PRACTITIONER'S POINT

By

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I was honoured to be asked to write the inaugural practitioner's piece for the first edition of the Students' Law Journal of the University of Strathclyde. The initial problem was that the editor allowed me *carte blanche* about the subject matter. This was rather like an artist being given a blank canvas and asked to paint a picture where they were allowed to choose the subject. That task proved difficult. It might have been easier had the artist to been asked to paint a bowl of fruit, as he or she then has the subject matter in mind.

My first task was to choose the subject for my blank canvas. In considering that matter, I took into account that I would be writing for students who are about to embark upon their legal career with enthusiasm for the law and the challenges ahead. I have very recently retired from the practice of law although I can look back on over a quarter of a century as a member of the Faculty of Advocates. I served in a variety of roles e.g. both defence and Crown Counsel and on the Shrieval bench. As I look back at my own legal career, I realise that the practice of law can be at different times exciting, rewarding, frustrating, boring, challenging, nerve racking and also the greatest cause for insomnia depending upon which Judge or Judges you may be required to face in court the following day. However, your purpose is to represent one party and attempt to achieve justice.

So, I sit with a blank canvas in front of me and I have decided that as this is being written for a University Journal for those about to enter their traineeship and thereafter be let loose into court, I thought the best subject matter would be about court presentation. For those who do not wish to proceed along the lines of becoming an old criminal legal aid hack like I did, I apologise. As most of my practice was in the High Court, I may tend to focus more upon the conduct of jury trials. However, many of the principles apply equally to summary trials and much of it is relevant to the conduct of civil proofs also.

I should also ask you to note that I am writing this article as if every trial or proof which you will conduct will be conducted in an ideal world. The reality, however, is that you might be working for a busy criminal firm in a major town. Your trial will just have been moved from court four to court six and you will be handed a file by the court partner with the words 'Go and do that trial. It is starting in 20 minutes, if the Crown witnesses have bothered to turn up.' No time to prepare meticulously.

Many years ago, while still at secondary school, to earn some money I worked for my dad who owned a small builder's business. I recollect one job where I was labouring to one of the builders helping to build an ornamental wall in my home town of Bathgate. That wall is still standing. I had no real idea about how to build a wall but,

fortunately, I was only labouring or the wall might no longer be there. I soon learned on the job that, firstly, having dug out a trench in the proper place, the foundation concrete was laid. We were then tasked with gathering the materials to build the wall; the bricks and cement. Once that was done, with care and attention to detail for this ornamental wall, the bricks were cemented together in a solid and neat, level fashion. The wall had to be solid enough to withstand weight and so the materials you had gathered had to be constructed together in a solid and reliable fashion.
As I thought about writing this article, I realised that the conduct of a court case is exactly the same as building a wall. The lawyer must do three things: - ensure a solid foundation for his or her case; gather together or create in cross examination materials to build the case and then, finally, in a well prepared submission for the judge or jury, cement the whole lot together in a reliable fashion.

Before I examine each of these individually, I will stress some issues.

The first issue is a question I would ask 'your first duty is to whom?' And the answer is not your client. Your first duty is to the court. You must never intentionally mislead a court. You are an Officer of the Court and your first duty is to that court. It takes years to build a good and honest reputation and it could take seconds to destroy it. Build that reputation and maintain that reputation for honesty.

Secondly, you must develop your own methods and style. Learn from others and adopt lines which you find useful but do not mimic anyone. Always maintain the dignity and authority of the court from the lowest court to the highest court. Please use proper grammar and if you need to go and buy a book about grammar then do so. No one has ever 'gone' anywhere and the plural of 'you' is 'you' unless 'ewe' is a female sheep. Learn the difference between 'My Lord' and "Your Lordship" or 'My Lady' and 'Your Ladyship'. You don't need to know the terms such as nominative and vocative but never use the term 'My Lord' or 'My Lady' as the subject of the verb. What do I mean? Well, it is easy. You would never say "My Lord will have a copy of the report'. You would say, 'Your Lordship will have a copy of the report.' Similarly you would never say 'If my Lady has the photographs', you would say 'if Your Ladyship has the photographs'. In addition, remember historically the Judge is the Monarch's representative to dispense justice. You would never call the King or Queen 'you' and, for that reason, you never address a Judge as 'you'. I cannot stress that enough. The bench is addressed in the third party. An example will explain this. You would say, 'If your Ladyship has the productions before her, she will see in photograph number three that…' or 'If your Lordship has before him the report, he will find in paragraph three that.' That would also apply in a Court of Appeal in the plural. 'My Lord' and 'My Lady' are the vocative and would be appropriate if you are asked a question by the judge, you might reply 'Yes, my Lord/Lady'.

Finally, before we start building the wall, object to the Crown calling the Complainer, "the victim". It is for the jury (or judge in a summary trial) to decide if there has been a crime and if the Complainer is, in fact, a victim. (See the obiter remarks of the former Lord Justice General (Hamilton) in the case of *David Hogan v HMA* [2012 HCJAC 12]. Victim is an emotive word. Even in a case where your client may not be denying that

the complainer was the victim of a crime, your client didn't do it because they have an alibi, and you should seek to prevent the opposition from using emotive language.

THE FOUNDATION

So, let's move onto the foundation for our wall. Like a wall, your case must have a solid foundation. Do the preparation for the day of court. It will be obvious to a Judge, jury and your client if you are unprepared. Do you have all precognitions (statements) and productions? Do you have the client's instructions about issues arising in the Crown case, in particular about anything incriminatory? You must be in a position to advance your client's defence about disputed facts. Have you satisfied yourself that your client has a defence in law? What is the test you must apply to advance your defence e.g. self-defence? Even if self-defence cannot be established, can you ask for a rider of provocation? Even High Court Judges of first instance in the High Court can make the mistake of thinking that although such a rider is not an issue necessarily raised by the defence, it may be a matter about which they have to charge a jury (see *HMA v David Shepherd* [2009] HCJAC 98

As part of the foundation of your case, prepare for cross examination in so far as possible although you will have to wait to see what a witness says first. I shall deal briefly with cross examination later but, in their statements, do witnesses trip each other up? Have witnesses made differing statements with prior inconsistencies (s263 (4) of the Criminal Procedure (Scotland) Act 1995)? Do you know and have you prepared for expert evidence? Have you had a chance to consult with the expert (even by telephone)? Counsel cannot speak to a civilian witness but can consult with an expert. Do you require a defence expert to try to contradict the Crown expert if they are in disagreement? Do you understand the reports? Experts are there to help Jurors in a field, which is within the expertise of that person and not within the knowledge of the jurors. Learn the difference between technical terms such as blood splatters, spots, smears and how the different patters might be caused. Forensic Scientists usually choose their descriptive words carefully. Forensic evidence or pathology can often paint more of a truthful picture than the eye witness and possibly be supportive of the defence position. Do you know the locus or should you consider a locus inspection and taking photographs? Photographs can often show that what a witness is saying is just not possible.

Now, you might see the importance of laying a foundation or, as I have heard both the Rt Hon Lord McLuskey and the Rt Hon Lord Hope of Craighead lecture on, the importance of preparation.

THE MATERIALS

Gathering the materials to build your wall is really your cross examination, which you will do much better if you have prepared properly. No one can teach you how to cross examine a witness but if you are given the chance to sit in the High Court with the most experienced Counsel try to learn from them, but never mimic them.

There are two places you will find your materials. There will be nuggets which witnesses might have blurted out in their evidence which help you and then there will be the points you have managed to make from e.g. prior inconsistent or different statements.

Little nuggets of gold might have passed unnoticed by the jury; the temptation is to ask questions about such pieces of evidence to highlight them. My advice would be to learn when not to ask questions. Leave the nuggets alone. You can spoil them. You can alert the witness to the point and give the witness an opportunity to explain a point, which may then go against you. Note the nugget and highlight it in your notebook for your jury submissions. Good advocacy knows when not to ask questions and having the confidence and ability not to do so.

So how do you try to make these bricks? Most of the time it is not easy as you may have to try to make bricks out of straw. If you must cross-examine, let me tell you what cross-examination is not. Cross-examination is not repeating the evidence of a witness and asking if he or she is sure. A witness is not suddenly going to say to that 'Oh, you've got me. Of course I am lying'. Repeating the Crown case only lets the jury hear the Crown case twice and, at worst, can only reinforce it in their heads.
So, what is cross-examination? Well, in cross-examination, you will have to put your client's position in related to disputed facts. This does not mean that you put your client's precognition line by line, whereby the witness will inevitably disagree with all of your suggestions. Psychologically that puts negativity in the minds of the jury towards the defence case. Put your client's position generally, in a carefully framed question, but in sufficient terms to avoid later judicial criticism. Put the client's position (with which you know the witness is going to disagree) so that the witness answers in the affirmative. How do you do that? One way might be to ask in the following manner:-

'If I were to suggest to you that matters did not happen as you want this jury to believe but in fact what happened is that you came at the accused in an aggressive manner about to punch him and he lashed out, you'll disagree with me?' 'Yes' the witness will say.

DO NOT SAY 'I put it to you that …'

Cross examination is: - testing the Crown evidence; finding nuggets which have not come out in chief; looking for pieces of evidence you can use in your submissions to judge or jury and testing the witness's evidence to see if they make sense. (Think about the witness's evidence - is it logical when they say they were in the middle of a housing estate in Govan at 2am in the morning with a knife because they were going fishing. Where? How? What other fishing gear did they have with them?) Furthermore, in cross examination you can use the evidence of one witness to trip up another if possible; use forensic or what we used to call 'real evidence' to see if you can trip a witness up e.g. forensic evidence (that might be when it is important to know the difference between blotter splatters, directional splatters or smears) or photographic evidence. This list is not exhaustive.

In cross-examination, use closed questions and lead the witness where you want to get them to go. Keep a hold of the witness (not physically) but don't let them say just what they want to say. Make them answer your questions and restrict them to that.

You may have a witness who is not speaking to a statement that you wanted them to speak to. You have to put the statement to them and if they then start to 'remember' by having looked at the statement, put the statement to one side and then see what you can get from them as oral evidence. Such evidence will seem more reliable and will be much easier later for the Judge to deal with.

THE WALL

Your foundation has been laid in preparation, your materials have been gathered and it is time to put together the materials into your jury submissions. Your jury submissions must be based on the evidence that has been heard in court and any reasonable inference from facts and circumstances proved. You cannot introduce anything that has not been dealt with in evidence.

For your first jury speech you will be nervous and just want to get through it and get your backside back down on the seat as quickly as possible. However, submissions to a Judge or, more importantly, to a jury are a form of public speaking. Therefore, you must try to sound interesting and not as if you are reading from a script; do not be monotone; vary your tone and maintain eye contact. Do not be frightened of pausing because it can give an opportunity for you or the jury to gather their thoughts and can stress the point at which you stopped. Speak at a proper and varied pace.
Like cross-examination, nobody can teach you how to present jury submissions. Develop your own style. Ask other more experienced practitioners for help if you need to. But again, do not try to impersonate someone else.

What should not be in your jury submissions?

Do not take on the role of Sheriff or Judge and start giving the standard directions that the Judge must do just after you have finished. It is common for the Crown to do this at the start. If you then do it too and the Judge does it as he or she must, how will the jury feel? They may even have switched off by then! You may have to touch upon the law to show how you have met the legal test e.g. self-defence but do not give them the start of the Judge's charge from the jury manual. Use your jury submissions and the way you phrase your submissions to implant ideas in the mind of the jury. Do not invite speculation although, as I have said, you can ask for an inference to be drawn from facts and circumstances that have been proved. Never mention the consequences of a verdict to a jury. A jury will be told that they must put out of their mind prejudices, sympathies or consequences of a verdict. Avoid being corrected by the Judge, by making sure you have correctly noted what the witness said.

Lastly, never, ever, ever express your view about what you thought about witness evidence. A Judge should jump on you from a great height if you do. You must not

say ‘I thought that witness was telling the truth’ or ‘He was a good witness’. You should frame it in a different way such as, ‘I would respectfully submit to you that you find yourselves in a position where you can rely on what that witness says’. It is only the opinion of the jury that matters.

You will develop your own style with experience but these might be a few pointers on your way along the road to learning how to build a wall.

Old codgers like I am leaving the profession aware of many recent changes that cause me concern. As young members of a profession which, at times, provided me with a great deal of pleasure and job satisfaction, I hope that you will do your best to ensure that standards are maintained. It is important that you understand the need for justice in a democratic society and stand up for those who are unable to do so on their own behalf.

I wish you all the very best as you embark upon your new profession.