which truth and justice are more likely to emerge if all the evidence and argument are subject to rigorous careful analysis by each side, taking and expressing an opposing point of view. However the style of advocacy may change, it is still always about persuasion. One irreducible aspect of the rule of law is access to justice with the assistance of an independent legal profession appearing as advocates before independent judges in a relationship marked by mutual respect. Without mutual respect between the judge and the advocates great damage can be done. Some advocates are, of course, better than others, just as some judges are better than others. We know of personality clashes between advocates just as there are personality clashes on occasions between the judge and the advocate. All this is true, but the essential feature to which I am driving is that there must be what I shall describe as institutional respect. Justice is better served when there is a degree of professional harmony between members of the legal profession and holders of judicial office.

Lord Bingham of Cornhill, a man who commanded the admiration and respect of the entire judiciary, went rather further than I should go when he quoted an observation of Piero Calamandei that,

“The judicial process will have approached perfection when the discussion between judge and lawyer is as free and natural as that between persons, mutually respecting each other, who try to explain their points of view for the common good. Such an arrangement would be a loss for forensic oratory, but again for justice”.

Where I respectfully disagree with Lord Bingham is I do not think there can be a discussion of the kind he envisages. There are formalities within the processes of law which are essential to the orderly discharge of business. More important, whether in a criminal or civil case the advocate is acting for a client, and the judge is having to listen to rival cases and make up his or her mind between them. The role of the advocate is dual.

The advocate has obligations to the court, but it is the undoubted responsibility of every advocate to advance the case of his client, however unpopular it may be, in its

best light and to the best of the advocate's ability. The judicial objective is a process which involves high quality advocacy on both sides of the case whether the prosecution and the defence, the claimant and the defendant, or whatever, which produces the answer required by truth and law.

The crucial words in the passage quoted by Lord Bingham are mutual respect. That is an expectation which the judge is entitled to have from each advocate, and each advocate is entitled to receive from the judge, an expectation based on a clear understanding of each other's different responsibility in the administration of justice; not too cosy, not as cosy as the quotation implies. Perhaps in the end Lord Bingham overlooked that litigation is not the symposium between distinguished commentators in a great academic institution, but a legal process, so far as the parties involved are concerned will often involve life changing consequences, such as the deprivation of liberty and punishment, or the removal of one child from a parent, or both parents, or financial disaster. Litigation is not a game, and it may produce shattering consequences for one or both sides.

Judges must not overlook the simultaneous duties owed by the advocate to the client and to the court, and this double responsibility can create very difficult problems of professional judgement. In any event there is a principle of legal professional privilege which means that the judge cannot know the whole story or the particular pressures under which the advocate is working. So before judges criticise the advocate they need to remind themselves of the problems of the advocate, and perhaps more important still, that they do not have the fullest idea of all the problems he may currently be facing. As for the advocates, perhaps on occasion they failed to appreciate that the answer to many cases is neither as straight forward nor as simple as the advocate thinks it must be. The problem was identified by King James I, at the start of the 17th century, when he decided that he would exercise some kind of judicial function. He immediately discovered what every judge in every jurisdiction recognises. He said, "I could get on very well hearing one side only, but when both sides have been heard, by my soul, I know not which is right".

So in the court there are normally speaking two advocates. Advocacy in court is the art of persuasion in courts. It is an art, not a science. There is nothing fixed or immutable about the ways of advocacy. If there is one message I can give, and I have given it time and time again, it is that advocacy is the most personal individual skill, involving different forensic techniques which have to marry up with and be

consistent with the character and personality of the man or woman advancing the case. Let me try and illustrate what I mean. If you need a major operation there will be a large number of surgeons who specialise in the particular field, able to help and advise you. Each will have his own individual bedside manner, and will discuss the operation with you and encourage you, and eventually assist you in its aftermath. The bedside manner will be a reflection of the surgeon's personality and character. But that is not the operation. The actual process of cutting into the body and working at the complex structures found there proceeds in a way which, allowing for the minutest variation in technique, is more or less identical. And all this takes place in private, in the operating theatre.

I am not of course referring to pioneering operations, or to those brave surgeons who take operations further than their predecessors were prepared to. That is a different matter. What is more I am not decrying the skill, care and professionalism involved in every operation. My point is simply that the operation in itself is not personal in the sense that the personality and character of the surgeon has a direct impact on the physical processes.

Now let us consider advocacy in court. Identify any difficult criminal trial. You can find ten good quality advocates to prosecute the case or defend it. Each of them, and we are assuming they are good quality advocates, will study all the papers, think about them, and reflect how to approach the case and come to court and present it as each of them judges best. The same process applies whether the case is a criminal, civil, family case, a planning tribunal, an arbitration, an appeal court or any of the myriad of tribunals in front of which advocates may appear.

There are many good advocates, but they do the cases differently. The first requirement is that the advocate must be comfortable with his own way of doing things, with his own personality and with his own style and attitude to the case, and his way of dealing with the judge and the witnesses reflects his personality and character. These responsibilities are carried out in public; and indeed just about everything an advocate does is done publicly. His client is never under anaesthetic. The client is there, observing it all for himself. So are all his colleagues, and they can spot a forensic blunder as soon as it has been made. What is more the profession, quite apart from working in public, is working in a constantly changing and fluid forensic situation, over which, however much preparation the advocate has made, he

has no complete control. Indeed if he is over prepared, he may stick too long to his script, clutching it like a child with a cuddly comforting toy.

The best advocates respect and understand the imperative of the moment, and they are alert to its needs. They are flexible to the changing momentum. Sometimes these changes are very subtle, apparently tiny, tiny movements in the court's atmosphere. You never know quite what answer a witness will give, or the way in which a piece of evidence which you anticipate will actually emerge. You have to be ready for it. And I emphasize it is you, you, the advocate who has to be ready.

In summary, fully prepared, but not over prepared. Anticipating the improbable, but unable to predict what form the improbability will take, but whatever form it may take, flexible enough to cope with it. This is about you, the individual, the human being in the advocate's profession.

These are the sorts of reasons why I describe advocacy as an art. The truth is that persuasion is an art. I want to give you examples of persuasiveness which have nothing at all to do with the court process, but which illustrate my point. Again, I have given these publicly and I am going back to Anthony Beevor's book about D Day in 1944.

An extraordinary, bold expedition to relieve Europe of the tyranny of Nazism was planned. We now know that happily it succeeded, but it was a most remarkable success, and the opportunity for failure was enormous. For this purpose a huge number of men were gathered together to sail across the channel to die in order to save Europe. And here are the words of three different commanders to the men under their command. All of them were united in fear and apprehension of what lay ahead, and there were going to be many casualties.

The first commander said:

“Look to the left of you, look to the right of you, there is only going to be one of you three left after the first week in Normandy.”

The second said this:

“What you are going to go through in the next few days, you won't change for a million dollars, but you won't want to go through it again very often. For

most of you, this will be first time you will be going into combat. Remember that you are going in to kill, or you will be killed.”

The third pulled out a large commando knife, flourished it above his head and shouted:

“Before I see the dawn of another day, I am going to stick this knife into the heart of the meanest, dirtiest, filthiest Nazi in all of Europe.”

Now let us pause. Remember I am talking about persuasiveness. The first commander was factually correct. The casualties were going to be and were in fact horrific. The second tried to suggest, by way of inspiration, that they were going into something of an adventure, a one off life time adventure. The third was utterly unrealistic because he knew, and the men he was addressing also knew, that the meanest, filthiest Nazi of all, and his close allies, were nowhere near the coast of France, but bunkered down in Berlin.

Relate this to the trial system. For a judge sitting on his own, perhaps the second of these efforts would have represented the most persuasive advocacy. For a trial by jury, perhaps the third. And for a court of appeal of three judges, perhaps the first was best. Each tribunal demands different advocacy techniques. Which of these 3 advocates would have persuaded you to follow them into the hell that lay ahead?

Returning to the quotations, the significant feature is that the words chosen by the three commanders were addressed to groups of men who were in identical positions of fear and apprehension, and the commanders themselves, who were going across the Channel with their men, were no doubt equally apprehensive and frightened. What each of them said to his troops was reflection of his own personality, of how he felt able to inspire them at a moment of profound responsibility and his own deep apprehension. In other words, they used words that their personalities led them to use.

The advocate cannot be anything other than his own man or her own woman. He cannot be somebody else. He cannot be trained to be an advocate which is not a reflection of his or her own personality.

We are, as I emphasise, talking about persuasiveness; persuading the tribunal. The point of construction of tax law or a charter party is quite different from a criminal trial,

arising from a homicide which may or may not have occurred in unreasonable or excessive self-defence. Of course, before any tribunal, there is nothing like standing still, keeping your hands out of your pockets, not waving your hands like a conductor of an opera by Wagner, looking at the court, speaking clearly, modulating your voice – remember, your crucial weapon, and the speed at which you speak, occasionally, when you are losing the court's attention, to drop your voice rather than shout. Unless you have already bored the court into somnolence, the judge will lean forward to try to pick up what you are saying, and then return to speak more loudly. If you have, of course, bored the judge into narcolepsy, you should have spotted the drift at an earlier stage. And do not forget that silence has its important moments: the pause can highlight that moment, and can add great emphasis, sometimes much greater than the shouted word.

At the same time, do not forget to listen. Listen for the hesitation in the evidence of the witness; listen for the issue your opponent is having trouble with; listen for what is not being said. Observe everything. Do not bury your head in your papers. If you do not listen and observe, you will miss the moment, what I shall describe as the eddy moment, the moment when something important and unanticipated occurs, or when something anticipated has a different effect.

If you have a good but slightly complex point, give it time to sink into the mind of the judge. Do not rush him or it. And if you were cross-examining a difficult witness, who is not telling the whole truth, a pause by you will often lead the witness to want to fill the silence gap, and in doing so he may give something away which he would rather have kept hidden.

One of the great advocates of my early days was an Irishman called James Comyn. He was appearing before Lord Denning, famous in England for his concern for what we would call the 'little man'. Comyn appeared in front of Denning in the Court of Appeal in a hopeless case for a tenant against the landlord, and he knew that there wasn't very much law on his side. He began with these few words:

“In this case I appear for an 87 year old widow, whose husband was a casualty in the last war, and she has lived in this house where he left her to go and fight for his country, ever since”.

“Come, come, Mr Comyn”, said Denning. “This is a court of law not a court of sympathy”.

There was then a long pause. Comyn did not break into it. He was waiting for the moment. And then Denning fell into the pause.

“How old did you say the poor old widow was?”

That was fabulous advocacy, not rushed, nor forced.

And in this pantheon of advocacy I offer you two further stories. Just about every common law jurisdiction claims the first one for its own. The advocate for the appellant opened an appeal in this way:

“My Lords, in this appeal, there are three points. One is arguable, the second is arguable, but not overwhelming, but the third is overwhelming”.

The court responded, “well, why don’t you tell us what your overwhelming point is?”

The reply of the advocate was “that is for your Lordships to discover”.

This is a great story. I love it. I tell it at every opportunity. But why is it a great story? Surely we all laugh, because that is a story in which the advocate has undoubtedly out-smarted the court. But I do ask you to think, to what end? Was it the best possible way to persuade the court to find for his client?

Let me suggest a different approach which is a true story told to me recently by a Lord Justice of Appeal presiding in a very busy day in the Court of Appeal Criminal Division. On such days things can take too long and the court finds itself in a hurry to complete its list. The appeal against sentence was in truth rather hopeless. Young counsel stood up, and within moments the court was intervening and interrupting. This can happen, but after they had gone on and on at him, they suddenly all paused for breath, and he said quietly, but firmly,

“My Lords, I know I am unlikely to get this aeroplane off the runway, but would you at least allow me to drive it out of the hanger?”

This was sublime advocacy. It stopped the court in its tracks. It made the court listen. The Lord Justice told me “he was marvellous, he never did get the plane off the runway, because there was nothing in his case, but it was marvellous”. Why? The court was carefully and courteously put in its place and the advocate was serving the interest of his client. He behaved firmly and respectfully, and the court recognised that he was right, and from that moment on, treated him with the respect to which he was entitled. It is an example of the mutual respect with which I began this lecture.

One of the problems of the modern world is that time has not expanded proportionately to material being created in every aspect of our lives. There are still only 24 hours in a day, and 60 minutes in the hour. The legal system is no less affected. Our trials are taking longer and longer, and the technique of advocacy has become much more diffuse. Not in my view for the best. For example, modern advocacy, certainly in England, no longer has much use for Rudyard Kipling's six wonderful friends. I read long transcripts of questioning of witnesses which virtually never reflect his advice, which I strongly commend to you all:

"I keep six honest serving men,
They taught me all I knew,
Their names are "what" and "why" and "when"
And "how" and "where" and "who"."

In court, virtually any question can begin with those words, and for cross-examination perhaps the word "did" could be added to them, and on occasions the "why" can become "why not". Alternatively, "did" can become "didn't..."

This is all so very much simpler, and ultimately more effective. I think advocacy also requires us to be realistic about modern conditions. Time is a resource, a finite resource, perhaps the most certainly finite of resources. Of course there must be a reasonable opportunity to deal with the case and to present and advance the client's case. But the opportunity must be reasonable in context. The length of time taken by a case provides no evidence whatever to suggest that the advocacy is high quality. Remember the old saying that I was too busy to write a short letter. The very point of careful preparation of the case is that it enables a decision to exclude issues or evidence which do not really matter. Much the same point arises with the written argument, or the skeleton argument, the written persuasions, the pen being used for something for the judge to see and read rather than the voice being used for the judge to hear. Whether the judge is using hearing or eye, the advocate needs to engage the brain. The written argument is a change to the common law system which is founded and still depends on orality.

These written arguments have developed their own technique, and there is much more flesh on them than there ever used to be.

My own experience is that when I read the argument for the appellant, I tend to be very impressed, and sure that the appeal should succeed. As a judge, I know I should read the respondent's written argument, and when I read that again, I am sure

that side should succeed. Well and good, that is advocacy, preparing a written submission to persuade. The skill is more subtle than it looks. Sometimes advocates forget that the document is prepared for the purpose of persuading the court. They are written for the judge or judges, to help them to the right answer, not for the client so the client will think that the big fat fee he is paying for the advocate is justified, not to impress the solicitor who is instructing the advocate. That can lead to lack of focus. The objective is to persuade the court, not to impress anyone else. For this purpose judges are ordinary human beings who tend to listen more carefully and follow more closely the argument of the advocate who seems to them to have thought carefully about his submission to the court, advancing submissions to the court with real weight, rather than those involving grandstanding to anyone else.

The written submission is followed by oral argument. One must be flawed. The advocate then must help the judge or judges see the flaw by carefully chosen words, and if you are a really good advocate, you will let the judge think that he thought of the answer first.

Some advocates who are masters of the written submission are not very good when it comes to oral presentation. An increasing habit has developed of the advocate simply reading his written submission. This habit can lead to the destruction of the oral process. Your written argument may command attention, but can be read out in a way which creates unbelievable boredom. I am about to parody the way in which this advocacy can develop.

See Queen Elizabeth I's speech at Tilbury:

“Do your Lordships have my skeleton argument? I am looking at paragraph 25, so sorry, 27..... I am sorry, am I going too fast for your Lordships – oh too slow, I am so sorry, too slow”.

The ability of the advocate to deal with issues which trouble the court is much harder than it looks, and requires at least as much preparation as the written argument. I want to offer one piece of advice which many advocates do not appear to have mastered. Of course you will think about how to advance your own case. That is elementary. Sometimes however this will lead you to fail to think through where your case is at its weakest and your opponent's at its strongest. Think about your response and be ready with it at the hearing. When I was at the Bar I would ask myself a simple question before going to court. “If I were the judge in this case, what would I ask me?”. The average advocate could deal with all the points in his own

case and advance them. The best advocates have thought about and are ready to deal with and must address the aspects of their opponent's case at its strongest, and their own most weak and problematic. This is integral to the quality of preparation of every argument, written or oral. And by doing so you can, on occasions, appear to be quite utterly brilliant in what appears to be a spontaneous response to a question from the court.

Again, let me refer to James Comyn. He was appearing in a case with very little law to support him, but he had found a text book which did offer some support. In those days you could not refer to an academic work unless the author was dead. Quite why death added respectability and weight remains a puzzle to me to this day. But that was the rule. So when one of the members of the court ask crustily whether Comyn appreciated that there was a rule against the use of this material before the author was dead, Comyn replied,

“My Lords, I saw him on my way to court this morning, and he really did look rather ill”.

The court looked at the authority. In the end, however one dresses it up, the quality of the judicial process – doing justice according to law – is heavily dependent on the quality of the advocates who appear in the courts. It really is a simple as that. The role of the advocate in our contemporary society and its contribution to the administration of justice is completely undiminished. It is not one jot less important now than it used to be. Modern technology and modern methods and indeed the modern world, with all the dramatic, and indeed revolutionary changes with which we are becoming familiar, has not altered the need for high quality advocacy. Indeed in some respects the importance of the quality of the advocates has been enhanced, not least because the law has become so complicated. But important as it is, the basic technique of persuasion, flexibility and alertness to the moment, and most of all of the advocate being the advocate that his or her personality and character makes him or her, is unchanged.

In the meantime any advocate will continue to recognise the reality of the observation of Mr Justice Jackson of the Supreme Court of the United States, who said that when he was in practice as an advocate, he had three arguments ready for every court appearance. This was less impressive than it sounded, because he went on to explain that:

“First, came the one I had planned – as I thought, logical, coherent, complete. Second was the one actually presented – interrupted, incoherent, disjointed,

disappointing. Third was the utterly devastating argument that I thought of before going to bed that night”.

Before ending, may I just briefly address the younger members of the audience?

I practised as an advocate for 25 years. I loved the profession, and the daily combination of responsibility and stimulation. Although some days were good, and some were not so good, there was never a single dull day. I also made life long friendships with those who were my opponents and competitors. However their capabilities varied, and some were quite obviously outstanding, and some were not particularly impressive, with one single occasion, in this very competitive competition, a dirty trick was never played on me. It was an incident which I have never forgotten, and never will forget, not least because with that one exception everyone I dealt with was a man or woman of personal integrity.

That is remarkable. The advocacy profession has never been easy, but nothing worth having has ever been easy, and you cannot succeed at anything if you do not try. If you are sure that you wish to be an advocate, really, really sure, not doing it because that would please your mother and father, because it sounds glamorous, and you have some idea that you will suddenly be wealthy, so if you are really determined do not be put off trying by the undoubted difficulties. And if, notwithstanding the difficulties, you succeed, stay humble and remember that without good luck along the way, you would not have been blessed with the success that you enjoy. If you do not succeed, remember that in life, in addition to everyone else or anyone else you choose to live with, you do have to live with yourself. If you really want to be an advocate, or anything else, and you do not even a try because you are put off by the difficulties, so that you do not give it your best effort, you have to live with someone and share your life with someone, you, who did not have the courage even to try. I think that can be life tarnishing.