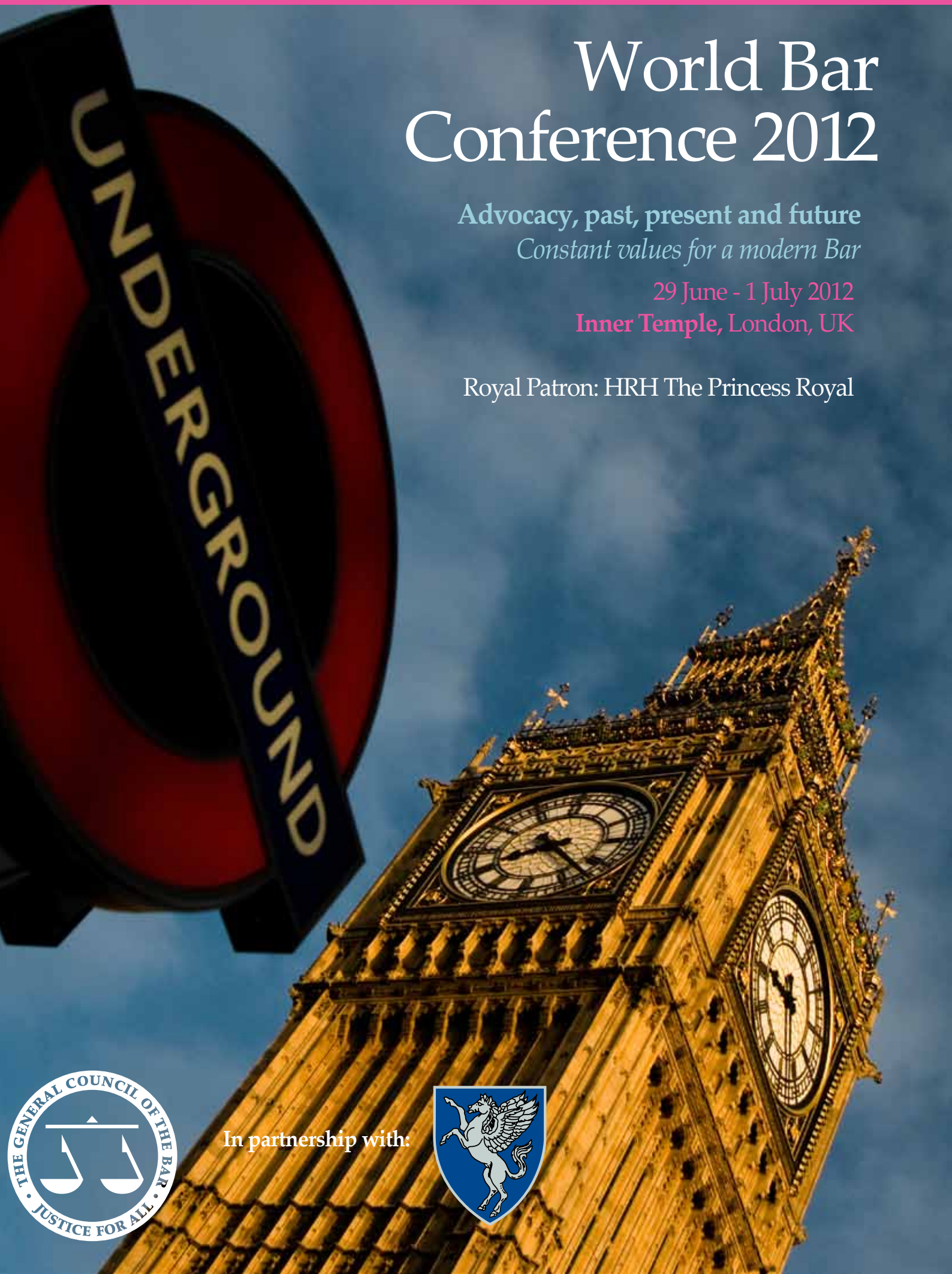
TRANSCRIPTS



World Bar Conference 2012

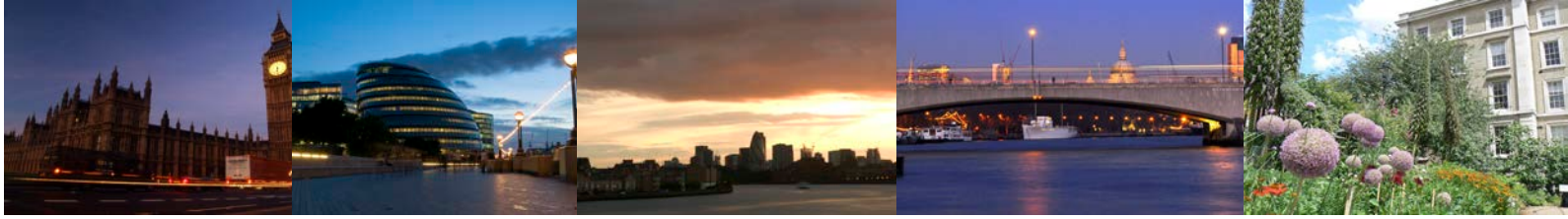
Advocacy, past, present and future

Constant values for a modern Bar

29 June - 1 July 2012
Inner Temple, London, UK

Royal Patron: HRH The Princess Royal

In partnership with:



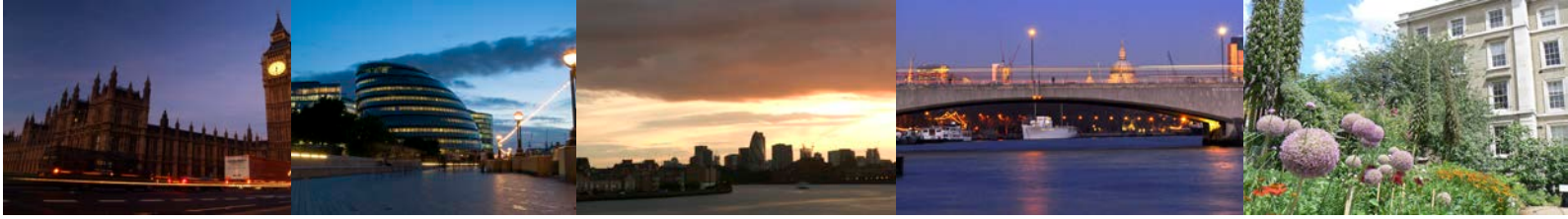
WORLD BAR CONFERENCE 2012

INTRODUCTION

The International Council of Advocates and Barristers (ICAB) is not a name which trips off the lips of barristers and judges up and down the country. Although it came into existence (as an "off-shoot" of the International Bar Association) in 2002, its main role to date has been to arrange an international conference for advocates and barristers every two years. These conferences have taken place at various venues from Hong Kong to Capetown, and from Edinburgh to Sydney. In 2012 for the first time the World Bar Conference was held in London over a weekend at the end of June. Some 250 delegates converged on the Temple from jurisdictions around the world which have the advantage of a specialist referral profession such as our own. Of these only about a quarter were from England and Wales.

Conference sessions included discussion of Supreme Court Advocacy, Advocacy Against the Odds (as in places like Zimbabwe), Prosecution Advocacy, Advocacy at Public Inquiries, and the topical issue of Quality Assurance. There was a historical session on G reat Advocates of the Past, including Cicero, Erskine and F.E. Smith. The keynote address was delivered by Lord Judge LCJ, the concluding remarks on the topic "Why the Bar matters – and will go on mattering" by Lord Clarke, a Supreme Court Justice. Delegates were able to visit the Supreme Court and the Rolls Building, as well as to attend a reception at the House of Lords and Choral Matins in the Temple Church, and to have dinner in Middle Temple Hall.

A sceptical reader might ask the underlying purpose of these discussions. In part, the answer may be found in the following comments by some of those who attended. For example, Jane Treleaven of the Melbourne Bar has commented *"Delegates left the Conference feeling renewed and inspired as to the role they play, not just as members of their own local Bars, but as actors*



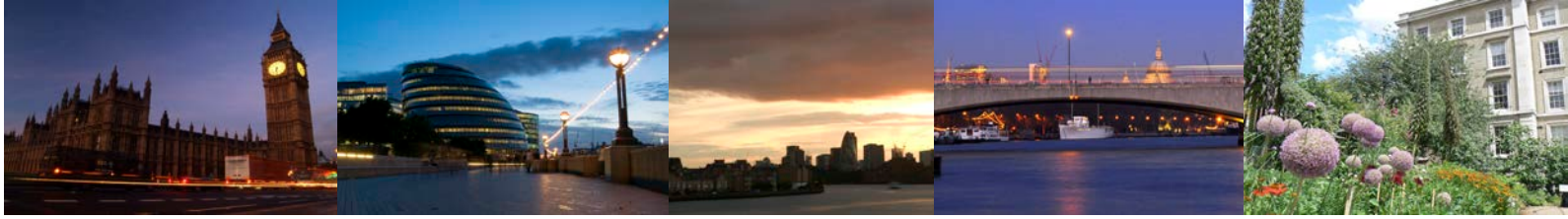
in a broader common law universe.…..…”

And another Australian delegate wrote as follows:

“I am sure that the England and Wales Bar do not take venues such as the Middle Temple Hall and the Temple Church for granted, otherwise you would not have bothered showing them off to us, but they do add enormously to such occasions. The service yesterday was truly special. And as I commented to one of the Australian judges as we walked home from Saturday's dinner, who had commented on what history the English Bar has, we must remember that it also the history of our Bar…..”

More generally, at a time when it is becoming ever more important to defend and proclaim the function in our society of a specialist independent bar, gatherings such as this are a visible embodiment of the importance and value of our tradition of oral advocacy, and of the crucial role of the advocate in a democratic society.

STEPHEN HOCKMAN QC



Saturday 30 June 2012

09:45 – 10:45 Keynote Address: The Court's expectations of the advocate

Speaker biography

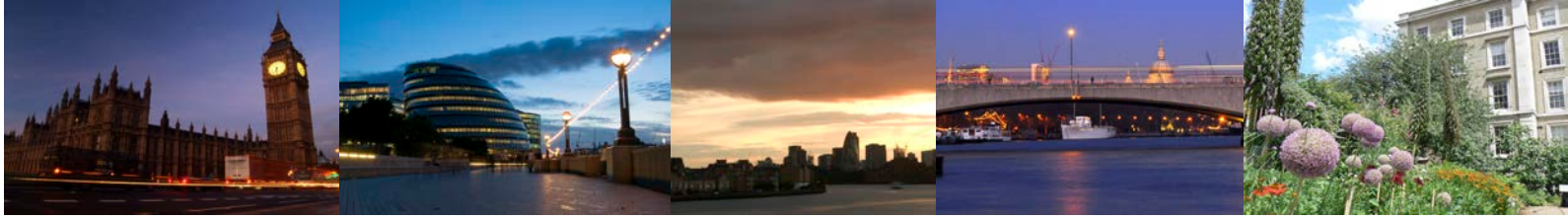
The Rt Hon. Lord Judge of Draycote, Lord Chief Justice of England and Wales

The Rt Hon The Lord Judge is the Head of the Judiciary and President of the Courts of England and Wales.

Lord Judge was awarded an Open Exhibition to Magdalene College, Cambridge in 1959 and graduated with a BA Hons (later MA) in History and Law. During his studies at Cambridge he entered the Hon Society of Middle Temple and was subsequently called to the Bar in 1963.

Appointed a Recorder of the Crown Court in 1976, Lord Judge was later made a Queen's Counsel (QC) three years later in 1979. He served on the Professional Conduct Committee of the Bar between 1980 and 1986 as well as being a member of the Judicial Studies Board between 1984 and 1988. In 1987 he was elected Leader of the Midland and Oxford Circuit and also elected as a bencher of the Middle Temple.

In 1988 he was appointed a High Court Judge, Queen's Bench Division and received a Knighthood. From 1990 until 1993 he was Chairman of the Criminal Committee of the Judicial Studies Board which was a post he held again from 1996 until 1998. In 1993 he became Presiding Judge of the Midland and Oxford Circuit. Three years later, in 1996, he was appointed Lord Justice of Appeal and soon after was sworn in as a Privy Councillor.



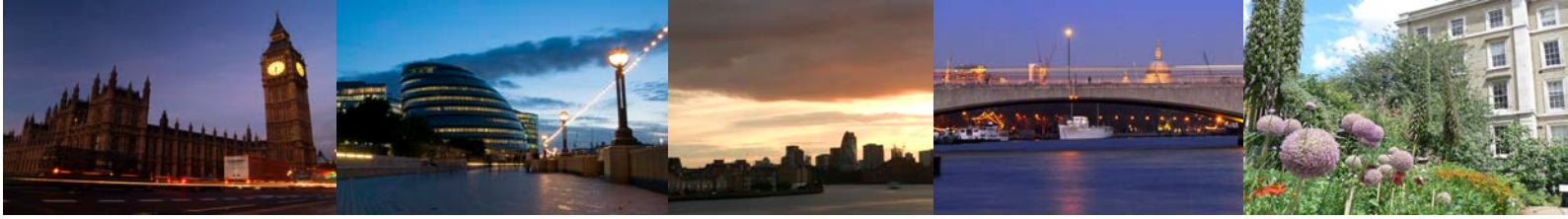
LORD JUDGE OF DRAYCOTE

1. LORD JUDGE OF DRAYCOTE: Well, ladies and gentlemen, you think you are a formidable lot, and to tell you the truth, you are. But you are not nearly as formidable as the moment when I was invited to open the cricket World Cup for lawyers tournament in Cambridge two years ago. The letter of request came to me inviting me to open the batting -- I thought that was a good paragraph. The next paragraph said, "Mr Michael Holding is going to open the bowling". So I wrote back saying, "I am very happy to open the Cricket World Cup, but I will open the bowling and Mr Michael Holding can open the batting". They didn't agree, so on the fateful Sunday, my wife and I travelled over to Cambridge, and I was sat beside Mr Michael Holding.

2. Now, those of you who have ever played cricket will know how, when you have got a serious fast bowler, you laugh at all his jokes, however poor they may be, and you flatter him as hard as you possibly can, and so I am sitting besides this still magnificent specimen, and I remember, because it is true, that I watched every ball he bowled in the Oval Test in 1976 when, on a batsman's wicket, he took 14 wickets for no runs at all, when there were over
1,000 runs scored in the match. "I just bowled fast", he said. This wasn't going very well.

3. Then I remembered the great over he bowled against Geoffrey Boycott in the West Indies a couple of years later. "I just bowled faster", he said.

4. My adoring wife, and aren't I lucky, aren't we lucky to have these spouses, decided it was time she took a hand, so she lent across to Mr Michael Holding and said, "Mr Holding" -
- "Just call me Mike". "Mike, I have been married to my husband for 43 years, I love him very much, and if you kill him, I'll kill you!"



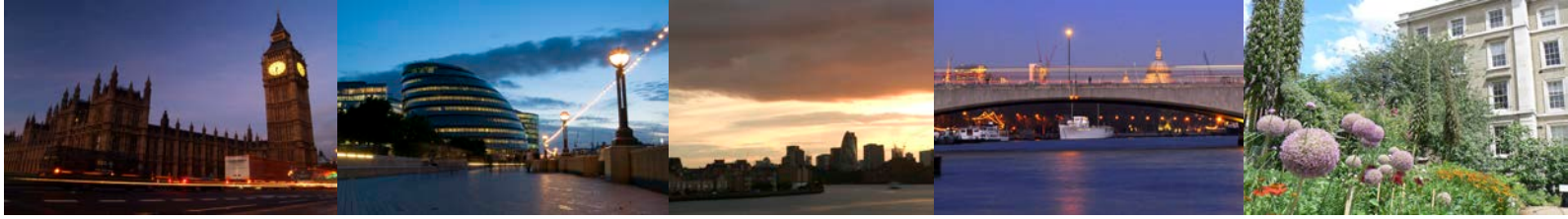
5. And he realised that she meant it! So anyway, this was all done, and then came the moment when I was supposed to walk out to the crease. Now, my wife is a very highly intelligent woman, as well as a wonderful wife, and she said, "Now look, don't represent any threat". That rather flattered me, the possibility that I might represent a threat. She said, "Don't wear any pads, no helmet, no gloves". I was rather disappointed with the last thing, she said, "Don't wear a box". I thought that was a bit on the harsh side.

6. So out I went to bat, and there was this magnificent – and he is a magnificent bowler, one of the greats, and he bowled, and it was so slow he could have run after it and caught it up. The result was, I was through my shot, and it hit me on the leg. And it didn't hurt. And it went for one leg bye, and then we went together and had a pint each in the tent.

7. So you can see that I have faced some very formidable tests of character, and now I am facing this test of character with you here in London. Thank you so much for coming. I am sorry we can't do better for you on the weather front, but, well, we can't do better for you on the weather front.

8. The story I am about to read to you is from the International Newspaper in Nigeria. I have got to give you the names, so you can follow the story. This is a true story. How do I know it's a true story? Because I am reading it from a newspaper. I am going to say that again. How do I know it's a true story?

9. The Attorney General is Udechukwu. Awomolo is counsel on the other side, and the judge is Justice Egbo. The Attorney General seeks an adjournment. Awomolo objects on the ground, I quote, "The entire world is anxiously awaiting the outcome of this case". Marginally overblown advocacy, because he was in a spot of bother, because only a few minutes earlier, he himself had been asking for a short adjournment, which is sort of not very



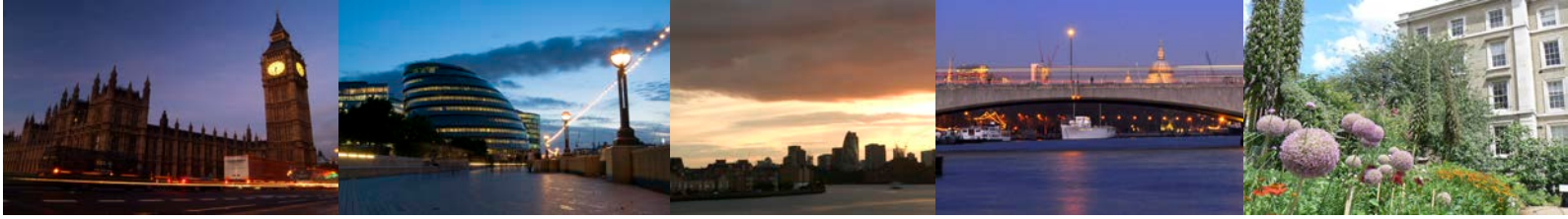
wise. It was objected to by the Attorney General, Udechukwu, and he asserted that the argument for the accelerated hearing amounted to a politicisation of the case.

10. N ow, something about what he said irritated the judge, because this is the judge: "Do not dictate to me. This is my court. Sit down, and allow Awomolo to address the court". The Attorney General was undeterred. He replied, "Don't intimidate me". Then, counsel on the other side -- this is one of yuckiest things I have ever heard, "We are officers of the court, the Judge is our good Lord, we must show good examples as senior members of the Bar". Oh God.

11. T he Attorney General was undeterred. "If he is your good Lord, he is not my good Lord". The judge intervened, "If I am not your good Lord, why did you bow when I came in? I respect lawyers, don't ridicule me, I'm in charge of this court". The Attorney General -- rather a good answer this: "I bowed to the office, not you. You are not my Lord at all". The judge: "The learned Attorney General should mind what he says. I don't take to sentiments like that. I am in charge of my court. I am not tainted or dented by what people say, I'm in charge". And at the end of it, the Attorney General - he allowed the adjournment, and with the grace which a defeated counsel is normally expected to show, the Attorney General turned to his opponent and said, "In this court, you always get what you want".

12. Now, I think that is a story about advocacy, isn't it? In the end, the creep won. Oh dear, doesn't it hurt to say it? But he did.

13. Now, what do we expect of the advocate, just coming to this slightly more seriously? Well, competence, and integrity. Pushed to embellish the proposition, which is very simple, I would identify it as high professional competence and absolute integrity. And although I have got a longer slot now, a good advocate would sit down, so I am going to.



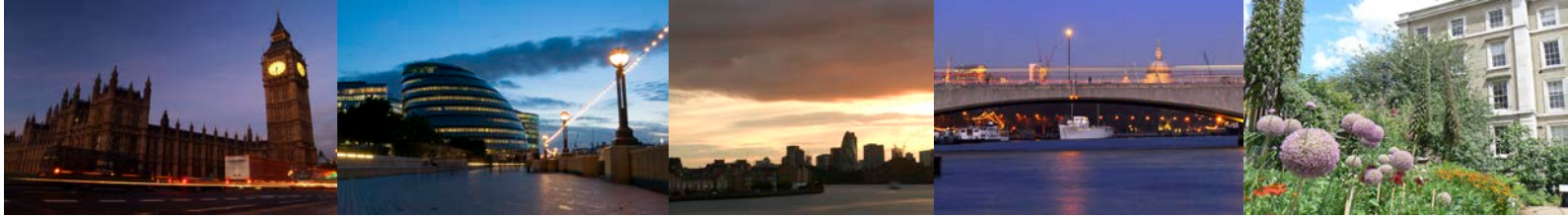
14. So that is it then. Is there any more you want to hear from me? Oh all right, I will go on just a bit longer.

15. But it is a very good idea to sit down when you have made your best point. Do occasionally, if I may say so, make the assumption that the judge is intelligent. Most of us are relatively so, and we are doing our best, and we might have got the point. But anyway, let me go on.

16. Lord Bingham of Cornhill, one of my predecessors, once quoted an observation of a thinker called Piero Calamandrei, who said this: 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 point of view for the common good. Such an arrangement would be a loss for forensic oratory, but a gain for justice.

17. Well, the nobility of that sentiment is plain, and it is rare indeed for me to disagree with Tom Bingham, who certainly in this jurisdiction can certainly be regarded as one of our most revered figures.

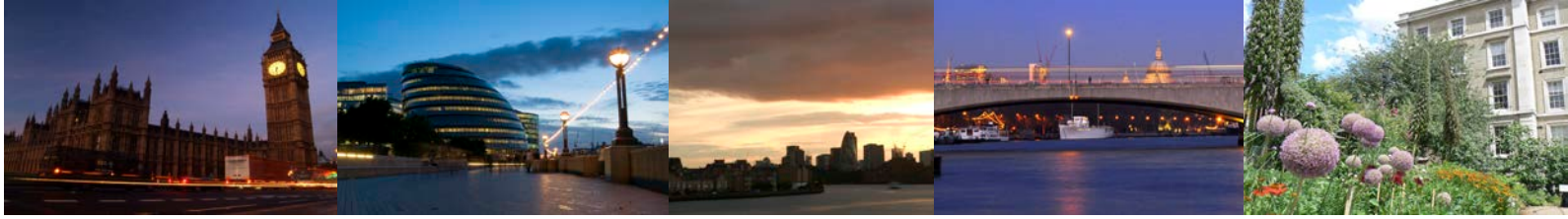
18. Mutual respect? Certainly. But I cannot agree that there can be a discussion of the kind envisaged in this quotation. The problem is that there are formalities. There are necessary formalities in our adversarial process. I mean, someone has to begin. Someone has to be last. The advocate remains acting for a client. The judge is having to decide between not one advocate but two. He is choosing between rival cases, each advanced correctly, by an advocate whose duty is to advance the client's case to the best of his or her ability. And hopefully, on both sides, the judge has competent advocates. Now, I am telling you something that you all appreciate, but at a meeting like this, it is perhaps worth



reminding ourselves of some of the responsibilities of the advocate. Of course, advance the client's case, however unpopular it may be, fearlessly, in its best light, and to the best of advocate's ability, on behalf of the client, and indeed that is reflected in the judicial responsibility. If we are to be independent judges, which we must be, then we have to make sure that the rule of law protects the worst people in our community, the people who are treated as if they are devils. They too are entitled to the protection of the rule of law, and they are entitled to a high quality advocate of independent mind, advancing such points as can be advanced in support of that client.

19. So that is a matter of obligation, but there is another matter of obligation with which you are equally familiar: the duty to the court. On occasions, it is a duty which for the client is extremely difficult, and so the advocate is sometimes stuck, and some of you will have been stuck, and I certainly remember being stuck between a rock and a hard place. And sometimes, which makes this more difficult, I think, the line which the advocate must not transgress in the course of operating the twin obligations is not easy to discern. The situation can be extremely complex. There is no hard line. There is a line which the advocate has to decide. Where does it lie? Of course, we all go, you would all go to your colleagues, you would discuss the issue with people whose judgment you trusted, and they would help you, and they would say, "Well, here I think the line is there", but in the end, there is only one person who can decide where that line is, and that is the advocate.

20. That, I think, is one of the more difficult parts of the system. We can all say, "Duty to the client, duty to the court", but when push comes to shove, the line - where does my duty lie? What is the consequence of these twin duties? - is, I think, much harder. We all know deceiving the court: prohibited. Easy. But on issues of judgment, much more difficult lines, much more difficult decisions of professional conduct arise.

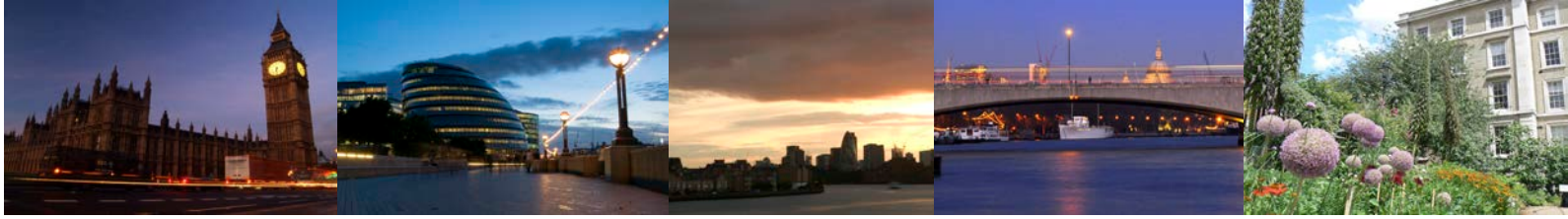


21. I used to have a little test for myself when I started, trying to embrace these concepts. If I didn't inform the judge of this or that fact, and he discovered later on, and discovered that I knew about it, would that be a source of embarrassment to me? But in fact, that is not a very good test. It is a good superficial test, but it is not a test that actually gets to the heart of it, because not least it presupposes that the judgment of the judge on that issue, of your professional responsibility, would be impeccable. But (a) it may not be, simply because human beings get it wrong, but (b) he hasn't had to exercise that responsibility.

22. Also, more important, because an advocate is sometimes, in the interests of his client, liable to be embarrassed, and he is certainly under a duty to displease the judge if the judge, for example, is being unfair to his client.

23. I have never forgotten how difficult some of these decisions are. It is very easy for the judge to see the issues starkly, simply, but he doesn't know the facts. In particular, he can't get through the confidential wall that exists between the advocate and the client, and then the court on the outside.

24. When you are contemplating this, please think of the judge too. When King James VI at the start of the 17th Century was seeking to exercise some kind of judicial function -- there is a whole lecture in how eventually he was stopped from exercising a judicial function. He used words which for every judge in every jurisdiction would evoke a profound response. "I could get on very well [he said, having listened to a case] hearing one side only, but when both sides have been heard, by my soul, I know not which is right". Wasn't he lucky? He had heard two good advocates. I have every sympathy with the King -- you would probably go to the Tower in King James VI's reign for saying you had sympathy with the King -- but I do have sympathy with the King. But actually I welcome a process by which, at the end of



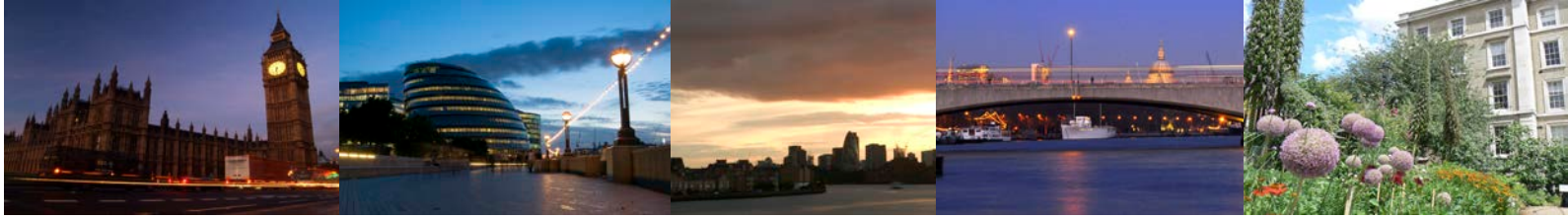
the argument, you are left faced with compelling arguments put to you by both sides. After all, my objective, the judicial objective, is the process by which, after quality advocacy, whether the prosecution and the defence, the claimant and the defendant, any form of litigation you care to think of, produces the answer required by law, by justice.

25. The achievement of this is not easy, and you are better placed as a judge if you have high quality advocacy, and the foundation for process.

26. N ow, in my first few words before I sat down, I identified this question of personal integrity. In an audience like this, I don't expect it needs any further elucidation, but I am going to say something about it, because the issue of personal integrity does call for more than lip service, and if I don't say at least something about it, it will look as though we can take it for granted, and nothing in our system should ever be taken for granted. So you give honest advice to your client, what you honestly believe his or her position is, on the basis of the facts as you know them. You don't tell the client what he wants to hear. You don't involve him in an expensive piece of litigation because you are rather interested in the point of law, or because you are seeking a little publicity for yourself, or self-aggrandisement, or just because you are intellectually stimulated by the thought of the legal issues which will arise from a decision.

27. The certainty that the obligation of confidentiality will be maintained, maintained not only when the judge is making inappropriate steps to try and get through that obligation of confidentiality, but to your mates in the pub, or wherever you have a drink at the end of the day, or when you get back home to your family.

28. Much harder is the issue I have already touched on, the obligation to the court which the client finds so difficult, and I have seen it done. You draw the attention of the judge to a



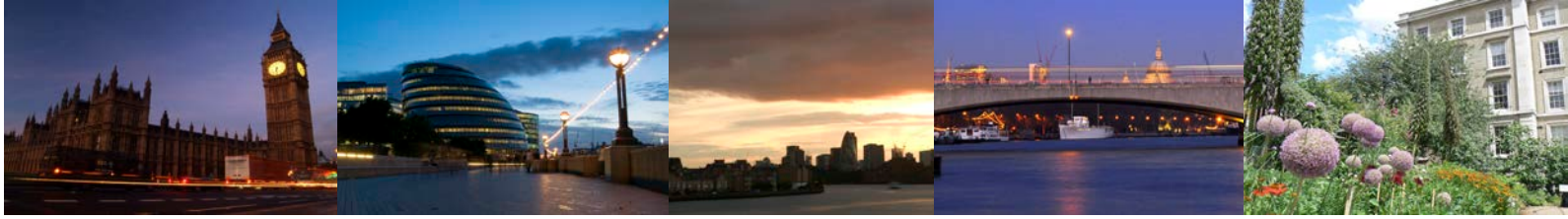
case which is clean contrary to your position, which your opponent simply hasn't spotted. Clients find that rather hard to understand.

29. Here in this jurisdiction, I can say with absolute confidence that we work on the basis that the profession of advocacy is filled with men and women of integrity, whose word can be relied on. We can examine the advocacy without any lurking anxiety about whether the advocate may be suspect or deficient in that quality of integrity to which I referred and on which I have placed such importance.

30. Let's never pay lip service to this, let's not take it for granted, but I want to move on.

31. Some of you will be aware of this, but if you are, forgive me. Mr Justice Jackson of the Supreme Court of the United States, looking back, as judges do, to the days when they were advocates; I do look back on the days when I did advocacy. My goodness though, I can remember some humiliating defeats. The day I went to the House of Lords with a case which was an absolute certainty to win, there was no possible alternative construction to the construction which I was advancing, I still remember it to this day. There was no answer. One of the Law Lords lent back, after one minute of me on my feet, "Well [he said], when we were considering this in the Law Commission, what we intended was so-and-so and such and such." And then all their Lordships thought that was what the Act had said, but it hadn't." My only comfort was two years later they had to say it was a case confined to its own very special facts. It happens all over the world, doesn't it!

32. Anyway, Mr Justice Jackson said that when he was an advocate, he had three arguments for every single court appearance: first came the one I planned, as I thought, logical, coherent, complete. Second was the one actually presented; interrupted, incoherent, disjointed, disappointing. Third, the utterly devastating argument that I thought of after going



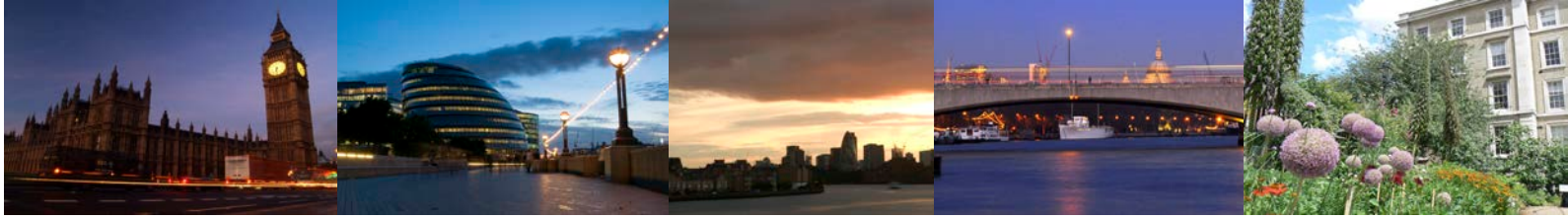
to bed that night.

33. I am so pleased you all found that funny! Because if there is an advocate here who can't relate to that observation, I don't think he or she is being as self-critical as perhaps you should be.

34. In the end, however, let us remember, so far as the court is concerned, what the advocate is doing is seeking to persuade, and here I want to just digress to illustrate what I mean. The best advocates -- and there are good, bad, indifferent, and wonderful advocates, it's a profession like any other, some are better than others, but the best advocates respect and understand the moment, and they are alert to the needs of the moment. They are flexible to the changing momentum of the case. Sometimes, the changes are very subtle, apparently tiny, tiny movements in the atmosphere in court. Trial process: constant state of flux. But so it is in the process of appeal to the higher courts. You never know exactly what will happen. You never know if a Law Lord will lean back and say, "When I was on the Law Commission, what we intended was that"; I mean, that was not something you could prepare for. So the best advocates use the words fitted to the moment, words appropriate to the audience they are seeking to persuade. And however many hours you spend, if you forget the understanding of the moment and its significance, then in the end you are a diminished advocate; you are not as good as you should be.

35. In the examples I am going to give you, they are nothing to do with court, but they are to do with persuasion, and they illustrate it, seen through the eyes of the court.

36. I was reading a fascinating book by Anthony Beevor about D-Day. We have just got to think about D-Day. I don't think there is anybody here who can really remember it. But a huge number of men were about to set across the English channel to die, in order to save



Europe. And off they went, gathered together in their different places, all of them, however thick, understanding that this mission was long and difficult, and that some of them were going to die.

37. The commanders, I am going to quote to you, said different things to the same sort of body of men, their own men, but all united in this fear, and apprehension of what lay ahead.

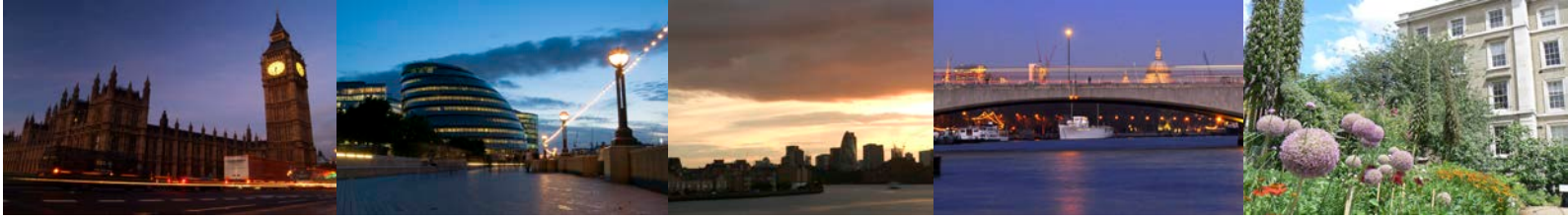
38. The first commander: "Look to the left of you, look to the right of you, there's only one of you going to be left after the first week in Normandy". The second: "What you are going through for the next few days, you won't change for a million dollars, but you won't want to go through it again very often. For most of you, this is going to be the first time you are going to combat. Remember that you're going in to kill, or you will be killed".

39. And the third pulls out a large commando knife, flourishes it about his head, shouting, "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 Europe."

40. Now, let us pause. The first commander, factually correct: the casualties were going to be and, of course, were in fact horrific. It may just be a moment to pause and think how indebted we are to all those who perished or were maimed in the process.

41. The third, utterly unrealistic, because you know and he knew, and I suspect the men knew, that if they thought about it, the meanest, filthiest Nazi of all and his close allies were far away from the coast of France, they were in Berlin.

42. Relate this to the trial system. For the trial judge sitting alone, perhaps the second of these efforts would have represented the most persuasive advocacy. For the jury, although the passion generated when facing the field of battle and possible death may seem overblown



when the combat is only forensic, perhaps the third. And for the Court of Appeal, perhaps the first.

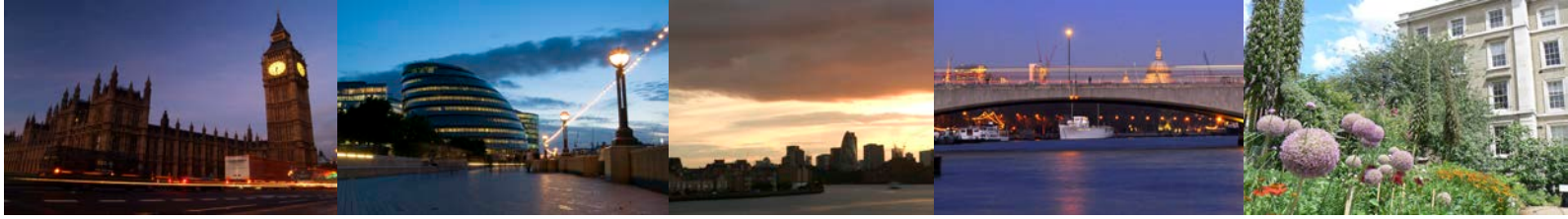
43. They are three different sorts of tribunals. As a court, you are looking for different sorts of advocacy.

44. Returning to the quotations, the significance is that the words chosen by the three officers were addressed to men, groups of men who were effectively in identical positions of fear and apprehension, and let us add, no doubt so too were the officers who were giving these final commands before they got into the vessels to take them across the Channel.

45. I come to that because in this case, we also have an example of something even more important. What each officer said was a reflection of his own personality, how he felt this moment of apprehension and responsibility. If I may say so, that too is a point of advocacy. You have to be the advocate that your own personality makes you. You cannot be somebody else. The advocate has to be his own man, or her own woman. If you are not, you will fail. You cannot be trained to be an advocate that is not a reflection of your own personality.

46. It is difficult to see too, or rather perhaps that is going to put it too high, if we are talking about personal integrity, that too is a reflection of your own personality. And it's difficult to see how you can preserve your integrity, if push comes to crunch, if you are not true to yourself, if you are not true to the inner man, or the inner woman that you are, independent of mind.

47. I can't resist telling you of the appearance of one of the great advocates; this is to contrast it with the very great seriousness involved in the D-Day landings. Great advocates of the previous generation, a wonderful Irishman called James Comyn before Lord Denning.



I suspect most of you will have heard of Lord Denning, famous for his concern of what we in England would call the little man. Comyn appeared in a hopeless case in the Court of Appeal for a tenant against a landlord, and he knew that there wasn't very much law on his side. "My Lords [he began] in this case, I appear for an 87-year old widow, whose husband was lost in the last war, and she has lived in this house, where he left her, ever since". "Come, come, Mr Comyn [said Denning], this is a court of law, not a court of sympathy. How old did you say the poor old widow was?" (Laughter). Wow, that was a good piece of advocacy -- knowing your tribunal.

48. A nd in the pantheon of advocacy, I offer you two further stories. I heard this first story when I was in Australia, told about an Australian barrister appearing in an Australian court, but I have also heard it in England, about an English barrister appearing before an English court.

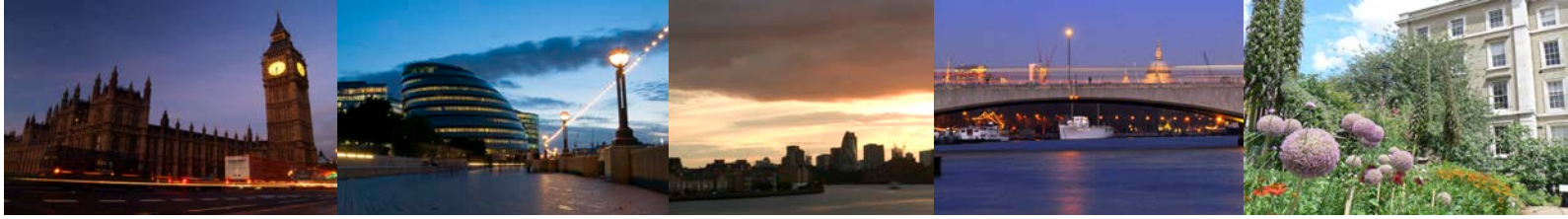
49. Robert French is here, I'm not going to have a battle with him about where the story happened first, because although we will laugh at this, I am going to raise a question with you. Was it good advocacy?

50. "My Lords, in this appeal, there are three points. One is unarguable, the second is arguable, but not overwhelming; the third is overwhelming.

51. "Court: Well, why don't you tell us what your overwhelming point is?

52. "Response: That's for your Lordships to discover."

53. Great story, I love it, I tell it at every opportunity that I can, claiming it, I am afraid, for England rather than Australia, but be that as it may, now why? You are a bunch of advocates. Because there is a story in which



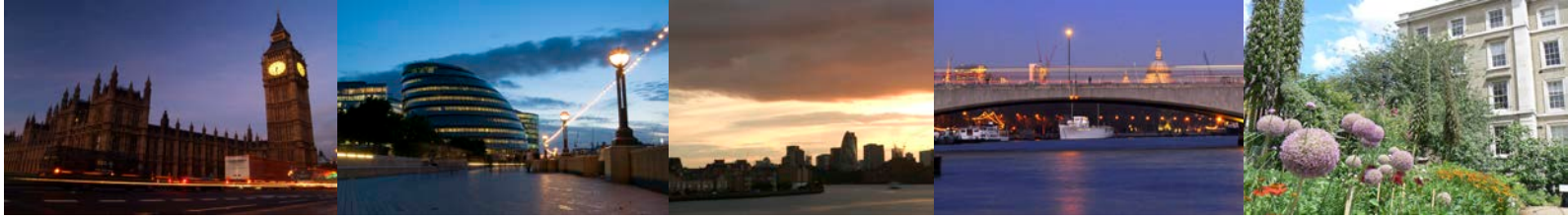
the advocate has undoubtedly outsmarted the court. I agree, I agree, I surrender.

54. But to what end? To what end? Was it the best way to help the court to find for his client? As I said, we would all laugh, but I would pose a question at the end of it. Now here is advocacy. None of you has had the disadvantage -- I don't think there are many of you had the disadvantage of appearing in front of the Court of Appeal (Criminal Division) here in London, when the court is in a hurry and has got a very heavy list. This was an occasion when there had been about eight cases on the list, the first four had taken forever. You probably appreciate, before we come into court, we have had discussions about the case, to see where we all stand, and by the time this fifth case was on -- I am not responsible for this. I am telling you a story told to me, it is not my court.

55. By the time the fifth case came on, it was a hopeless case and the court had started to get in a hurry, so young counsel stood up, and within a moment, "What do you say about this? What about that? Have you overlooked the other? Three bags full", and so on, and on and on they went at him. When they suddenly paused for breath, he responded "My Lords, I know I am unlikely to get this aeroplane off the runway, but could I at least get it out of the hangar?"

56. Now that was sublime advocacy. It stopped the court in its track, and made the court listen, and I mean it made the court listen, and the Lord Justice who told me this story against himself said, "He was marvellous, he never got the plane off the runway, but he was marvellous", and so there was a piece of advocacy where the court was put in its place, and the advocate was serving the interests of his client.

57. I was meaning what I said about the voice making the court listen. I want to just read you a few lines. Have your Lordships got my skeleton argument? I am looking



at paragraph 43 -- no, 42 -- 43, I am so sorry, 43:

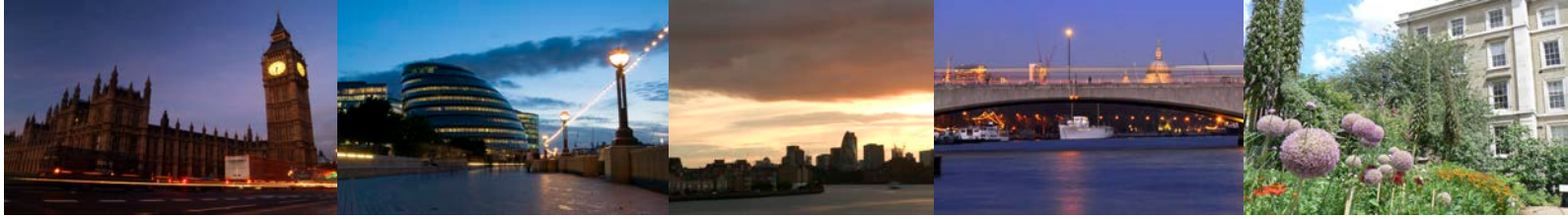
58. ' It is rather for us here dedicated to the great task remaining before us. From these honoured dead who take increased devotion for that cause for which they gave the last full measure.'

59. "I am sorry, my Lord, am I going too fast for your Lordship? Too slow, I am so sorry, too slow. Oh no, the third - I am so sorry.

60. 'that we here highly resolve that these dead shall not have died in vain, that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth.'"

61. It is impossible to crucify the great address at Gettysburg. Well, it is, I assure you. I have heard people write stuff and then recite it in the most dreadful monotone. Here is a man speaking about eternity, at any rate the entire time while the human race will abide on this earth, and it has been killed off because of lack of attention to the use of the voice, to the need to command the attention of the tribunal. I had better put Gettysburg away.

62. The judge needs good advocates. The judge is trying to do his own job. Part of his job depends on good advocates. Any judge will tell you that there is a nightmare problem, particularly - always, but particularly in a case where emotions are running high; a criminal case, a family case where the decision is, "Should these children be moved from one parent or the other parent or both parents?", with all the catastrophic emotional disaster for a whole lot of people, including, indeed, the children themselves. One side, high quality advocate; the other, poor. And the same issue arises in relation to your written submissions. The judge needs the pen to be recognised as equal to the voice, but whether pen or voice, the brain must

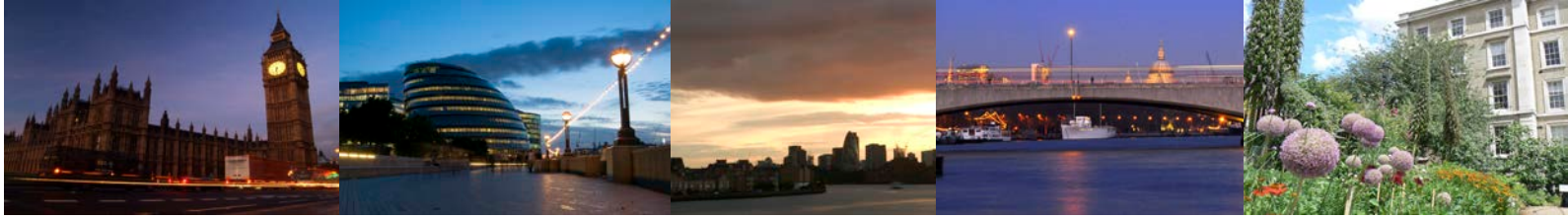


be engaged.

63. I used to find, I still find, and I am sorry to say this with Stephen here because he will probably tell me so next time he appears in front of me: I read the skeleton argument on one side, and I think, "That's it, the appeal has got to be allowed". Oh dear, I had better read the argument on the other side, and I think, "Well, that's the answer, isn't it?" In our adversarial system, the point of the oral advocacy is to tease out the point in the argument, whether it is for the appellant or for the respondent, where the reasoning so skillfully glossed over in the written submission is seen to be flawed.

64. That seems to me to be the issue that we have to address. I am going to say something though, lastly on this topic, I have something else I want to say. Oh my dear, we are letting ourselves get very carried away, and failing to discern between the length of an argument and the quality of an argument; the length of time a case takes and the quality of justice that is done. This is a common law system in which orality is at the heart of the decision-making process, the judge needing the assistance of advocates to help him or her to justice.

65. Now, why is this? I am referring to skeleton arguments. A skeleton argument used to be that, five bullet points. Skeletons now run to hundreds of pages. For whom are they written? Are they written for the judge or the judges, to help them in their burdensome task? Or are they written for the client, so the client will think the big fat fee on your brief is justified? Or are they written, in the case of countries with divided professions, to impress the solicitor who is instructing you with how clever you are? For whom are they written? I suspect you would say to me, if you had the chance, and maybe you will, when we have questions, "They are written for all those three constituents", but we mustn't make the mistake of thinking that a document written for the purposes of persuading a judge to a point

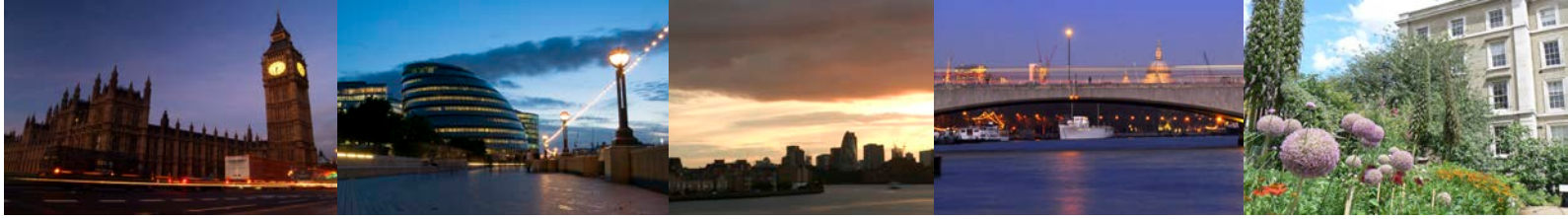


of view is going to be the same document that will necessarily impress the client. And, again, why has our system, why have all our systems become so lengthy? Well, some problems are judge-made. In our jurisdiction, some of it is the prodigality of legislation. Some of it is a misapplication of the wonders of modern technology, just the way things are today, where 20 e-mails replace one carefully crafted, reflected-upon letter.

66. To coin a phrase then, the length of cases has increased, continues to increase, and ought to be diminished. Every long judgment, our responsibility, makes the task of the legal adviser that much more complex, and the hearing at first instance that much more complex, and the cost of litigation proportionately more expensive, and I am very concerned - I am being absolutely serious about this, it is an issue which troubles me - I am very concerned that we are, one day, in danger of burying our orality system under the weight of bumph. We will bury it under all those huge bundles of papers that each of you takes into court.

67. Although my talk is about the court's expectations of the advocates, I am reflecting on something which is often overlooked. There is another lecture to be had, and its title should be, "The advocate's expectation of the judge". It is an entitlement you have. We are talking about mutual respect, mutual respect, not just one way, and the advocate is entitled to something from the judge. But this is where we are approaching what Tom Bingham had to say about mutual respect between judge and advocate. I hope things have changed since one of my predecessors, Peter Taylor, appeared in his first or second case ever before a Magistrate's Court up in Yorkshire.

68. Now, for those of you who aren't familiar, very briefly, the vast majority of our cases are held and decided by magistrates, civilians chosen, volunteers, members of the public, doing justice in the Magistrate's Court, with power to go up to six months' imprisonment, but



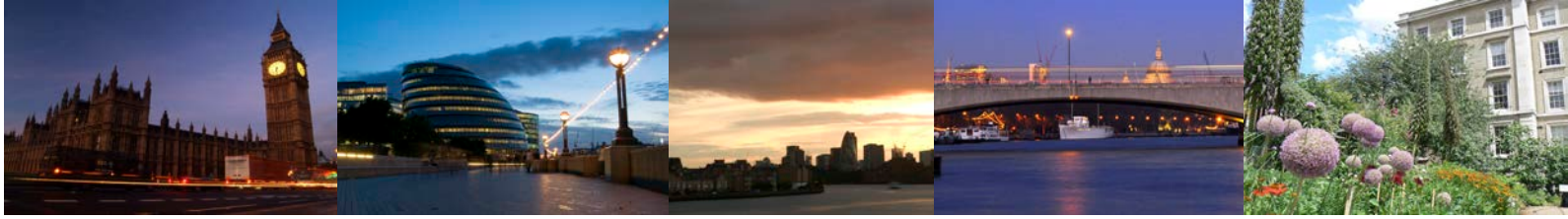
doing the vast majority of the ordinary day-to-day stuff.

69. So he turns up at Heckmondwike Magistrate's Court and here is an example of where the advocate's expectations of the court were somewhat diluted. "Mr Taylor [says the solicitor] you'll have to ask for an adjournment". Why? "Our client isn't here". Well, even a new barrister with two cases under his belt can stand up and ask for an adjournment. "May it please you, sir" -- actually, they used to be called Your Worship in the '50s, but we will move on from there -- "I appear for the defendant. I am seeking an adjournment". "Why?" "Because my client isn't here yet". And the magistrate turned to the policeman standing there, "Inspector, are all our witnesses here?"

70. H e used to go on and tell this story against himself, so I will finish it for you. Anyway, eventually the client turned up, the witnesses gave their evidence, and he put in one of these impassioned pleas that you do as a new advocatee, the golden thread -- you have all done it, haven't you? Oh, there have been one or two who haven't done it?

71. Anyway, it was wonderful, and the bench retired, and the solicitors in this tiny Magistrate's Court surrounded him and said, "Oh Mr Taylor, that was wonderful, the bench hasn't retired here for at least three years, fantastic job, where's your work, what chambers are you in, we will send you all the work we have got" – none of them did. You have experienced that too, haven't you!

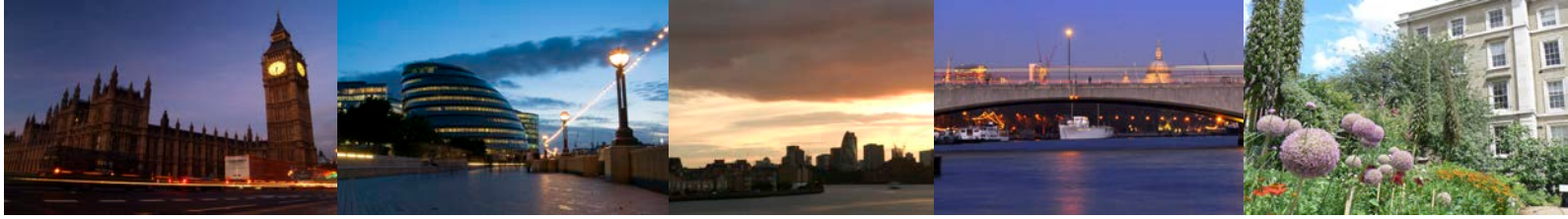
72. The bench returned. "Young man [says the chairman of the bench to Peter Taylor] in this case the bench entertains a doubt, but we are not giving your client benefit of it". So the advocate's expectation that the court might just conceivably have some idea of a sense of fairness and balance was betrayed.



73. There is another judge I can remember as an advocate myself. Gosh, we hated him. You would make your mitigation plea, and you would start off by saying, "My client is a man of good character [nod, nod, nod]. He has pleaded guilty [nod, nod, nod]. Done this, done that, remorseful about the other", but on every occasion - and in those days, your mitigation plea was no more than three minutes -- after about two minutes and 20 seconds, you would say something, and the judge would shake his head, "Oh Mr Judge, I wish you hadn't told me that". I didn't think that was a very good working mutual relationship between judge and advocate.

74. But we have to grasp it: time is not unlimited. It is a precious resource, and with the way our system is developing we are taking too long. The common law system -- and I can't exclude any individual jurisdiction, I am making a broad statement, but I suspect you will agree with it, because I read judgment precise all sorts of courts around the common law system, and the judgments are getting longer and longer. Hours, hours, hour jurisdiction, we do have to, do we not, shorten our judgments? How, you will say? Well, I am going to get you to answer that. But our judgments are taking longer and longer. Read the 19th Century judgments. Two pages: the principle is this, apply it to this case, the answer is that.

75. We now have judgments -- and I perfectly happily accept -- well, not happily, but I do accept, I am just as responsible. I am not looking at other people, I am looking at myself. The judgments do take longer, and every time we produce a long judgment, there is more grist to the advocate's mill, and the advocate is faced with a situation in which it may be said about him later, "Well, he failed to draw the attention of the court to this statement of Mr Justice X, or Lord Justice Y, which would have helped", and so all that gets poured into the written submission, and then the oral submission.

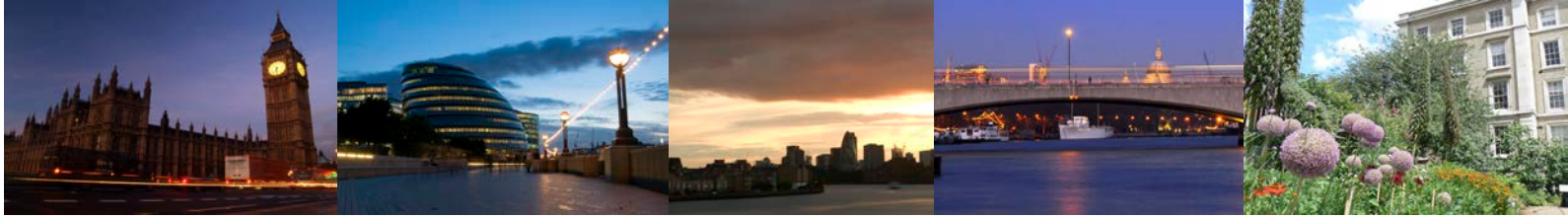


76. I do think that the length of the judgments that we, the judges, are producing is something that we have to address, and it is something which goes to the issue of the obligations of the judiciary to the advocates appearing in front of them. I am concerned about it.

77. If I want to say what I can about mutual respect, to which Tom Bingham refers, can we just summarise it in the simplest of little examples? In my view, the advocate should always be in court at whatever time the court is due to sit. Not two minutes later, not three minutes later. But I also think the court should sit at whatever the time is, not two minutes later, not three minutes later. There is a mutual obligation about this. It is to do with mutual respect. It is to do with mutual respect for the system which we seek to serve, and for the justice we seek to have administered.

78. O f course, there are going to be occasions when that isn't possible. Of course, there are going to be occasions when something goes wrong, of course. But that as a matter of practice we should do it, I have no doubt.

79. I was advancing this proposition at a meeting in Europe. I don't think there are many advocates here from Italy or France, but I am going to tell the story anyway. I gave this little lecture about the importance of time, and it captivates, it captivates this audience of judges from all over Europe, and so I am asked if I will do it again, amplify it, say more. So I agree. So I say, "Right, if you would like me to, we will all meet at 2.00 in room 201". I go there for five to two; the Dutch judges are there, the Swedish judges are there. 2.00 comes, and I say to the assembled – small assembled company, "If you don't mind, we will wait a couple of minutes because I know there are others who are interested". Oh yes, they say, others are interested. At about ten past two, I start. A few minutes later, some of our colleagues from

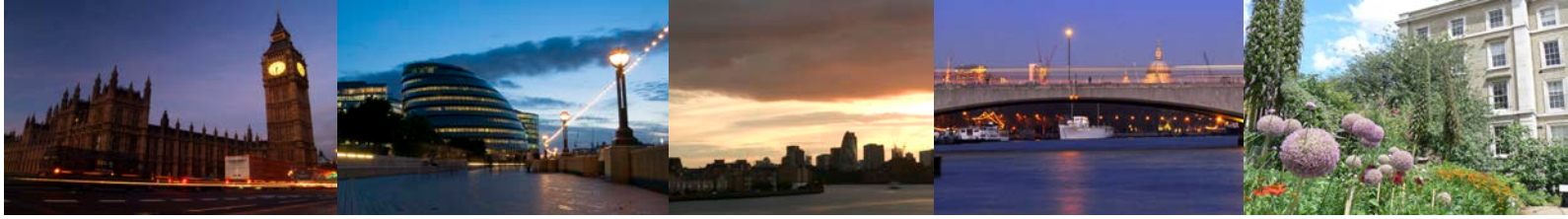


France arrive, and our colleagues from Italy turn up not far short of half past two. And are offended that we have started.

80. Now, I think that is a good example of what I am driving at. You have to mutually respect each other, and we have mutually to realise that we are trying to achieve the administration of justice in as efficient a way as we can.

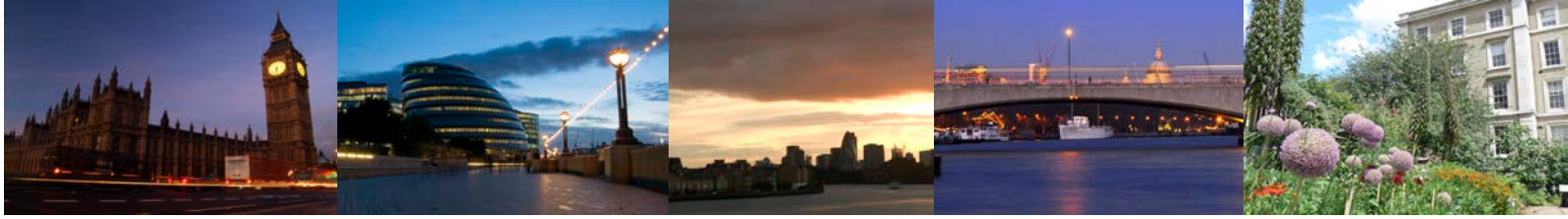
81. So, with a light hearted moment or two, I hope I have got across to you that I do not regard the subject of this talk as a subject which is a one-way traffic, talk only. This goes both ways. I don't think I have said anything fresh or new, or anything that you may not have thought of for yourselves, but from a system which is adversarial, which is very dependent on orality, high quality advocacy is what the judges most need. Without it, we have miscarriages of justice. We don't want people locked up for things they haven't done. It is not a bad thing for people who have done evil things to be convicted and locked up. We don't want bad decisions, bad at any rate in the sense that the quality of advocacy let justice down, which resulted in children being moved when they shouldn't, or moved to the wrong place, but this is true whatever level of litigation you do, Chancery, Commercial, Constitutional; all needs high quality advocacy.

82. Stephen said at the start of this that I enjoyed my years as an advocate. I loved them. When I was asked if I would become a judge, I wondered how I would cope with giving up the joys of working in a profession where in the whole of my career, the entire career, in a very competitive profession, where the instructions you get are instructions that somebody else does not get, and so the instructions your friend gets are instructions you will not get, in all that time, I only had one dirty trick played on me. Lots of times when my opponent thought of points and thought more deeply and so on and so forth, but that's fair does, but



only one dirty trick in 25 years of practice, in a competitive profession.

83. It was a wonderful profession, and I enjoy being a judge just as much, and in particular, when I see high quality advocacy, which confuses me, puts me into the position of King James VI, and forces me to think what the right answer is. Thank you very much indeed.



Saturday 30 June 2012

11:15 – 12:45 Practical lessons for today from the advocates of the past

Speaker biographies

Dr Michael Crennan SC

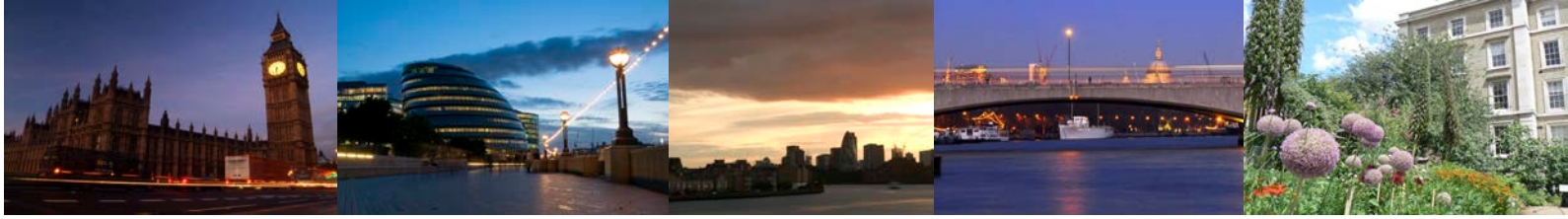
After reading in the School of English language and Literature at the University of Melbourne, Michael qualified as a Master of Arts and a Bachelor of Laws at that University. He went on to teach English Literature at the Universities of Melbourne and New South Wales between 1967 and 1979 and was called to the Victorian Bar in 1982, taking silk in 2000. Michael retired from active practice in 2006 and returned to research, taking out a doctorate in Ancient History in 2011, on the subject of the Roman historian Tacitus. Dr Crennan is currently working on a project with the provisional title *A Mightier Sword? Cicero, Catiline, and the Ends of Rhetoric*.

The Rt Hon. Lord Sumption SCJ

Jonathan Sumption began his career as an academic historian at Oxford, and continues to write about late medieval European history, the subject that he once taught. Called to the Bar in 1975, he became Queen's Counsel in 1985, practising mainly in commercial and public law. He was appointed a Justice of the Supreme Court, directly from the Bar, in 2011.

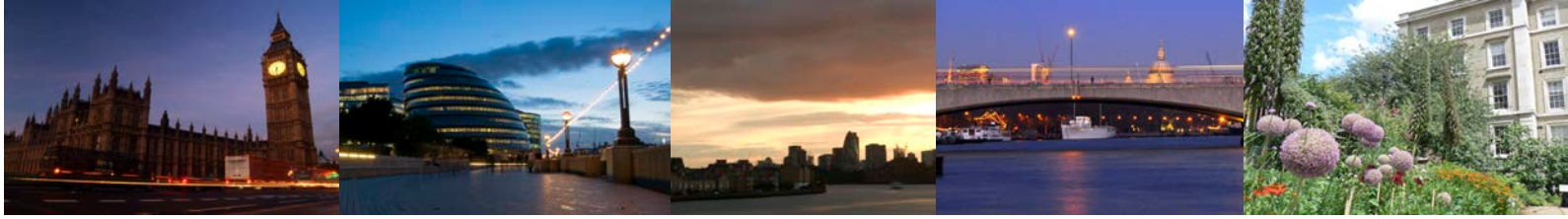
Michael Collins SC

Michael M. Collins is a Senior Counsel, a Bencher of the Honorable Society of King's Inns and the previous Chairman of the Bar Council of Ireland. He also practises from Monckton Chambers, London. After graduating with postgraduate degrees in economics and law from University College Dublin and the University of Pennsylvania, he was admitted to the New York Bar and worked in the area of corporate finance with Shearman and Sterling in New York in the early 1980s before returning to Ireland. He practices mainly in the area of commercial law, EU law, constitutional law, judicial review and arbitration. He is President of Arbitration Ireland, Chairman of the Irish Anti-Doping Disciplinary Panel (Irish Sports Council) and a member of the International Centre for Dispute Resolution (ICDR) Panel of Arbitrators. He was elected a Fellow of the International Academy of Trial Lawyers in 2009 and is Adjunct Professor of Law at University College Dublin Law School, a Board Member of All Hallows College and a Director of the Dublin Theatre Festival.



The Hon Michael Beloff QC

The Honourable Michael J Beloff QC of Blackstone Chambers, is a sometime President of Trinity College, Oxford and a Master of the Bench (and former Treasurer) of Grays Inn. He is the Senior Ordinary Appeal Judge of Jersey and Guernsey, a member of Singapore International Panel of Arbitrators, and a foreign consultant of The Law Counsel (Dacca). He is also Chairman of the International Cricket Council Code of Conduct Commission, a member of the Court of Arbitration for Sport and a member of the Formula One International Appeal Tribunal. In the course of practice in over three decades as a Queens Counsel, he has appeared in the Courts of more than ten Commonwealth countries, as well as in the European Court of Justice and European Court of Human Rights, and in a variety of international arbitrations, both as advocate and arbitrator. More than 425 of his cases have been reported in various law reports. In 2009 he was given a lifetime achievement award at the annual Chambers Directory awards ceremony. He is a prolific author and lecturer.



MICHAEL CRENNAN

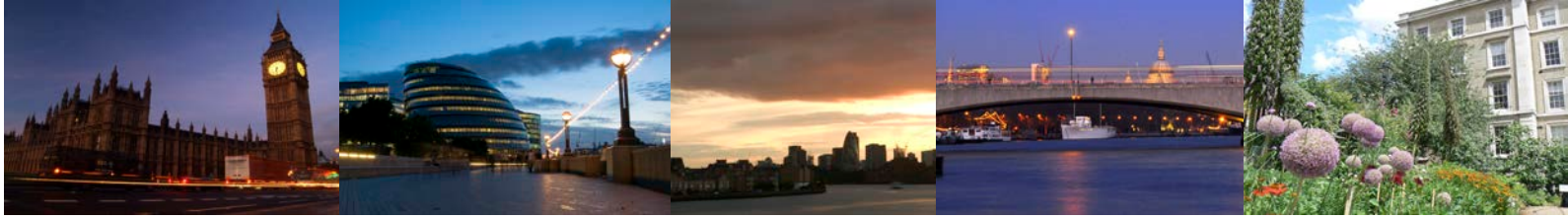
1. MICHAEL CRENNAN: In late 63 BC, Cicero was coming to the end of his 12 months as consul, which was the highest political office in Rome. There were two consuls at any one time, the office lasted for 12 months. He received startling news late in that period that a man called Lucius Sergius Catilina, we call him Catiline, was planning a coup against the Roman government. Catiline had made several attempts, unsuccessful attempts, to become consul himself, and for various reasons, especially because not enough people voted for him, he failed. He gave up on that route and decided to seize power by force.

2. Cicero, being the consul, had the job of dealing with this. After a few details of the plot came to light, he berated Catiline in the Senate House, and after Catiline rather angrily responded to this, he fled, that is Catiline fled to an army that was gathering in the north of Italy. He left behind a group of conspirators who were tasked to carry out various acts of mayhem.

3. When Cicero gathered more evidence, he arrested five of these conspirators, and brought them before the senate. At one meeting of the Senate, the evidence was gone through, confessions were given, then another meeting was held, at which the question of penalty was considered. After a lengthy and very interesting debate, the Senate determined that the five men should be executed. This was done, and some time in the New Year, battle was joined with Catiline's army, which was obliterated, and that was that.

4. Except that Cicero never let it go. My theme is why, why did he never let it go, why did he speak about it so often, and eventually so suicidally?

5. After the Catiline conspiracy was crushed, Cicero became very popular for a time,



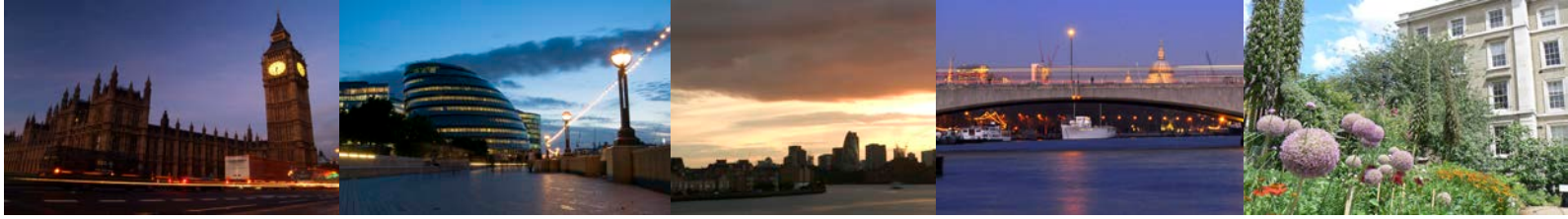
although it was said that he wearied Romans with his constant self-glorification. Indeed, he kept this up until the end of his life, when he was murdered -- I think the word "executed" was used, but I prefer the word "murdered" -- by a death squad acting on Mark Antony's behalf.

6. Now, we know about this episode principally through Cicero's own speeches of the time, which he published, and probably rewrote, or having probably rewritten, a few years later.

7. The usual account from ancient historians is generally based on Cicero's account, which is unfortunate, for several reasons. First of all, Roman oratory, including that of Cicero, whether political or forensic, was marked by hyperbole, unfounded slander, and plain lies. You may say, how unlike modern times.

8. Secondly, the oligarchy which controlled Rome, as a matter of habit described popular discontent as a result of moral depravity. The leaders were accused of incest, rape, murder and so on. Their followers were described in various abusive ways. Cicero described them in a speech to the Senate as "sentina", the Roman word for sewage. He made a speech to the popular assembly the next day about the various people supporting Catiline, but he left that one out, so at least he had the advocate's sense of how to deal with his audience.

9. Cicero's speeches on the subject of Catiline were no different. Catiline's personal character was savaged. We know that Cicero almost certainly did not believe the myriad personal allegations he made against Catiline, in fact two years earlier he had been mulling over the possibility of running on a joint ticket with Catiline. Secondly, Cicero falsified the account of Catiline's plans and by doing that, he grossly exaggerated the threat he posed to the Roman state. This was deliberate, and Cicero had good reasons for doing so. He did it in



order to detach Catiline's followers.

10. Catiline really wanted to be consul. He was prepared to kill a few people to do it. But he wasn't prepared to murder the entire population of Rome, which was one allegation Cicero made, or to have a Gallic tribe repopulate Rome, or to burn Rome to the ground, which were all allegations Cicero made at one point or another, in one form or another.

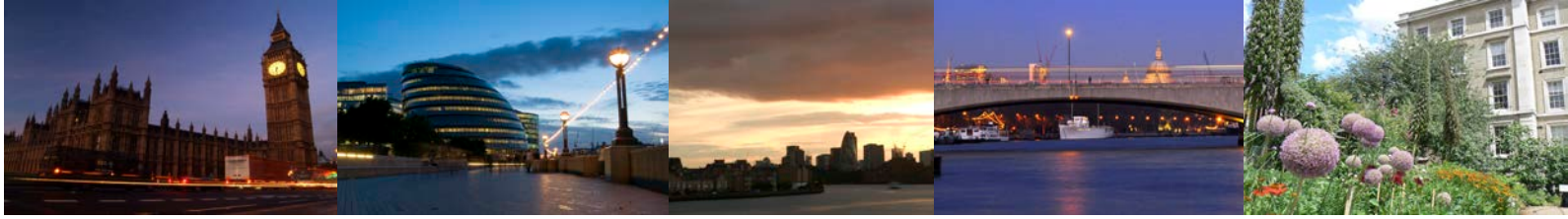
11. Obviously, if a man is going to kill everyone in Rome, no one in Rome has any good reason for supporting him. And it worked.

12. The other reason was in general to create an atmosphere of fear and panic, which would give the authorities a freer hand.

13. Now, looking at Cicero's conduct in all this, there were several things that drove him. The first was he was a new man, a novus homo, that was he was a man whose family had never produced a consul. He was very keen to be a consul, and once he became a consul, he was very keen to have his consulship marked by a great achievement. When Catiline came along, he seized the opportunity with both hands.

14. Second, he was eager to ingratiate himself with that group or tendency in Roman politics called the Optimates, conservatives or reactionaries, if you like. Until this time, until the time of the Catiline conspiracy, he had generally been closer to the other group or tendency, called the Populares, which is self-evident.

15. After the event, he had another thing driving him. Allegations were raised in the argument in the Senate, by Julius Caesar, as it happened, that the execution of the five conspirators was unlawful. That being so, Cicero was locked for the rest of his life into asserting that the execution was lawful.



16. Why was it unlawful? Well, this is a question of legitimacy, as I say. And this case is a case in which a lack of legitimacy really haunted Cicero's public and private life until he died.

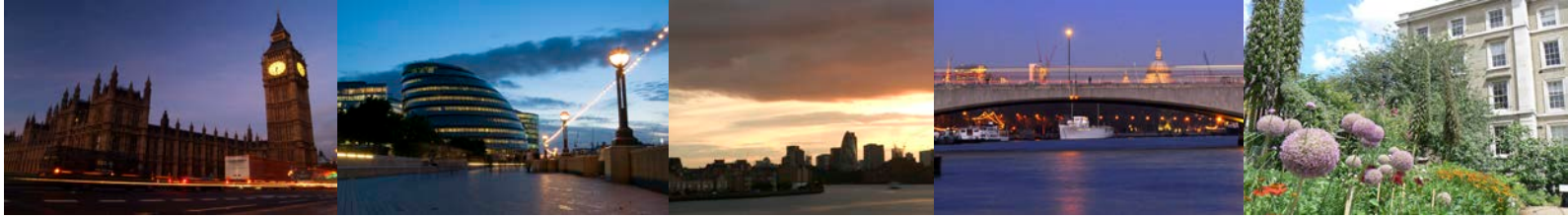
17. There were at the time a number of leges, written statutes which gave certain protections to Roman citizens regarding arbitrary corporal or capital punishment. If the statutes applied to the conspirators, whom the Senate ordered to be executed, then there was a strong argument that the killing was unlawful.

18. Now, there were two answers to this, and they were well-known answers that had been tossed around for the previous 70 years or so in Roman politics. It is important to understand that the written laws came not from the Senate, but from other assemblies which had a much wider membership, a much more diverse membership.

19. The two answers were first that a short time before the execution, the Senate had issued what was called a senatus consultum ultimum, which was a direction to the consul or magistrates to take any steps they thought necessary to defend the Republic.

20. Now, what that meant varied in each case. It probably did not give any immunity to the magistrate, because they had to make the decision about what had to be done, so it wasn't a proleptic immunity.

21. The second answer might have been that the protection that the statutes I referred to gave was applied only to citizens, so that if the five conspirators were no longer citizens of Rome, then there was no unlawfulness, and in fact, in argument, Cicero did rely on this. He didn't rely on the ultimate decree, he said, in effect, that these men were plotting the destruction of Rome, therefore they could not be regarded as Roman citizens, therefore we



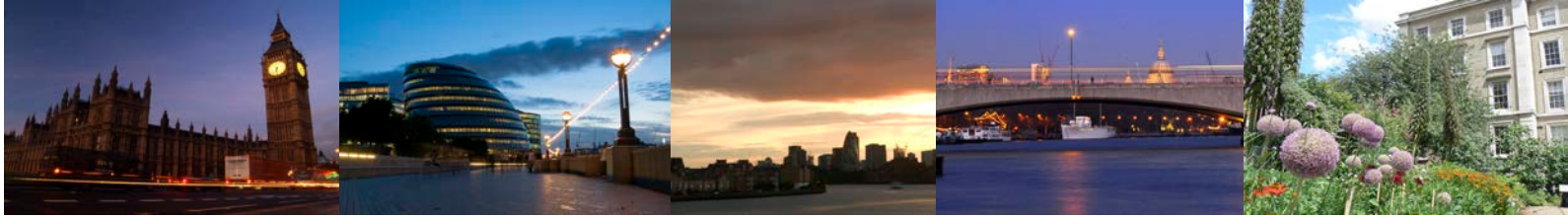
can kill them.

22. N ow, there were problems with that answer. The first is that there was a procedure for stripping Roman citizens of their citizenship and it had not been followed. That was the procedure of declaring that the magistrates had to deal with a hostis, an enemy. The problem with that is that that procedure applied to people outside the pomerium, outside Rome; in other words, if someone brought an army against Rome, they were no longer a citizen of Rome. So it wasn't at all clear that Cicero had a proper legal basis for saying that the statutes do not protect these people, they are not citizens, they are not citizens because they are engaged in all sorts of bad behaviours. As one commentator said in the 20th Century, it is one of the best examples of a thoroughly begged question.

23. Now if what I am saying is so, the prisoners before the Senate were still Roman citizens, and still, on their face, entitled to the protection of the relevant laws. Even in the case of the ultimate decree, which he didn't mention in argument, as far as we can tell, there were other problems.

24. In a sense, it's analogous to -- not the same as, of course, but analogous to some of the administrative law questions we have to deal with so often. The Senate was acting not as a court and not as a legislative body, it wasn't either of those things, but it was acting as the ruling body of the Roman Republic, saying, "Well, things have got very bad, we have to forget about the law for a while, let's get rid of these people".

25. But whatever the merits of the argument, it didn't take long before a number of important popular leaders, including Julius Caesar, who was then a relatively young man, Claudius and eventually Mark Antony, were accusing Cicero of unlawfully killing these prisoners.



26. The second problem Cicero might face is that the danger faced by the Republic -- the real danger, not the rhetorically inflated danger -- was not sufficient to justify the summary execution.

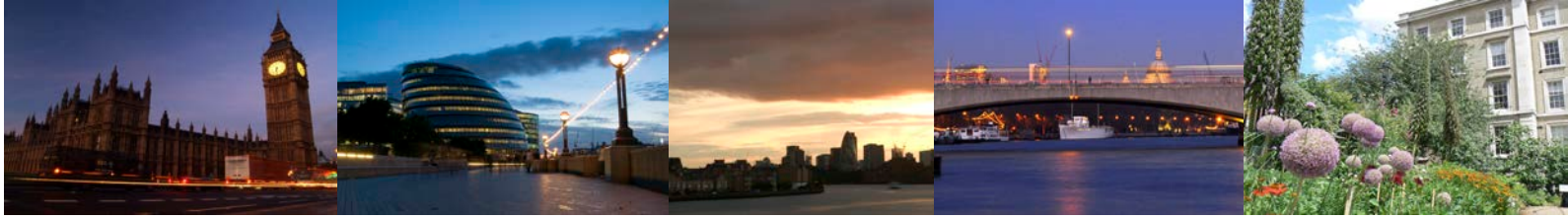
27. Now the argument about legitimacy which Caesar raised in the Senate, but Cicero attempted to rebut, in what is called the fourth Catilinarian speech, was not only about the content and interpretation of the laws, but the priority of different sources of the law. That made it a political issue, because popular assemblies had passed the laws and the Senate tried to bypass them.

28. The historical question, was Cicero correct about the nature of Catiline's attempted coup, underlies the jurisprudential question: did he act lawfully?

29. Furthermore, as I say, those sources were not only different legal sources, they were different social or political or class sources, so this gave a social dimension to the issue.

30. We know what Cicero's arguments were, or we think we know what they were, because he published the speeches he made in the Senate and to the people about three or four years later. However, most respectable authorities are pretty clear in their views that the speeches that were printed were not the speeches that were given. The speeches that were printed were speeches rewritten to meet criticisms made of Cicero after he had taken these actions. In any event, the speeches we have, which were written within a few years, contain the arguments which Cicero wanted on the public record.

31. N ow, the personal repercussions for Cicero were immediate. His consulship concluded in due course a few days after the executions. The tribune of the plebs denied him the traditional right to give a public account of his stewardship. This was a sensational rebuke



for a consul. He soon made a new enemy, in the popular leader Publius Clodius. He accused Clodius of incest with his sister -- that is with his own sister, not Cicero's. His own sister by the way was Clodia, who was the famous Lesbia of Catullus' love poetry.

32. Clodius then became Cicero's nemesis, and three years later he threatened to reintroduce a law which would clearly make Cicero criminally responsible for the deaths of the five conspirators. Cicero saw this coming and fled into exile for a while. His letters of the time make it clear what a terrible blow that was for him.

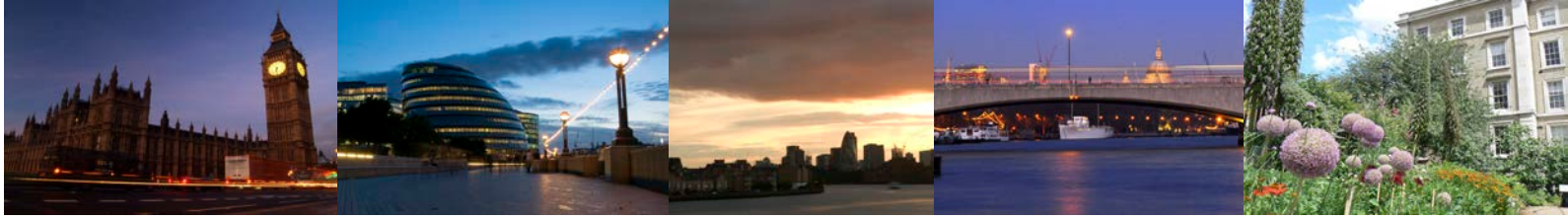
33. Clodius by the way was later murdered by a rival gang, led by a man called Milo, and Cicero, who had returned by this time, defended Milo in his subsequent trial for murder. So the practice of the Bar was the prosecution

34. of politics by other means.

35. Now, Cicero's incessant self-praise about this issue was generally explained as a result of his personality flaws. He had an unusually crass kind of egotism. Who but Cicero would have written an epic poem about himself, now unfortunately lost except for the line "Oh Rome, so happy to have me born in it". That is a generous translation.

36. He also wrote to a historian, asking him to write his biography, and not to worry too much about the truth.

37. But he had a serious reason for persisting in justifying what he had done, and it is contained in what I have been saying, that there were serious attacks on him that he had killed these people unlawfully, and he had enemies who were prepared to do it, so he had to maintain the legality of his actions and to maintain the legality of his actions, he had to maintain that the threat was just as serious as he had said in the Senate, that Catiline was just



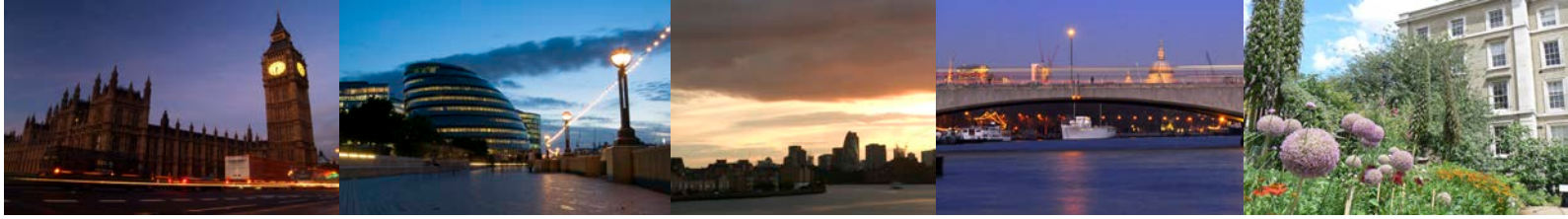
as depraved as he had said in the Senate, and he was therefore acting lawfully, in other words there was an urgent need to kill these people. So he could never ever back away. So assuming that he was acting with legality, assuming that, he was locked in forever. It is a very interesting, I think, and a very salutary tale.

38. So he kept talking about this, but he did it once too often, and to understand this, we need to go back to the Senate, in December of 63 BB. After the debate had concluded, the five men were led off to be killed, killed by being lowered through a hole into a cave, where the public came and strangled them. The man that Cicero led to the drop was a man called Publius Lentulus Sura. He just happened to be Mark Antony's godfather. And in his Life of Mark Antony, Plutarch said it was from that time that Mark Antony's hatred of Cicero

dated.

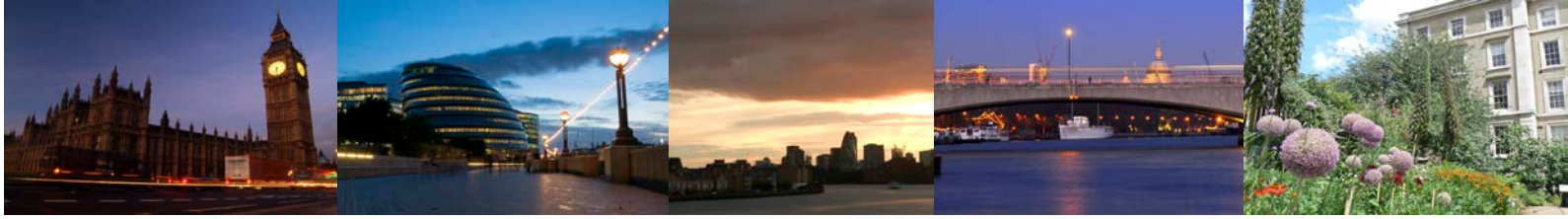
39. N ow, be that as it may, 20 years later, Mark Antony, who was then consul, picked a fight with Cicero in the Senate, in the course of which he accused him of murdering Catiline's supporters. Cicero, not worried about time, responded to this in 14 speeches, which I will call the Philippics, and the important one was the second one where he not only referred to the killing of Publius Lentulus Sura, he taunted Mark Antony about it.

40. What could he have been thinking of? Mark Antony was consul, a very dangerous and violent man. Well, shortly after that, a kind of civil war broke out between Octavius, later Emperor Augustus, and Mark Antony. But that didn't last too long, and after a while, Octavius and Mark Antony had what the Sopranos call a sit-down on an island in the Tiber, where they effectively gave up their supporters to one another to cement their alliance; Octavius gave up Cicero, and a death squad was duly despatched to Cicero's home, where he was squalidly butchered, or executed.



41. What does this all tell us? I think what it tells us is this, that in the life of the advocate -- and Cicero was no doubt acting as an advocate; he wasn't acting just as a politician here, he was acting as an advocate. In fact, his speech in the Senate, the fourth Catilinarian, was supposed to be, as my chairman will do, a balanced account of each side and an invitation to the Senate to make up their mind. But it wasn't balanced, it was a completely partisan account, asking the Senate to do what he wanted.

42. But that act of illegitimacy trapped Cicero. It trapped him and he had to keep doing it, he had to keep saying it, and eventually, he said it once too often, and as a result, he was killed. It even followed him after death, because Mark Antony arranged for his hand and head to be cut off; the hand that wrote the second Philippic was nailed to the rostrum, the head that composed it with it.



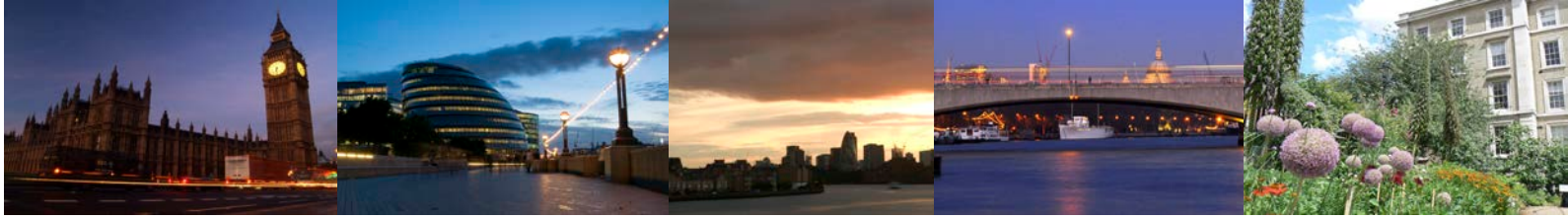
LORD SUMPTION

1. LORD SUMPTION: Dr Samuel Johnson famously observed that the finest sight that a Scotsman ever saw was the high road to England. One of the most talented Scots to take that road in Johnson's own time was Thomas Erskine, who was the third son of a genteel but down-at-heel family in West Lothian, who arrived in London on leave from the army in 1772, and was eventually called to the English Bar in 1778.

2. Erskine's 30-year career at the Bar was arguably the most successful legal career in history, culminating in a brief tenure of the office of Lord Chancellor in the Fox-Grenville coalition ministry of '86 and '87.

3. The fame of advocates is generally short lived. Great forensic speeches make their mark and then pass into oblivion, even among those who have listened to them. Styles of advocacy date quickly, and can often seem unbearably mannered to another generation. For that reason, there are few historically famous advocates, but most people would I think agree that Thomas Erskine was one of them.

4. E rskine was a highly political advocate, who lived in an age, in some ways rather like our own, when some of the great political issues of the day were fought out in the courts. Judicial review, as we know it, was, of course, unknown, but the law of defamation provided plenty of occasions for bringing politics before the courts. Personal abuse was an important part of the repertoire of political orators of the late 18th Century. Political speeches were widely circulated in the form of printed handbills and pamphlets. So politics was a fertile source of libel actions. For their part, late 18th Century governments were inordinately sensitive to criticism, and to threats of public disorder. They were inclined to bring prosecutions for sedition or criminal libel as a means of silencing unfriendly voices. In the



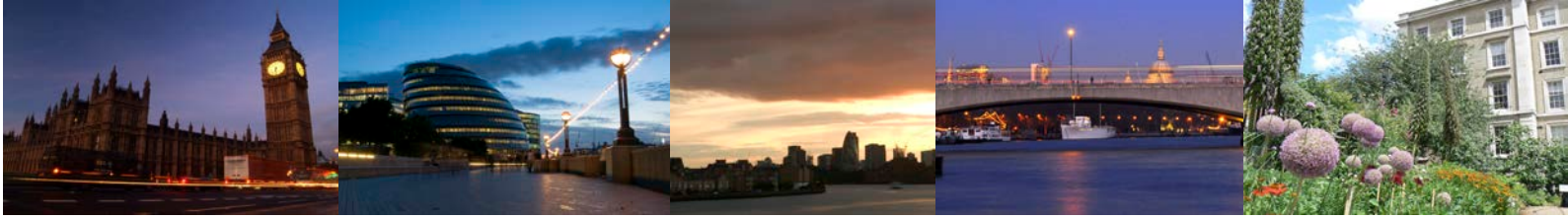
1790s, at a time of great domestic political unrest following the outbreak of the revolution in France, the tools available to the executive for carrying out such prosecutions became much more extensive. Most of the prosecutions for political causes at that time were based on allegedly treasonable words, and the treasonable character of words, although a jury question is very often fundamentally a political one.

5. E rskine associated himself closely with the Whig faction of Charles James Fox and the playwright Richard Brinsley Sheridan, which constituted an almost permanent opposition for most of his career.

6. All his most famous cases were argued in opposition to the government interest. His very first client was a naval officer called Bailey, who had accused the governors of the Naval Hospital at Greenwich of corruption, and found himself prosecuted in the King's Bench for criminal libel. Erskine went on to act as Admiral Keppel's legal adviser and speech writer in the highly politicized court martial of 1779 in which the Admiral was accused of failing to win a sufficiently decisive victory over the French at Ushant in the previous year.

7. He defended Lord George Gordon on a charge of treason arising from the anti- Catholic riots of 1780. He defended William Shipley, the clergyman accused of seditious libel for publishing a pamphlet advocating the expansion of the electoral franchise and the right of resistance to unconstitutional acts.

8. He defended John Stockdale, who was prosecuted by the government for publishing pamphlets in defence of Warren Hastings, the disgraced Governor of Bengal. And in the 1790s, he defended a string of prosecutions for sedition, wearing suits made in the style favoured by the French Jacobins, with brass buttons inscribed with the motto "vivre libre ou mourir"; "live free or die".



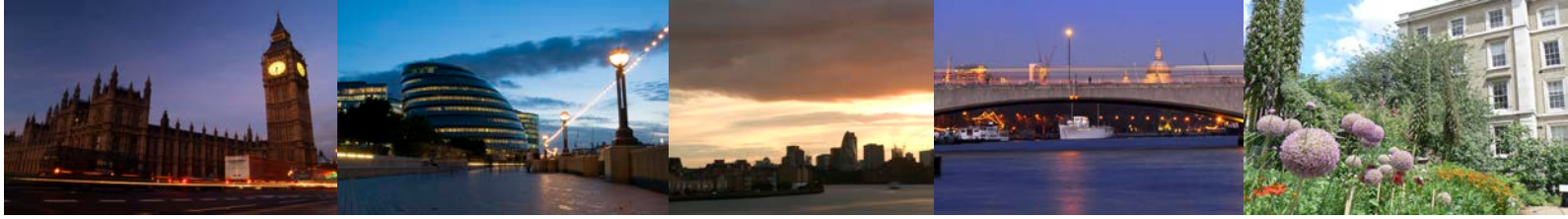
9. His clients included Tom Paine, the organisers of the Manchester Constitutional Society, Thomas Hardy, the secretary of the London Corresponding Society, Home Tooke, the radical pamphleteer, and many others whose views for one reason or another were unwelcome to the political establishment.

10. The reputation that he made for himself in these cases made him famous and rich. He was received as perhaps no other barrister ever has been as a national hero. Medals were struck in his honour. Busts were commissioned, with florid mottos, badges and caps of liberty were mass-produced bearing his image.

11. His first will, drawn up after he had been in practice at the Bar for four years, showed that his earnings at the Bar over that period had amounted to the equivalent in today's money of about £3 million a year.

12. What does this extraordinary career have to tell us about the work of an advocate today? Here are some thoughts on that subject. I think the first point to be made is that anybody who imitated Erskine's style of advocacy today, far from earning £3 million a year, would probably be disbarred. The 18th Century judiciary was a socially highly conservative group, which had little natural sympathy for either Erskine himself or most of his clients. Their reaction to his advocacy was generally unfavourable and was not improved by his manner, which treated them with alternating flattery and contempt.

13. According to the contemporary memoirist Nathaniel Wraxall, he spurned all precedent to apall or silence judges. His legal knowledge was notoriously thin. Erskine's very first forensic speech in R v Bailey, a case about corruption at Greenwich Hospital, had all the hallmarks of Roman advocacy as just described by Michael Crennan, and indeed established the main features of his own future style. His submissions for the defence were exhibitionist,



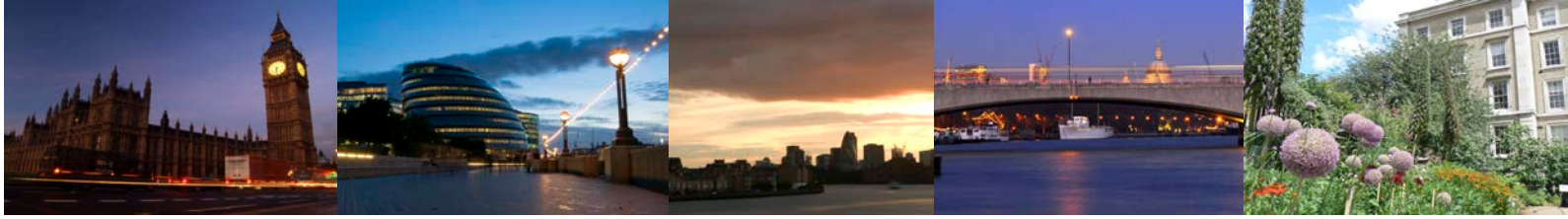
florid, slapdash, extravagant, tendentious, abusive, hyperbolic and almost entirely irrelevant.

14. It undoubtedly constituted great entertainment. But Lord Mansfield, who was trying the case, ignored his submissions entirely, and gave judgment in his client's favour on a technical point that had not been argued at all.

15. For all that, the case does illustrate a notable truth about 18th Century litigation and perhaps also to some extent about modern litigation. I suspect most of us have occasionally been tempted to address the people behind us instead of in front.

16. A great deal of forensic advocacy in the 18th Century, especially in politically controversial cases, was not addressed to the judge. Fox's Libel Act of 1792 reversed a series of decisions in which judges had assumed the right to decide whether a statement was defamatory, and restored that right to juries, who took full advantage of it. They were frequently swayed not just by rhetoric, but by class and political prejudice. Even in cases which were not tried by juries, the audience which mattered was often the public outside, and by that I mean literally outside. Crowds gathered in the street outside the open windows of the courts to hear the great political advocates of the day addressing judges in a deafening roar designed to be heard half a block away. Thomas Erskine must have been the only advocate in history to have to apply to a judge for a five-minute adjournment in the middle of his submissions so that he could go and calm the cheering crowd outside.

17. Erskine has a hallowed place in the collective memory of the English Bar, because of his association with the so-called cab rank rule, by which, irrespective of personal sympathy, a barrister is professionally bound to accept instructions on any matter within his competence, for which he is available, provided that an acceptable fee is offered.



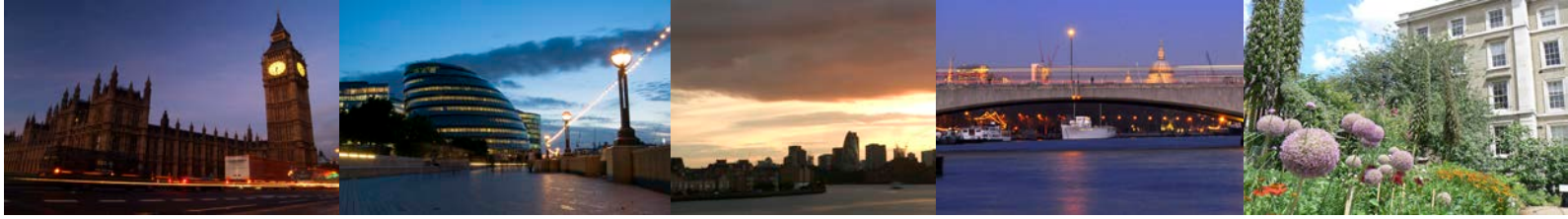
18. He famously formulated the rule when defending his decision to represent Tom Paine, who was being prosecuted for his pamphlet on the rights of man, in spite of the fact that he, Erskine, was warned that defending Paine would cost him his appointment as legal adviser to the Prince of Wales, as indeed it did.

19. After a long period of obscurity, the cab rank rule has recently been dusted off and polished up by the English Bar as a rhetorical weapon for resisting the encroachments of solicitors on their traditional monopoly of rights of advocacy.

20. O ne recent Lord Chancellor has described it as one of the glories of the English Bar. I hope that I may be forgiven, in an audience like this one, for being a little more cynical. There is, I think, a great deal to be said for the view expressed not long ago by the New South Wales Law Commission that the interpretation of the duty and its exceptions has become highly subjective, and there is in reality plenty of opportunity for any barrister to refuse a brief offered. The main practical effect of the rule, they continued, is not that it forces reluctant barristers to accept unpopular cases, but rather that it reduces criticisms for those barristers who choose to take such cases. In my experience, it does not even do that very effectively.

21. Those who regard the importance of the cab rank rule as overstated, and I confess to being one of them, will find plenty to support their view in the career of Thomas Erskine himself.

22. Erskine may have perfectly articulated the cab rank rule, but he certainly did not practise it himself. He accepted notorious clients because he enjoyed notoriety and found that it was good for his practice. His choice of work was strongly influenced by his personal views. He very much associated himself with his clients' positions, and polished up many of

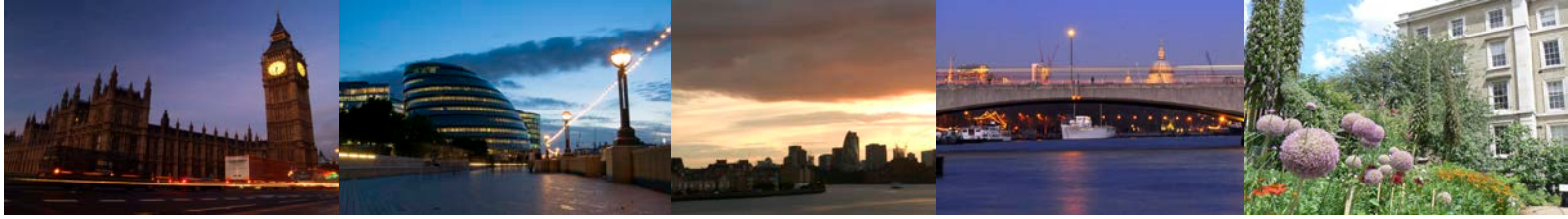


his forensic speeches for publication as political pamphlets. He never accepted a brief which he didn't want, or which he did not believe would serve the brand which he had established for himself as a defender of critics of the government. He rarely appeared for the prosecution, and never for the government or for unpopular ministers or officials.

23. There is perhaps one final lesson that I think we can learn from Thomas Erskine's career as an advocate, and that is that forensic advocacy is a very special art form which does not translate well into other contexts. Erskine was a member of the House of Commons for 16 years, from 1790 to 1806, as well as for a short period at the beginning of the 1780s. It was an age when Parliamentary oratory was as good as it has ever been in the history of this or quite possibly any country. Parliamentary audiences were critical, intelligent and eminently persuadable. Yet the great Parliamentary diarists and memoire writers of the period are broadly agreed that as a speaker in the House of Commons, Erskine was a failure. He was regarded as a prolix and predictable bore, whose orations were not always well informed or properly prepared.

24. Socially too, Erskine was regarded as insufferable. "The eminence of Mr Erskine [wrote Fanny Burney in one of her diary entries] is all for public life; in private, his incessant egoism entirely undoes him".

25. Many people fondly imagine that because barristers spend all their time talking, they are the ideal people to deliver after dinner speeches, addresses at weddings or funerals, or speeches on occasions like this. The problem with barristers, as my wife never ceases to tell me, is that they do spend all their time talking.



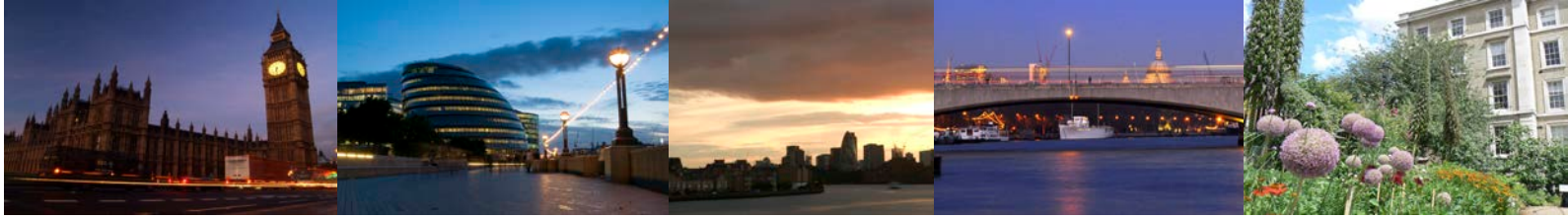
MICHAEL COLLINS

1. MICHAEL COLLINS: Good morning, ladies and gentlemen. If you take a stroll down Pennsylvania Avenue in Washington DC, after you pass the White House you will come to the National Archives Building, which houses the US Constitution, the Declaration of Independence and the Bill of Rights, and just outside the entrance to the National Archives Building, there is a very large white marble statue of a Roman soldier called Guardianship.

2. It is sitting on a very large marble plinth and on the plinth is written the words "Eternal vigilance is the price of liberty". The quote is unattributed, but it is in fact an abbreviated version of an address which John Philpot Curran made to the Irish Privy Council in 1790 when he was arguing over the validity of the election of the Lord Mayor of Dublin at the time. Curran used the occasion to attack the political abuses of the Alderman, and the full quotation in its original form is in fact as follows:

3. "It is the common fate of the indolent to see their rights become a prey to the active. The condition upon which God has given liberty to man is eternal vigilance, which condition, if he breaks, servitude is at once the consequence of his crime and the punishment of his guilt."

4. Curran's junior on that occasion was George Ponsonby, a gifted advocate in his own right, who later became Lord Chancellor of Ireland. An echo of those voices can be heard today in the fact that sitting in front of me is Desmond Browne QC, a descendant of Ponsonby's John Philpot Curran was certainly regarded by some as the greatest orator of his time. Goodrich in his Chronicle of Eloquence says in somewhat florid language that:

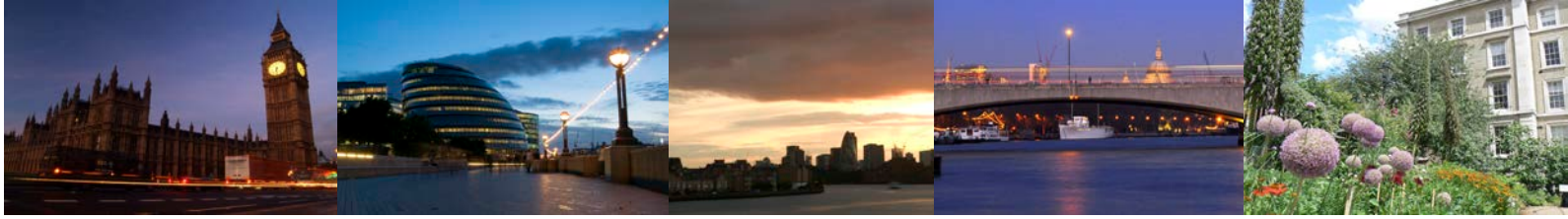


5. "Curran's power transformed the courtroom into a place of tears by a tenderness and pathos which subdued every heart, and poured out his invective like a stream of lava and inflamed the minds of his countrymen almost to madness by a recital of their wrongs." He started life from a poor background, his father was a steward for an Anglo- Saxon family in West Cork, but having caricatured a local clergyman who had sent for him, the clergyman was captivated by the cheeky urchin and paid for him to go to the local grammar school, from where he won a scholarship to Trinity College and ended up reading law in Middle Temple.

6. He came back to practise at the Irish Bar in 1775 but was hampered initially by the fact that he was short, unattractive, some say ugly, and had a terrible stutter, something that he only conquered by virtue of the fact that he stood in front of a mirror and read aloud for hours the works of Shakespeare and Bolingbroke.

7. One of Curran's principal assets was not necessarily a detailed knowledge of law, but of the virtues of honesty, courage and integrity. In fact, he had the virtues of courage possibly to a fault. He operated in a world where political corruption in both law and politics was rife in a way that -- I was going to say seems unimaginable today, let us hope that that is so.

8. The King's Ruler in Ireland was the Viceroy, whose only function seemed to be to give out patronage. When Lord Townsend was appointed Viceroy in 1767, the Speaker of the Irish House of Commons, the Prime Sergeant and others, met with him to demand various things such as, in Hely Hutchinson's case, the Prime Sergeant, £4,000 a year for life, offices worth £500 a year for his two sons, who were then aged 10 and 11, and a



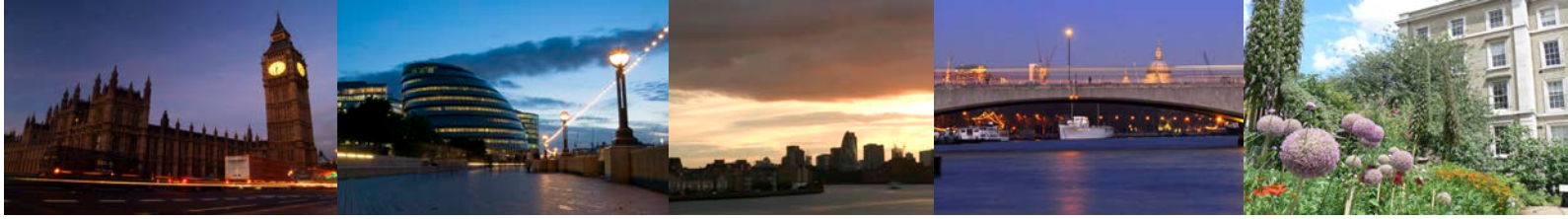
promise that his wife would be made a Viscountess.

9. Curran's politics were those of a liberal Protestant who was in favour of Catholic emancipation, and opposed to the illiberal government of the time. He made his fame through defending many members of the United Irishmen on charges of high treason. The United Irishmen was started originally as a group of Protestant lawyers concerned at the widespread corruption that was rife in the system, and felt that the only way forward was to set up a truly independent Irish parliament and an Irish government.

10. But those were days in which it was exceptionally difficult and indeed dangerous to defend such cases. The cases were unpopular, for obvious political reasons. The trials were dangerous, as juries were selected by the sheriff, and almost invariably packed to convict, of course. Prosecution witnesses were paid to fabricate evidence. The judges themselves were frequently, although in fairness not invariably, overtly on the side of the prosecution, and unlike in England, only one witness was required to secure conviction.

11. Some judges in particular were hostile to Curran. John Fitzgibbon detested him for his liberalism and his tolerance, and when Fitzgibbon was appointed Lord Chancellor of Ireland, the public enmity between the two men became very evident, helped no doubt by the fact that Fitzgibbon must have heard Curran's description of his appointment: like a chimney sweep rising laboriously through dirt and calling attention from the roof to a surprising elevation.

12. Their exchanges in court were bitter, robust, and as Lord Sumption said, would undoubtedly not be tolerated today. "If that be the law, Mr Curran [said the Lord Chancellor] then I may burn my law books." "Better read them, my Lord".



13. Fitzgibbon often brought his dog on to the bench with him, and once fondled the animal during Curran's speech. Curran paused. "Go on, Mr Curran, go on". "My Lords, I took it for granted that your Lordships were engaged in consultation".

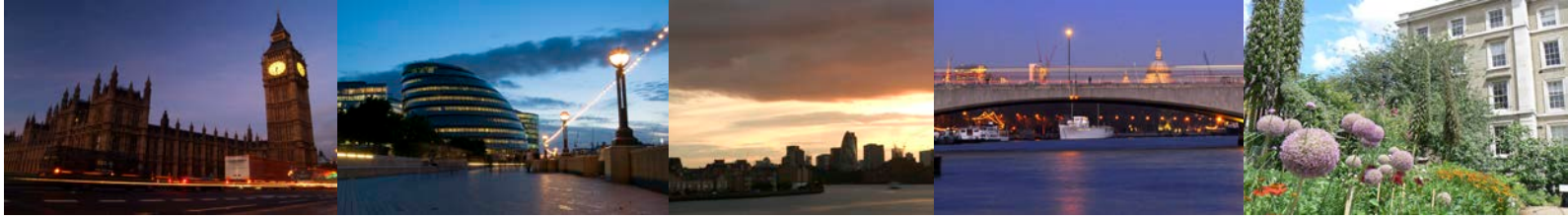
14. When some dispute arose over Lord Fitzgibbon's wig, he turned to Curran and said, "Mr Curran, do you see anything wrong with my wig?" "Only the head in it, my Lord".

15. One legal argument turned on whether there was a distinction between the words "also" and "likewise". Fitzgibbon looked at him and said, "Mr Curran, the words seem to me to be almost synonymous". Curran calmly replied, "No fanciful distinction, my Lord. The great Lord Lifford for many years presided over this court. You also preside, but not likewise".

16. Curran's remarkable courage and advocacy skills can be seen at the trial of Archibald Hamilton Rowan, who was a founding member of the Dublin Society of United Irishmen. He was arrested on a crime of seditious libel in 1792, in handing out an address to the Volunteers of Ireland, which was a pamphlet pleading to citizen soldiers to take up arms to supersede the police.

17. The trial took place before Jack Scott, known as Copper Face Jack, the Chief justice of the King's Bench and then Earl of Clonmell.

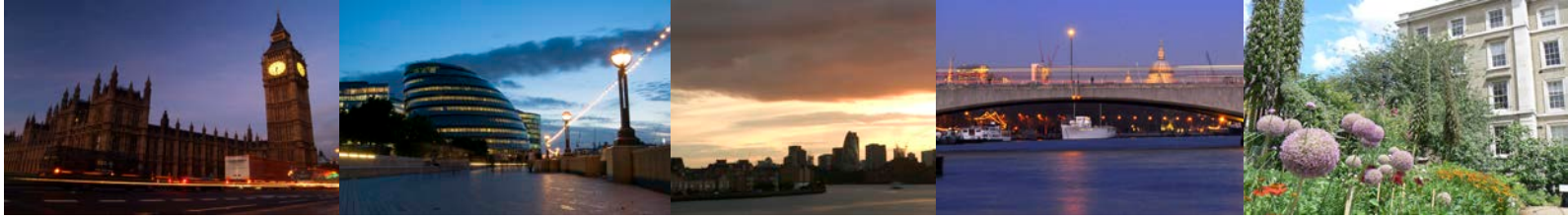
18. Curran had frequent conflicts in court with Scott, although they did share the fact that they mutually despised Fitzgibbon. The jury was hand-picked by Sheriff Giffard and the Attorney General, who was a good friend of Curran's, Arthur Wolfe, prosecuted.



19. Curran's greatest fear was not the judge but the fact that he knew Wolfe would open the case with effective moderation. Wolfe had in fact pleaded with Curran to not bring the case, not to represent the United Irishmen. He described them as "a desperate faction that will abandon you at the last" and pointed out that if Curran did abandon the representation, then he would almost certainly succeed Wolfe as Attorney General. But Curran, although married at the time with small children, had no care for such things. His main problem was he had no evidence to offer in Rowan's defence and he had to resort to the customary attack on the probity of the prosecution witnesses.

20. He prepared his speech with exceptional care, not taking many notes, but walking in his garden in a suburb of Dublin, and when he rose to make a speech which Lord Brougham described as the greatest ever made at the Bar, and which even in the abbreviated reports extends to 15,000 words, he only had 30 words of notes written in the folder of his brief. And as he stood up, Sheriff Giffard marched into the courtroom an armed guard rattling their muskets. Curran glanced for a moment at the intimidating soldiers, the hostile jury, the unsympathetic judge and then opened his address in a manner which calls to mind the introductory part of Cicero's defence of Milo. If you will bear with the florid language, I will perhaps read it to you:

21. "When I consider the period in which this prosecution is brought forward, when I behold the extraordinary safeguard of armed soldiers resorted to, no doubt, for the preservation of peace and order, when I catch, as I cannot but do, the throb of public anxiety which beats from one end to the other of this hall; when I reflect on what may be the fate of a man of the most beloved personal character, of one of the most respectable families of our country -- himself the only individual of that family -- I may almost say of



that country -- who can look to that possible fate without concern? Feeling, as I do, all these impressions, it is the honest simplicity of my heart I speak when I say that I never rose in a court of justice with so much embarrassment as upon this occasion."

22. His techniques are not unfamiliar to us today. He spoke of the jury as old and valued friends. He complimented his friend and opponent, Arthur Wolfe, with adroit phraseology. He outlined the use of the ex officio information which enabled the prosecution to bring the accused to trial without a preliminary hearing.

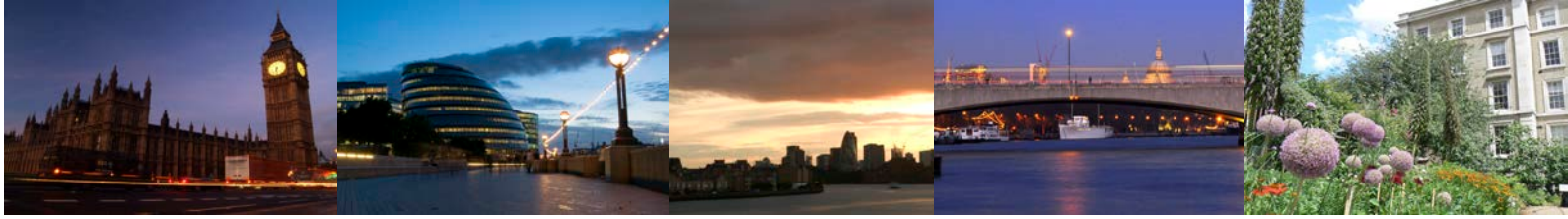
23. "Why [he asked] was this procedure used, if the charge has no cause to dread the light? You will find a material part of your inquiry must be whether Mr Rowan is pursued as a criminal or hunted down as a victim."

24. He then moved to the heart of his speech, which was the fact that this was:

> "... not an attack by one citizen on the reputation of another, but a criticism by the citizen of the State. Can I conceive any case in which the firmness and caution of a jury should be more exerted than when a subject is prosecuted for a libel on the State?"

25. He spoke slowly and powerfully, and then he introduced a passage which brought an immense outburst of sustained cheering from the audience, which held up the proceedings for several minutes, and is now regarded as one of the classic tributes to liberty. Again if you will forgive indulging the florid language, I will read it to you:

26. "I speak in the spirit of the British law, which makes liberty commensurate with and inseperable from British soil; which proclaims even to the stranger and sojourner, the moment he sets foot upon British earth, that the ground on which he treads is holy and consecrated by the genius of universal emancipation. No matter in what language his

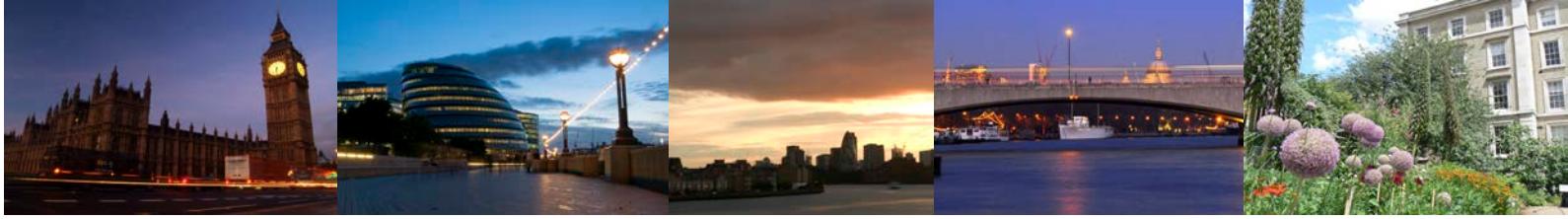


doom may have been pronounced, no matter what complexion incompatible with freedom an Indian or African sun may have burnt upon him; no matter in what disastrous battle his liberty may have been cloven down, no matter with what solemnities he may have been devoted upon the altar of slavery; the first moment he touches the sacred soil of Britain, the altar and gods sink together in the dust; his soul walks abroad in her own majesty; his body swells beyond the measure of his chains, that burst from around him; and he stands, redeemed, regenerated and disenthralled by the irresistible genius of universal emancipation."

27. Chief Justice Scott made no attempt to restrain the cheering crowds, but the jury remained, hand-picked, of course, silent, implacable and hostile. Curran spoke for almost two hours without a single sign from the jury that they were in agreement with him. Glancing again at Giffard and the ranks of armed soldiers, he minded the jury of the Glorious Revolution of 1688, prior to which "venal sheriffs returned packed juries to carry into effect those fatal conspiracies of the few against the many".

28. However, the jury took only a few minutes to convict. I am glad to say that 210 years later, Curran's words still, I think, ring out to the referral Bars of the world. He had said in closing that if they did convict, then there would be a monument which will record the atrocity of his crime and the atrocity of his conviction, and the atrocity of that conviction is still remembered today.

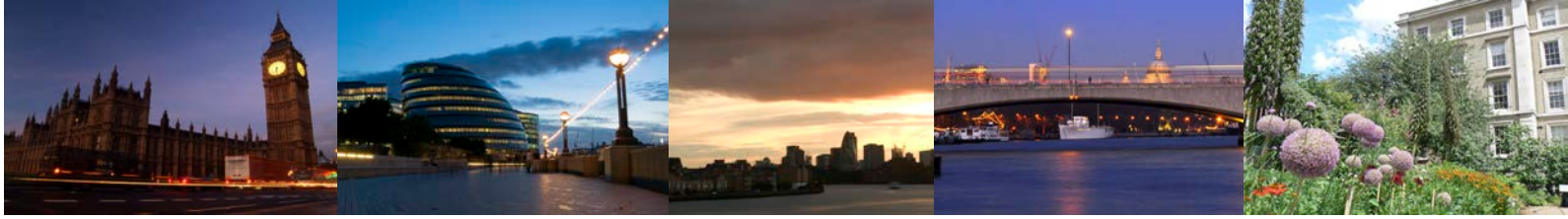
29. Although convicted, the crowds cheered Curran out of the courtroom. His horse and carriage was standing outside, and they unshackled the horses from his carriage and pulled his carriage, with Curran in it, to his townhouse in Dublin, aided by lamps which



they had stolen from the carriage of the judge's wife. On one occasion, Samuel Neilson, the Belfast radical charged with high treason, was only brought to court after four years of being imprisoned without charge or trial, and was ruined both psychologically and financially. Asked if he had counsel to defend him, he explained he was unable to get a counsel. Curran was in court, possibly by pre-arrangement, and rising to his feet said, "Now, Mr Neilson, do you positively say you have no money, and do you mean to say it is the cause of your wanting counsel? I am sure if I were to ask any lawyer in this court, he would take up your case without fee or reward. For my part, if my services are of any use to you, you can command them". Neilson replied, "Sir, I accept your offer.

30. The following day, Lord Carleton, Chief Justice of the Common Pleas, sent for Curran and berated him furiously for having offered to do such a thing. He said one of His Majesty's counsel had no right to volunteer his services to a traitor and an agent against the Crown. Curran insisted he would represent the man, the discussion became heated, and the Chief Justice threatened him that if he continued in his way, he would remove his status as Queen's Counsel. "My Lord, I thank you", replied Curran. "His Majesty may take the silk, but he will leave the stuff behind". Sometimes his friends were the butt of his jokes. Barry Yelverton, a good friend and a judge, a kind hearted, decent, honourable man by all accounts, had a tendency to leap to conclusions in court, which sometimes annoyed Curran. He was annoyed by this tendency, so he arrived in court one day, determined to put this habit of his friend's to rights.

31. "My Lord, if I stray from the question you have asked, you must impute it to my agitation of mind", and Curran began to describe how he had passed through Butcher's Row on the way to the court, and had seen a calf tied up ready to be slaughtered. Just as



the butcher's hand was raised, a lovely small girl approached the scene. "My Lord, I can still see the lifeblood gushing out as the butcher plunged his knife ..."

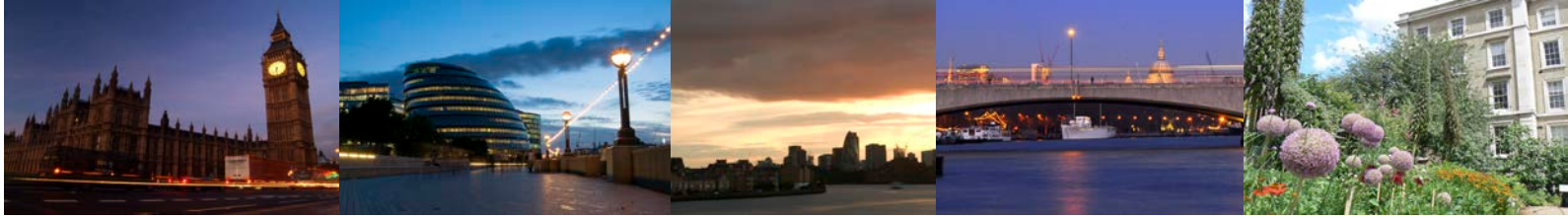
32. "Into the bosom of the child?", said Yelverton in horror. "No, my Lord, into the neck of the calf, but your Lordship frequently anticipates".

33. Curran frequently had to simply discredit by cross-examination of the witness, who was sometimes the sole witness in treason cases. In one such case, he was cross- examining a Mr O'Brien, and he asked in opening an apparently innocuous question that was designed to confuse Mr O'Brien:

> "Question: Pray, Mr O'Brien, whence came you?
> "Answer: Speak in a way I will understand you.
> "Question: Do you understand me?
> "Answer: Whence -- I am here -- do you mean the place I come from?
> "Question: By your oath, do you not understand it?
> "Answer: I partly censure it now.
> "Question: Now that you partly censure the question, answer it. Where did you come from?
> "Answer: From the castle.
> "Question: Do you live there?
> "Answer: I do while I am there."

34. The jury would have well understood, of course, that the castle was a reference to Dublin Castle, centre of government rule in Ireland, and a place where spies and informers were given free accommodation:

> "Question: Were you an excise officer?
> "Answer: No.
> "Question: Nor ever acted as one?
> "Answer: I don't doubt that I may have gone one messages for one.
> "Question: Who was that? "Answer: A name of Fitzpatrick. "Question: He is an excise officer?

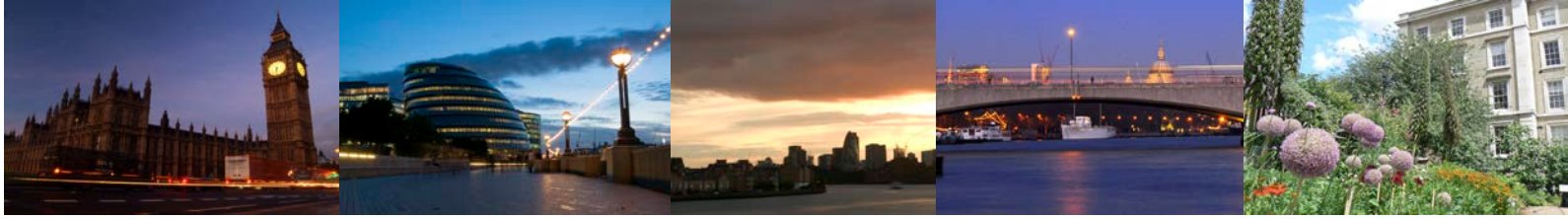


"Answer: So I understand.
"Question: What messages did you go for him? "Answer: For money, when he was lying on a sick bed. "Question: To whom?
"Answer: To several of the people in his walk.
"Question: But you never pretended to be an officer yourself?
"Answer: As I have been walking with him and had clean clothes on me, he might have said to persons that we met that I was an excise officer.
"Question: Did you ever pretend to be an excise officer?
"Answer: I never did pretend to be an excise officer.
"Question: Did you ever pass yourself for a revenue officer?
"Answer: I answered that before.
"Question: I do not want to give you any unnecessary trouble, sir -- treat me with the same respect as I shall treat you -- I ask you again. Did you ever pass yourself for a revenue officer?
"Answer: I never, barring when I was in drink or the like ... I do not know what I have done when I was drunk.
"Question: Are you in the habit of being drunk?
"Answer: Not now, but for some time past I was.
"Question: Very fond of drink?
"Answer: Very fond of drink."

35. Curran then forced an admission from O'Brien that he has posed as a revenue officer when serving a summons on one:

"Question: Were you drunk when you summoned Cavanagh?
"Answer: No.
"Question: When you did not prosecute him?
"Answer: No.
"Question: When you put money in your own pocket?
"Answer: No."

36. Curran then, to a silent courtroom, extracted admissions from O'Brien that he made his living by fraud and blackmail, that he was a paid informer, that he had a recipe for passing off silvered pence as half crowns, and that he threatened witnesses with a pistol and a sword. The jury returned a not guilty verdict. There were a number of other prisoners awaiting charge based also on O'Brien's evidence, but the next day the Attorney

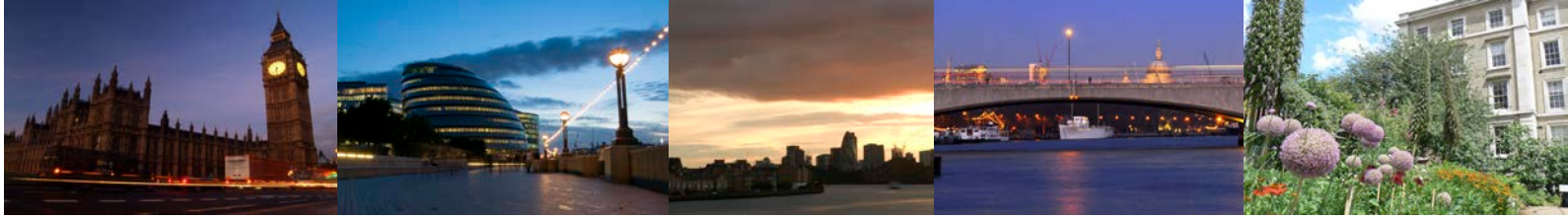


General, Arthur Wolfe, directed that the other prisoners who were awaiting trial should be immediately released. Curran's advocacy had saved 16 men from the scaffold. The last case I want to refer to is one of his most publicised cases, but not a political case, where he was acting for the plaintiff, the Reverend Charles Massy, in a claim for damages for criminal conversation against the Marquess of Headfort, who had seduced the pastor's 24- year old wife and had run away with her on Christmas Day, when the clergyman was giving a sermon in church. The defence, that the parson had connived in his wife's adultery, failed utterly as the witness called by the Marquess in support of this contention was exposed by Curran as an unsavoury character, including a description of a blackleg, a swindler and a knave.

37. Curran's closing speech, which was read by Queen Caroline and reduced her to tears, was described by Thomas Davis as "beyond comparison, the most persuasive ever uttered in a case not involving national interests or public passions. He made it a great contest between virtue and vice. The safety of the juror's family, the character of the country, the fate of society itself seemed to depend upon their making an example of this hoary criminal."

38. But the extent to which the wife was regarded in society as having disgraced herself irredeemably may be seen from the description that Curran gave about her:

> "Alas, gentlemen, she is no longer worth anything -- faded, degraded and disgraced, she is worth less than nothing! But it is for the honour, the hope, the expectation, the tenderness and the comforts that have been blasted by the defendant, and have fled forever that you are to remunerate the plaintiff by the punishment of the defendant. It is not her present value you are asked to weigh, but it is her value at that time when she sat basking in her husband's love, with the



> blessings of heaven upon her head, and its purity in her heart -- when she sat among her family and administered the morality of the parental board. Estimate that past value, compare it with its present deplorable diminution, and it may lead you to form some judgment of the severity of the injury and the requisite extent of the compensation."

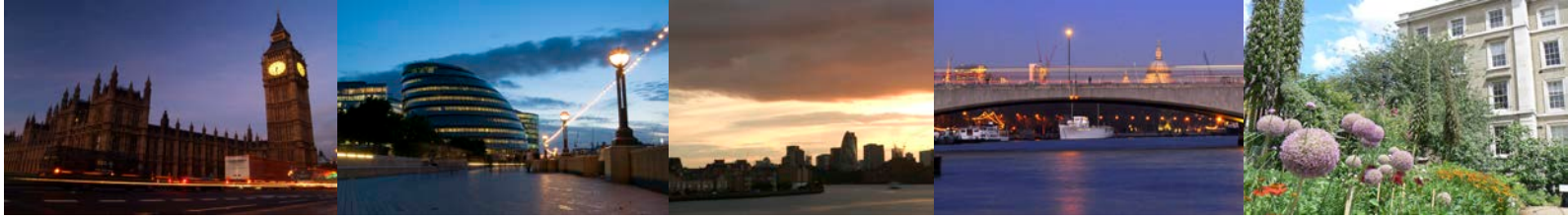
39. He reserved particular invective for the Marquess, who Curran disliked personally:

> "He paraded his despicable prize in his own carriage, with his own retinue, his own servants -- this veteran Paris hawked his enamoured Helen from this western quarter of the island to a seaport in the eastern, crowned with the acclamation of a senseless and grinning rabble, glorying and delighting, no doubt, in the leering and scoffing admiration of grooms and ostlers and waiters as he passed."

40. Never blessed with good health, Curran finally accepted reluctantly an offer of the position of Master of the Rolls in Ireland. He made very few public appearances and died in 1817. Years later, one of his friends, the poet Lord Byron, who said Curran talked more poetry than he had ever seen written, wrote of him as follows:

> "Curran i s the man who struck me the most, such imagination. There was never anything like it that I ever saw or heard of. His published life, his published speeches, give you no idea of the man, none at all. He was a machine of the imagination."

Thank you.



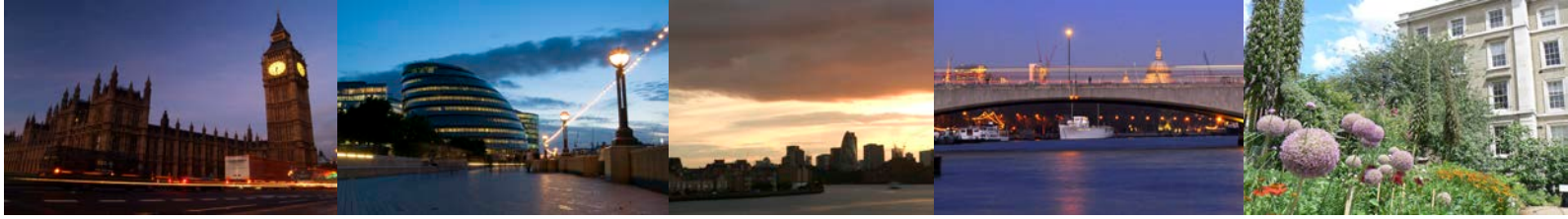
MR. BELOFF

1. MR BELOFF: Frederick Edwin Smith, who became both the youngest Attorney General and the youngest Lord Chancellor in English history, and the Earl of Birkenhead, was nonetheless known throughout his lifetime only by his initials, FE. And not only known, but well-known. One lesson that one can learn from his career is that the profession of law can be a ladder for the ambitious, an avenue to the glittering prizes of which he memorably spoke to a student audience in his later life.

2. The phrase "from log cabin to White House" captures the ideology of aspiration. Of FE Smith, it could be said, in a similar phrase, that he went from the Wirral to the Woolsack. He was not born with a silver spoon in his mouth, though he shared the propensity of many modern politicians to exaggerate the humbleness of his origins. But nonetheless, he was right to choose as his motto "Faber mea fortuni". "Faber" means workman in hard materials, more particularly smith, and "mea fortuni" I suspect I do not need to translate: author of his own good fortune.

3. I mention by a sidewind that one shouldn't assume in these days a knowledge of Latin. Exactly a week ago, I was appearing before a body known as the Septemviri, which are the supreme appellate tribunal of the University of Cambridge, chaired by none other than a former Lord Chancellor himself. Cambridge's reputation, such as it is, for classical scholarship, took a battering when I discovered that of the Septemviri, there were only six, and of those six, two were women.

4. F E, perhaps more prudently, chose to go to Oxford, where he won an open scholarship, and he achieved the coveted double distinction of the presidency of the Oxford Union and first class honours, on the back of work which he crammed in, in a manner not



unusual even to the modern student, a mere six months before his final examinations.

5. He also won the vinerian scholarship, the most prestigious scholarship open to lawyers at the university, defeating a rival of the distinction of William Holdsworth, an author, as one knows, of the multi-volume History of English Law, and he became for a short time a don or tutor at Merton College, which served him to secure a solid foundation in academic law, which would be put to good purpose in later life.

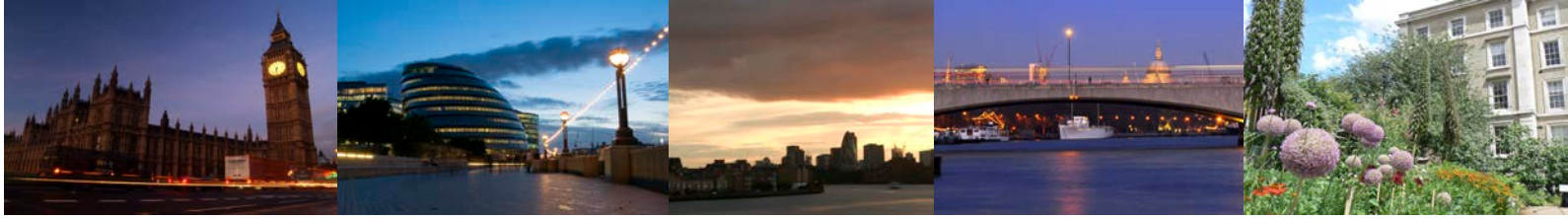
6. While at Oxford, and still a student, he unusually defended himself before a bench of Oxford lay magistrates. He was charged with assault and obstruction of a police officer in the execution of his duty, arising out of an incident during the visit to the university of the then Prince of Wales.

7. He won the case, which proves it's not always the situation that he who is his own lawyer has a fool for a client.

8. He was called to the Bar by Gray's Inn in 1894, coming equal first in his Bar finals. He was an early star on the Northern Circuit. His practice ranged widely. He earned regular money from the delightfully named but now obsolete Brewster Sessions, in which he procured licences to sell alcohol for his various clients.

9. He took advantage of the propensity of solicitors in Liverpool to engage Liverpool counsel, even for cases in London, and he appeared for the appellant in what was then the leading case on the right of public meeting, Wise v Dunning, and although he lost the appeal, the then Lord Chief Justice wrote him a note of congratulations which he promptly framed and hung on his chambers wall. It can fairly be said that modesty was never his strongest suit.

10. He was wise in one way. Appearing in a County Court case, he paid a great



compliment to the other side's solicitors, who promptly briefed him in litigation that went all the way to the House of Lords and lasted for several years. It was, in an aromatic phrase of a Liverpool silk of my youth, a dripping roast.

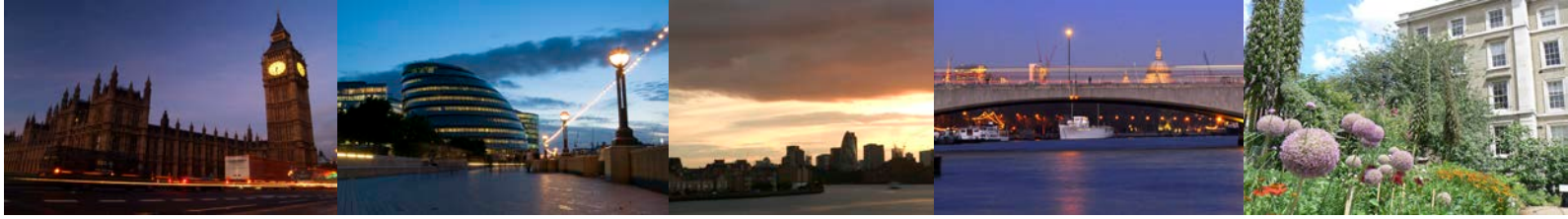
11. Once elected a Member of Parliament in '96, he moved to London, and he indulged a career in both politics and law at the same time, a possibility which is effectively denied to the modern generation, since the timetabling of Commons and courts of law is now simultaneous rather than, as it used to be, sequential.

12. The nature of his practice was quite astonishing. According to his most recent biographer, Wright, by reference to the Times Law Reports, which contained far more information about law than they do today, he was continuously busy in the courts: divorce suits, contested wills, complicated commercial disputes, libel actions, the occasional murder.

13. In our age of specialisation, that seems an astonishing range. Sometimes one could say he was guilty of overstretch. One of his contemporaries in a memoire wrote: I have never ceased to marvel of the breathtaking technique of fashionable advocates of the day, FE Smith for one, who manage to appear in various cases simultaneously in different courts.

14. At the end of 1910, there was a wave of elevations to the High Court bench from the commercial, criminal and special jury courts, and two of his great rivals and contemporaries, Rufus Isaacs, subsequently Lord Chief Justice, and John Simon, subsequently Lord Chancellor, both became law officers, leaving a gap in the front rank of the profession which FE Smith nimbly filled.

15. A subsequent permanent secretary to the Lord Chancellor's Department wrote in a memoire, "By 1914, he was in the front rank of advocates and was making an income which



was, by the standards of those days, prodigious", while adding the somewhat censorious words, "He was also spending as much as he earned".

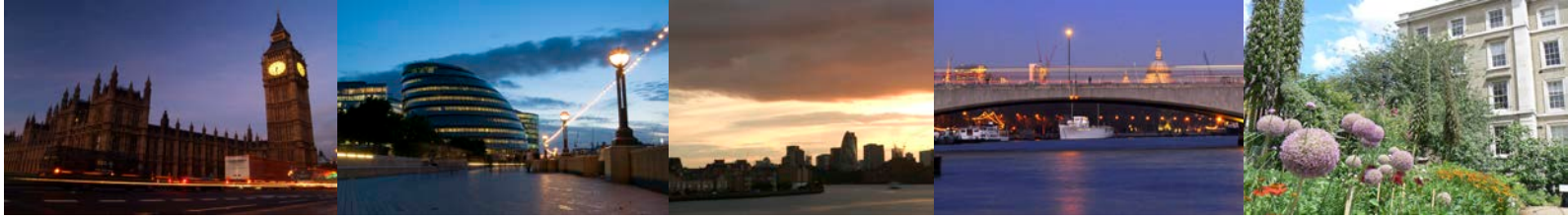
16. He gave brief wartime service during the First World War and never thereafter returned to private practice, being first appointed Solicitor General, and then Attorney General. Once a law officer, the nature of his practice became shaped by the demands of the office itself. He led for the Crown in many cases in the prize courts. Among his leading cases in that jurisdiction was The Ophelia, concerned with whether a German hospital ship had been lawfully taken by forfeiting her immunity from seizure through her involvement in intelligence gathering.

17. But his most celebrated appearance was, of course, as the lead prosecutor in the trial of Roger Casement in 1916. Casement faced a charge of high treason as a former member of the British consular service who had used a German aide to promote the Irish cause against the British.

18. I commend his opening to you. It is barely ten pages in length, but every word is weighty, and he ends vividly, and in a phraseology still attractive even to the modern ear:

19. "The prisoner, blinded by hatred to this country, as malignant in quality as it was sudden in origin, has played a desperate hazard. He played it and he has lost it, and today the forfeit is claimed."

20. In another case, again, illustrating the range of his abilities, the Rhodesian Land case, which lasted for 14 days in the Privy Council, he secured for the Crown vast tracts of the then colony against the triple claims of the British South Africa Company, the white settlers, and the indigenous population. Because he was elevated to the Woolsack, he



practised at the Bar for less than two decades, mainly before juries, before the attrition of that mode of trial in civil and even more recently criminal cases, which took place over the succeeding century.

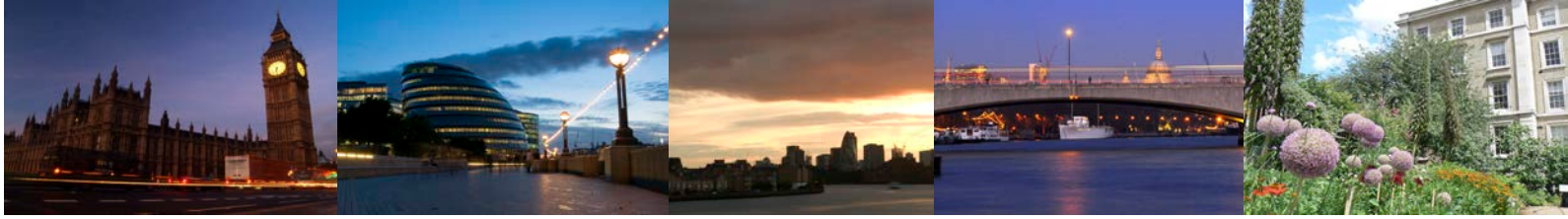
21. His most recent biographer asks the question, how highly did he actually rate as a barrister? And he answered it as follows:

22. "A part of FE's success lay in his physical appearance; the figure he cut in court, the style which he brought to the leading role. On the platform, he gave the impression of vitality and physical strength. In court, it was more his stillness and icy control which compelled attention."

23. He continued "His second asset was his voice", and we have a contemporary record from the Daily Telegraph, reporting on a trial:

24. "He speaks [the reporter wrote] deliberately with studied calmness and so low at times as to strain the ears of the more distant listeners. When he has a point to make, there is a sudden departure from this quiet conversational manner. He then lifts his voice in crescendo passages and finishes with a blow to the table which startles the unwary. Delivered of his point, he subsides at once, as though nothing had happened. His whole speech suggests a tide with intermittent, long separated waves as contrasted with the tumultuous current of his predecessor, Marshall Hall."

25. N ow, this session is meant to give you practical lessons from the past, but both those major assets enjoyed by FE are genetic. The lessons we can learn are limited. We all have to make the best we can, and John Curran, as we have heard, overcame apparently physical disabilities and speech disabilities to become so formidable an advocate as we have



just heard.

26. One of the combinations of these strengths was, as Campbell, his biographer, puts it, his power of persuasion, particularly over juries. Judges tended to be then, as they are now, a little less susceptible to advocacy.

27. The conclusion of the analysis of FE's qualities by his biographer was this: he said his essential attribute, on which his reputation really rested, was his exceptional clarity of mind, and the capacity of going straight to the heart of the case.

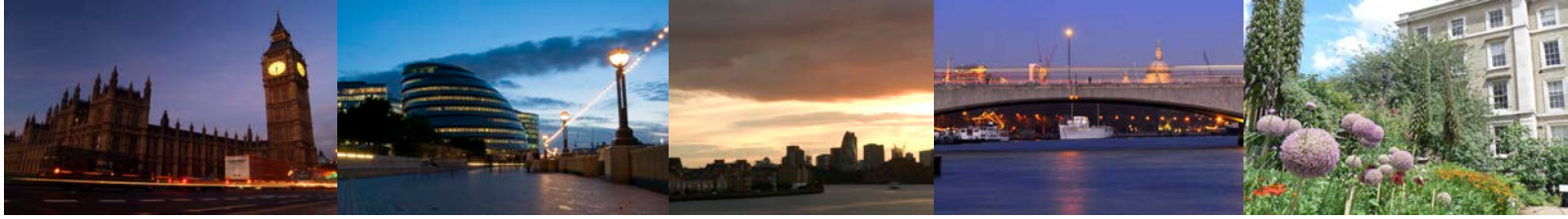
28. It is my view, no doubt shared by many of you, that an appreciation of what is truly relevant in a particular case is a highly important, if not the most important quality that an advocate can enjoy. There may not be merely one point in a case, but there is certainly one point more important than others, and it is the duty of the advocate to identify precisely what it is.

29. Now, of course, what FE Smith is perhaps best known for is his wit, which often veered close to rudeness. We heard from Lord Sumption that Erskine was apt to mix contempt with flattery. FE Smith never indulged in the latter of those two exercises. One judge, Judge Willis, was a particular butt. During a fierce interchange, that judge asked:

30. "What do you think I am on the bench for, Mr Smith?" To which FE replied: "It is not for me to attempt to fathom the inscrutable workings of Providence."

31. After yet another passage of increasingly vituperative repartee between the pair, Mr Justice Willis said:

"You are an extremely offensive young man."



To which FE replied:

> "As a matter of fact, we both are. The difference between us is that I am trying to be, and you just can't help it."

And then the most famous interchange, the butt was another judge, who unwisely said to FE:

> "Mr Smith, I have listened to you for several hours, and I am none the wiser."

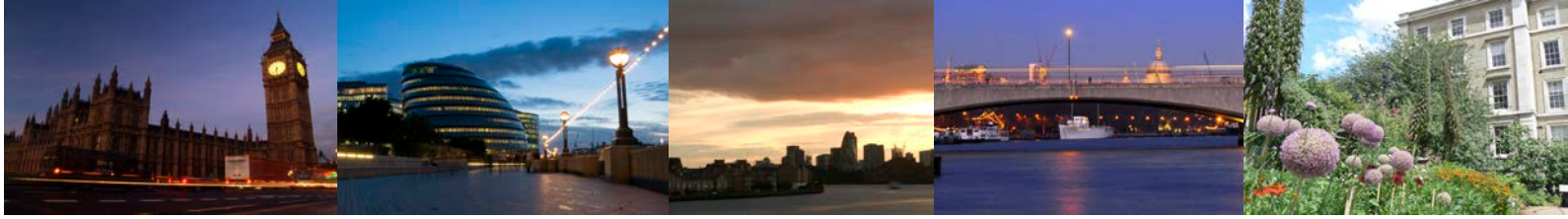
To which FE replied spontaneously:

> "No, my Lord, but you are considerably better informed."

FE Smith was not just witty, but he was wily. There is a tale of his forensic cunning, when he appeared for a bus company in a personal injury claim. The boy plaintiff claimed that as a result of an injury sustained in a collision, he could not lift his arm above shoulder height. FE asked him to demonstrate the disability, which he did. FE then asked him, how high he could lift it before the accident, and the boy's arm shot up. In the week of Wimbledon, I hope I may be forgiven for saying: game, set and match.

32. On occasions, he overreached himself. There is a reported case, a libel case, Greenlands v The London Association for the Protection of Trade, in which the plaintiff was awarded damages of £1,000, when FE Smith was representing the defendant. The damages were set aside, the presiding judge saying, "By no formula or manipulation can £1,000 be got at. For any damage really done, £100 was quite enough. Double for the sympathy, double it again for the jury's sense of the defendant's conduct, and again for their sense of FE Smith's, the product is only £800".

33. A t the start of his career, and indeed throughout it, he cultivated an air of effortless superiority, but we know, from the records, that this was partly the result of great and



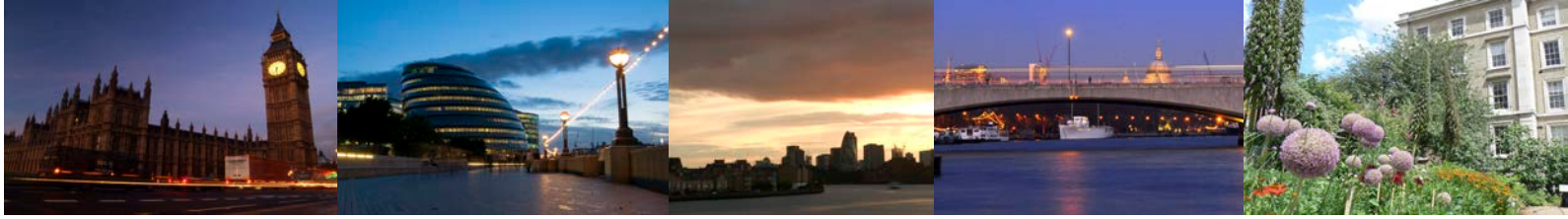
superior effort. In one of his early cases, where he represented the swindler, Goudie, who cost the Bank of Liverpool £150,000, his speech was written out, revised, rewritten and entirely committed to memory. We know this because a clerk to a fellow or co-counsel in the case picked up his notebook when they were going back to the Temple. It's a very important lesson one might learn to segregate one's papers from those not only from the other side but even from one's allies.

34. But the point I would make most about FE Smith is his extraordinary energy. His son, who wrote a filial biography, said this:

35. "Every night, FE Smith sat up into the small hours of the morning. In the light of day, he was the most active barrister in England, and was making frequently and carefully mediated contributions to the House of Commons, ranging from platform to platform, all over the country, freely using his pen, and regularly riding and hunting. His stamina was almost superhuman."

36. And a lesson that we can learn is that our profession is indeed a physical one, as well as a mental one. In the same way as for footballers, it is important to have the mental strength as well as the physical strength. The only difference is that the balance between the two activities may, of course, be somewhat different.

37. Can I just, before concluding, mention something which is a footnote to Lord Sumption's observation and scepticism about the cab rank rule. FE was devoted to the cab rank rule, and he wrote a remarkable letter to The Times after his fellow Conservative Members of Parliament criticised his appearance for the Liberal Rufus Isaacs in the Marconi case and its sequel, in which Rufus Isaacs' brother was accused of a range of financial vices.



38. This is what he said to the readership:

39. "Political issues constantly present themselves for decision in the law courts. In the overwhelming majority of cases, juries have done their duty indifferently between the parties. How long do you think this state of affairs would endure if every Conservative case is presented by Conservative advocates and resisted by Liberal advocates?"

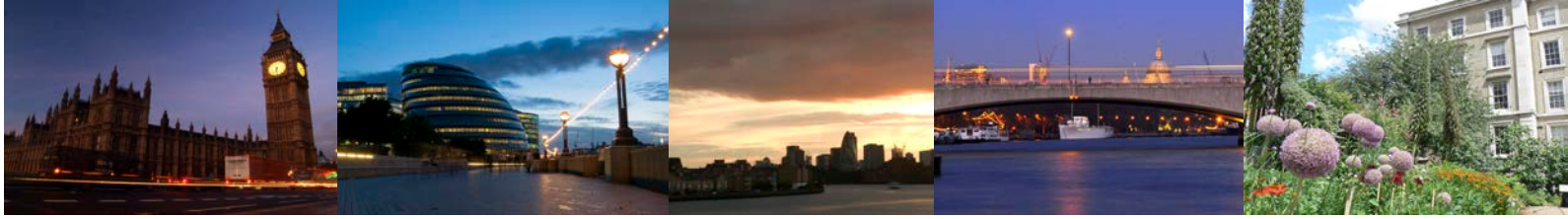
40. And he referred to the cab rank rule as being the function which every civilised country in the world has assigned to the advocate.

41. F E burnt himself out and died at the age of 57. He was an advocate in the golden age of English advocacy, rivalling such masters of the art as Simon, Rufus Isaacs, Carson, of course, and Marshall Hall. His was an age when the names of great Queen's Counsel bulked as large in the public eye as the names of star footballers and indeed minor celebrities do today, when forensic skills and acuity of intellect allowed advocates to be prominent in a whole range of disciplines, and not just, as they are now required to be, with few exceptions, focused in a few, and an age indeed when interestingly, these spheres of law and politics, of which Lord Sumption has also spoken, had a porous boundary.

42. The only feature that I share in my own career with my subject is that we were both treasurers of Gray's Inn, though in his case, on three separate occasions.

43. So if our chairman will forgive me, I want to leave you with FE Smith's words, made in an after dinner speech in Gray's Inn hall. What he said was this:

"A Gray's Inn man is better than any other man, and no damned nonsense about other things being equal."



Saturday 30 June 2012

14:15 – 15:30 Advocacy against the odds

Speaker biographies

Sir Sydney Kentridge KCMG QC

Sir Sydney Kentridge KCMG QC is a prominent South African lawyer and member of the English Bar. He played a leading part in a number of the most significant political trials in apartheid-era South Africa, including the Stephen Biko inquest in 1977.

In 1949 Kentridge was admitted as an advocate of the Supreme Court of South Africa, being appointed a senior counsel in 1965. He became a leading defence lawyer in political trials in South Africa, with some of his major cases including the Treason Trial (1958–1961) and the newspaper Prisons Trial (1968–1969).

He has practised at the English Bar since 1977, and was appointed Queen's Counsel in 1984. He became a Bencher of Lincoln's Inn in 1985. He is a member of Brick Court Chambers, a leading commercial set. Kentridge has furthermore served as a judge in a number of jurisdictions, sitting as a Judge of Appeal in Botswana (1981–1989), as a Judge of the Courts of Appeal of Jersey and Guernsey (1988–1992) and as an Acting Justice of the South African Constitutional Court (1995–1996).

Asma Jahangir

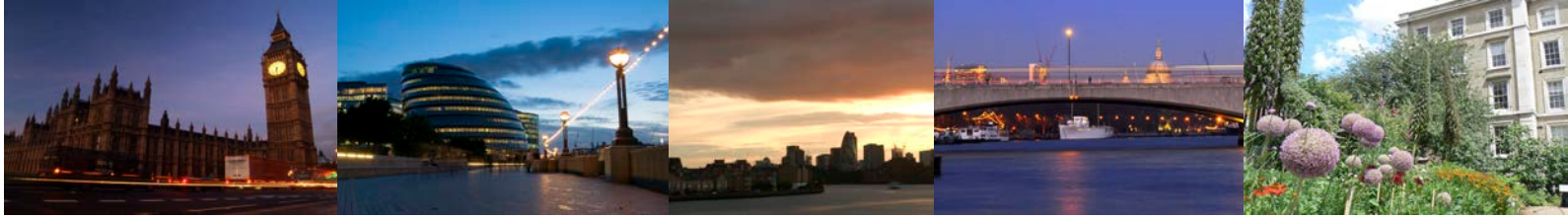
Asma Jahangir is the elected President of the Supreme Court Bar Association of Pakistan in 2011 and was twice elected as Chairperson of the Human Rights Commission of Pakistan. Asma is also a Director of the AGHS Legal Aid Cell, which provides free legal assistance to the needy and was instrumental in the formation of the Punjab Women Lawyers Association in 1980 and the Women Action Forum in 1985.

She was placed under house arrest and later imprisoned for participating in the movement to restore political and fundamental rights under the military regime in 1983.

She has received honorary Doctor of Law degrees from the University of St. Gallen, Switzerland, Queen's University, Canada and Amherst College, USA. She has been the recipient of a number of international and national awards, among them the Ramon Magsaysay Award in 1995.

In 1998, Asma was appointed United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary execution of the Commission on Human Rights and in 2004 she was appointed United Nations Special Rapporteur on Freedom of Religion or Belief of the Council of Human Rights.

She served as a leading figure in the campaign waged by the women activists against the promulgation of the controversial Hadood Ordinance and draft law on evidence. Moreover, she has defended cases of discrimination against religious minorities, women and children.



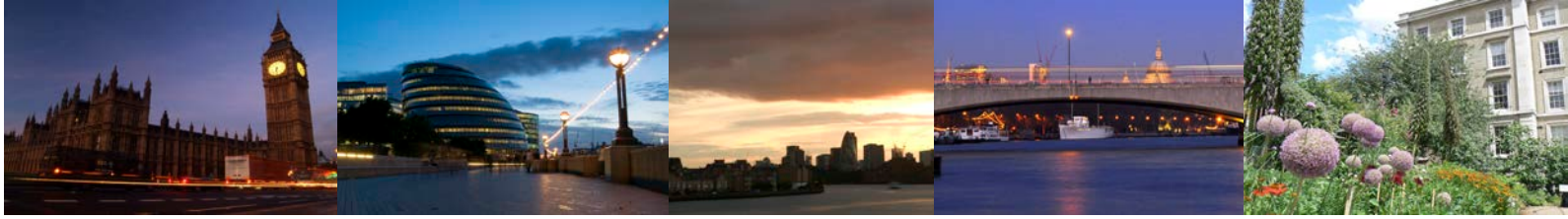
SIR SYDNEY KENTRIDGE

1. SIR SYDNEY KENTRIDGE: Thank you for those kind words. I am only sorry I won't be present to hear what is said about me.

2. Now, the subject this afternoon is advocacy against the odds. Well, that has many meanings, "against the odds". It may simply be that you are up before a hostile and unfair and irritable judge, and you have got to stand up to him. That is one side of it. On the other side of it, on the far side, you have the sort of experience of some of the people who are going to talk to us this afternoon, where being an advocate for a particular client or a particular cause can carry with it a threat not only to your practice, your popularity, but a threat to life and liberty. We will hear from people today who have risked their lives and liberty in that way.

3. Now, the advocacy against the odds, and the problems that it may bring, also have certain professional and ethical problems that go with them. Sometimes, as I said, you may simply have a hostile or unpleasant judge, but there are cases where the odds are so heavily weighted against you in a court that you may wonder whether it's worthwhile to appear or not, whether you can still do your job as an advocate against the odds.

4. Now, as you might have seen in the programme, in addition to being Chair, I have been asked to say something about the experience of advocacy under apartheid in South Africa. I am not going to make a speech about it, but I am just going to refer to one of the ethical problems that have been raised by certain people with regard to advocacy in those conditions.

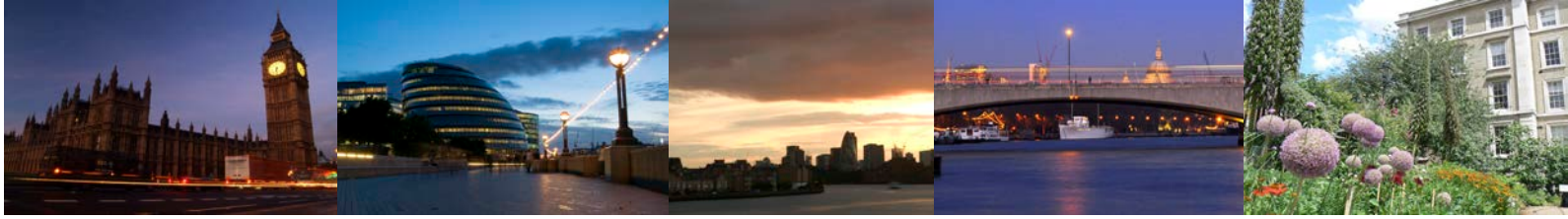


5. In South Africa, under apartheid, it was a very strange situation. It was against the odds in many cases, criminal and civil, where the government was on the other side, for a number of reasons. One of them was that the bench had to a large extent been packed with political appointees. The second was that there was a series of Acts of Parliament under which the law as we had understood it had been changed: onus of proof moved to the defendants, presumptions in favour of prosecutions, and so on.

6. But there were still judges who were not political appointments, or even political appointees, who were fair, possibly because in their time at the Bar they had absorbed the culture of independence, so in many cases, although the odds were against you, you thought you had a chance, that sometimes you could win.

7. Now, there were critics outside South Africa, and academic critics in particular, who said that we at the Bar in South Africa who appeared in these political cases against the government, ought not to be doing that, and the reason that they gave was that by appearing in these cases, we were giving a veneer of respectability to what was actually a distorted, unfair and unjust system. They seriously suggested that we should simply refuse to do those cases.

8. Well, none of us that I know of took any notice of that. We rather thought that it was the people at the sharp end, the accused in the criminal cases, in the terrorist cases, and so on, who had the first choice, and oddly enough, no doubt because they were not as politically advanced as the critics, they on the whole prepared to take the chance of being acquitted rather than convicted. They preferred us to carry on.



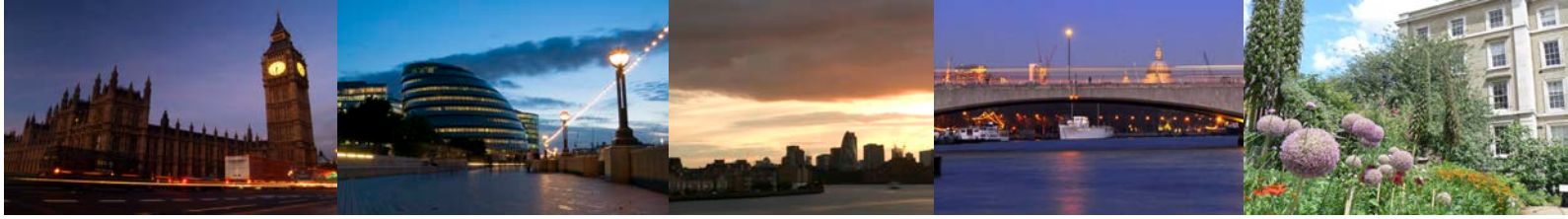
9. Now, I am not going to make a speech about it, but I am just going to tell you of the one case which I ever knew in which the accused did not want to be defended by advocates. A number of young Africans had come across the border from Swaziland. They were part of the African National Congress and they had come there in order to commit sabotage against police stations. As so often happened, they were picked up just when they had got over the border, and the case against them was very, very strong, and many of them had confessed, some voluntarily, some involuntarily, and anyway, they came before a judge in the town.

10. They had an advocate, but they decided they didn't want him and they sacked him. They said they didn't recognise the jurisdiction of the court. So when the judge came in, they were undefended. And they had decided to take no part in the proceedings. So when the judge came in every morning, they just stood in the dock and they sang freedom songs, and then when the evidence came along, they didn't bother with the witnesses, they just turned their back on the judge, and they simply chatted to each other, and shouted to people in the gallery.

11. Now, the judge imposed several sentences for contempt of court, but when you are on trial for an offence which had a minimum sentence of five years and a maximum sentence of death, well, they weren't very, very disturbed by being given three months for contempt of court.

12. However, at the end of the case, as expected, they were all convicted, and they were sentenced to various terms of imprisonment, except for one of them, who was sentenced to death.

13. Now, at that stage, notwithstanding not recognising the jurisdiction of the court, he decided that he would like to go on appeal, and I was briefed to take the case on appeal, and I



looked at the record, and I saw that although the judge had sentenced him to death as the ringleader of the conspiracy to commit sabotage, that's not what the evidence showed at all. He was not the general or the colonel, he was the corporal in the outfit. But what he had been was the ringleader of the contempt of court; he was the main voice in the singing.

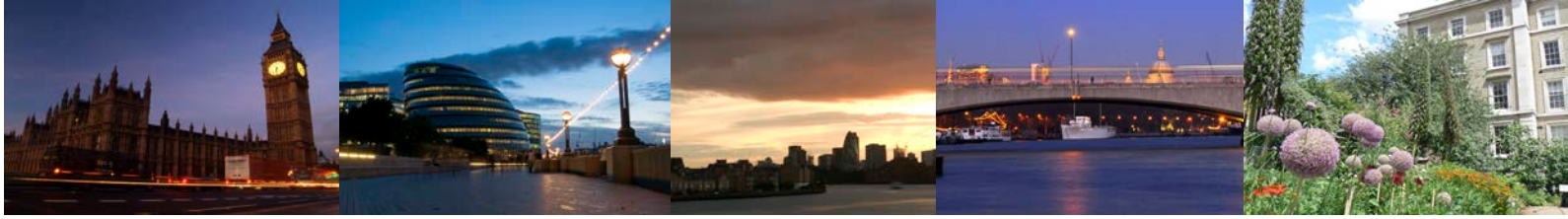
14. Well, we went to the Appeal Court, and the Appeal Court at once saw it just the way that I did, that he had been the ringleader of the contempt, but not of the conspiracy, and the court agreed that the death penalty was not an appropriate sentence for contempt of court, so the death sentence was set aside, and he had a term of imprisonment.

15. Well, I wondered after that case what the critics would say about it. I was pretty sure what their view would be. The view would be that someone with a more sophisticated appreciation of the political issues at stake would not have gone on appeal, and he would have faced the alternative, however stark that might have been. Well, you can form your own opinions on that.

16. So much for the anecdote. We have got three speakers today on the subject, and they are all peculiarly well-qualified. They are Mr Mark Mulholland, chairman of the Northern Ireland Bar; Mrs Asma Jahangir, who is a doughty practitioner from Pakistan, and Mr Tino Bere, from Zimbabwe.

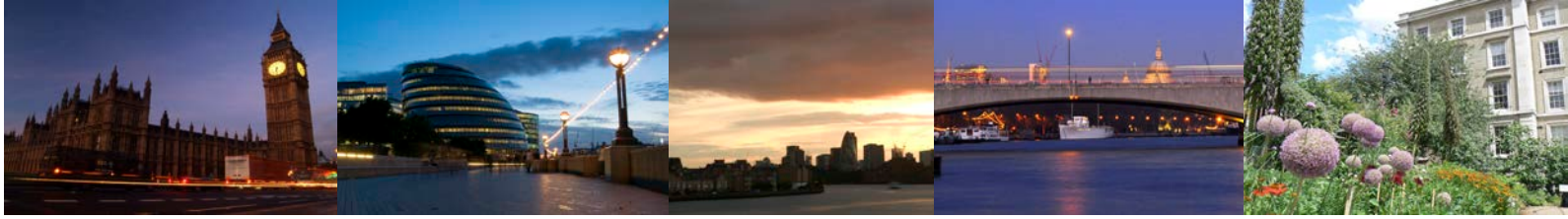
17. Between them, they have all faced as heavy odds as I think any advocate can face, and most of us here can look on them and listen to them only with admiration mixed with awe.

18. I am going to introduce them as they come. The first one, as I have said, is Mr Mark Mulholland. He has been an advocate in Northern Ireland throughout the years of what are



euphemistically called the Troubles, a situation which I don't need to describe to you, even if I were competent to do it, but in which lawyers were the subject not only of vituperation, but often of assault and even threats of death, threats which were sometimes carried out. One had a situation there where at times, people concerned in the law, from judges downward, had to have armed guards to protect them.

19. Well, I am going to ask Mr Mulholland to speak to us first about his experiences of advocacy against the odds in Northern Ireland.



MARK MULHOLLAND

1. M ARK MULHOLLAND: Ladies and gentlemen, Sir Sydney, I do feel it is only right and proper that I begin with a confession about timing, which is so precious today. In the early hours of this morning, my pupil master insisted on hearing and timing my talk. So having cleared out my minibar -- for fortitude, of course – he promptly fell asleep halfway through. And then when I stopped, he sprang back to life, declaring, "Great, well within your one hour slot". So I will do my best to remain short and precise.

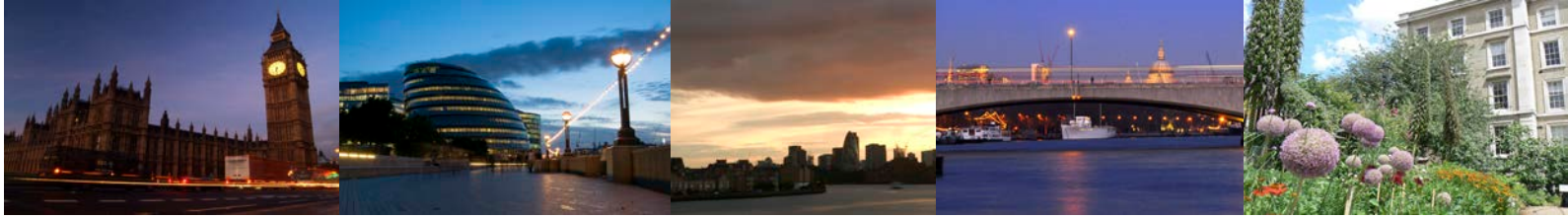
2. Perhaps with a degree of poignancy, as I crossed to the Supreme Court yesterday, through Parliament Square, I looked up at the statue of Winston Churchill, and, of course, it was Churchill who famously contrasted the vast changes in Europe after the First World War with the entrenched religious divide which remained in Northern Ireland. As he put it:

3. "The deluge subsides, and the waters fall short. We see again the dreary steeples of Fermanagh and Tyrone emerging once again. The integrity of their quarrel is one of the few institutions that has been unaltered in the cataclysm which has swept the world."

4. Born in 1969, at what has now become known as the beginning of the Troubles, "the integrity of their quarrel" was something that from an early age I personally was all too painfully aware of. Before starting primary school, my family had experienced an arson attack on our home, we had lost a close family member, and I personally as a child had been caught up i n a boobytrap bomb device which tragically killed a young British soldier.

5. Northern Ireland at that time was a place of paradox, heartbreak and bitter irony on a par with a Greek tragedy.

6. I will give you an example. My Uncle John, a civil servant, walking down the Falls



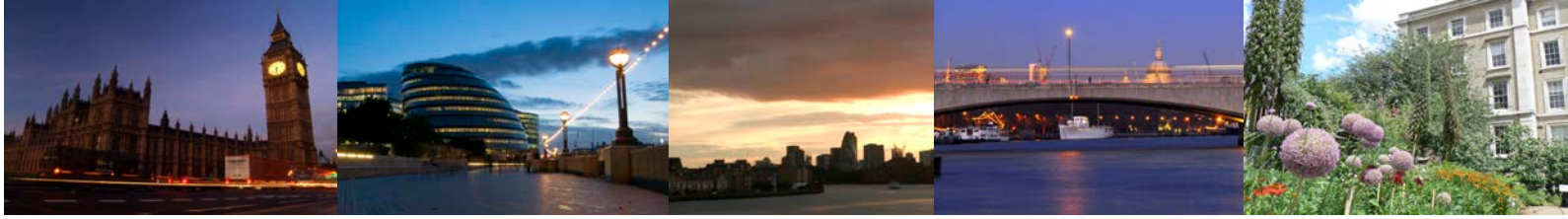
Road in Belfast, a staunchly Republican, Nationalist area, he was murdered by Loyalists; five bullets. The claim of responsibility ended from a Loyalist paramilitary group, "God Bless Ulster", an apparent tribute to their loyalty to the British Crown. His brother, ten years later, Hugh, in the County of Fermanagh, a serving police officer, as he left mass one morning, was shot dead by the IRA. Two families, two tragedies, and neither advanced any cause one iota.

7. On starting primary school, we moved to Derry, or should I say Londonderry, but then again, we don't know, because we can't make up our minds, because we're divided over the name. But in the early 1970s, Derry was still recovering from the events of Bloody Sunday, when 13 civil rights activists were shot dead by paratroopers.

8. Recognition must be given to all the advocates who appeared at the Saville Inquiry. And amongst those -- and I know they are at the conference -- Edwin Glasgow, Christopher Clarke and Brian Kennedy -- who is my pupil master, by the way, I haven't forgiven him yet. But their unstinting work on justice resulted in the Prime Minister, David Cameron, recently appearing before the House of Commons and stating: unjustifiable. For that, on behalf of the Government, and indeed our country, I am deeply sorry."

9. On the eve of the Queen's visit this week to Northern Ireland, I proudly led the tribute on behalf of my brethren to my grandfather at the Bar, Mr Justice Richard McLaughlin, on what was his retirement from both the Bar and bench. Spanning over four decades, McLaughlin J's career perfectly captures our theme here of advocacy against the odds.

10. Rick McLaughlin came from modest beginnings. He was reared in a two up/two down house in North Belfast, in an area called the Ardoyne, synonymous with sectarian strife and trouble to this very day.

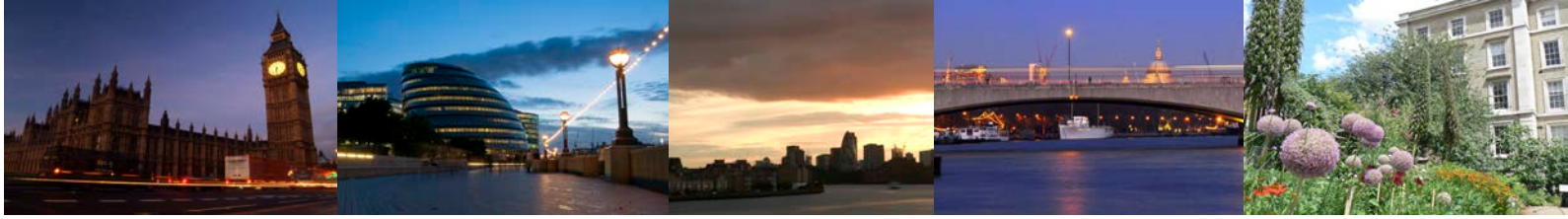


11. H e was called to the Bar in 1971, and he began his legal career against a backdrop of unprecedented violence by both Loyalists and IRA Republican paramilitaries. Rick's very first case was in the High Court, before, as he was then, Mr Justice Gibson, himself in 1984 murdered by a bomb, and in that first case, Rick successfully challenged the operation of what was then the Special Powers Act. Under the Special Powers Act, any man or woman could be interned without trial, simply based upon, and I quote:

> "Suspicion of acting in any manner prejudicial to the preservation of peace and the maintenance of order."

12. Hundreds, and then some several thousands, were interned on the premise of that piece of legislation. Mr Justice McLaughlin, as a young junior, challenged that aspect of the legislation, which resulted in access to legal representation, and an order from the court that it was essential the suspect would know the substance of the suspicion against him or her. In today's world, pretty fundamental rights, you may think.

13. But to go back to the early 1970s, over the next 12 months we saw in Northern Ireland what has now been deemed the worst civil unrest of all our decades of Troubles. We had 10,628 shooting incidents, we had 1,853 bombs or bombing incidents, and tragically, the loss of no less than 467 lives in one year. It was as a direct consequence of this that Lord Diplock recommended what he determined as using extrajudicial processes. In effect, the procedural safeguards and judicial discretion concerning the admissibility of confessions was suspended, jury trials for what are classified as scheduled offences, for terrorist type offences, were suspended, and judges from thereon would sit alone without a jury to determine the guilt or innocence of an accused person, in what can only be classified as the most serious criminal trials to come before our courts in Northern Ireland.



14. It was undoubtedly one of the most significant departures from our common law system, and the Bar in Northern Ireland rose to the challenge. It adapted accordingly not only in terms of how it presented its cases, but with an encyclopaedic knowledge and forensic skill, both in relation to the rules of evidence and procedure.

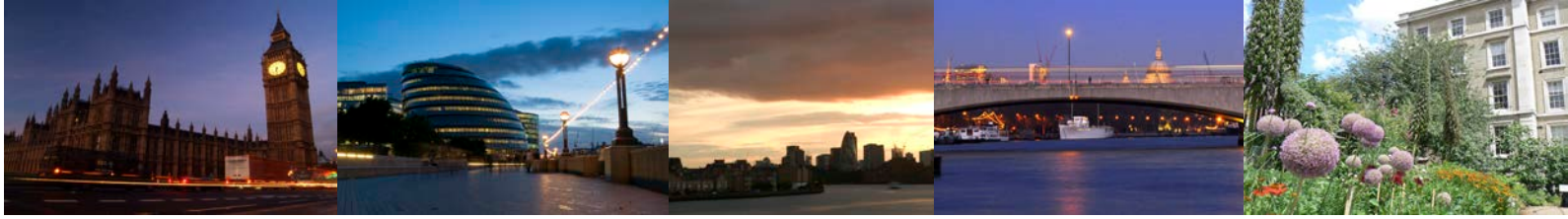
15. I should by way of footnote add that the temporary measure introduced under the Diplock system still exists to this very day.

16. The criminal Bar's basic sustenance at this time centred around what became classically known as "statement fights", where charges were grounded principally, if not exclusively, on confession evidence, normally obtained, it would be alleged at court, in circumstances of brutality, where coercion was the norm. By 1977, the then Secretary of State for Northern Ireland was written to by a number of solicitors who worked in this field in the following terms:

17. "Ill-treatment of suspects by police officers, with the object of obtaining confessions, is now common practice."

18. One case of note is a recent case to come before our own court of Criminal Appeal in Northern Ireland, R v McCartney and McDermott, both of whom were charged and convicted solely on confession evidence in the mid-1970s, in relation to membership of the IRA, and of murder.

19. In 2007, the CCRC reviewed that case and brought it back before our Court of Appeal, and in February of that year, the Court of Appeal in Northern Ireland stated that they had a distinct feeling of unease about the safety of the conviction, and thereby quashed it. Somewhat ironically, Raymond McCartney of the McCartney judgment is now the vice chair



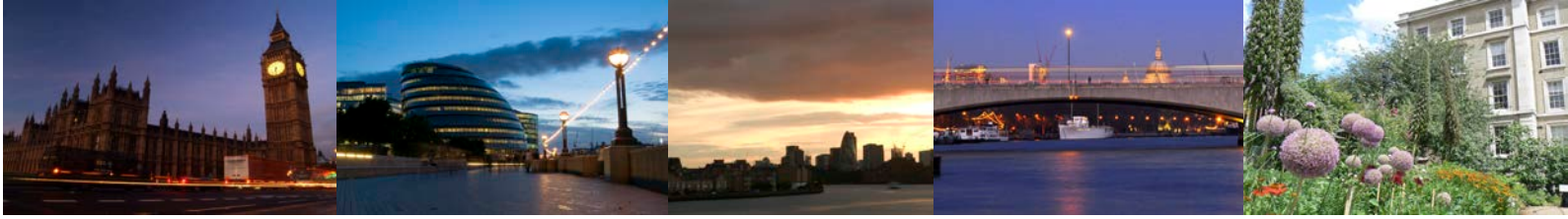
of the Justice Committee sitting in Stormont in Northern Ireland.

20. Amongst the other efforts deployed during this time to deal with and to curb terrorism, was the use of the "supergrass" system. You may find up to 30 defendants in the dock, one of whom comes forward and agrees to give Queen's evidence in return for immunity from prosecution, and in many ways gets into the witness box either to tell the truth, or, as it transpired in many instances, to settle old scores.

21. We had in Northern Ireland during this time the Bar library and barristers deployed in vast numbers where the sole witness in these cases, in what were classically called very high- profile cases going head to head with counsel before a judge sitting without a jury. Certainly there was no shortage of work, and the flying hours accumulated over those years placed the Bar in Northern Ireland in what can only be classed as an exceptional position in terms of the wealth of experience and knowledge.

22. But by the late 1980s, a marked decrease in the rates of the supergrass convictions, in many ways exposed by the rigours of our adversarial system, brought it to an end, and certainly by the 1990s, they became a thing of the past.

23. As a young barrister at that time in Belfast, I distinctly recall those days, in our fortified High Court building, which was also home to our judiciary, as well as the Bar. We had bombproof walls, we had barbed wire, we had armed guards, and we had the constant buzz of helicopters overhead, something we are all too familiar with in Belfast over the years, but I was somewhat out of kilter when I arrived yesterday to find a Chinook helicopter fly overhead.



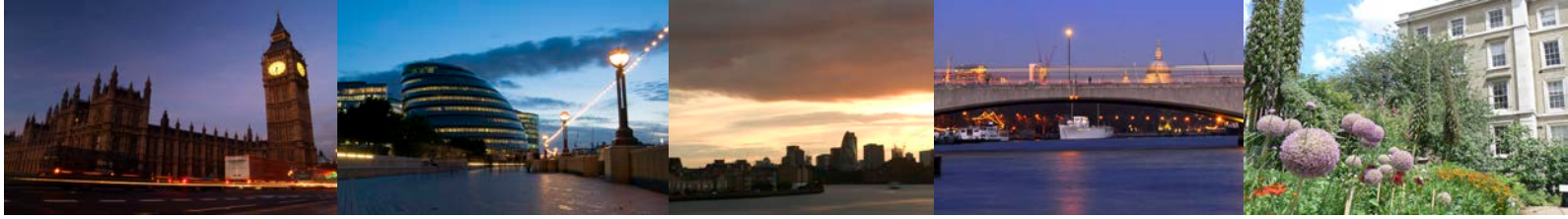
24. But certainly, during those days, we endured bomb explosions at the High Court, rocket attacks, threats, and as Sir Sydney has mentioned, both members of the Bar and judiciary required 24-hour surveillance and protection. Health and safety at work, as you can imagine, took on a whole new meaning.

25. But it was against this backdrop that the Bar in Northern Ireland conducted their daily business objectively, independently and professionally, and certainly, contrary perhaps to Erskine's view, it was the expert representation of the diverse clientele that was underpinned by the fastidious operation of the cab rank rule that ensured justice was done, and every suspect and every accused was afforded the proper and true representation that was required.

26. McLaughlin J, in the course of his career, at both the junior and senior Bar, represented soldiers and UDR men at one end of the spectrum, IRA men at the other end of the spectrum, and somewhere in between, the widows of RUC men tragically killed. Personal views could play no part in the discharge of professional duties; far less would the Bar tolerate any division in relation to sectarianism or sectarian thought, and even through the worst of the Troubles, the independent Bar of Northern Ireland stood together in what can only be called a unified and collegiate fashion, representing all regardless of class, creed or religion.

27. As we moved into the 1990s (as I walked here this morning, I happened to notice the building at Canary Wharf), and whilst by the mid 1990s there was talk of peace and ceasefires, they were very short lived, with the detonation of a 3,000 pounds homemade explosive device in the banking area of London. That, in conjunction with sniper attacks in South Armagh on young soldiers, shattered any hope there was at that stage of peace.

28. I had the very good fortune at that time of working alongside Mr Philip Mooney QC,



and we defended those of what was known as the South Armagh sniper team, who had been responsible, allegedly, for those killings.

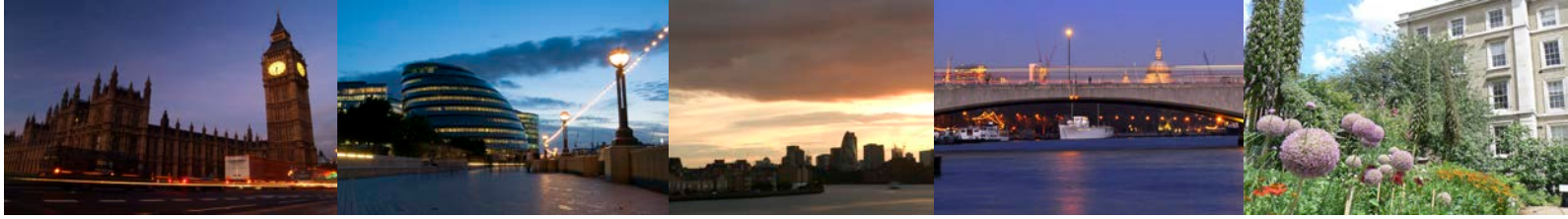
29. The most remarkable aspect of that was Buffalo Phil, as everyone knew him to be, was himself a former British soldier, representing the IRA.

30. About this time, I also had the opportunity to work with Rosemary Nelson. She had gained notoriety in a successful murderer case called R v Colin Duffy, where his conviction for the murder of a part-time soldier had been quashed by our Court of Appeal because the key witness, as it later transpired, was arrested for gun running on behalf of Loyalist paramilitaries. Tragically, the same notoriety that Rosemary had enjoyed gave rise to her assassination some few years later.

31. Amongst the cases she was involved in was that of Sam Marshall. Sam Marshall, on leaving Lurgan police station with two others, came under a hail of gunfire and was executed where he lay on the ground wounded by Loyalist gunmen.

32. Rosemary campaigned for an inquiry. I appeared last month before the coroner; 20 years on, an inquest has now been scheduled.

33. By the late 1990s, the Troubles seemed to be reaching an end, but in-between times, we still had bombs, we still had bullets, but we did have a power sharing government. We finally got the Good Friday Agreement in 1998, and tragically and poignantly, three weeks later we also had what has now become known as the Omagh bombing, killing 28 and injuring 250 people. In many ways, this simply added further impetus for all in Northern Ireland to push for peace, and a permanent peace, and perhaps as a backdrop to that, what has never been acknowledged, was the advocacy at work by members of the Bar who quietly and

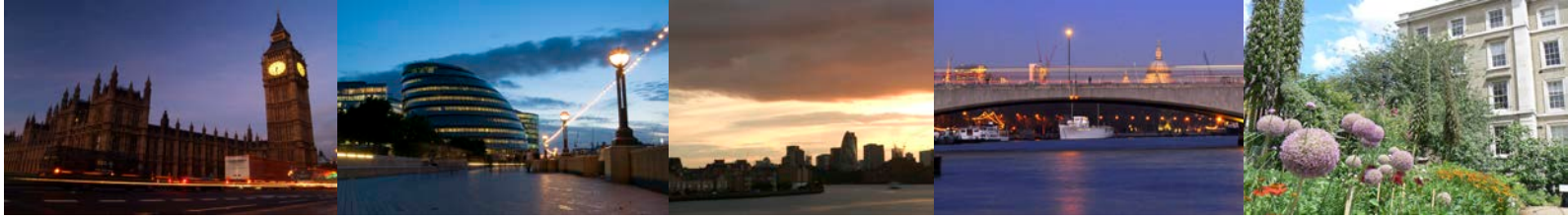


in different ways helped to move that process along.

34. There is no doubt about it that peace in Northern Ireland is still fragile. In 2009, two soldiers were murdered just before deploying -- or about to deploy to Afghanistan. I appeared in that case, and my client was acquitted. And the verdict of not guilty before the Diplock judge, as he was then, Mr Justice Hart, was indicative of his professional, dispassionate, independent thought process.

35. Duffy, my client, the same client who had previously been convicted and then had his conviction quashed in the earlier years of the Court of Appeal, had been refused bail, he had spent two years and nine months in custody, he had gone on to the Republican wing, where there was a dirty protest in operation over strip searching, and he took part in that. So every day for six weeks he appeared in court with a long beard, unwashed, surrounded by armed guards, and despite that notoriety, and despite the fact he was very well-known as being a prominent Republican, Mr Justice Hart, quite properly, dismissed the charges, the multiple charges of murder against him. Indicative, I would say, not only of the impartiality of the judiciary, through which we have managed in Northern Ireland to maintain successfully the rule of law.

36. By way of conclusion, the dreary steeples of Fermanagh and Tyrone referred to by Churchill again secured notoriety this very week. When the Queen visited Northern Ireland, she went to those dreary steeples of Fermanagh, Tyrone and Enniskillen. Symbolically, she crossed from the Protestant church, from a thanksgiving service on the left-hand side of the street, across to the Catholic church, on the right-hand side of the street. Unprecedented for a British monarch. The next day, she met Martin McGuiness, now our Deputy First Minister, a former IRA commander, and they shook hands. Unprecedented to the power of ten, plus,



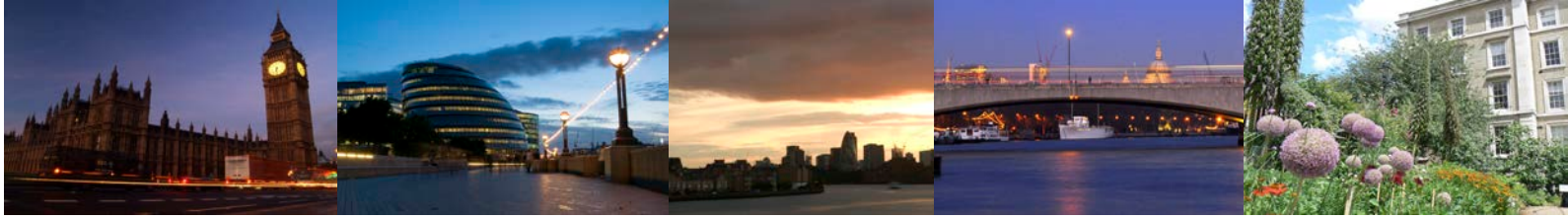
plus, plus.

37. The Troubles have largely now been consigned to history and as a society, Northern Ireland is moving forward. A great debt of gratitude is owed, not only to the members of the legal profession, but to the judiciary, because notwithstanding the professional pressures, the personal costs, and those who actually paid the ultimate price, the profession laboured and managed to maintain the rule of law, put quite simply, during the years of the Troubles, held the justice system together.

38. Yesterday evening we heard from Chief Justice French in the Supreme Court, and he cited the Iliad. I am going to try the Aeneid, where Virgil opined:

> "One day, it would be good to remember these things."

39. Perhaps I can add this: some day, it would be good to talk about these things. Perhaps that day is today. Thank you very much.



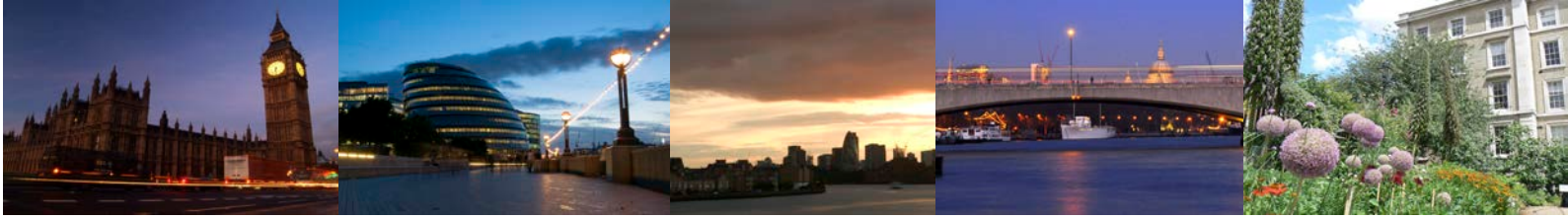
ASMA JAHANGIR

1. There was a time not long ago when many of us worked hard. We never lost our sense of humour and I hope we still have some, but we are seeing gradually the deterioration in our society. The areas of hope that we have vanish by and by. And one of the key reasons is that we have still not understood the basic concept of what is rule of law. It is very much misunderstood there, both by the Bar and the bench, and this was a Bar Association that had carried out the historic movement by many lawyers, thousands of them on the street, to restore a judiciary, which we had hoped would now take us towards more democracy, towards more protection of people's rights, the more upholding of rule of law.

2. But basically, what we understood, and perhaps you understand, is what is rule of law, it's based on values of non-discrimination and protection, of the people's rights, rather than populist justice, based on confused values of rights, and the process that they adopt to reach a just conclusion is not predictable.

3. On the contrary, rule of law must ensure that the process is a legal one, and it does follow some kind of a scientific legal methodology which has similar yardsticks and similar bars. We have seen, in our country, the Supreme Court use different yardsticks for different cases, and we have something called suo motu, which means a Supreme Court can take a case by itself. So it reads the newspaper in the morning, it fancies which case to take and which one to drop.

4. There was also one case which was taken up of a television star who was caught by the customs bringing in one bottle of wine which somebody had presented to her in Kazakhstan and she had forgotten to take it out of her bag, but the customs man realised that



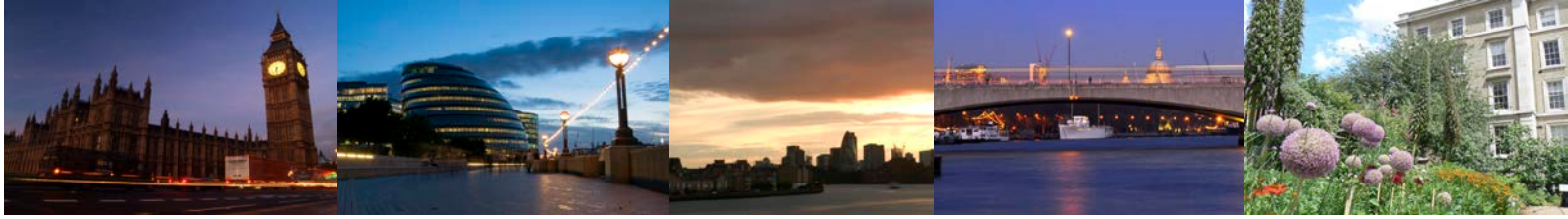
this was a mistake, so he just took the bottle out and said she could go on the next flight.

5. This news appeared in one of the right-wing newspapers, and the Chief Justice of Pakistan, for the protection of the right of the vulnerable, took up this case suo motu. The result is that this poor woman has so far not been able to get rid of that case, and she is in trial court for the last two years, because no trial judge would dare give her any relief, because it is the Supreme Justice of Pakistan who has taken up this very important suo motu case, without which the morality of the country would have come to an end.

6. Yesterday, I was really struck by one of the definitions given by one of your honourable judges here of the Supreme Court, and I will use it when I go back to Pakistan. She made a distinction of how advocacy and judgments by judges are different. We reach a conclusion and build our arguments towards it, but a judge must reach the conclusion after having taken the reasoning into consideration, so that for a judge, the reasoning comes first and the conclusion comes later. But in Pakistan, I can assure you that I would make much more money if people came to me and asked me, "Can you predict how and which way my case will go?" I would not look at their briefs, I would ask them who their legal counsels are, who is on the bench, and what is the nature of the case, and I can assure you that 99 per cent of the time I will be right.

7. So what I am trying to say is that when judiciaries reach conclusions before they listen to arguments and build the conclusions based on reasoning, I do not consider that a practice of rule of law.

8. We have not only in Pakistan but in South Asia, which unfortunately is very poorly represented at this meeting, a bug called public interest litigation. I was one of the first

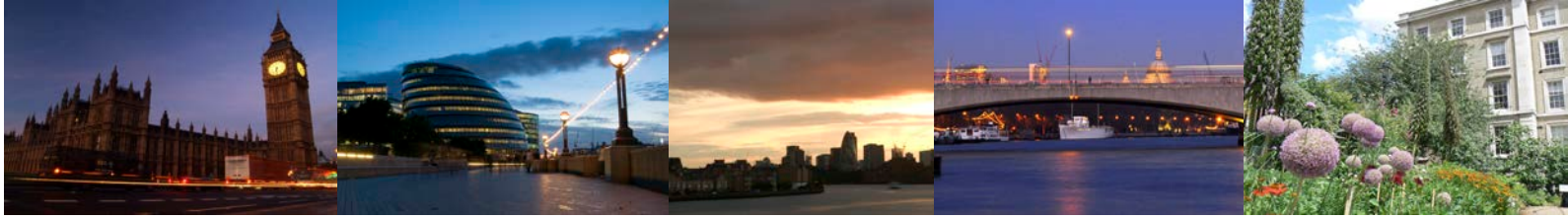


people to start public interest litigation in my country, and that was a case of bonded labour. And I am very strongly in favour of public interest litigation, very strongly in favour of activism of the bench, very much in favour of pro-activism of the bench, but I wonder where the red line begins.

9. So my question always is: does public interest litigation mean that the judges will discard the age-old shackles on the judicial system which keep them at a distance from reaching out to the suffering vulnerable, in order to protect them from abuse, or does public interest litigation mean that they will go to any extent in the name of liberating themselves in order to persecute and witch-hunt people.

10. When we come to that level of pro-activism, then I am afraid that there is very little distinction left between what we call the fascism of the judiciary, as against the fascism of the state.

11. I want to say this very clearly, because now judges are leading the path in giving us a direction of what our political make-up should be like. For example, there was a case in the Supreme Court, and judges turned around and said to one of the senior counsels who was arguing the case, "How can we not strike down a constitutional amendment? We are within our rights to do that, because we interpret the law". And the senior counsel said, "You can strike down a law that is in contravention of the constitution, but you cannot strike down a constitutional amendment". And they said, "You horrify us, because if tomorrow the parliament decides that Pakistan shall be a secular state, should 17 of us sit here and watch this country go to a path that nobody in Pakistan would like it to go? We shall certainly strike it down".



12. So the question then arises, is Pakistan going to be a vision of 17 judges that are conservative in nature, with a very dubious past, where they have taken oaths under every dictatorial regime, and suddenly after the lawyers' movement, have said that they have suddenly gone to the River Ganga, and now become purified. But nevertheless, the same is not given up or not -- if the message from the judgments is not -- it is a message of purification of the Supreme Court of Pakistan.

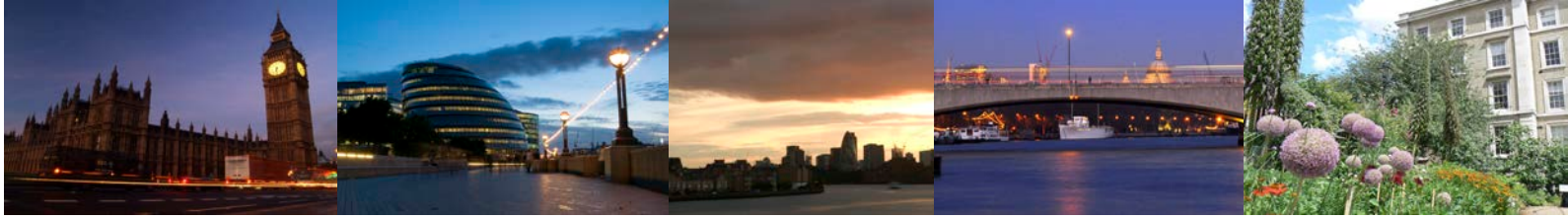
13. But in any event, should the Supreme Court of Pakistan tell the people of Pakistan what our political future would be like, or should it be the parliament and through the people?

14. So these are certain questions that we have to ask ourselves, particularly in a state like ours, which is a security state, and is a people who, including the Bar Associations, and a large number of journalists, are divided. But many of us want to convert that security state more into a welfare state, and the resistance is coming from the courts, and that is why we are fighting against all odds.

15. As far as the contempt of court is concerned, because there was mention of it, we have judges who have been sent out of the bench, threatened by contempt of court. There are 80 judges who were dismissed, otherwise they would have faced contempt of court; of the superior courts.

16. We have had lawyers whose licences have been taken under contempt of court. And we have now very recently a Prime Minister who has gone home under contempt of court, and we have another one being threatened under contempt of court.

17. This is not all. This dire mindset, we have a problem at the Bar as well. While the

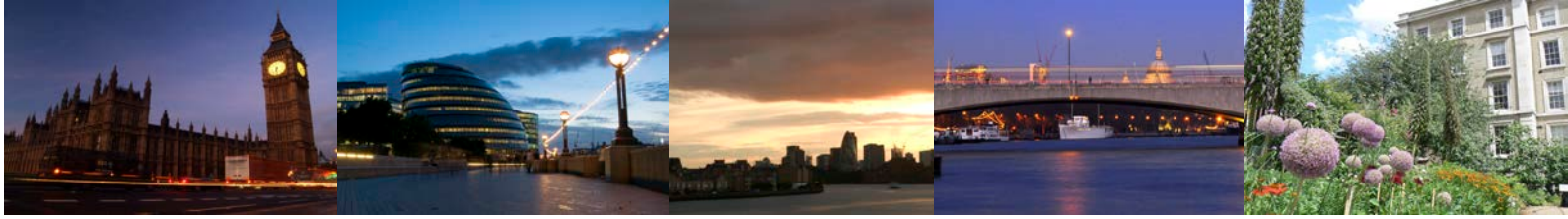


ethics bodies of the Bar still continue to support the genuine standards of rule of law, there are smaller Bars that we call Janasari (?)that have a slogan saying, "Chief Justice, we are your ardent admirers, ardent admirers, ardent admirers", so we call them the ardent admirer group, that have debarred the former president of the Supreme Court Bar from coming to this Bar, because he took on the brief of the Prime Minister. And then they debarred another lawyer, because he took on a brief of a business tycoon who had presented some evidence of the Chief Justice's son having taken millions of rupees from him while his cases were in court being heard by the Chief Justice, on the promise of rectifying them.

18. And then I was debarred, as a third person, because I criticised the debarring of the other two from the court. And as I go back, I will be visiting that court, just to take up that challenge, that nobody can debar anyone from any court. And this is incidentally a court where we don't practise.

19. But the message that goes out is that it is wrong to protect the Prime Minister, it is wrong to accuse the Chief Justice's son, because they have come from the Ganga.

20. So we are divided into two sets in Pakistan, one who comes out of the Ganga, which is people who are the old establishmentarians, and the chutras like myself, which includes women, which includes religious minorities, which includes people who unfortunately have liberal ideas, and the chutras can do all wrong and are always wrong, except that history has proved that what we said turned out to be true. But whereas the Gangas, which I call the Brahmans, have always erred, and yet they have such a self- righteous tone about themselves, and if you read the judgments of the Supreme Court today, half the judgment is praising themselves with poetry. And it's poetry, and I'm not joking.



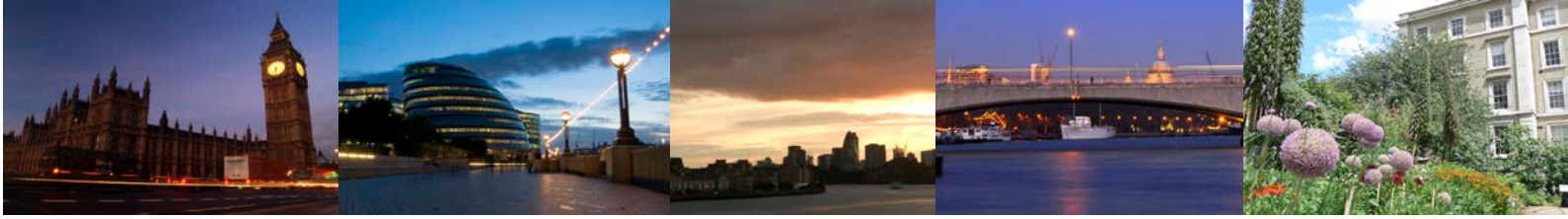
21. I will now conclude by saying that we are torn, we are torn because there is a tension between the judiciary and the executive, but if we actually demonise the judiciary, the executive may become all-powerful. So we have to keep that balance.

22. We are also torn because there is militancy in our country, and the militancy threatens us, but at the same time, like you were saying, that there are laws that do not allow them due process: That confession is taken, that the evidence of a military man is conclusive against them. We are fight for their rights as well.

23. So we are in a strange situation that we are fighting for the rights of those that threaten our lives every day. We have seen that there was a governor of our province who got killed, because he supported the law of blasphemy, and lawyers went to garland the killer, who confessed that he had killed, but at the same time the ethics Bar stood by the lawyer who took his case and ensured that the murderer was given the punishment that he deserved.

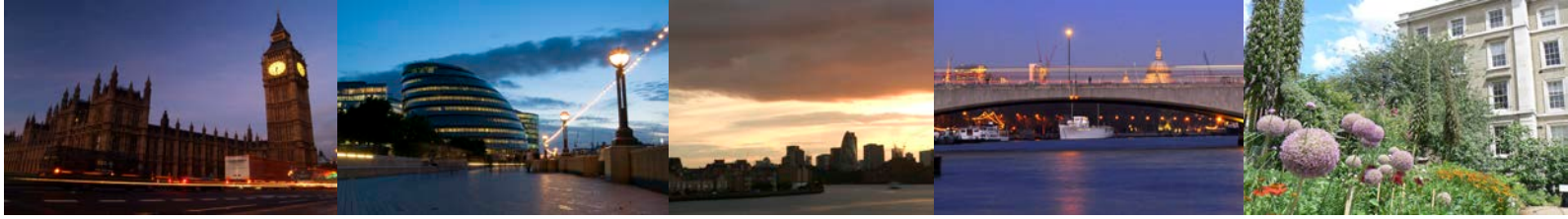
24. We are fearful of emergencies and military rules, but most sadly, when you say fighting against all odds, I just recall that when I first started working against bonded labour and child labour, I was accused of being treacherous to the economy of the country, and therefore colluding with the enemies of the country.

25. When you fight for women's rights, and for religious minorities, you are accused of being against religion and Islam. When you fight against disappearances of people, which I am also a counsel in that case, you are accused of being a traitor to the cause of security agencies. If you criticise judicial pronouncements, you are accused of being enemy of justice. If you fight against the government and criticise them, you are accused of being against democracy.



26. Fortunately, there is only one entity that we can criticise, and we do it full-mouthedly every single day, and that is the West.

Thank you very much.



TINO BERE

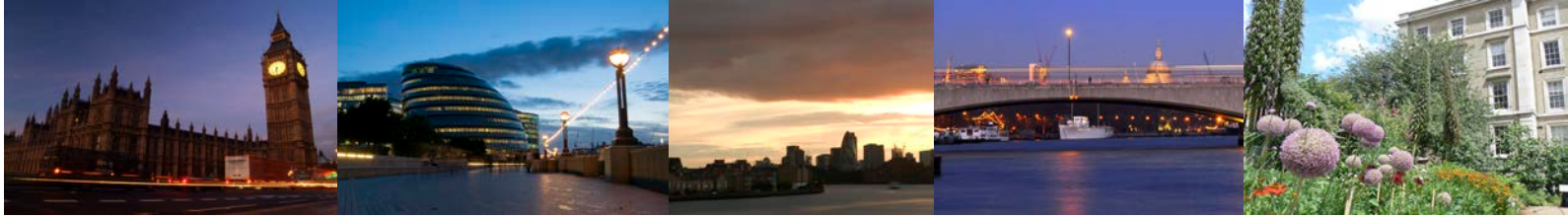
1. TINO BERE: I don't know whether it was by accident, Sir Sydney left a note for me here which says "Five minutes to go".

2. As you have already been told, I am not Beatrice Mtetwa. I am not sure I am fit to stand in her shoes. But I am reminded today of a story that I know she would not have shared, because she is very modest.

3. Tired of being pushed around in police stations, thrown out of police stations, being harassed, arrested, being insulted, the legal profession under the leadership of Beatrice decided that on just one day, we would robe, and after robing, we would go to court, but instead of entering the court building, we would march as a sign of protest at the ill-treatment that we were suffering from the police for defending people they felt should rot in jail.

4. The march was partly successful, and then it was disrupted by armed police officers. They threw tear gas at the lawyers. In the melee, they picked up three of the organisers, who included Beatrice, abducted her and the others, and took them to a secluded place, and made them lie down on the ground, and then beat them. About five police officers took turns to beat them. The two men that were in Beatrice's company described how they had never felt that kind of pain. Beatrice did not describe her pain. She described her humiliation, because she was wearing a dress, and these people did not care where they hit. Most of us only saw the evidence afterwards. The wounds were in places where a woman would be unable to show you. But she showed the world.

5. And she led the profession fearlessly throughout that time, continuing defending that



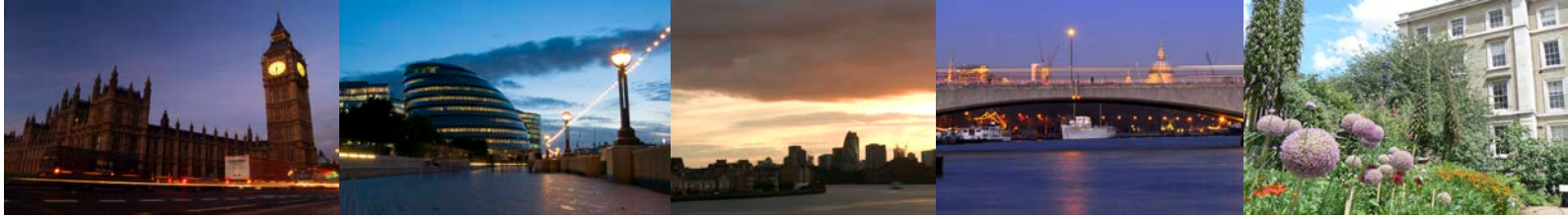
the government did not want to see her defend, continuing to go into the same police stations and face the same police officers. Despite their hatred, despite their abusive nature, she did not drop a single brief on account of that She would have been with you today, but 29 people, who were sitting peacefully in their homes, about a year ago, were arrested because of their political affiliation, following a brawl at a beer hole, which they had not been to, and they have spent most of the year in jail. The trial started, they have been denied bail, Beatrice is leading that team.

6. These are people from what we call Glen View. I believe in this country it would be a posh place; in our country it is where the poor live. They are unable to afford a lawyer of the standard and quality of Beatrice, but they have been given five such lawyers, decorated lawyers. Some of you may know Alec Muchadehama, you already know Beatrice, you know Selby Hwacha. They have been given five of the best lawyers in the country to defend them. They need not pay them, and nobody has promised to pay these five.

7. T he trial will take probably a month. They will be poorer after they have done it, but in their hearts they know they will be richer.

Such is the kind of practice we endure in Zimbabwe. That is why I say that I may not be able to fit into Beatrice's shoes, but I know she was not going to tell you the story of her experience then, and I have taken the opportunity to tell it.

8. I take away from this conference many things, and I was whispering with some people during lunch that their books or biographies that I am going to take with me, chief among them, FE Smith. "You are an extremely offensive young man. As a matter of fact, we both are". I loved that. I found it amazing that you were talking about experiences in the



17th and 18th Century; well, these codes are present in our courts today.

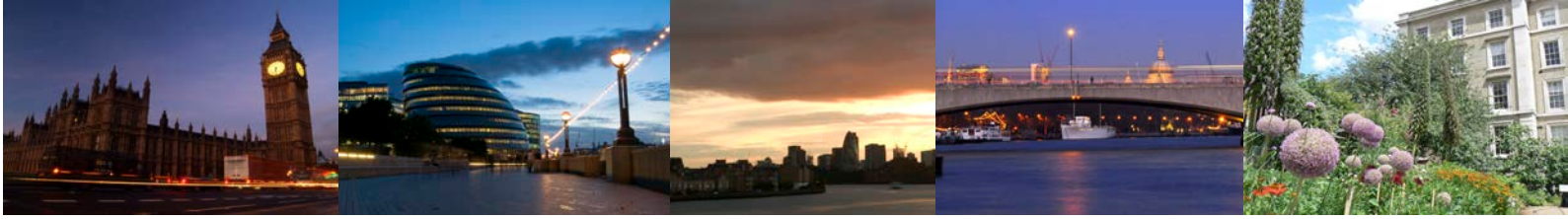
9. I remember recently I stood up -- they had arrested an advocate who had done nothing but try and represent his client, so I stood up and said, "For their hands are stained with blood, their fingers with guilt, their lips have spoken lies, their tongues mutter wicked things, none of them call for justice, none of them plead their cases with integrity" -- I didn't finish. That was Isaiah 59, verse 3 on. There was a very strong objection, and the objection persisted even as I said, "But this is from the Bible". State counsel would not hear it, the objection was sustained.

10. D uring the adjournment, the magistrate sent someone to ask what exactly the verse had been, quietly, and because we were successful, I suspect they read the verse.

11. We have done things that would probably equate us to the 18th Century in this country.

12. I remember in one case asking the court to remind the prosecutor that if she wanted the opportunity to be cross-examined, I was available to cross-examine her, but she needed to wait until the witness finished, so that I could cross-examine her. And it is because the prosecutor kept on giving answers on behalf of the witness.

13. And we have heard judicial officers whose body language shows you that you have lost the case before you have finished making your submissions, but you won't believe that we have a judicial officer who two sittings in a row adjourned the proceedings because he could not restrain his tears. He felt so angry with the accused person, whom he felt had wronged the very good and kind-hearted head of state who fought for the liberation of the



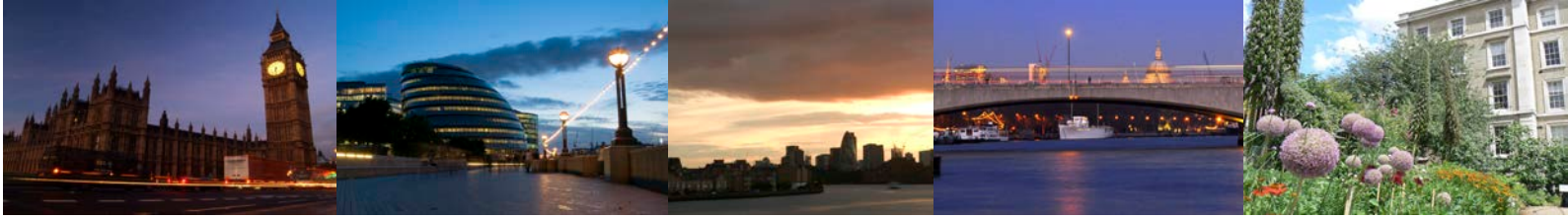
country. The crime that this little man had done; well he had walked across a diamond field. He didn't know it was a diamond field. So he was arrested and accused of mining. He was convicted, and before sentencing, the magistrate broke down. So proceedings were adjourned.

14. Then they resumed, and again the magistrate broke down. Efforts by defence counsel to quieten the magistrate and assure him that things would be fine did not work. Needless to say, subsequently, the poor man was sent to jail. But not in vain; it then triggered a reaction from the entire profession, where we then organised gangs of lawyers to go and represent for free everybody arrested from the Marange diamond field. And as a result, they stopped arresting them. And the solution for them began to beat them up at the place where they would have arrested them, and set dogs upon them, and then put an embargo on any lawyer or anything looking like a lawyer going to that area.

15. Things are a little better now. The diamond fields have been given to certain individuals who are mining very happily, and they have displaced the people who used to disturb the mining there, with or without compensation.

16. But I could speak of many challenges that we face in Zimbabwe. I could speak about the trauma that lawyers face. We are not trained to deal with traumatised people. When you see extreme pain, when you see people that have been tortured, you do the best that you can, but we are not trained. In the end, we absorb the pain of our clients. We become bitter, we also become very angry. And our language in the courtroom is as a result changed.

17. We have been impoverished. We take on these cases: they cost us time, they cost us money, they cost us business, but we still do them. Add to that the danger. But let me not



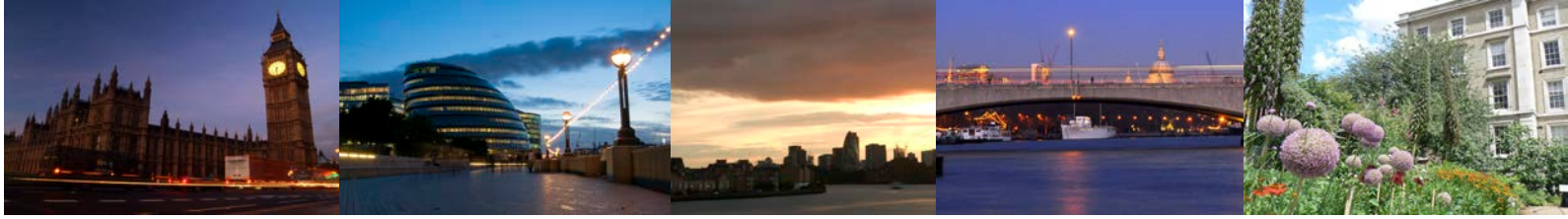
talk or give you a list of our pain, let me give you a list of what I think is wrong in our environment, what has made practice in our environment so difficult.

18. Unjust laws, unjust processes and an unjust culture. We have a constitution that has been mutilated over the years; every time a case was won on behalf of the cause of the individual against the state, the constitution was amended. So where it said "No inhuman or degrading treatment", if a case was won it would then say, "But however, keeping somebody waiting on death row forever shall not be inhuman or degrading treatment".

19. We have seen delays in administration of justice. We have seen cowardice on the part of the bench. We have seen delays of as much as five years in respect of cases that were urgent. We have laws that the courts have not struck down which fly in the face of any reason.

20. We have struggled with competence on the bench. We have also seen the judiciary choreographed to take one particular line, especially in respect of land cases.

21. But if that was not enough, our second problem has been partisan institutions, with a security force that is now made up exclusively of people that support our rulers, a police force that support our rulers. They arrest those that have come with bloodied faces and broken bones, and charge them with the offence that has been committed upon their body. We have a hate-filled media, that demonises lawyers and accused persons. We have a prosecution that prosecutes people from a particular political party and exonerates those from another political party, and invariably suspends bail granted by the courts, and on appeal, they always lose their appeal. We have judicial admin staff, we have a judiciary and we have a prison service that have been politicised.

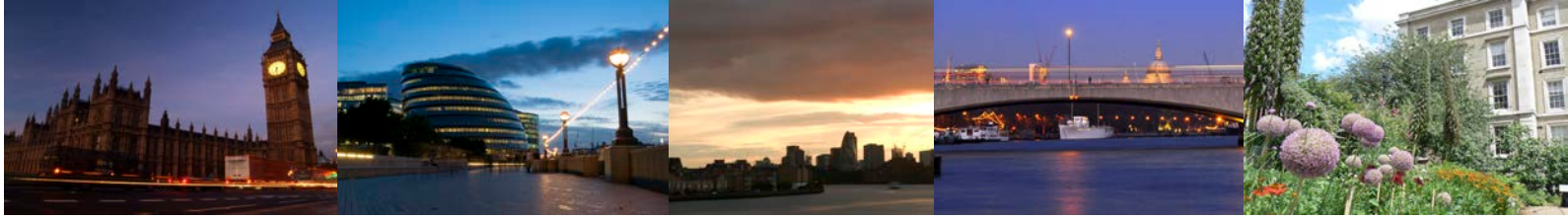


22. We also have very highly volatile politics. Human rights defenders are called "regime change agents", "puppets of the West". So every lawyer who defends somebody they don't like takes the colour of the person they do not like. We have struggled to restore rule of law. We have a judiciary that is stigmatised, or that has stigmatised itself, that is bullied by the police, by the Attorney General, by the executive. The other challenge that we have is security. Nobody defends us. We are the last line of defence. So we have been pushed, we have been beaten, we have been arrested, we have been denied access to our clients, our offices are searched, and if they can't find you, they arrest your relatives, they demand a ransom.

23. We have challenges of resources. The courtrooms that we appear in have no recording equipment. So it is what the judicial officer says happened that happened. We also have suffered from economic hardship, a general decline of everything. But the worst decline has been in respect of our skills. We have been to the deep end, and some of our youngest lawyers have been also thrown to the deep end. There is no time or resources to train. The focus has been to get people out of jail. If they arrest as many as 500, you deploy everybody. And so we have learnt the wrong things, and it has affected us.

24. The ninth area is corruption of administration of justice. We have an administration that has been affected by political patronage and corruption through and through. So from the police station, they choose what lawyers will be seen, they remind the clients that it is cheaper to pay the police officer. We have judicial officers who will tell the accused person, "Listen, you are gambling. You are going to get him, and he has to argue, but I make the ruling, why not just pay me?"

25. We have prosecutors that are primed to always oppose anything that the lawyers say if they are defending someone within an unpopular cause. From the police station to the prison



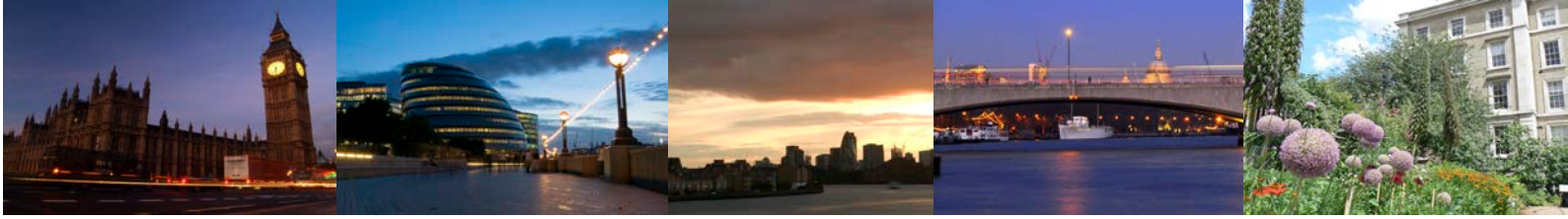
officer, our system has been permeated by corruption, and it just makes you so powerless as a lawyer, that where politics are concerned, you come second best, and now because money is also concerned, you also come second best, and that is true.

26. The threats to the individual lawyer and the threats to the licensing authority, they have abducted and tortured lawyers. It did not end with Beatrice. As late as last year, they did it again to another lawyer, so we know they will not stop. And now they talk in the media, because we dared challenge a thief who had joined our ranks, we disbarred him, he joined their party, and now, because we have said we will not meet him because he is a thief, they have now said we have too many powers. They now want to attack our independence, and our right to continue to license lawyers. And this has been our strength, that as lawyers we license ourselves.

27. So I have tried to put in thematic form the challenges that we have, but I want to be able to say before I leave this place that we are not disheartened by the number of challenges, we are strengthened by the support that we have received from the profession across the world. It reminds us that what we are doing is not a waste of time, but there must be something good we are doing, that we are actually not insane, that we are actually very patriotic, that we should carry on.

28. So thank you very much. Our solutions are simple, we need to listen, we need to be efficient in self-regulation, we need to maintain human rights defending as a passion for our profession, we need to advocate for reform to our unjust laws, and we need to build knowledge and resources for our security.

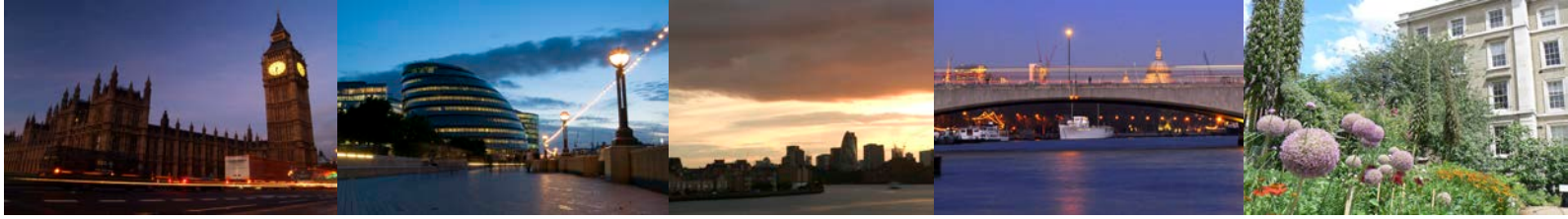
29. So we may be the worst example, but we know that we hold the best lessons, and that



our foundations are very strong. We may have been witness to some of the worst wrongs, as our colleagues in Pakistan, but the line that we hold just puts inside us values that nobody can ever take away from us.

30. Yes, we are traumatised, we have been beaten, put in jail; we know they will do so again in future, but our cause is so much stronger than their propaganda, their power in their mind, and so we see hope in all that we do, and we just encourage everybody, wherever there are lawyers that are in danger, to please stand by them, as you have done with us.

Thank you.



Saturday 30 June 2012

16:00 – 17:15 Prosecution advocacy

Mr Justice Frank Clarke

Frank Clarke is a judge of the Supreme Court of Ireland. He was called to the Bar in 1973 and to the Inner Bar in 1985. He was Chairman of the Bar Council from 1993 to 1995. He had a practice in commercial, constitutional and family law. He was external counsel to the Laffoy inquiry on child abuse, the Ryan inquiry, and represented the Flood Tribunal in its case against Liam Lawlor.

Justice Clarke was appointed a Judge of the High Court in 2004. He was Chairman of the Referendum Commission for the referendum on the Twenty-eighth Amendment of the Constitution of Ireland (Lisbon II) in 2009. As a High Court judge he gave a ruling, on the Leas Cross nursing home case against RTÉ, that the public interest justified the broadcasting of material that otherwise would have been protected by the right to privacy.

He was appointed to the Supreme Court in February 2012

Sir David Calvert-Smith

Sir David Calvert-Smith was Director of Public Prosecutions of England and Wales from 1998 to 2003 and is now a High Court judge. He was called to the Bar at the Middle Temple in 1969 and became a Queen's Counsel in 1997. He was Knighted in 2002 and became a High Court judge in 2005.

After beginning his career both prosecuting and defending, he specialised in prosecution work from 1986, including several cases of murder, terrorism and organised crime. In October 1998 he became Director of Public Prosecutions and Head of the Crown Prosecution Service, a post he held for five years. When the Human Rights Act 1998 was passed (most of which came into force in 2000), Calvert-Smith was the first DPP to have to deal with the impact it was expected to have on criminal trials.

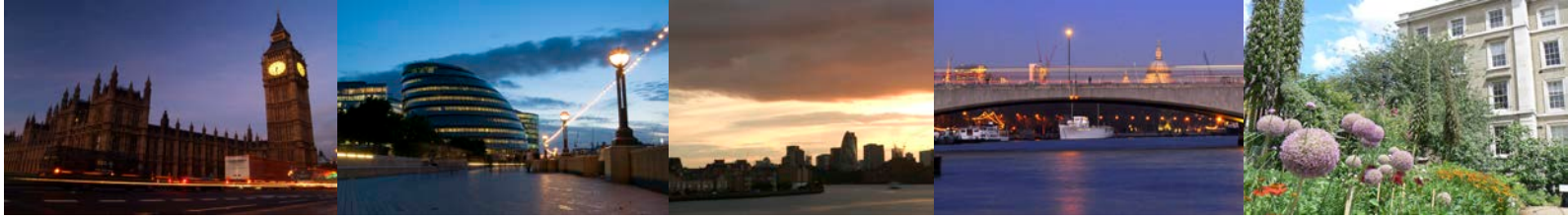
David Perry QC

David Perry was called to the bar in 1980 and took Silk in 2006. He has built a reputation as a prosecutor in appeal courts, appearing in the House of Lords around 56 times. In addition to his work as a barrister, Perry has served as a Deputy High Court judge since 2003.

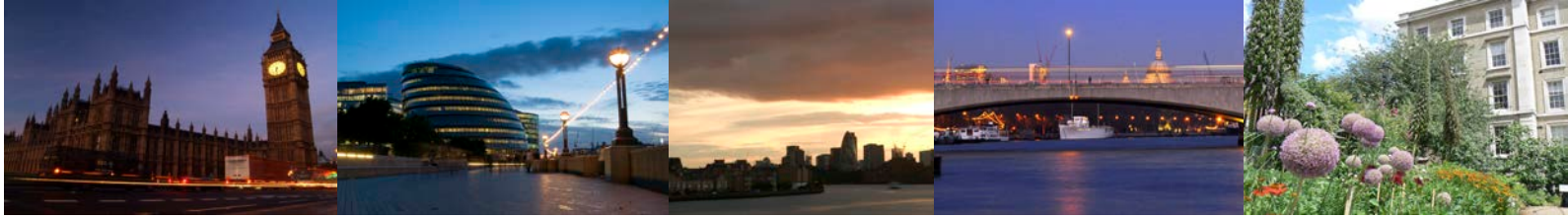
In 2007, Perry advised the Crown Prosecution Service on the viability of prosecutions relating to the 'Cash for Honours' scandal. He has also been involved in a number of high profile cases, many of which have reached the House of Lords or European Court of Human Rights.

Iain Morley QC

Iain Morley is Queen's Counsel at the Bar of England and Wales. He was called to the Bar in 1988, and until 2004 practised domestically from London chambers, 23 Essex St, prosecuting and defending in criminal law at all levels. Between 2005 and 2009, he was appointed prosecution trial counsel at the UN International Criminal Tribunal for Rwanda, in Arusha, Tanzania, appearing in the cases of *Rwamakuba*, *Zigiranyirazo*, *Bikindi*, and *Karemera et al*. Since



April 2009, he has been prosecution senior trial counsel at the Special Tribunal for Lebanon in The Hague, where with others he has been preparing the indictment, *Ayyash et al*, for trial concerning the assassination in 2005 of former Lebanese PM Rafiq Hariri. In addition, in England and internationally, he has been for 20 years an established teacher of advocacy skills, and is the author of the bestselling advocacy skills manual, *'The Devil's Advocate'*.



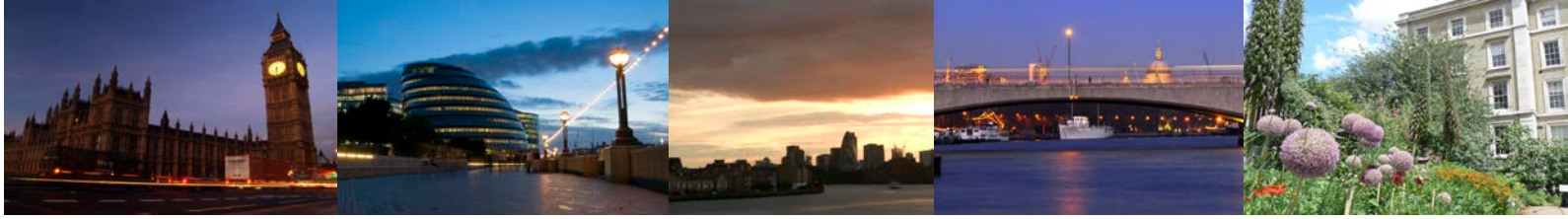
SIR DAVID CALVERT-SMITH

1. SIR DAVID CALVERT-SMITH: Thank you very much, Frank. I was for many years before I took silk Treasury counsel at the Old Bailey and that is where I got my real hands-on experience, and education, in the art of prosecution, being led by a number of the best prosecutors, many of whom the English barristers in the audience will remember.

2. Then as DPP, my prosecution advocacy was almost confined to the advocacy needed in Cabinet, with the Treasury, trying to screw money out of the authorities for my grossly underfunded service, so I learnt a different form of advocacy there.

3. But on that topic, and picking up something that Frank said, one of the arguments that I brought with me from having negotiated fees for the Bar with the two government departments that fund both prosecution and defence, when I was at the Bar, there was a gross disparity, as it seemed to me, between the fees paid to the prosecutor to prosecute a particular case and the fees paid to the defence, whereupon the then Lord Chancellor, Lord Irvine, turned on me at a meeting chaired by the Prime Minister and said, "It's far more difficult to defend than it is to prosecute", whereupon I exploded, I always believe the prosecution is extremely difficult, leave aside the fact that on many occasions there is one of you and ten of them, and so on.

4. I do believe that striking the sort of balance that Frank has just referred to, between representing, in the most general sense, the victim of a crime, and in the more particular sense, the public at large, but also justice and ensuring that nothing you do causes injustice, is a very, very delicate balancing exercise to perform, before you get to the business of whether you are actually any good at expressing yourself, putting the arguments forward



and the like.

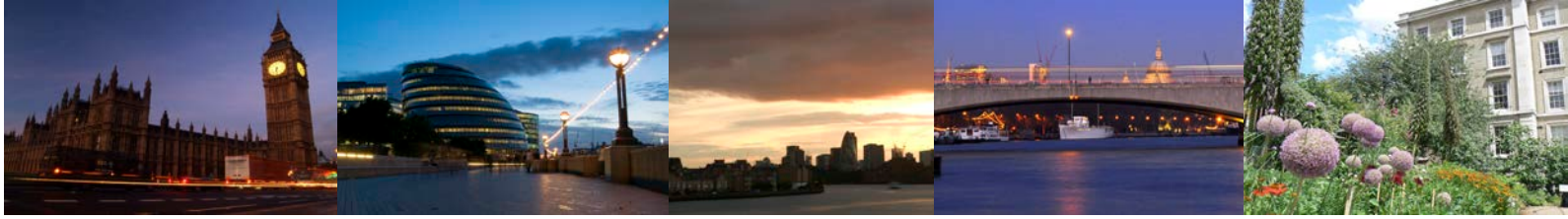
5. I will confine myself, because I have to, to the way in which we approach prosecutions at first instance in this country: an opening speech by the prosecution, followed very rarely, but sometimes, by a short address from the defence, setting out the broad nature of its defence, the business of calling witnesses in-chief, by and large still orally, and therefore needing the skill of enabling people unfamiliar with the court to relax and give their account to the best of their ability, dealing with any legal submissions as they go along, and in particular at the close of the prosecution case, and then cross-examining the defendant or defendants, if they choose to give evidence; and finally, making a closing speech to the jury.

6. The opening seems to me, as an English prosecutor, to be an absolutely key moment in the case. It's the point at which the prosecutor either does or does not establish him or herself in the eyes of the fact finders, in this country the jury, as somebody that the jury can trust, and just as important, somebody the jury can understand.

7. Far too many prosecutors, and I attended a number of courses designed to equip my then employee prosecutors for the business of presenting cases in the Crown Court, seem to think that jurors have at least a first degree in law, if not a masters, when they stand up and address 12 citizens who have never actually sat in court before.

8. Tell the jury the story. Tell it as you would tell it to a relative, to a child of 12, to somebody who happened to ask you what your job was when you were sitting on a train travelling out on circuit. Tell it like that. Do not lard it with legal terms, propositions of law

-- there will be plenty of time for that, when the jury understand what the story is. Stick to the story. That's my advice. Do not lard your story -- and this is very much picking up on



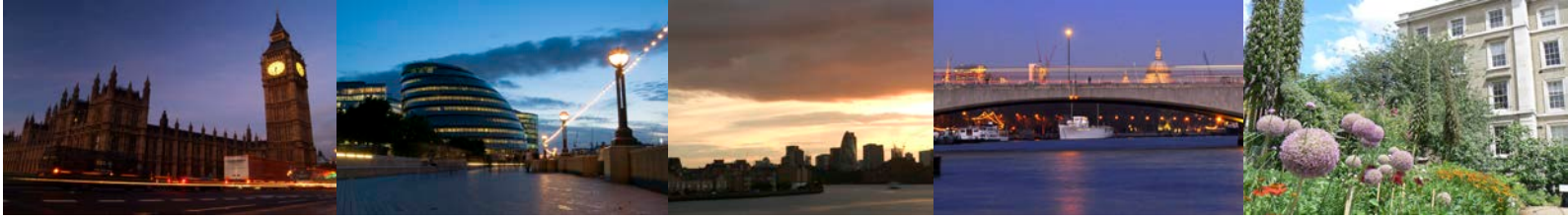
what Frank -- the story about FE Smith -- with pejorative adjectives or adverbs, simply designed to get a headline, which I am afraid to say is sometimes the case, so that you kick off with a drama-queen speech, rather than a balanced exposition of what you propose to prove.

9. Those epithets, "wicked", "vicious", those sort of words, often come back to haunt you in the defence speech, and quite right too.

10. Make it your story. If possible -- and I say this now, after eight years, just under, on the bench, trying very heavy first instance crime -- do it chronologically. You can see the jury wondering where we are going when the prosecutor darts from the day perhaps that the body was found, back to some quarrel three years ago, which might form the beginning of the bad feeling between victim and defendant, and forward to the forensic evidence, which might then prove that it was actually the defendant, and so on. So the story is presented to them in a sort of abstract cinema type way, with flashbacks and flashes forward and so on. I don't believe that is helpful.

11. For the same reason as I say use ordinary language, give them a beginning, a middle and an end of your story, if that is possible. Clearly there are cases where that is not the best way, but that should be the default option, I believe, having sat and listened now for so long.

12. Understate your case, rather than overstate it. If possible, get it absolutely spot on, but you can never predict how well your witnesses are going to stand up when you start a trial, and you may well know that some of them may be a bit wobbly, whether because of credibility issues, nerves, or whatever it may be.

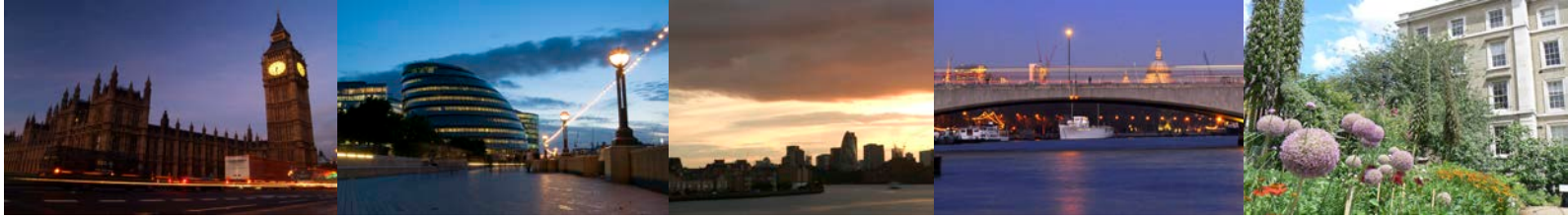


13. It is important to think, when you stand up to open the case, how in due course you plan to close it. What is the case I would like to leave to the jury as my final word? If you open a case too high, not only will you not be able to do that, but you will leave the defence umpteen perfectly good, if sometimes rather cheap points about, "Well, the prosecution told you this, where was it? It didn't match up to what the prosecutor said. What else of the prosecutor's case actually doesn't stand up?"

14. A case which grows in strength is a better case to leave to the jury than a case which has gradually lost it, because of applying the standard of proof that I think we all apply in this room of beyond reasonable doubt, or being sure of guilt. A case that is even slightly weaker than the case presented by the Crown is bound to make some members of the jury think, "Oh, I see, there must be a doubt, if the case is not as strong as the one the Crown brought", so don't overstate.

15. As you go through the story, at least in non-legal language, stop when you get to bits of the evidence which are actually the bits of evidence around which the issues are going or should be decided, whether it is in an assault case, self-defence or an accident, or alibi, or in a case involving acquisitive crime; dishonesty, intention to deprive permanently, or whatever it is. But don't do any more when you're opening the case than indicate that that is the sort of battleground, and certainly don't give a little exiguous from Smith and Hogan on what amounts to intention to permanently deprive, or the other concepts that may have to be spelt out in due course by the judge in his summing-up.

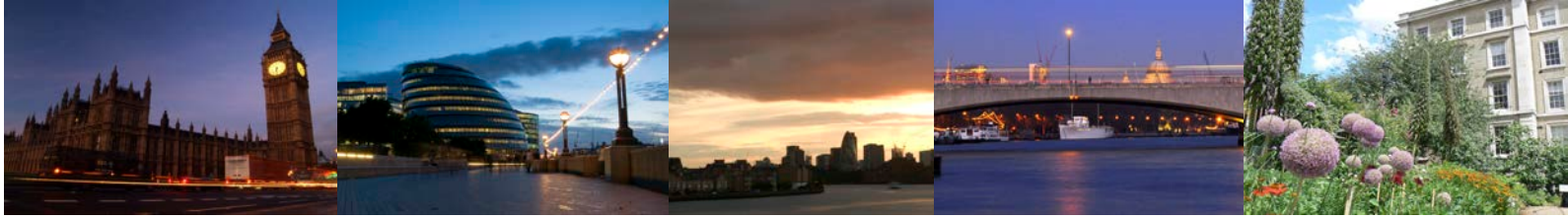
16. The best advocacy, I believe -- and sometimes I walk home from court thinking, "Ah, that is why I changed my mind" -- is advocacy that doesn't actually strike you direct



between the eyes, it somehow gets to you, without your even knowing it; putting the idea into the judge's mind without ramming it down his throat. And I'm quite sure, though I've never sat on the jury, that the same would apply to any ordinary members of the jury. I don't want the prosecution telling me in a loud voice what the answer is, I like to able to work it out for myself, but if he or she presents the facts in an orderly and sensible way, then I will probably jump to the conclusion that the prosecutor wanted.

17. Evidence-in-chief; please -- I don't know whether this is a problem in all countries, but it certainly is in this one -- don't ask long questions, or rather, make a long speech followed by a short question. Ask short questions, don't give up if the witness doesn't get the answer right, often because they are nervous, and they haven't actually quite heard, or they were thinking of the last answer they gave, and not focusing quite on what you were asking them next time round.

18. If they get something wrong, or they say they can't remember something which it's clear from their statement that they should be able to remember, don't get the statement straight out and thrust it in front of them. I see jurors thinking, "Oh, is this cheating? Is this all right?" Of course it is within the law to do so. Get as much as you can, and just mark important facts that the witness hasn't actually come up with in-chief and then go back to them at the end of the story, saying, "You didn't actually remember the time at which this all happened, would it help to look at your statement? You didn't remember the colour of the T- shirt the guy was wearing, would you like to look at your statement?" But let them get the story without constant reference to a document, again because the jury are going to think, what is happening here? Is this really playing fair with us? And so on.

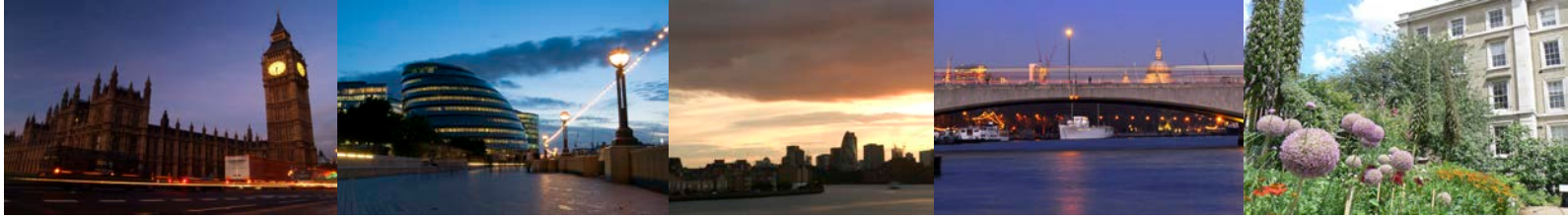


19. That is my advice. It does seem to me that when I look at jurors, they get a bit mystified if there is constant answering one question straight out, and then the next one by reference to a witness statement. As I say, throughout the trial, focus on the case you want to leave, and that, of course, applies to cross-examination of the defendant. Even more in the case of cross-examination of defendants, keep the questions short. The shorter the question the less chance the witness has to think of the answer, particularly if the answer is likely to be a lie. Why, how, when and where, as single word questions, can be extremely effective. I have seen it. If only I knew this when I was at the Bar, I might have done it myself! You live and learn, it is too late for me now to go back.

20. I instinctively react against, even after 40-odd year, the "You may think", the "I put it to you", the "In my submission", the kind of legal "give me a bit of time to think what I actually want to say" phrases that we come up with all the time. Again, if I were a juror, I think I would go with the advocate who simply said what he or she wanted to say, or asked what he or she wanted to ask, without larding what they say with these quasi posh legal expressions.

21. I may be wrong about that, maybe some jurors rather like the olde-worlde Rumpole type way of carrying on, but I suspect that the majority would rather get on with it and focus on words from you which actually have got something to do with the case.

22. This is a particular fad of mine, and I suspect won't apply to many of the jurisdictions represented here, but since 1996 in particular, but even before that, a failure to answer questions when interviewed, and a failure to give evidence at your trial, has been the possible subject of adverse comment, both by the prosecution and in due course by the judge.

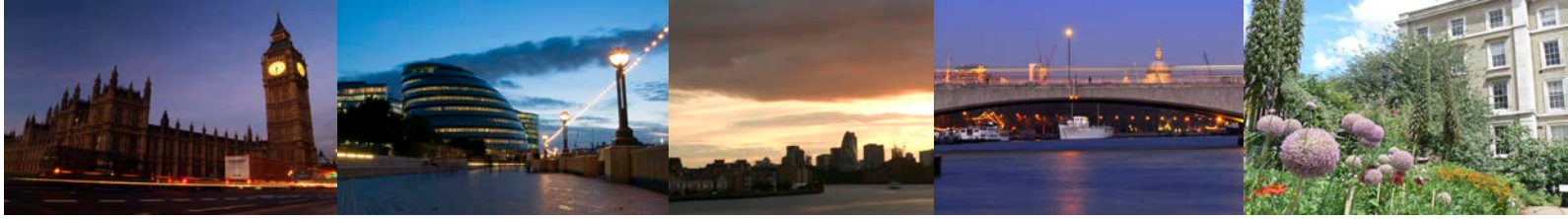


23. I have been astonished in certain cases, in particular very high profile terrorist cases, having been the terrorist case management judge for the last seven years, at the lack of use by prosecutors of the provisions of the CPIA, in cases in which, when the defence is actually put before the court, there is no earthly reason why it couldn't have been raised before.

24. Sometimes even, as again some of you will know here, but others may not, there is now a requirement for a defendant to put in a defence case statement setting out the general nature of his or her defence, and sometimes in cases I have tried, there hasn't even been one of those, and yet there has been a full blown defence at trial, and very little focus on the reason why that might be when cross-examination took place.

25. So that's just something I have got off my chest because, having just retired, I can say that sort of thing. To pursue that, I see nothing wrong with asking – though David Perry who follows me is a proper lawyer as opposed to the criminal hack I have always been -- if they are prepared to waive the privilege they may have. "Well, I don't want the solicitor's advice". "Well, would you like to tell us? You don't have to, but would you like to tell us about that, and what your reaction was when you had heard that advice, and you knew that you had been in Preston on the day of the crime and you decided you wouldn't say it?", or whatever.

26. Very quickly, appellate advocacy, because David is the past master of that. I'm going to deal with the bog standard advocacy. Frank (Mr. Justice Frank Clarke) was kind enough to tell me just as we sat down that he has recently been appointed to the Irish Supreme Court, which sits both as a version of our now new Supreme Court in this country,



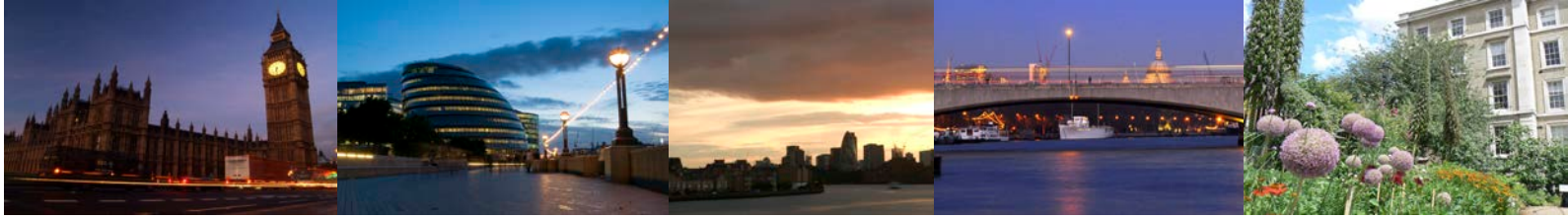
but also like the Court of Appeal, and hears first instance appeals from trials, just as I have done as a mere puisne judge in this country for several years.

27. The only topic on which I would like to say anything new about prosecution advocacy concerns the gradual emergence in this country -- although again, I don't know whether this applies in other countries, or to what extent -- of sentence appeals. When I was at the Bar, the prosecution was rarely, if ever, summoned to court, to appear in an appeal against sentence by a convicted defendant. Very, very occasionally the Court of Appeal would want to hear from them on perhaps the interpretation of a particular statutory provision, as to whether a particular sentence was legal, or indeed apposite to a particular set of facts.

28. Now, that is not the case. Frequently, the Court of Appeal gets a written document setting out where in the hierarchy of offences, within sentencing guidelines, or guideline cases of the Court of Appeal, the prosecution submit that the case fits.

29. I have seen a very wide variation in approaches by different prosecution advocates to the question of representing the Crown in a sentence appeal, and I do think that perhaps a degree of standardisation or education in this country at least would be a good idea, because some take the very old-fashioned view, the one that we all had when I was at the Bar, that really we are rather embarrassed to be here, we would rather say nothing at all if possible, and to look the other way when the President of the court looks at us; others are only too keen to get up and say, "This was the worst case in Manchester of its kind ever, blah blah blah, and the judge was positively lenient", and all that sort of thing.

30. There is here, I think, a topic for discussion, as to whether the Crown, to what

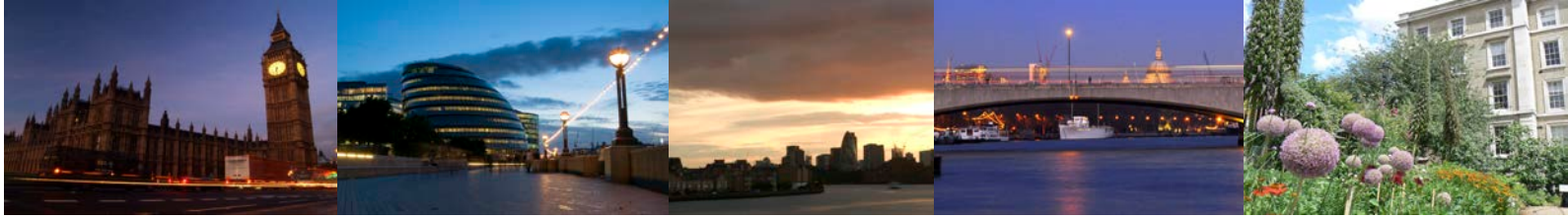


extent it gets involved. My humble suggestion is that prosecutors would be extremely helpful were they to produce a schedule which contained the name of the case, which corrected any errors of facts, in either the summary of facts which we get, or in the grounds presented by the appellant; to clarify the stance that the prosecution took and takes on any basis of plea that was put forward at the trial by the accused, whether in writing or not; to point out facts which in the Crown's submission do put the offence into a particular category within sentencing guidelines, or guideline cases of the Court of Appeal; and to indicate, if that can be done, a range of cases, if there is no guideline case, within the relevant textbooks with roughly similar facts.

31. So a schedule with columns, setting out the name and reference of any given case, the plea, the age of the accused, whether he or she was of good character, and a single sentence setting out what the facts were, would be of extreme assistance.

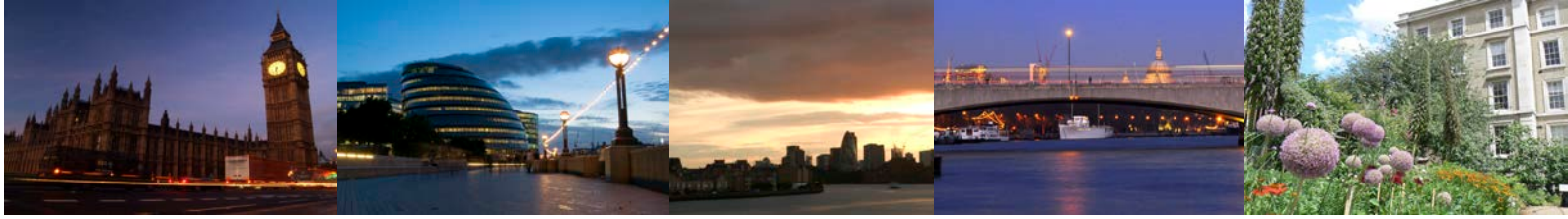
32. Of course, on conviction, again, much of what I have said applies to judges, some of whom are not criminally qualified, at least from the Bar, and do need assistance about setting the story out clearly and concisely. Of course, the prosecution advocate will know that the members of the court will have read the papers in advance, and indeed any skeleton arguments that have been put in, even if, as frequently happens, they won't all have agreed on what the answer is before they go into court. So curt and short, and with the assumption that the court has read the papers.

33. That said, I do believe that prosecuting cases is and can be an extremely satisfying experience. You are performing a public function, a private function, and a function which hopefully advances the cause of justice, and you therefore are privileged every time you stand



up and address a court, whether at first instance or on appeal.

34. The techniques used are different to those defending, as Frank said in his introduction. Many people, and no doubt many in this audience, do both equally well, but I am sure that those who do do both would say that there are very different considerations and techniques, if you like, which are required to do both. So I hope that was of some help.



DAVID PERRY

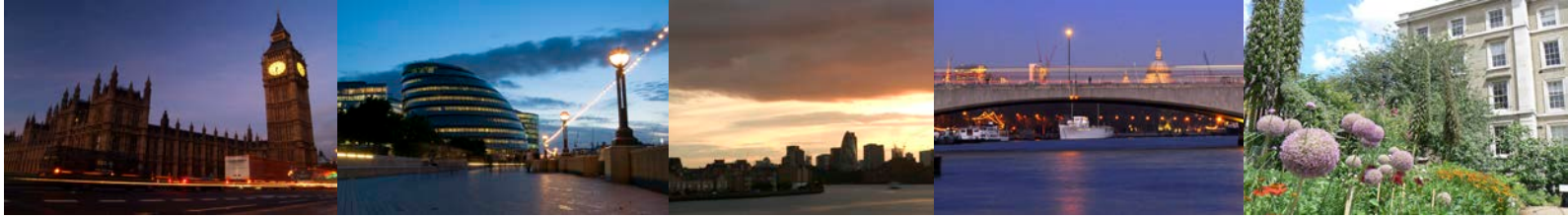
1. DAVID PERRY: It is convenient to pick up where David (Sir David Calvert-Smith) left off, that prosecution advocacy requires different skills.

2. Erskine, about whom you heard earlier today, I understand, went to his tailors and he had a coat made by his tailor, and he asked his tailor to make it in the style of a coat favoured by the Jacobins in France, and he wanted buttons on it, that he could display to juries in court when he was making his submissions, and the buttons were to be inscribed "Liberty or death".

3. Now, if a prosecutor had buttons inscribed with "Imprisonment or death", or, for that matter, shed tears, as Marshall Hall used to do during his closing speech, we would all consider it most unseemly. Prosecuting calls for modesty, fairness and self-restraint, and this is the theme of this short talk this afternoon.

4. I am going to use a case in the law reports which should serve as a warning for all prosecutors. It is a criminal justice morality tale. It concerned an appeal against conviction following a trial before a judge and jury which lasted 41 days. The conviction, richly deserved, was quashed on the basis that the defendant had not received a fair trial, and what was the source of the unfairness? The source of the unfairness was prosecuting counsel.

5. The defendant complained that prosecuting counsel had repeatedly interpolated prejudicial comments while examining prosecution witnesses. "Mr X, would you agree the defendant is a crook?" He repeatedly interrupted the cross-examination of prosecution witnesses with prejudicial comments, and gave a running commentary during the case for the



defence on the motives and conduct of the defendant.

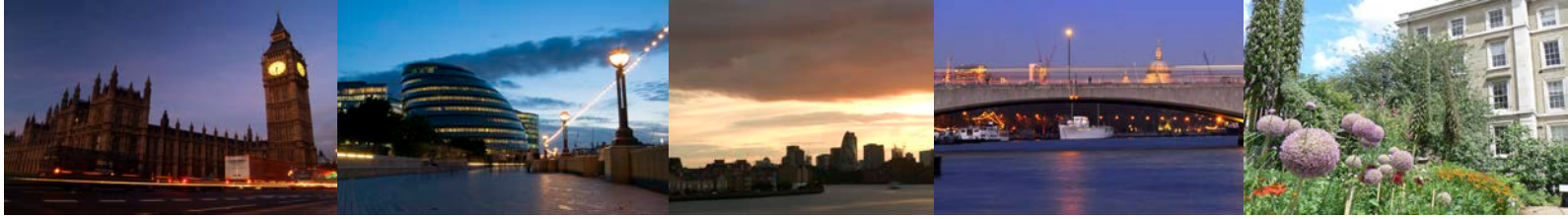
6. Let me give you some examples. During examination-in-chief of the defendant, prosecuting counsel said that defence counsel must have taught his client the skills of evasion and circumlocution. When the defendant gave an answer to a question posed by prosecuting counsel, and the judge said, "What should I put in my notebook, in response to that question?", prosecuting counsel, quick as a flash, said, "Put 'smokescreen'".

7. The judge did nothing. Defence counsel complained to the judge that prosecuting counsel was preventing the defendant from prosecuting his case, and the prosecuting counsel said, "Yes, I am, because defence counsel ask such ridiculous questions", and he went on to describe defence counsel as a disgrace to the legal profession, who was dishonouring the law.

8. On appeal, I may say in the Court of Appeal, the conviction was upheld, but on a further appeal, it was quashed. The final appellate court described the conduct as insulting and overbearing.

9. When quashing the conviction, it was concluded that prosecuting counsel had conducted himself as no minister of justice should, and Lord Bingham of Cornhill, who gave the judgment of the court, cited with approval comments made by Mr Justice Rand in the Supreme Court of Canada in 1954, and they are as relevant today as they were in 1954. Mr Justice Rand had said:

10. "The purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence, relevant to what is alleged to be a crime."



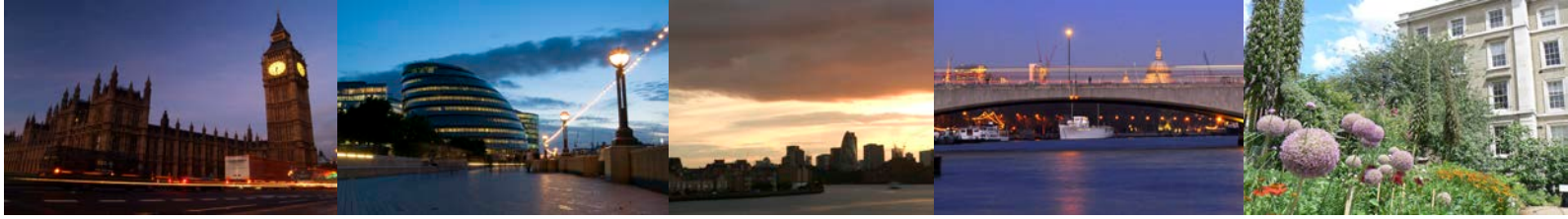
11. He said that counsel have to press their cases firmly, to the legitimate strength of the case, but they must act fairly. And crucially, prosecutors must perform their function with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

12. At about the time when Mr Justice Rand was making those comments in Canada, Sir Travers Humphreys, a highly competent prosecutor and later a distinguished judge in this jurisdiction, published his Book of Trials. He gave three example of things that account for wrongful convictions and the very first example he gave was a confusing and therefore unfair presentation of the case for the prosecution.

13. By way of an aside, if you look at the Oxford Dictionary of National Biography, if you are that way inclined, and you look up Sir Travers Humphreys, you will see it is said there that it was said of him, by his colleagues, that he prosecuted so fairly that he left the defence with nothing to say. He was absolutely devastating.

14. Now, having given you one extreme of prosecution advocacy, may I give you another example, by way of contrast. A great leader of the North Eastern Circuit was once prosecuting a fraud case, rather like the case I have just mentioned, which was a fraud case, in which the evidence, as in the case I have just mentioned, was overwhelming, overwhelming against the defendant.

15. The leader of the North Eastern Circuit opened the case shortly and with great simplicity. When the defendant gave evidence and gave a very full account of himself, protesting his extremely improbable innocence, he was cross-examined courteously and with respect.



16. At the conclusion of all the evidence, the prosecutor was expected to address the jury on all the evidence, which had lasted for several days, and the great leader rose to make his closing speech, and the jurors leaned forward in their seats and picked up their pencils and notepads in anticipation of a detailed analysis of all the issues that had been raised in the case. And the great leader closed the case with 13 words, and his closing speech, and I quote, was this:

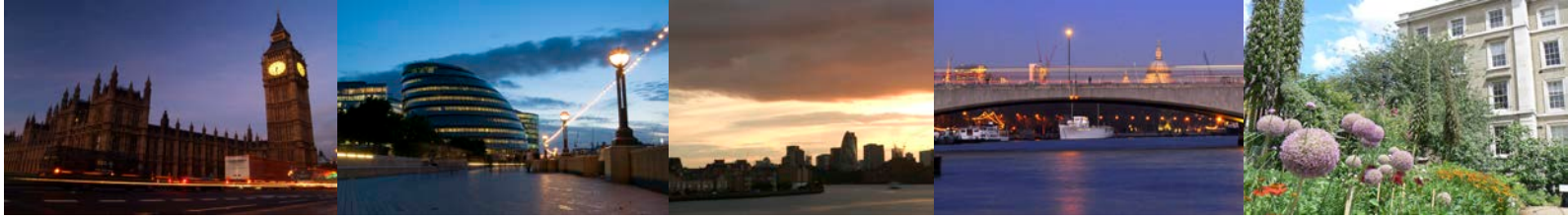
> "Members of the jury, do fairies live at the bottom of your garden?
> Thank you very much."The jury convicted in ten minutes.

17. These cases illustrate some of the core characteristics of an effective prosecutor. First of all, fairness. Felix Frankfurter, a very, very brilliant Justice of the United States Supreme Court, said that a good judge needs to have three qualities, each of which is impartiality. He might equally have said that a good prosecutor needs to have three qualities, each of which is fairness.

18. Second, dignity. Prosecutors should exhibit self-restraint and self-control. Defendants should be treated with courtesy and respect, and so too should defence lawyers, and all those involved in the court proceedings.

19. Also, do not be tone-deaf or insensitive to atmosphere, and certainly as a prosecutor do not be self-righteous. Even when defending, being self-righteous is disastrous.

20. In the 1970s, Professor Anthony Amsterdam was generally regarded to be the most brilliant advocate to appear before the Supreme Court of the United States. He appeared on behalf of the abolitionists in all the landmark death penalty cases, and after argument in Fowler v North Carolina, Justice Powell described the Professor -- having



listened to his submissions over a lengthy period of time, Justice Powell described him as a complete nutcase.

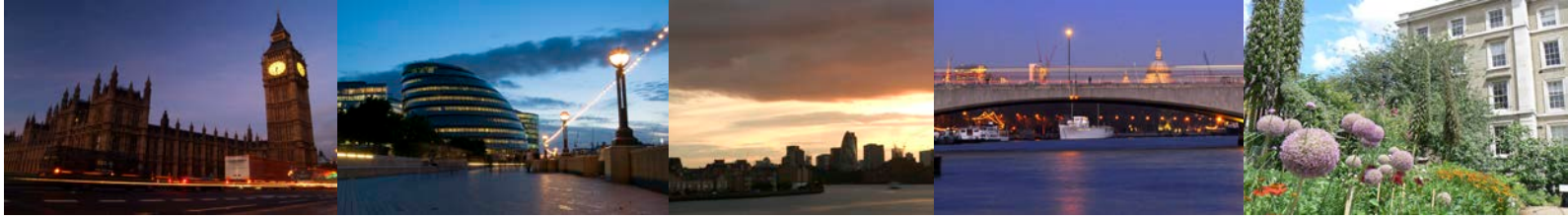
21. A nother Justice was heard to comment at the judicial conference that followed the case, "Now I know what it's like to be lectured by Jesus Christ". This was not intended as a compliment.

22. It is always essential to remember that advocacy is psychology, it is one mind working on another, and consistent with what David just said, a truly great advocate appears not to argue his or her case, he merely states it in a simple conversational narrative.

23. It is also essential, finally, always to remember that the legal profession is more than a group of individuals who do a particular type of work on which they depend for their livelihood. The profession is supposed to work in the public interest and the advocate exercising his profession is discharging a public duty, and not a business transaction.

24. Sir James Fitzjames Stephen in his classic General View of the Criminal Law in 1863 took pains to emphasise the advocate's duty to the court, and the administration of justice generally. The advocate did not have an unrestrained licence, but was trusted with a wide discretion. As Stephen put it, the adversarial form of criminal procedure places a very wide discretion in the hands of counsel, and it depends entirely on the way in which they use it whether their functions are a public duty or a public nuisance. So in conclusion, the most important requirement for a prosecution advocate is to avoid being a public nuisance.

Thank you very much.



IAIN MORLEY

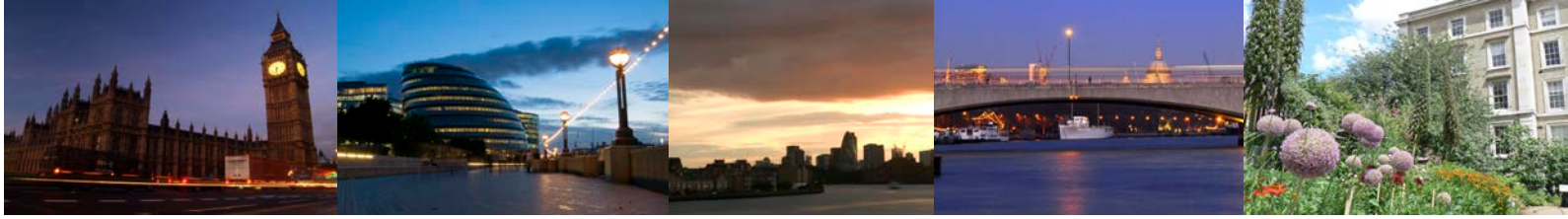
1. Good afternoon everybody. You will probably be aware that working in the international tribunals is very similar to landing yourself in the Land of Oz where Dorothy is told, "You're not in Kansas any more", when she is complaining that things don't seem to work in the way that they did back home.

2. T he international tribunals are very varied in the way that they approach what would be otherwise standard questions to many of you in your domestic jurisdictions. Things that you learn at your pupil master or pupil mistress' knee, these things can turn themselves into very complicated questions when you are dealing with so diverse an environment as is created by the various tribunals since 1994.

3. There are many advocates from the Bar of England & Wales who have been out there; and I mean out there, it is really an out there. But most of them defend, and my hope today is that I'm going to encourage people, as a call to arms, to come forward and help prosecute these cases.

4. T here are many distinguished people, there is Courtenay Griffiths, Peter Haynes, Ben Emmerson, Michael Mansfield, Michael Topolski, Sir Ivan Lawrence, David Hooper, Steven Kay, Judge Howard Morrison when he was in silk, they have all defended. But there has only really been amongst those at a senior level prosecuting, there has been the great Joanna Korner, there is the inimitable Sir Geoffrey Nice, there is the fascinating Desmond de Silva, and then there is me going around as well.

5. So there are four of us really who have been doing this work at different times over



the last 15 years, and we would like some more people from this tribal gathering of advocates from across the world, where we generally share the same outlook on ethics and on approach to evidence, because as I say, when you walk into this international tribunal world, things that you take for granted are not so, and it would be great to have some reinforcements. It would be great to have some more people involved who, as it were, speak the same legal language.

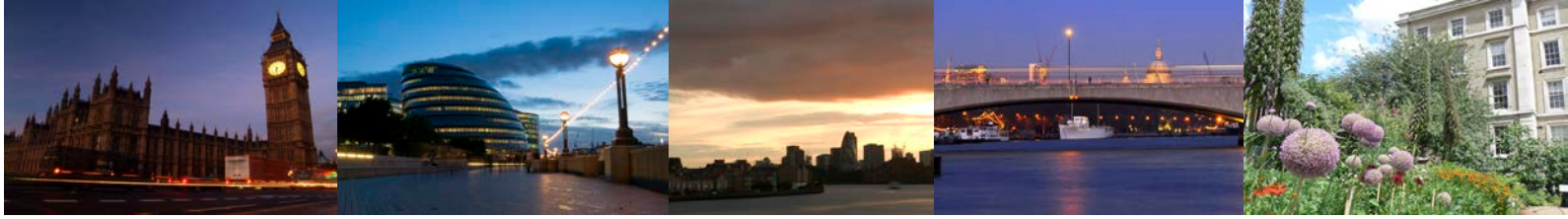
6. I am passionate about prosecution advocacy internationally. I am one of the advocacy teachers, I wrote a book called The Devil's Advocate and I teach a lot of advocacy skills internationally, because we're trying to create some level of standardisation, so that, as I say, people are singing from the same hymn sheets.

7. There are three things which characterise these tribunals: diversity, scale of allegation and history. We are going to be dealing with events which are causing history books to be written.

8. We now have I think it is about six -- let me see, we have the Yugoslav Tribunal in The Hague, we have the Rwanda Tribunal over in Arusha, in Tanzania; the Sierra Leone Tribunal, that has been in Freetown and also in The Hague, the Cambodia Tribunal in Phnom Penh, there is the International Criminal Court in The Hague, and there is also the Lebanon Tribunal in The Hague. So a lot of stuff in The Hague.

9. And collectively, these tribunals are costing about $1 billion a year, probably a bit shy of that, and if you add it all up, over the last 15-20 years, they have probably cost about $15 billion.

10. People often say, hang on a second, that's very expensive, isn't it? Well, maybe not,

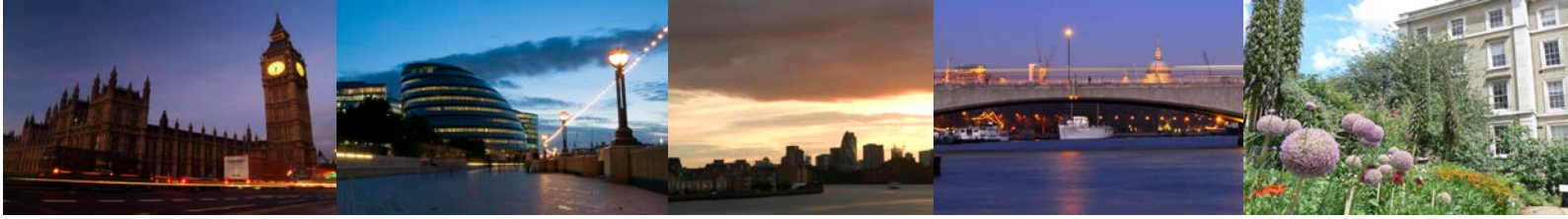


because they are designed to deal with very big events, normally the resolution post-conflict of wars, bring some measure of reconciliation to social groups, and it may be helpful to know that the combined cost of the international tribunals over the last 15-20 years is less than 1 per cent of the annual cost of conflict globally. Or as you may imagine it's the sort of money the Greeks ask for every second week for a bailout.

11. So when you look at the money in a roundabout turn, it is arguable that it has been reasonably well spent. But there are problems. There are challenges to being a prosecution advocate in these environments.

12. We started with diversity. The flipside to diversity is it creates uncertainty, as to what is going to happen in the courtroom. I have worked with people from all over Africa, from North America, from out in the Far East, a bit of the Middle East, obviously Australia/New Zealand, a lot of people from the Continental jurisdiction, people from the formerly Communist, presently Communist jurisdictions, and you put them all in a melting pot, whether they are judges, defence counsel, prosecution counsel, and you are not in Kansas any more.

13. The uncertainties which arise are that the judges very often approach questions completely differently. Michael Carnavas famously was told to stop asking leading questions, to which he responded, "But I'm cross-examining", to which the reply was, "Precisely, stop it". So you've also got the very different experience of the judges as to what to expect in the courtroom, because many of the judges are not from the adversarial school, they are civil law judges, who make inquiries into the truth of allegations, and they control their proceedings completely, so that really the role of the advocates is quite limited; they are there simply to ask helpful questions, whilst the judge is the only person who is allowed to really get stuck



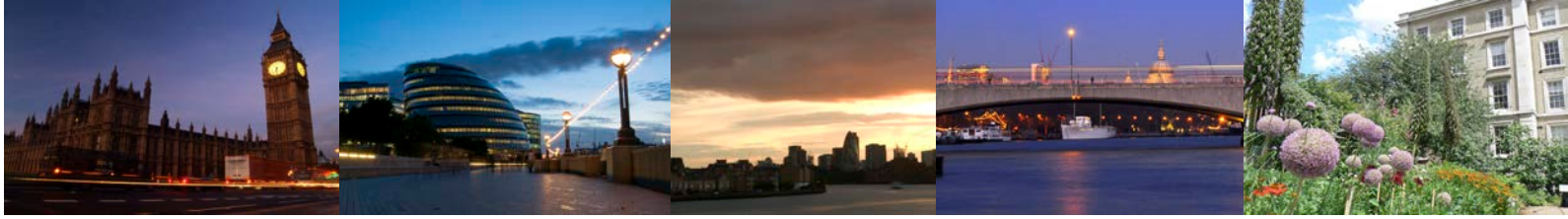
into witnesses, and also decides whether or not anybody is going to give evidence. The judge makes the decision as to what evidence is going to be heard.

14. So the danger is the sort of disconnect between your standard adversarial advocate, as most of us are drawn from here, and many of the civil law judges, who will appear on the international benches. They can be very legalistic, always asking for an authority on everything that you might say.

15. There are so many things that we take for granted when we stand up in court and just assume are sayable. There are different approaches on the parts of the judges to disclosure, what should be disclosed to the other side, and knowing what is in the mind of your Tribunal is very much at the forefront of what it is to be a prosecution advocate in these environments.

16. You have got to try and work them out, and it is not always that easy, and it is also not always that easy because there is not the same tradition of mixing the judges with defence counsel and prosecution counsel that we have in our adversarial Bars. They tend to keep very separate. One of the great strengths of the Bar of England & Wales, in my experience, has been that we mix with the judges, we chat with them, we go to dinners with them, we find out what is in their heads, we start to understand the way that they think. There is not as much of that internationally and that presents its own problems, if you're prosecuting, and you're trying to work them out.

17. But then we come to the defence. When you are prosecuting, you often have no idea what's going to come at you from the other side. There are very different approaches, from all sorts of different places, to what the job of defence advocate is. Very often, the job of the defence advocate, in the minds of some, is to attack the prosecutor personally, and if possible,



have him or her disbarred. Alternatively, grind the case to a halt by filing endless motions, many of which are frivolous. Arguably frivolous. A good example might be the filing a few years ago of an argument that there is an inequality of arms between the prosecution and the defence because the prosecution have more pencils than the defence, and that was filed and required I think it was six filings in all, to be resolved.

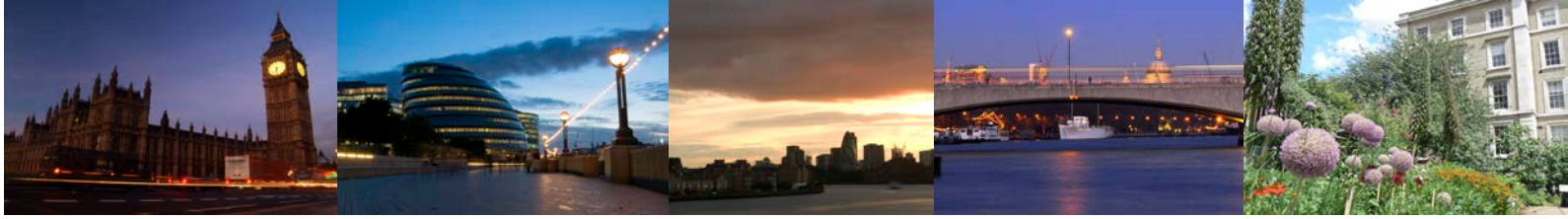
18. That sort of thing makes you ask the question, "Well, what is in the mind of the defence advocate?" Because you can only be a good prosecutor if you understand what is exercising the minds of your opposition, and how they are coming at problems.

19. It is not unusual for defence counsel to say that they disagree with the judge's decision, and they mean, they disagree with the judge's decision, that is to say they are not going to implement it, they are going to ignore it, and they will say that.

20. Alternatively, on letterheads, one I particularly remember, nicely written, in the top right-hand corner, just below the address of defence counsel, lovely chap, was "A good lawyer knows the law; a great lawyer knows the judge". So you have a different approach to how advocacy is performed. Your personal relationship with the judge may be more important than your ability to stand up in court.

21. I have seen disputes between prosecution and defence counsel which have amounted to, "I'll see you outside", to which the response has been, "Yeah, let's go". So we need to try to take the heat out of some of these exchanges.

22. A large part therefore of being an effective prosecutor is to try and get inside the minds of defence counsel, who have this different tradition, this different background, this



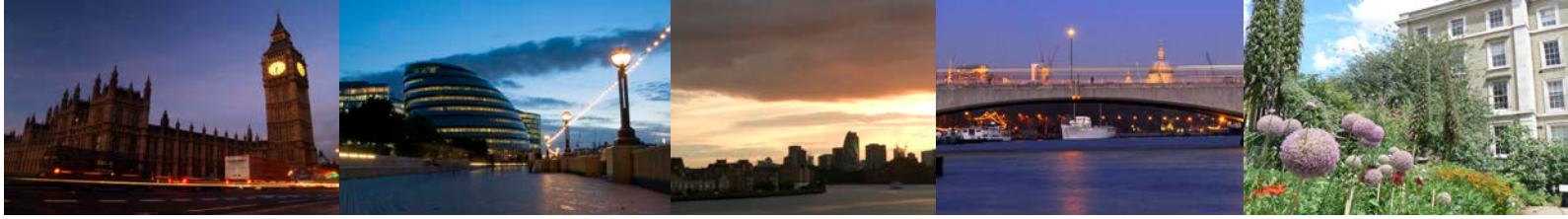
different experience, in circumstances where, as I have said, there isn't the same measure of mixing between prosecution and defence, and with the judges, which is something that some of us have tried to put right over the years, but it doesn't work as well as we might want it to.

23. So if we now turn to scale; having dealt with diversity, scale. Well, a lot of these allegations relate to wars, over long periods of time, with atrocities committed against very many people, in a wide variety of places, by a large number of people. A lot of it involves command responsibility allegations, and a lot of the process which arises from the creation of these tribunals is to set about a huge number of investigators. And the investigators pile into countries, and they pick up everything. So they go into ministries and they lock down everything. So what gets scanned and put into your computer system is the entire Ministry of Home Affairs paperwork, or the Ministry of Foreign Affairs paperwork, or if they get anywhere close to the armed forces records, which haven't been destroyed, it's all of that.

24. So you get huge amounts of information, and as a prosecutor, you have to try and work out what's relevant, and to work out what's relevant you've got to work out what you've got, and working out what you have got is hard, and it's hard because there is so much of it. You would have to live to about 900 to be able to read everything you've got in each case.

25. So you've got to find search engines or computer mechanisms by which you can search through the material, and sensibly sift what you need to know from what you don't need to know.

26. So the scale of these things is quite big, and the natural consequence of that is that a prosecutor generally does not know the whole case. Now, that's kind of odd for, I suspect, people here. To be in a situation where you're in court, and you know that there is large stuff

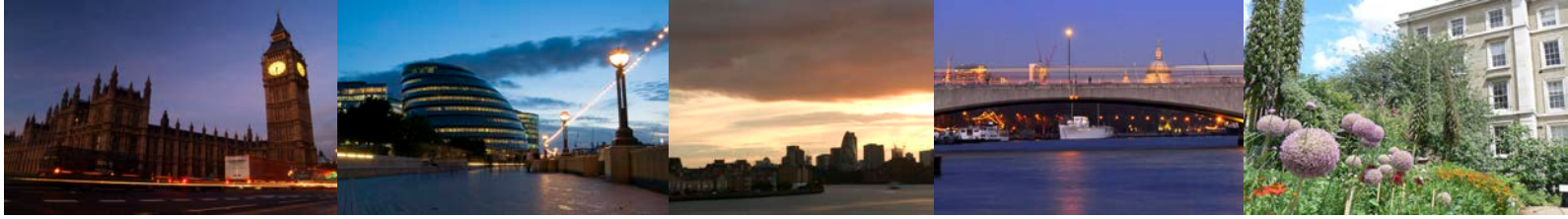


out there, you just don't know about. What was it Rumsfeld talked about: known unknowns. You just know it is out there, you don't know if it's going to come back and clobber you. So to some extent, there is an element of flying by the seat of your pants, hoping not to get knocked out.

27. And of course the defence are given similar search engines, and very often trials, as they develop, involve the arrival of new information, as people discover more things, which are in the databases, which may have been overlooked or not seen to be relevant, in initial searches. So there is a great deal of flexibility involved, and mental dexterity required, as you're going through the trial process and receiving more and more material.

28. Now, the flipside of scale is industry. These are big cases, and the consequence of that is that they become industries. And I remember it so fondly seven years ago, when two of you would do a case. I am working in a team where there are 18 of us. One of the problems with that is, I am in charge of ten of them. Now, that means there's a load of people running around, there is a management structure, and I am having to be a manager, not just a trial lawyer, and I am having to try and manage what people are doing, and work out what they have discovered, and when you've got ten people running round doing things, it's very difficult to keep up with everything that they discover. It's very difficult to keep on top of all the material that is therefore generated.

29. The additional feature to the scale of the industry which is created by these cases is that you've got to watch your integrity. As a prosecutor, you've got a lot of people running round, wanting you to do something, and you're not fully informed of all the facts. So you've got to constantly be careful not to make a decision in the courtroom or in terms of disclosure and trial preparation, constantly on notice not to make a decision which may in fact turn out

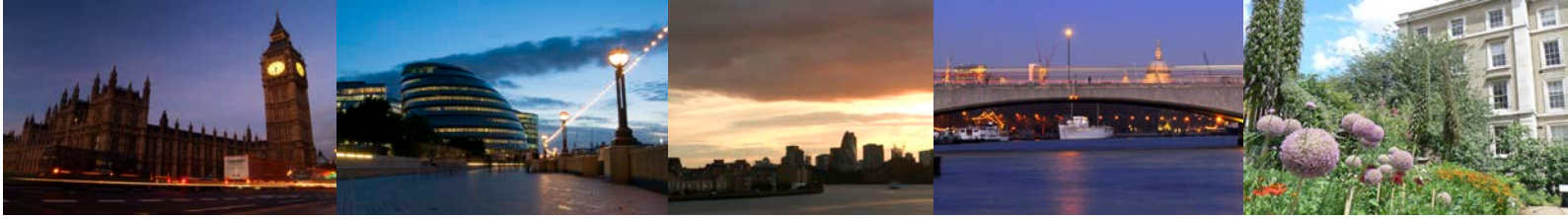


to be wrong because you have not been particularly well informed. You have got to watch your decision-making process, to try and maintain maximum information, which can be mentally quite exhausting.

30. Now, additionally, where you have management structures in the way that I have described, you also have this problem, which is when you're in court, you may have some senior figure, who is the overall bureaucratic boss of the institution, who may want you to do something, may want you to take a particular position, but that person is not best informed, because you are the person with the detail as to what's going on in court, but they are the person in the line management structure who thinks they are in a position to tell you what to do. So with your practice as a member of the Bar as your background, your guiding light is your integrity and your code of professional conduct, you find yourself from time to time at odds with your management structure.

31. So there is advocacy required, not just in the courtroom, but there is advocacy required in the office, because you are often having to explain what you are doing to people who think that they are in a position to tell you what to do, but they don't know what you know, and you have to be a bit tactful about pointing out that "You don't really know what you're talking about". So there is a lot of advocacy going on both in and out of the courtroom.

32. Another feature which has arisen in prosecution advocacy internationally is there is a weight of appearance on the part of our North American friends, and the North Americans, it seems to me, love writing stuff. Now, Lord Chief Justice Judge earlier on today really struck a note with me this morning, when he said there is a danger of orality being snuffed out by bumf. You may remember that expression he used earlier on today. Well, there is a lot of

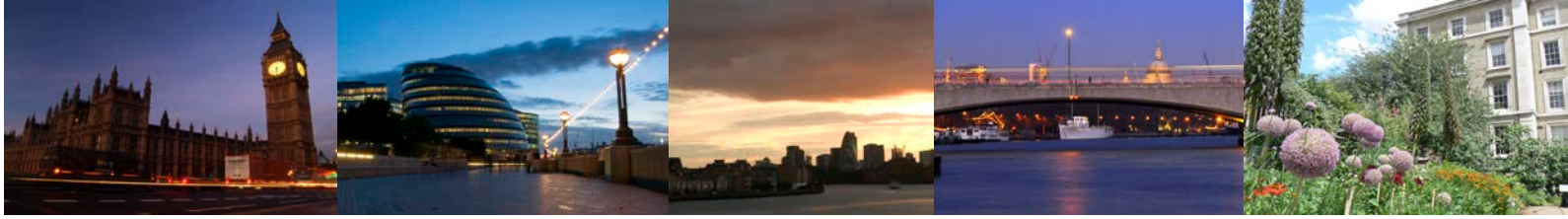


that potentially going on in the international tribunals. There is a lot of paperwork filed and originally it starts as: we have limited time to deal with big cases, so all the legal arguments will be written, and we will just hear evidence during hearings. But actually that has then created this side industry of filings and motions on all sorts of legal matters, which get cross- filed, and crank up the quantity of paperwork which has to be decided as a preliminary, before any evidence is heard.

33. And there isn't the school of thought internationally that short is good. Internationally, people think "The longer, the more clever I look", so we get a lot of very long filings about things of not very much importance, which might be said in only a few paragraphs.

34. So you wouldn't want to be a judge in the international tribunals. The amount of material you have to read is considerable.

35. Now, the consequence of that, the amount of material you have to read being considerable, is that you don't read them. And what you manage to do is you find an army of youngsters, who come in, all bright-eyed and bushy-tailed, and they want to write law. They are straight out of university, and they want to write law, and change what everybody's understanding of genocide is, or other crimes against humanity. Because there is so much of this paperwork generated that no individual judge, for example, or senior prosecutor can keep control of it, what naturally happens is it filters down to others to be responsible for, who are quite junior. And it is very difficult as a senior to keep your eye on what's being decided, what's being written, what's being drafted, and if you're a judge, what's been drafted as your decision by the juniors.

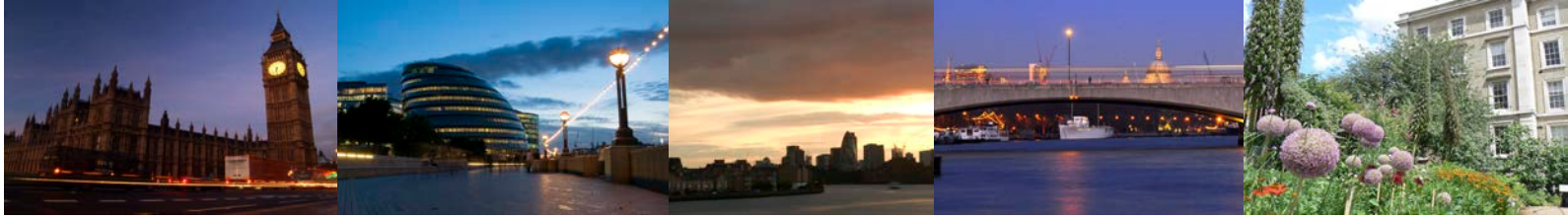


36. So if you're prosecuting in this environment, you've really got to learn quickly about what is a motion you need to pay attention to, and what's just bumf, as the Lord Chief was saying earlier on.

37. Finally this, the third word: history. One of the problems with these international tribunals is they set out to create a historical record of a big event. But that's a good thing, because very often, these events are clouded in the fog of war and conflict, and the tribunal set out to create records by way of the judgments which are passed as to what really happened on the ground, and they also set out to give victims some measure of justice, who otherwise would be staring at a world where all the bad people enjoyed impunity. So good things.

38. But the reverse side of that, the reverse side of history is politics. In the international tribunals, there is loads of politics. Not just in the office, between people in the honeycomb of the office environment, but big stuff. Governments take an interest, they take a position on what you have filed. There is lots of whispering and gossiping going on at ambassador level. And you get information coming back to you as to what particular groups might like to see, what they would enjoy reading or learning is happening in the courtroom.

39. Journalists take an interest in everything you do. And there is an element of, if you don't strike the right note, you are going to lose co-operation with regard to getting your witnesses. Because it is very disconnected in these cases. We tend to be a long way from where the conflict arose. We tend to be in The Hague, for a start, and everything happened in either Yugoslavia, Africa, Sierra Leone, so you are a bit disconnected. So you need the co- operation of various governments to get your case together.

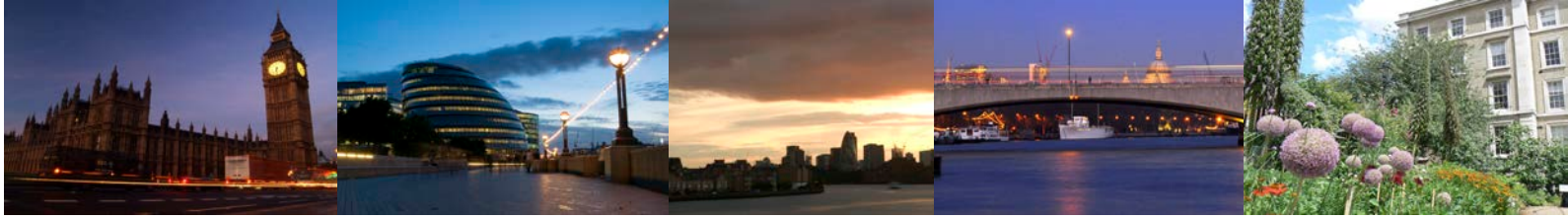


40. So as a prosecutor, you have always got to be alive to making the right decision, uninfluenced by the politics in the background, and that's quite hard. To give you a concrete example, which I think is well documented, with regard to the Rwanda Tribunal, there is some suggestion that when the Tutsi swept through the country and saved the country from the genocide of the Tutsi by the Hutu, by the Hutu government, that group that swept through the country may have committed some atrocities themselves -- not on the same scale.

41. But you can't talk about that very easily if you're in court, because you've got the politics in the background of how the government in Rwanda would react to anything being said in the courtroom about their saving Rwanda from the Hutu genocidal government.

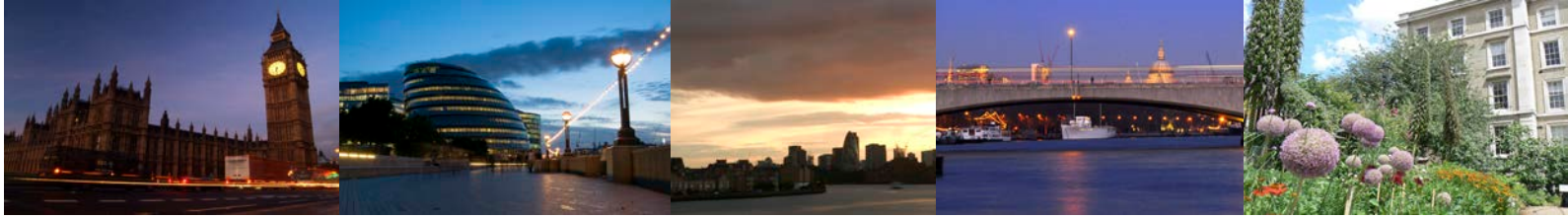
42. So that's the sort of way in which what you say in the courtroom, whether you acknowledge what has been suggested by the defence, whether you are able to accept what is being put forward by witnesses, can be influenced by nothing to do with the case, nothing to do with the rights and wrongs, but to do with what's being said by government elsewhere. It's tricky stuff.

43. So all in all, what I would ask you to think about, in terms of prosecution advocacy internationally, is you've got to be wary of disconnect, where you don't have a feel for what's going on on the ground, you've got witnesses who are culturally distinct from you, come from another country, speak another language, you haven't seen them before; you've got to be alive to maintaining your integrity, whilst presenting a case fairly, making the right decisions with regard to how to behave towards the defence, how to help the judges; and you have to try and avoid an overlong situation, where too much material is being put into the courtroom, so that instead, you are stripping it to its most relevant material, because otherwise you end up with a case which is disconnected from the people, which is far too long, and nobody is sure



whether they are all doing the right thing.

44. So there is a lot of mental energy going into the work. A lot of the guiding lights that you learnt as a pupil become very real when you're in these environments, and if I can ask, please get involved. We need good people prosecuting these big cases, so that history will record we did it right. Thank you very much.



Sunday 1 July 2012

09:00 – 10:00 Advocacy training: What the Young Bar really needs

Speaker biographies

David Nicholls

David Nicholls is the Chairman of the Young Barristers' Committee and leads the representation of the interests of young barristers on behalf of the Bar Council. He is a commercial chancery practitioner at 11 Stone Buildings in Lincoln's Inn and his practice particularly focuses on property and insolvency law.

Phil Greenwood SC

Phil Greenwood is a barrister who has been in practice for 30 years; 15 years as a junior and 15 years as Silk. Phil is in general civil practice with particular emphasis on professional liability, insurance and commercial disputes. He has also been heavily involved in Bar education and advocacy training for 25 years.

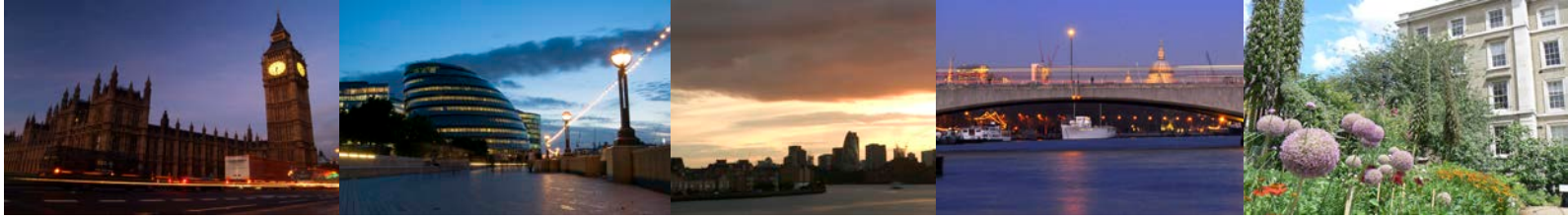
Edwin Glasgow CBE QC

Edwin Glasgow CBE QC has practised at the English Bar for over 40 years, for more than 20 as Queen's Counsel.

Having acted in an exceptionally wide range of substantial commercial cases he was also the Chairman of the Financial Report Review Panel for five years, and honoured with a CBE in recognition of that work.

In addition to his practice in the United Kingdom, Edwin Glasgow has been engaged in litigation, arbitration, mediation, humans rights cases and/or as an expert and lecturer in the USA, Singapore, Hong Kong, South Africa, Australia, India, Pakistan, Malaysia, the Caribbean and most European jurisdictions. He is a Fellow of the Chartered Institute of Arbitrators, the Institute of Linguists, the Advocacy Training Council, and of University College London; a member of the commercial panel of arbitrators for AFSA; President of the International Tribunal; Vice-President of the International Court of Appeal for the FIA; and, President of the International Advocacy Training Council.

Widely acknowledged as one of the most effective and user-friendly experts in dispute resolution he was nominated as Lawyer of the Year in 2007 in recognition of his human rights and pro bono work and is described by Chambers Guide as "something of a legend in his own lifetime".



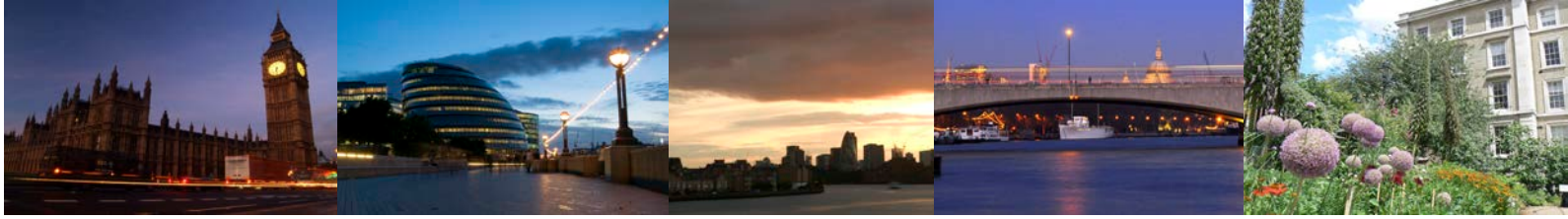
DAVID NICHOLLS

1. DAVID NICHOLLS: Good morning, everyone, and thank you Nick for that introduction. I know how important timekeeping is, so I've brought my stopwatch and I'm going to set .running now. I'm not going to promise I'm going to keep to it; I might overrun slightly.

2. When my predecessor as chairman of the Young Bar, Nicola Higgins, told me that I would be speaking to the World Bar Conference, I was enormously excited. When I got the programme a few weeks ago and saw it would be at 9.00 on a Sunday morning after the gala dinner, my enthusiasm was somewhat more muted. When I looked at the programme yesterday and saw that every speaker was a judge, a QC or the leader of a national Bar association, bar only two, myself and the sponsor, I was terrified, to be frank. But, I do want to pay tribute to the organisers for giving me this opportunity and I'm very grateful to them.

3. Before I come on to what the Young Bar needs from advocacy training, can I say a little bit about what young advocates need for Bar training. I didn't think I needed any Bar training but I was with the Irish contingent in the bar of the Apex Hotel last night, and I certainly got some Bar training I saw very effective deployment of advocacy skills and we got our drinks. It was very, very impressive.

4. What I want to do in this session is talk about two things: one is the state of the Young Bar in England and Wales today and the second is what do we need from our advocacy training. Before I do that, I need to ask the question, I need to define my terms: what is a young barrister? Well, a young barrister is a barrister under seven years' call; we define it by years in practice, not by age. And in fact, although I lead the Young Bar, I am too old myself: I was called ten years ago.



5. What is the state of the Young Bar? I've met young barristers up and down the country and they're generally keen, they're enthusiastic, but they're realistic about the serious challenges ahead, and those at the criminal and publicly funded bars are hard pressed because times are tough.

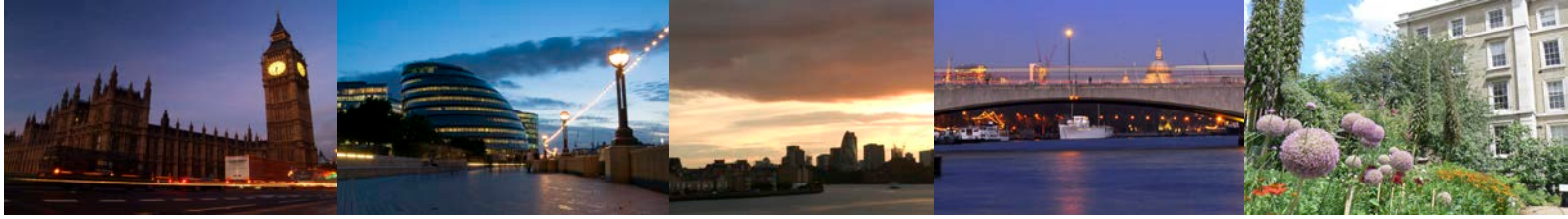
6. Now, the Bar in 2012 is, to be frank, in a state of crisis. .There are serious challenges, and I will mention them briefly, and many prophesy the demise of the Bar, certainly certain areas of it; as I say, criminal and publicly funded, those parts.

7. But the difficulty is, the Bar is in a state of crisis in 2012; it was in a state of crisis in 2011; it has been in a state of crisis every year since I became a practitioner in 2002. It was in a state of crisis in the mid-1990s when I was a schoolboy. People said: don't come to the Bar, there's no work, you won't earn a living, go and become a solicitor.

8. According to Lord Judge, when he spoke at the Young Bar Conference two years ago, the Bar has been in a state of crisis since the 1960s, when he joined the profession.

9. Why? Why are we in this state of crisis?.I think it's because we are a group of generally self-employed individuals who tend to be enormously paranoid about where the next brief is coming from, where the next cheque is coming from.

10. Those glib comments, I don't mean to underestimate or under-describe the serious challenges ahead, and they are really threefold. As Nick mentioned, we have the challenge of declining incomes, particularly, as I said, the criminal and publicly funded Bar. We've also got the challenge of a declining work, whether it is driven through restrictions in Legal Aid,

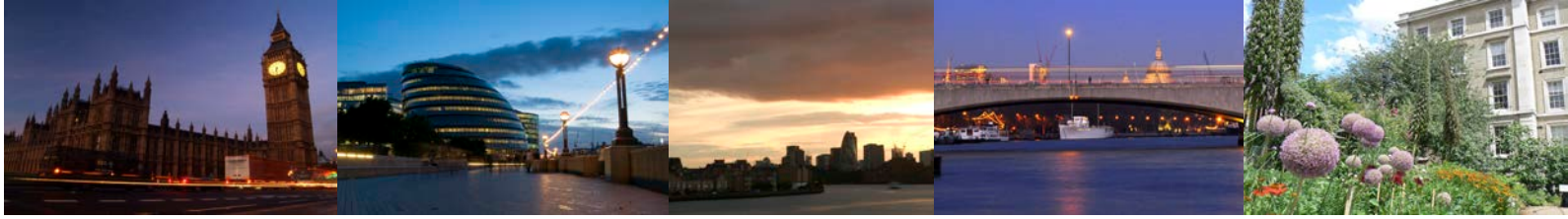


opportunities to resolve disputes outside of court, which is really being driven by the Government, and increased emphasis on mediation and so on, or changes in the way we litigate, there are fewer and fewer opportunities.

11. And there is increasing regulation, which is a bind in itself, but the aim is to drive and improve standards.

12. Let me just say one thing about declining fees, and to give you an example I received an e-mail last week from a constituent of mine, a criminal practitioner, who went to the Magistrates Court to do a driving under the influence of drugs case, there was three hours' preparation, there were expert reports, he had to travel out of London to Reading and back again, there was the hearing itself. For that he was paid £75, half what the Bar Council recommends. When you take into account the cost of travel and a proportion to chambers, for work like that he's earning less than the minimum wage, and that's a practitioner of six years' practice, who undoubtedly joined the profession with large debts from university. So these are serious issues to address.

13. Now, the impact on the need for advocacy training, for a number of reasons: as fees decline, as there's less work, the pool of advocates will necessarily reduce, and that means the quality has to improve because the Young Bar from where the QCs and the High Court judges of the future will be coming will be a smaller pool and, of course, as regulation increases, and later this morning you will be hearing about the quality assurance scheme for advocates, that is intended to drive up standards and so there is a need for greater skill in advocacy. As I say, when there are few opportunities to practice, we don't get the opportunities we need and should have in order to hone those skills.

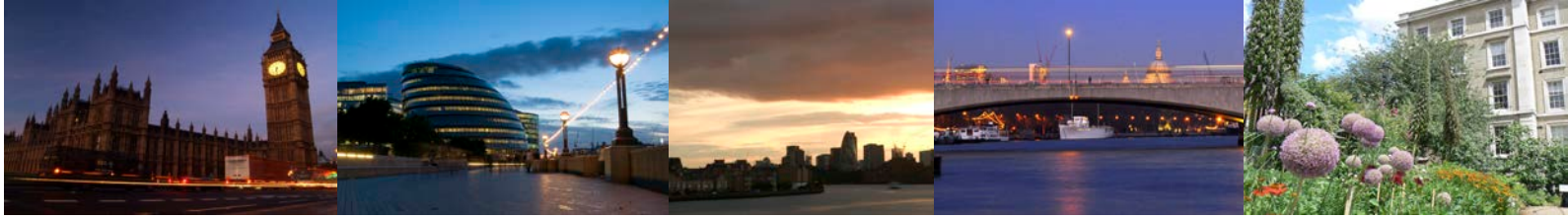


14. Now let me just say a few words about the current method of advocacy training here in England and Wales. We teach advocacy both at Bar school, we teach it during pupillage, and this is done by the Inns of Court, and we teach advocacy in a three-year programme after you have been called to the Bar, which is the new practitioner programme. I think it is right at the outset that I give thanks publicly to the senior members of our profession who dedicate so many long hours training their more junior colleagues, because without that dedication we would not have the training that we need.

15. N ow, the method that we use in this country is known as the Hampel method or, in fact, it is known as "The Method", and it was devised by Professor George Hampel QC from Australia, and it essentially is a six-stage process. I won't go through it in detail, I'm not an advocacy trainer myself, but you get the student to perform a particular part of advocacy, you identify a defect or an error he makes, you explain why it's wrong, how to remedy it; the trainer will then demonstrate how it should be done and the student gets to reenact the scene and to correct the error himself.

16. Now, the method has become something of a sacred cow in the world of advocacy training and the question I pose this morning is whether it is time to take that sacred cow to the slaughterhouse.

17. Before I answer that question, I want to say a word about the conservatism of the Young Bar. I have been .astonished since I joined the Young Barristers Committee four years ago at how deeply conservative my colleagues were. Whenever there is a serious proposal for change from the senior profession: shall we get rid of wearing wigs? The Young Bar says: no, no, we shan't. Shall we have more flexible business structures? Absolutely not, says the Young Bar.



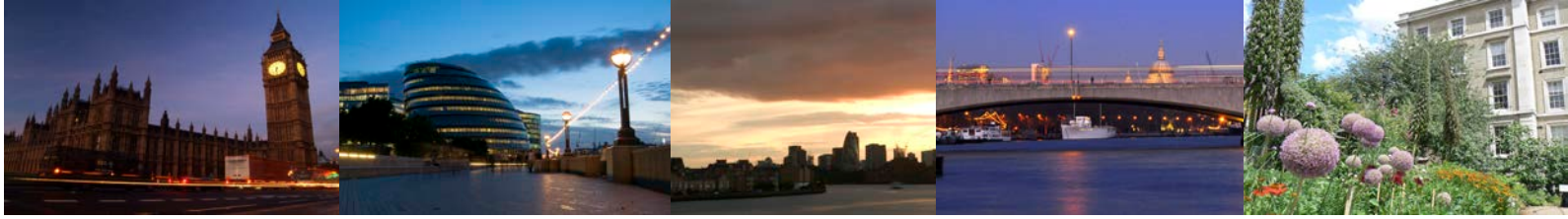
18. I have to say we're not conservative about everything; when it comes to equality, diversity and access to the profession, my committee is second to none. But there is that conservative streak, so I have to be cautious. So I'm not going to talk about abattoirs for the sacred cow; what I am going to suggest is what we need is a little genetic modification.

19. What is good, firstly, about the way we do things?.As I say, I have mentioned the dedication and commitment of our trainers. The Hampel method has the benefit of simplicity. It is easy to teach and easy to learn from.

20. My first criticism is this: it needs to be more focused, it needs to be more rigorous. The message I receive time and again is: it's got to be tough, it's got to get personal. It's too namby pamby, if you like. It wants to be nice to everyone. We have got to get in there and be hard hitting and be frank, because most young advocates have a number of defects. I'm sure you've already counted several of my own during the course of this short speech. And we need to be told what they are. You need to be frank with us, you need to be honest. We're big enough to take the criticism and we hope we're intelligent enough to respond to more than one criticism at the time. So that is hugely important.

21. Secondly, we would like to see more advocacy training. We would like to see it extended beyond the first three years of practice. We would like to see it extended perhaps over the first seven years in practice. I certainly haven't had advocacy training for about nine years, so there's a real opportunity there to continue the advocacy training. That, of course, though, will require the continued commitment, as I say, of our more senior colleagues.

22. So it's got to be personal, we want it to continue for longer, and we would like it to broaden its remit and to focus in more detail on different areas. For instance, cross-

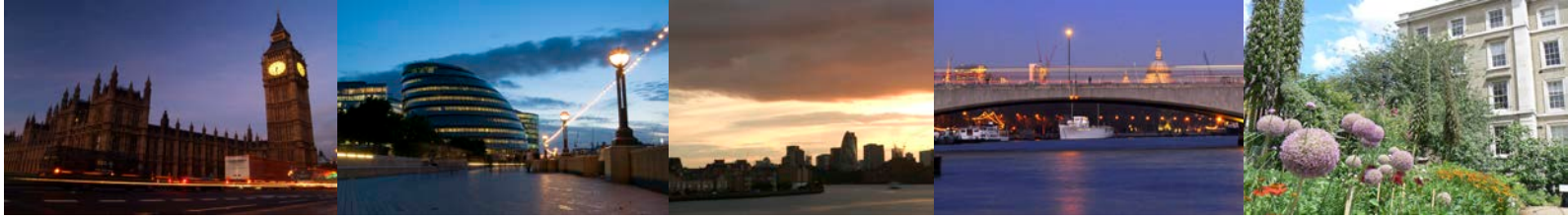


examination is obviously something covered at the moment, but if you do civil work, like me, you do maybe two, three, perhaps four trials a year; you're not cross-examining often enough. And I know that's an experience common to many of you, as you've told me over the course of this conference. How can we honestly proclaim ourselves as experts in the trial process and experts of cross-examination if we're only doing it a few times a year?.Would you trust a surgeon who only performs two or three operations a year?

23. So we need to have that practice, and we need to have it not just for cross-examination in general, but, for instance, my colleagues at the criminal Bar would like to see more training in respect of child witnesses, more training in respect of vulnerable witnesses, different types of witnesses who they would encounter in court.

24. What other areas can we look at?.Applications. Now, of course, the type of work I do we're always doing applications. Other areas of the Bar may benefit from more detailed training on that topic, but what about applications in front of a difficult judge?.We all know what it's like when you have a recalcitrant judge, and that requires specific skills.

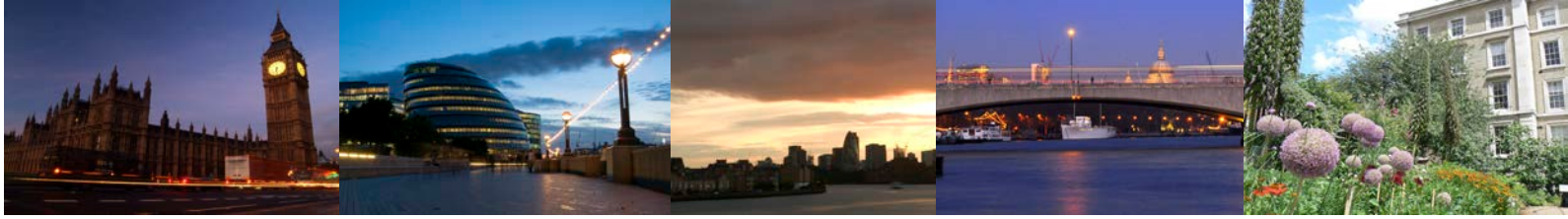
25. I'll just tell you a story, very briefly. I remember appearing in the applications court in the Chancery Division and the judge is well known for his independence of mind. I probably shouldn't mention him by name but most of you won't have heard of him anyway, it was Mr Justice Peter Smith, and the method in the court is he will run through the list of cases and you have to say your time estimate and whether it's effective. So he's going through the list and he calls on the case blah, blah, blah, and counsel next to me stands up and he says, "My Lord, 30 minutes, effective", and the judge rather grumpily says, "Mr So-and-so, do you have an opponent?".Mr So and so replies, "No, my Lord, apart from your Lordship".



26. We all need training to deal with difficult judges like that.

27. Appellate advocacy, again, is another topic that could be focused on. Again, juniors, young practitioners are doing appeals. Of course they are. They don't do them very often, and that is an area where the focus could be.

28. Just looking at the time, I think timekeeping and keeping to time is another area of focus, and knowing when to stop is something we could all learn from as well, and on that note I will conclude, but thank you very much for listening.

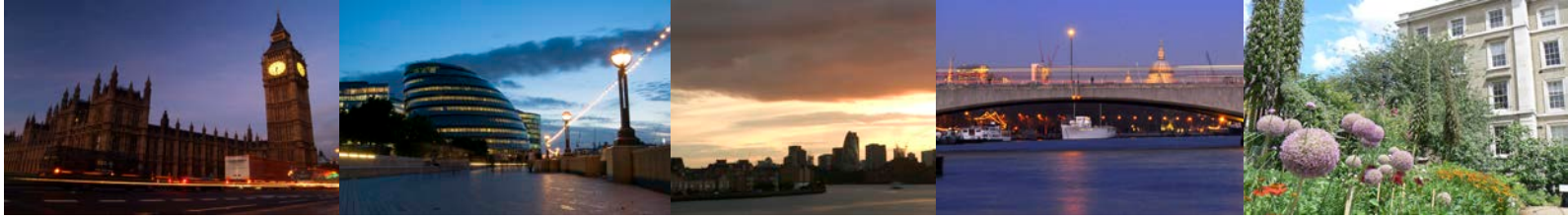


PHIL GREENWOOD

1. PHIL GREENWOOD: Thank you for the privilege of being here. It's been a wonderful and a powerful reminder, this conference, of the similarities between what we do in different places around the world. We're all seeking to try and achieve the same objectives, we're just in different time zones, and I thought it was a wonderful juxtaposition we had yesterday morning, yesterday afternoon and yesterday evening.

2. Yesterday morning we had talked about advocates from the past, and how rude they were to judges, and we laughed at it, and we considered was that good advocacy? Then in the afternoon we heard from Asma and Tina about them actually needing to do that kind of advocacy in their countries. It's not a case of being good advocacy; it's a case of being necessary advocacy. The need to actually say to some judges: this is the job that you must do to apply the rule of law. We can laugh about it in our situation, but there it's very real. And then last night we're sitting in a hall, 1570 it was completed. It's a lovely juxtaposition of different times.

3. But to the topic: what does the Young Bar really need? Well, you'll have to drag me away, I am afraid, Nick, from this topic. We could go on and on and on. I want to speak, obviously, just in the context of advocacy, and I want to just try and boil it down to a couple of things. It's basically opportunities to get on their feet. That's what they really, really need. Advocacy training came about because of the lack of opportunities for them to get on their feet, to provide as an adjunct to real practice those special occasions where they could get up and appear without a client's interest being at risk.

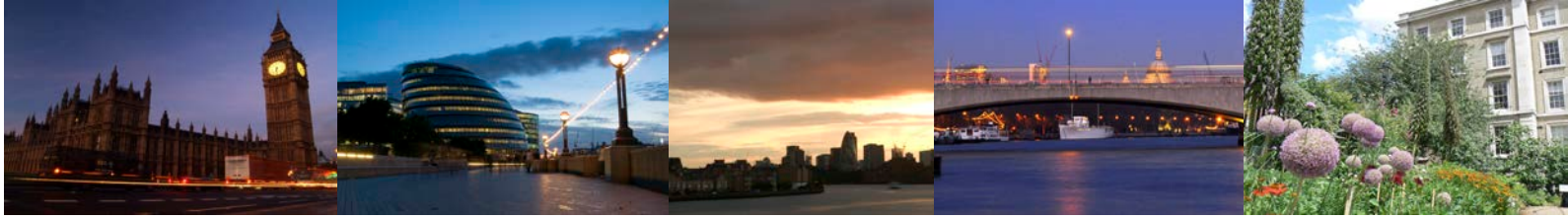


4. A lso, of course, there was the problem in the pupilage system, whatever it was wherever it was, that the people providing the training weren't actually doing what was really necessary in terms of providing the essential guidance, you know, careful instruction in a thoughtful way.

5. But one needs to keep advocacy training in its place, in my view, and let's go back to what young barristers, wherever they are, really need, and that's guidance. They need guidance before they appear in front of a court, and they need guidance after they've done that appearance, and they need encouragement before they appear, and they need encouragement after, as we all know.

6. Now, that is concerning me because I think that guidance and that encouragement has declined. What has occurred with the advent of advocacy training is a sense that one can send people to a course and that's all they need. They will do the course and at the end of the course they will have achieved all the competencies that one expects from such a course, and in terms of advocacy that's just unrealistic. We all know that you can't, in a course, teach everything a person needs to know. Our own experience, wherever it might be, in whatever course you have ever done, is that after you attend a course you start to properly learn as you apply what's occurred during that course. In advocacy that's because, just like surgery, every case and everybody is different, and one needs to deal with the intricacies of what the particular situation is that's before you; you can't teach that in a course.

7. What we need to do, I think, is make sure the pendulum doesn't swing too far in the profession's mind to advocacy training being the be all and end all and leaving behind the importance of mentoring, of coaching one on one by the senior members of the Bar. When I say the "senior members", I'm talking about anybody who is not a young member. I'm talking



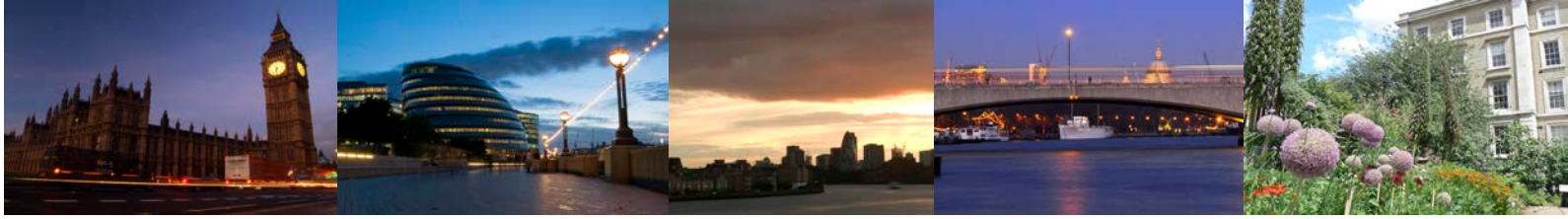
about the most senior members especially, because these people, these young barristers, need to hear it from old, wise heads.

8. Now, why isn't that occurring? I think it's not occurring for a few reasons. One is that there's a sense within our current generation that we shouldn't be, as older people, telling younger people what to do, and it may well be that some of them don't want to listen.

9. But in terms of what's necessary and what's needed, I think we need to ensure that the old, wise heads are there and doing their job just as much as advocacy training provides more opportunities for coaching and learning there.

10. If we use the surgeon analogy David raised, and I think it is a very good one for the similarities between what surgeons do and what barristers do, if you think about how a surgeon trains, they have a lecture, they learn about what's going to be involved and they do some tests. Well, we kind of do that within our Bar training courses. Then they practice on cadavers, or, now, very fancy man-made sophisticated life-like models, and they get commented on that. That's a bit like our advocacy training, actually. Then they go and they observe the best surgeons doing their work and they talk to the surgeons. The surgeons explain what they're doing and why they're doing it.

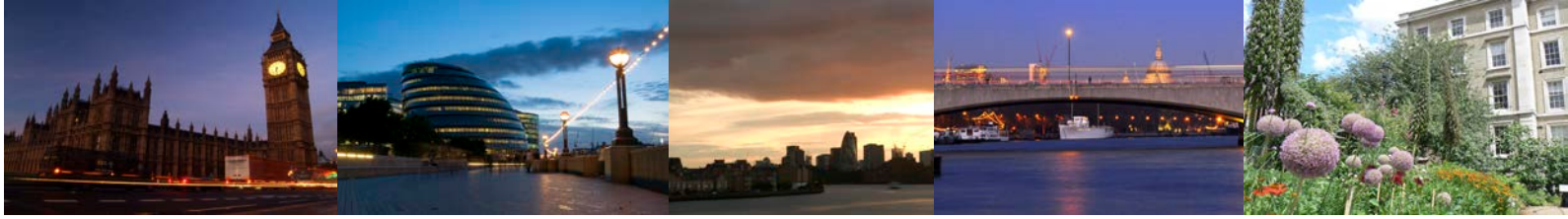
11. Then they get to try a little bit here and a little bit there, and they get to do it, and they're required to do it, in front of the surgeon, on a real person, where it really matters, and they get commented upon and they get shown the techniques and improved techniques, and they do it on lots of different bodies and lots of different parts of the bodies, until people are satisfied that they can go and do it on their own. We don't do that last bit so much.



12. Who has to do it? My suggestion is it has to come from the old, wise heads. Why? Well, for several reasons, but I won't appeal to the lofty one of giving back to the profession: that goes without saying. I'll tell you why. Because it's fun. It actually connects you with the most important and valuable resource for the future of our legal profession: the Young Bar. It's important that we do it. It's satisfying that we do it, and it provides you with a sense of actually feeling like you are doing something for somebody else in a very positive and effective way.

13. For them, it's hugely important, it shows them the respect for the old Bar has for the Young Bar, which is critical for the Young Bar, then, to show the respect that it should for the older Bar. And for them it shows leadership. It shows them the very thing that you want them to do in the future as they become leaders of the Bar, wherever they are.

14. So, in a word, what the Bar really needs is inspiration, and it needs you.



EDWIN GLASGOW

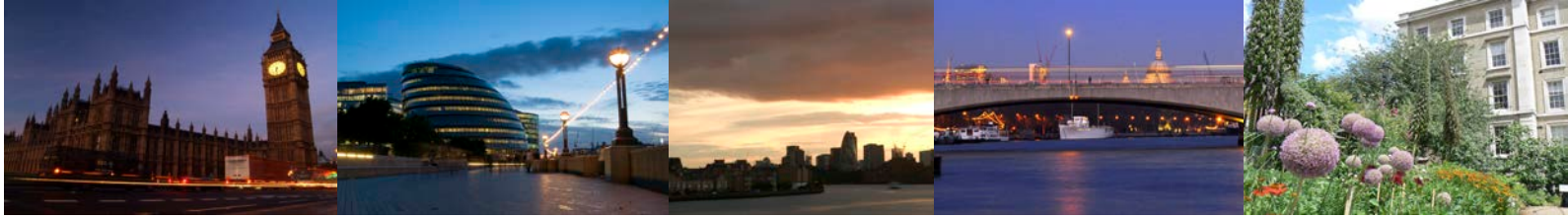
1. EDWIN GLASGOW: Yes.

2. Good morning, ladies and gentlemen. The one thing I wanted to get away from was the kind of personality cult, that the old people who have been seen around too much get up and, in some ways, are treated as special. At least that doesn't happen in this session. It's the one session of this conference that I wanted to come to and I wanted to participate in, because, like Phil Greenwood, I believe very passionately in the future of our Bars, wherever they are.

3. O ne of the huge privileges that Phil and I enjoy with the international work, is that wherever we go, and actually I totted it up that, between the two of us, with our two teams, we've actually now visited 21 jurisdictions as advocacy trainers during the 25 years that we've been doing it, and we are not remotely complacent: we know that we have a huge amount to learn. We would both say that we have never been to any jurisdiction where we have not come away having learnt something. Absolutely true in every single case.

4. What we have also learnt, and this is a real privilege, is that wherever we have gone we have found the younger Bar in a better state of health than it was when we were at that stage. The Young Bar of today, evidenced by David, but the Young Bar, throughout the world, is better educated, it's more committed, it is more generous in what it does and more public spirited.

5. What I was saying was, and I'm speaking on behalf of both of us, because we do a lot together and we're very proud of what we do and what our teams achieve, the International Advocacy Training Council has, at last, been incorporated, and it is a body that is up and

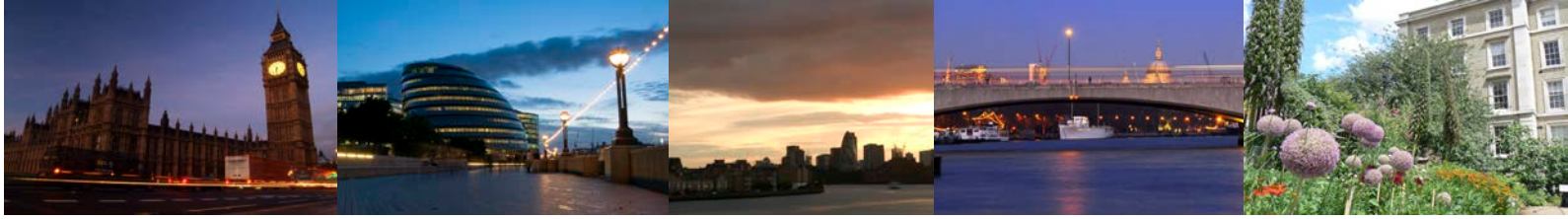


running. Thanks, let me say publicly, to the enormous generosity of the Hong Kong Bar, where we decided it was sufficiently neutral to centre it, and personally the enthusiasm and personal generosity of Russell Coleman who sits in the third row in front of us, because without that commitment and that generosity, the international body simply would not have got off the ground.

6. We believe that it is tremendously important. As I say, wherever we go, we find the Young Bar in great health. Of course there are exceptions. There are the exceptionally good and the exceptionally bad, both in our past and at present, but on the whole it is true to say, and no exaggeration and no platitude, that the young barristers and the young advocates today, certainly whom we would encounter in what we call the common law world, are far better equipped, far more committed, far more generous and public spirited in the pro bono work that they do, far less greedy and self satisfied than our generation ever was.

7. In tiny part, I hope that that's due to the fact that our Bar woke up about a quarter of a century ago to the fact that, as Nick rightly observed, advocacy is not something that comes with mother's milk or an English public school education or being male and middle class; it's something that needs to be taught and we acknowledge that.

8. I said right at the start, I think we need -- and I know George Hampel himself would share this -- to be aware of holy cows and of personality cults around individuals. We tend to call it here "The Hampel Method", because George was inspirational 25, 24 years ago when he came over here and shared it with us. But, let's be fair: we owe a huge amount to the Americans, the idea of structured advocacy training came from the National Institute of Trial Advocacy, which some of us went to more than 30 years ago. What George did was take that and make it more fitted to jurisdictions where, as we've frankly acknowledged, one of the

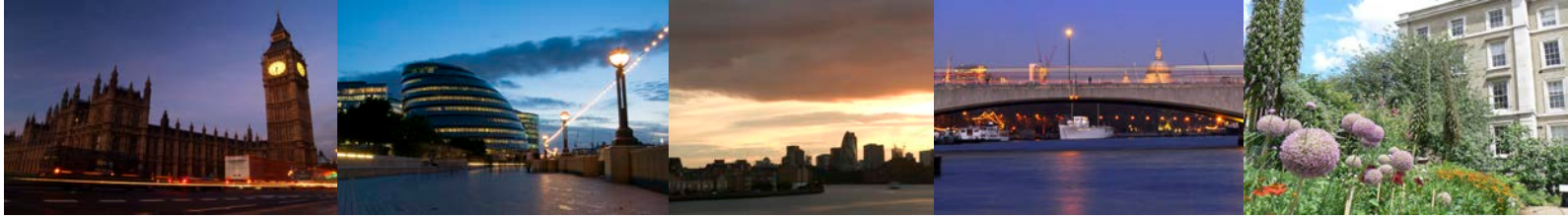


things that we're trying to teach our advocates is ethics, and it's essential that the teaching method is specifically geared towards advocacy in a tribunal where advocates owe a duty to the court. And, of course, different standards of ethical behaviour are thereby required of them.

9. But the method that has been developed and, yes, the emphasis on the definite article is perhaps a little mistaken, it can become too rooted and it can become highbrow, but if David thinks that advocacy training is all about praise and disingenuous spreading of goodwill and kindness, I invite him to come and watch Phil at it for a time, because he would soon learn that there is another side: the word "rigour" and "Phil Greenwood" do tend to go together.

10. What worried us, I think, when we started this advocacy training was we first woke up to the fact that the Bar did owe a duty to its profession. It did owe a duty to educate the young advocates of the day, and that what we were doing 30 years ago, which was simply bringing those who thought of themselves as being the great cross-examiners of the day in to give a lecture to a room full of law students, was not actually doing anything more than making the majority of them feel that it would have been better if they had taken up poultry farming as a career: showing off in front of students how clever you are and telling war stories is not actually an effective way. And it was in order to get away from that that those of us who were interested in trying to establish a new wave of advocacy training went to watch the way the Americans did it and invited George Hampel over to show us, and unashamedly we adopted and adapted for our own purposes that method and we have spread it worldwide. As I've said, in Phil and my case, I think in exactly 21 jurisdictions.

11. The impact that that had -- and before we're too self-critical about it -- the impact that

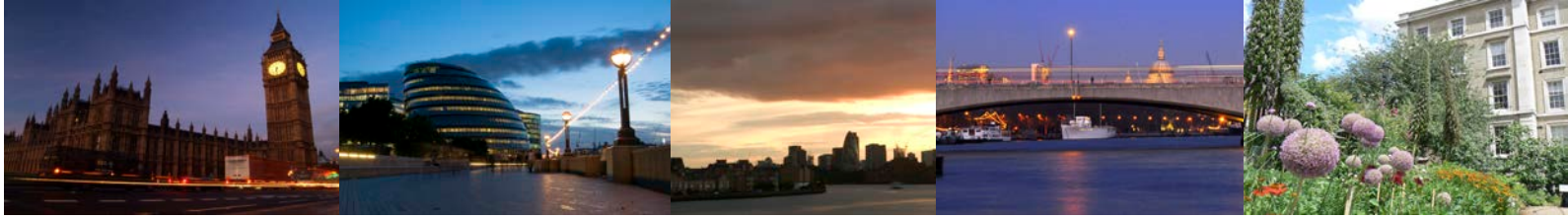


it had at the time when it was introduced here and spread from here with the help of the Australians could hardly be overstated. I've told the story before, but for those of you who didn't hear it, the initial conference, 24 years ago in Gray's Inn, where all the inns attended, when George and a very small team of three other colleagues from Australia explained the method and demonstrated it over the course of a three day period, was so stunning that the then treasurer of Gray's Inn, the head bencher of Gray's Inn, addressed the pupils at the end of the sessions, told them how lucky they had been to have this, and said in passing -- and a distinguished and elderly man who had sat for many years on the Chancery Bench -- he said: and I think back that when I came to the Bar just after the war there was no advocacy training at all. Then he paused and said: and, come to think of it, there wasn't a lot of advocacy. Mere audibility was regarded as an affectation.

12. T hinking back to that age, that there was a time when there was no advocacy training of any kind at all, I hope that we have improved upon that. We have improved upon that because the audience to which we are addressing and with whom we are cooperating is, as I've said, of a remarkably better and more worthwhile calibre and quality than that which we were at their age.

13. We learn a lot. We are very anxious from conferences like this for you to tell us what you think you are doing in your jurisdictions which is better, and I speak, I know, in that on behalf of all the five founding countries of the IATC, because we get round as far as we can. It is hugely rewarding work. Advocates of the quality of David -- I mean obviously you can see the sort of advocate he is -- it's not easy to improve upon someone like that and it sometimes isn't easy to improve upon lots of people.

14. But if you are at the very bottom, if you are trying to establish a career at the Bar in a

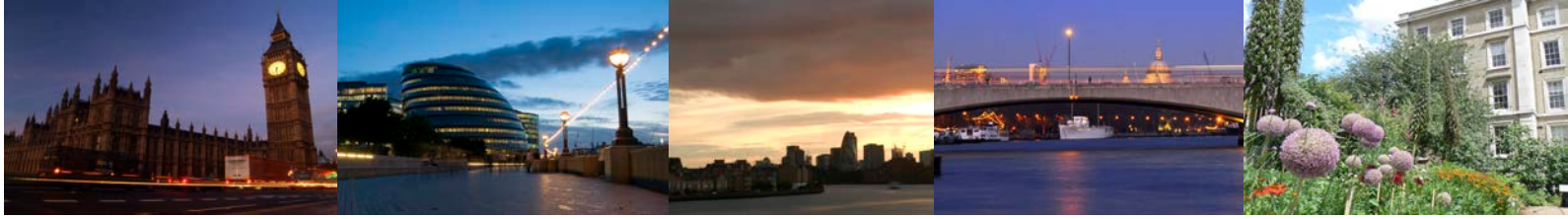


difficult jurisdiction with no help at all and no finance, it's very difficult to overstate the obstacles that you face.

15. By sheer coincidence, and this is true, three days ago I had a very moving e-mail from a young man in South Africa. I had first taught him with Denise Fisher, who is sitting in this room from South Africa, I think about ten years ago but the dates don't matter. He was fresh from university, having qualified to go there by reading at night in a squatter camp that didn't even have electricity. He'd got himself through his university, he had so distinguished himself as a devil of a reader at the Bar in South Africa that he'd got a scholarship, we had taught him advocacy and he had excelled so much that he had been invited to join their now very distinguished course that they run, with help from the Australians and from ourselves in the Stellenbosch University, which is their own advanced advocacy course.

16. He had done so well there that he'd been invited to attend the Oxford advanced course, the international course that we run at Keble, and so well there that he'd come to the notice of the Australians, and he is due to attend the advanced international course in Australia, in Brisbane in January of next year, and what that young man said about the opportunities that had been given to him by a very small band of international trainers who had gone to help Denise and Tim Bruinders, who is sitting at the back there as well, was one of the most moving things that I have ever read, and if we think that we can be complacent about what we're doing in our own jurisdictions, you only need step aside to see the help that we ought to be giving those people and the way it's valued.

17. T hose of you who were with us when we came back a couple of months ago from Zimbabwe and the course that Desmond Browne had set up and led, to see the quality of advocacy there and the encouragement, in the most appallingly difficult circumstances -- I



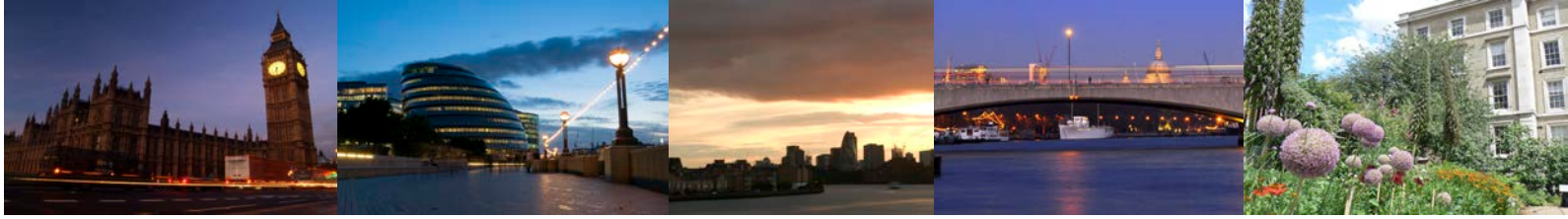
don't underrate anything of the difficulties that David has spoken about, but you can just imagine some of the obstacles to trying to play your role to the enforcement of the rule of law in Zimbabwe in the present climate in order to put into context some of the difficulties that the Young Bar tell us about that we're facing there.

18. Because at the end of the day, as advocates, what we are trying to do is to uphold the rule of law -- and we don't need to make pompous speeches about human rights -- it is what we do for a living in our own jurisdictions and elsewhere. And it is a fact that the world, not only lawyers -- there are lots of bad jokes about lawyers and most of them are well deserved -

- but when the chips are down and the rule of law is under threat, advocates, it is just assumed and taken for granted that they will have integrity, independence and courage. We see that in abundance, wherever we go. Two recent examples in Pakistan and Zimbabwe where the Bar could not have those qualities in greater quantity.

19. The sad thing is if you are going to be effective as an advocate, you also need competence, and it's that final fourth element that we believe the advocacy trainers add and it is vitally important. I commend the work that they do.

20. I'm going to move on and other people, like David -- actually now he's too old to be a young barrister, so he should never have been allowed to address you at all. What he ought to be doing is moving on and joining us, where he will be most welcome, as will all of you, to support the work that we're trying to do, which we believe very sincerely is worthwhile, and we welcome your feedback very much during the course of this session.



Sunday 1 July 2012

10:15 – 11:15 **Quality Assessment: how will it work and what will be expected of advocates**

Speaker biographies

The Rt Hon. Lady Justice Rafferty DBE

After reading Law at Sheffield, which in 2005 awarded her a LL.D, Lady Justice Rafferty was called by Gray's Inn in 1974. She took Silk in 1990 and became a Recorder in 1991. As well as being Head of Chambers at 4 Brick Court (now 9 Bedford Row) between 1994 to 2000, Lady Justice Rafferty was a member of the Criminal Bar Association (CBA) between 1986 and 1991. She then became the first female Vice Chair of the CBA (1993 to 1995) and subsequently Chair (1995 to 1997). She was the first female Chair of the Bar Conference in 1992.

Lady Justice Rafferty was the only barrister on the Royal Commission on Criminal Justice (1991 to 1993). As a member of the Pigot Committee in 1988 to 1989, she wrote the recommendation which is now reflected in Achieving Best Evidence (ABE) interviews. Lady Justice Rafferty was presiding Judge of the South Eastern Circuit between 2003 and 2006 and a member of the Sentencing Council between 2009 and 2012.

Lady Justice Rafferty was made a High Court Judge in 2000 and a Lord Justice of Appeal in 2011.

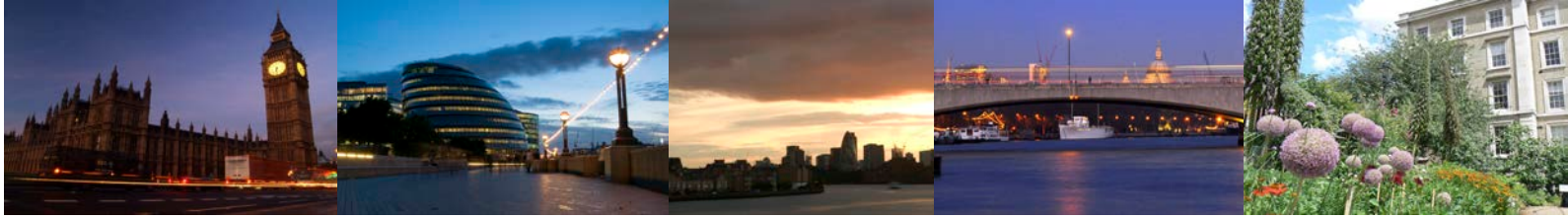
The Baroness Deech DBE

Baroness Ruth Deech of Cumnor is Chair of the Bar Standards Board and a member of the House of Lords Communications Committee. Baroness Deech lectured in law at Oxford University for many years before being elected Principal of St Anne's College (1991-2004). She is now Gresham Professor of Law. She has extensive experience of regulatory bodies, having served as Chairman of the Human Fertilisation and Embryology Authority (1994-2002), a Governor of the BBC (2002-2006) and as the first Independent Adjudicator for Higher Education (2004-08). She is an independent member of the House of Lords.

Sam Stein QC

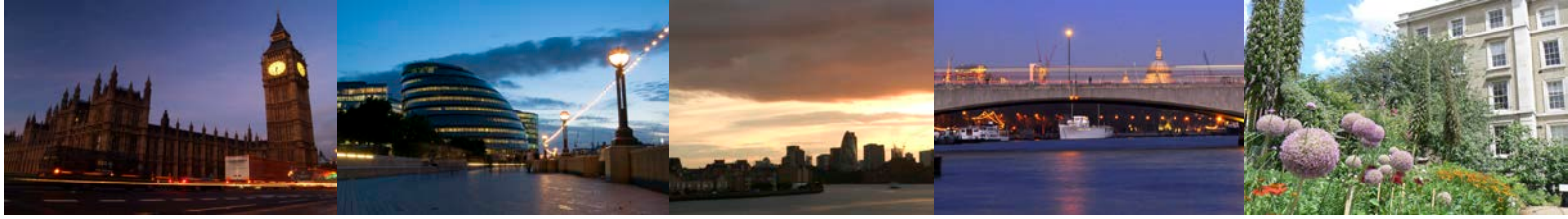
Sam Stein was called to the Bar in 1988 and took Silk in 2009. He is a criminal practitioner. Since the beginning of the Bar Standards Board in 2006 Sam has been a member of its committees and became a Board member and Chair of Committees in 2009.

One of the committees Sam Chairs is the Quality Assurance Committee, which has the responsibility of seeking to bring in the Quality Assurance Scheme for Advocates (QASA).



Max Hill QC

Max Hill has been instructed for the prosecution in many of the most significant and high-profile terrorism trials of recent years. Before taking Silk, he was involved in many serious murder trials, such as the successful second prosecution for the killing of Damilola Taylor. Recently he has been continuously instructed for the prosecution, in a series of Al Qaeda terrorist trials from 2004 to date, including the so-called 'Ricin Conspiracy' trial (R v Bourgass); all three trials resulting from the '21/7' plot by suicide bombers to detonate bombs on London transport two weeks after the carnage of '7/7.' In 2010 he was instructed to act for the Metropolitan Police Service throughout the 7/7 Bombing Inquests before Lady Justice Hallett.



LADY JUSTICE RAFFERTY

1. LADY JUSTICE RAFFERTY: Good morning. How very nice to see how so many of you choose to spend your Sunday mornings.

2. I'm relatively confident that you'll hear some stimulating ideas this morning, and I'm going to waste very little time introducing the topic, but let me set a few hares coursing.

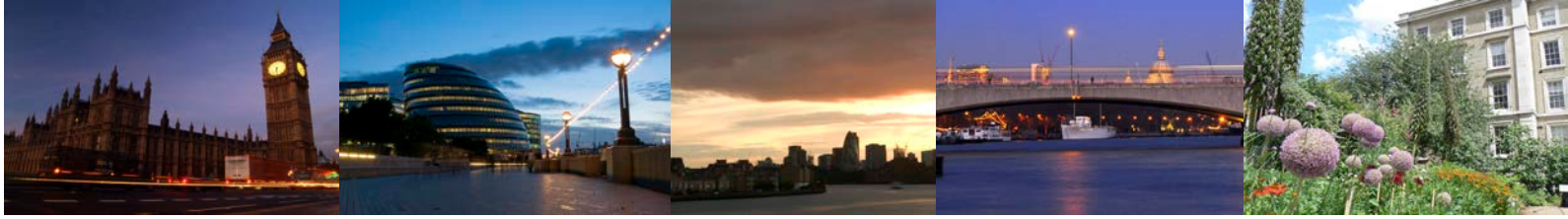
3. As I understand it, the quality assurance scheme contemplates four levels of accreditation: from level 1 at the bottom, perhaps in the Magistrates Court, to level 4 at the top, the most serious, novel and difficult homicide and sexual offences.

4. The next question: is advocacy anything to do with the difficulty of the case?

5. Next, one would have to think about competency, by which I expect is meant "competence". Competence is prey to two subgroups: (a) judicial; and (b) an approved assessment organisation. Even in the latter, I think there is a judicial component. One must be re-accredited five-yearly and one can have, of one's five assessments, the ability to choose one's best.

6. So, again, I think this is the proposed system: the judge fills in a form, but then it is a regulator, one of three, the Bar, the Law Society, the executive, who, as part of a team, will assess the assessment of the judge. And, umbrella-like atop those regulators, I think, is the top banana regulator, the Legal Services Board.

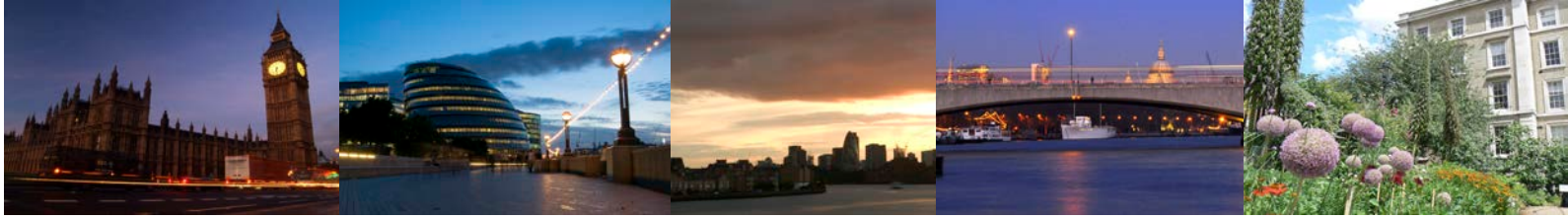
7. I think that the regulator can send in an independent assessor, if a challenge arises, to



watch the performance of an advocate. Then there are the training providers. They can deal with an under-performer or they can deal with a performer who wants a refresher. There's bound to be an appellate route and, as I understand it, it is two professionals from the three regulators, Bar, Law Society, legal execs, but, perhaps interestingly -- I'm reading what the proposal is -- they're going to identify procedural errors or ask themselves whether a decision is one that a reasonable man would find comprehensible. Underline in your heads "comprehensible", because it's not the same as "reasonable" or "rational": you could make a decision which was barking mad, but I could understand it. So it's a very interesting test.

8. And I think, too, that the scheme contemplates the judge as the "consumer of advocacy". There are some reviewers of the potential scheme who wonder whether it's the judge who is the consumer of advocacy or the jury which is the consumer of advocacy in a contested trial. And one keeps coming back, in the opinion of many, to what advocacy is all about. If you have read the words of Michael Beloff QC, you'll know that he thinks the object of advocacy is not to show how clever the advocate is, but to show how clever the judge is. And if you've been around for as long as I have, which is a very long time indeed, you will have been brought up on the old adage that the finest advocate is the one that the jury can't bear to disappoint.

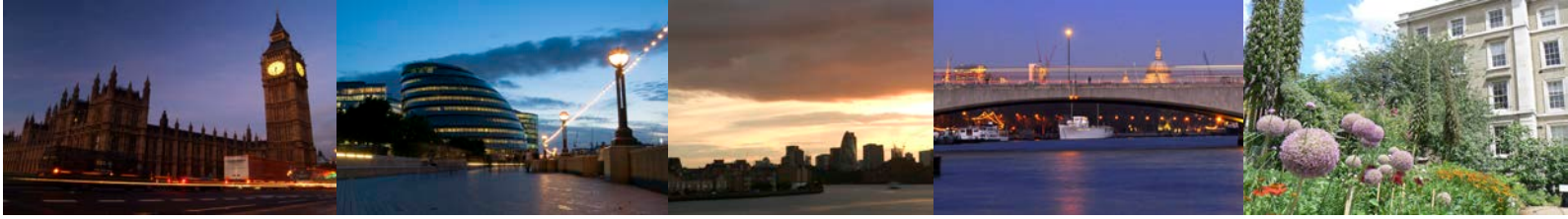
9. So what's the evaluation that the judge will do? Where does incompetence figure? Where does that leave, for example, the Court of Appeal? The Court of Appeal frequently, now, considers applications where one, if not "the", ground is: I was poorly represented by an incompetent advocate and I waive my privilege so please investigate it, my conviction is unsafe. And I wonder whether, in the fullness of time, there will be a fellow application for disclosure: I was represented by an incompetent and I can prove it, if you'll just let me see his evaluation. And he's got it, I know he's got it, because the advocate has to be shown it.



10. So, with those markers down, all of which have been aired as the scheme might or might not approach lift off, let's see what your three speakers can tell you about it. We're going to begin with the very distinguished Baroness Deech, Chairman of the Bar Standards Board and a member of the House of Lords Communication Committee, a lecturer in law at the University of Oxford and, for some years, principal of St Anne's College. She's now a Gresham Professor of Law. A lot of experience of regulatory bodies, not just in the law, and she was a very distinguished chairman of the Human Fertilisation and Embryology Authority; a governor of the BBC -- tempting to ask her some questions about that -- please don't -- and an independent member of the House of Lords.

11. You might like to take note of the blog in which she takes part. It's a very interesting read. Just look up Lordsoftheblog.net.

12. Baroness Deech. Thank you.



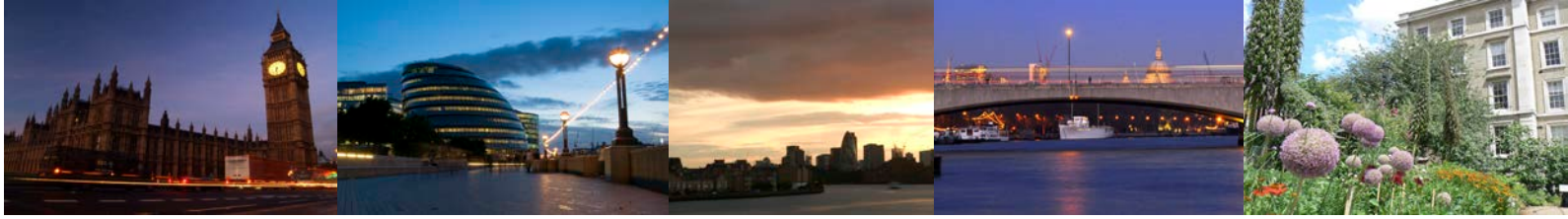
BARONESS DEECH OF CUMNOR

1. BARONESS DEECH OF CUMNOR: Nobody loves a regulator, but I stand before you and I do the job because I believe, from the point of view of the consumer, the client, the judge, the public, the rule of law, the Bar is good for all of those, the independent, competent well regarded Bar.

2. The Bar challenges the Government when necessary. It is barristers who will stand up, as Erskine said, to defend even the most unpopular of clients, and I will just take slight issue with Lord Sumption's criticism of the cab rank rule, as encapsulated here by Erskine. I think his criticism that it wasn't really working misses the point. The point of the cab rank rule, the point of it all, as understood in this country, is that there is availability of counsel all over the country. We can be confident that there will be good advocacy as available to the paedophile, the terrorist and the drunk driver as there is Russian oligarch or the rich woman involved in a divorce.

3. My slides are just pictorial. They have very little to do with what I'm saying, but I had a great deal of fun picking out, in my view, some famous advocates, both fictional and real. This is where we start, of course, with the training, and this is really what QASA is all about; weeding out, I think, the very, very, very few who perhaps need some careful attention.

4. So you have my personal selection, and I wanted to linger a little on this, because we haven't heard much about female advocacy at this conference, and I do wonder -- and I haven't got the answers -- whether there are certain qualities that women might bring to advocacy which are being overlooked, and whether there are certain criteria that we've heard



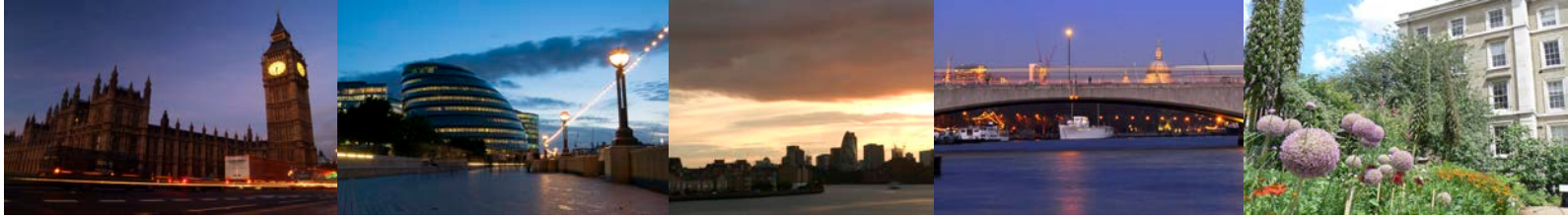
a great deal about in the last couple of days relating to good advocacy that simply aren't the sort of thing that women do. So I'll let you look at that picture for a bit while I continue.

5. Because I have a very short time, there are a couple of points I want to make at the beginning in case I don't have time at the end. What you have to understand about regulation of the legal profession in this country is that it has gone very far. I am a regulator, together with my board, of the Bar, but above me there is a super-regulator, the Legal Services Board, a macro regulator, and I was musing on the virtue of that while reading about the failings of the FSA and Barclays Bank in the newspapers this weekend.

6. We are not, at BSB, a macro regulator; we concentrate on the Bar. To the side of me there is the Solicitors Regulation Authority, which regulates the solicitors, of whom there are ten times as many as there are barristers, and underneath us all is the great hole of the Legal Services Commission, which hands out -- or, rather, does not hand out Legal Aid -- a factor which may have more effect on advocacy than anything else that we've heard about.

7. I sometimes see it as my job as regulator of the Bar, since I believe that it is in the interests of the rule of law, to fend off the attacks of encroachments from above, and below and from the side, and in relation to QASA, which I know, the policy assessment of advocacy, which was not very popular when first suggested, I say just two things: other professions do it. We've heard about medicine already this morning.

8. Secondly, if we don't create and operate a scheme which, as someone else said this morning, will separate the sheep from the goats, it will be imposed by a less friendly and less expert regime. We have the opportunity now to do what we must, but to do it in a way that really will bring out the strengths of advocacy in this country and show those who are



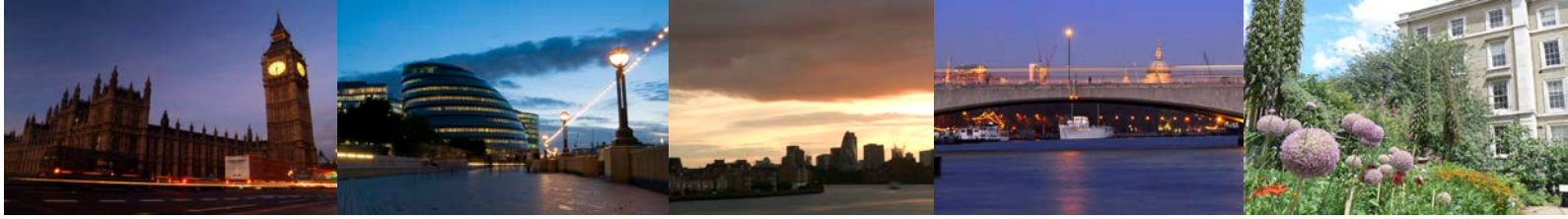
opposed to it just what our barristers, old and young, can do. So I think there is no avoiding it, and we've designed a scheme that will serve the public.

9. T here is nothing to be frightened of -- I continue with my pictures of famous advocates, not that we get that sort of thing very much any more. I had difficulty finding sufficient women. I could have thrown in, I think, as it were, Jean Southworth, Clare Montgomery, Ann Kernow. In fact, they're so retiring I had difficulty finding photographs of them, but I do think that the qualities that women bring to advocacy should not be overlooked, as well as what it means to the public, especially in their imagination.

10. Lord Pannick, whom I actually taught, is doing sterling work as an advocate in the House of Lords.

11. That is the public's notion of a woman advocate. But let me get to the nitty gritty. Our system, as you know, depends on competent advocacy on both sides of the case to deliver fair and reliable verdicts. So it is in the interests of the consumer, as well as the public interest, and that of the Bar, to ensure that there is decent advocacy and, therefore, efficient and fair administration of justice. Why should there today be any concern about the great tradition of advocacy in this country? It is because over the decades, as higher education has spread, there are many different qualification routes, and not all of them with the same attention to advocacy.

12. There are financial pressures and the natural quality assurance of the referral system is being eroded as more solicitors do advocacy and as more people go direct to a barrister and, as some would say, have difficulty in choosing the right one.

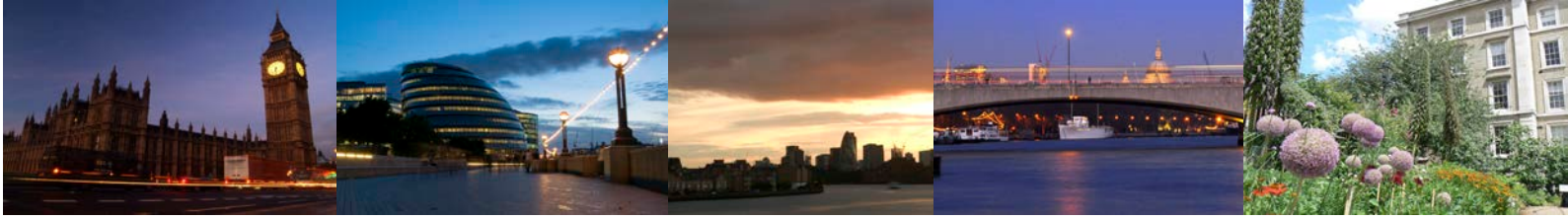


13. A s a regulator under the Legal Services Act 2007, we are responsible for setting and maintaining standards, and it follows from that that we have to do quality assurance. We're starting with criminal advocacy because it is so crucial and because there are, indeed, pressures on quality from lack of money and it is central to the rule of law in this country.

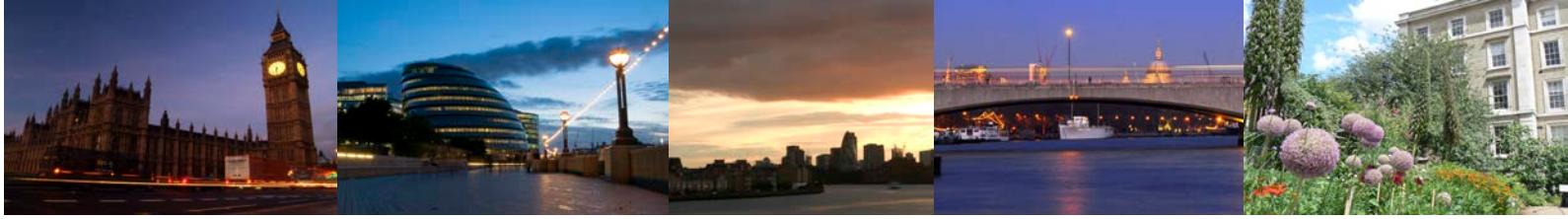
14. Regardless of the route to qualification, all criminal advocates -- barristers, solicitors, legal executives, whoever they are -- will be required to demonstrate equivalent standards of competency and judicial evaluation will be at the heart of the assessment of advocates so that consumers, all those who use the courts, can have confidence that criminal advocates are competent to handle the level of case that they are undertaking, and I do believe that this will serve the public interest.

15. Let me just go back to one. I have just one fear, and it comes from my time as a lecturer at Oxford. When I was about to leave Oxford, the money to the university -- all universities -- was being cut drastically, and at the same time, by no coincidence, the Government introduced a scheme of testing the quality of lecturers, and we were told that we had to spend the first five minutes saying what we were going to do, 50 minutes doing it and then five minutes saying what we'd done.

16. Fortunately I was leaving at that stage and I got rather worried, because the inspirational lecturers for me, in my time, and maybe for you, were Isaiah Berlin -- I said he would have failed this immediately -- HLA Hart; Rupert Cross; David Daube; Humphrey Waldock, who spent the whole time telling us what he'd said to the international court; and SA de Smith, who virtually single-handedly founded judicial review and was quite incapable as a lecturer, stood on the platform and stared at the ceiling, and I worry that formulaic assessment of advocates will drive out that natural spark, that humour, that cutting edge, all



those wonderful qualities that we've heard about this weekend, and I assure you that we at the Bar Standards Board understand that and we are committed to, and will do our best, to uphold that valuable tradition of superb advocacy, sometimes slightly eccentric, and the wonderful traditions of the English and Welsh Bar, the reason why you have all come here from all over the world. Thank you very much



SAM STEIN

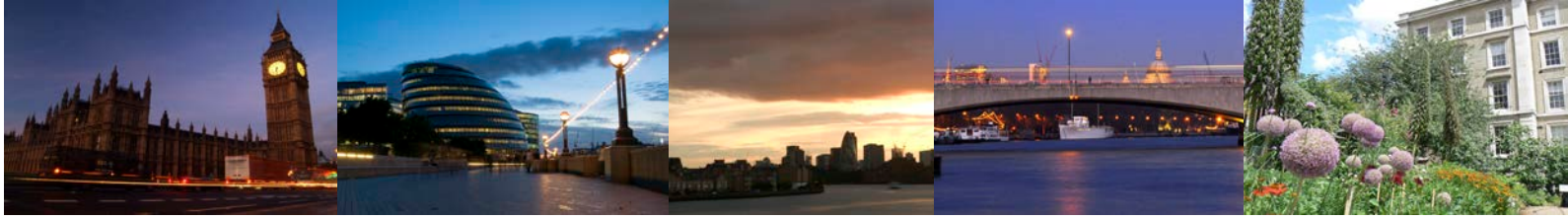
1. SAM STEIN: The danger, ladies and gentlemen, of being the Chair of Quality Assurance for the Bar Standards Board, the independent regulator of the Bar of England and Wales, as well as being a criminal practitioner, is that expectations as to my performance in advocacy may be all too high. You're about to find out whether I would pass my own competency test or not.

2. In the commercial world employees are the subject of regular performance reviews and stop checks: doctors have 360-degree reviews and most people within the commercial sector and the Civil Service work within a framework of annual appraisals.

3. T he tolerance of the community where public money is being used to simply say: let's leave it up to the market and let market forces decide that standards are maintained has now gone. Professional standards require professional systems of measurement and quality assurance.

4. When I was a junior barrister a long time ago, more than 20 years ago, it was understood you either had it or you didn't, that indefinable quality that made you a good advocate. Time has changed. We now accept that advocacy can be taught. If we can teach advocacy, we can measure standards in advocacy.

5. So once you make the decision to set up a quality assurance system for advocates, then decisions need to be made as to how to go about it. Now, first of all, remember what advocates are like. Remember that in theory I am one. They are independent, free-thinking, dominant characters who have a sustained belief in their own self-worth -- or maybe that's



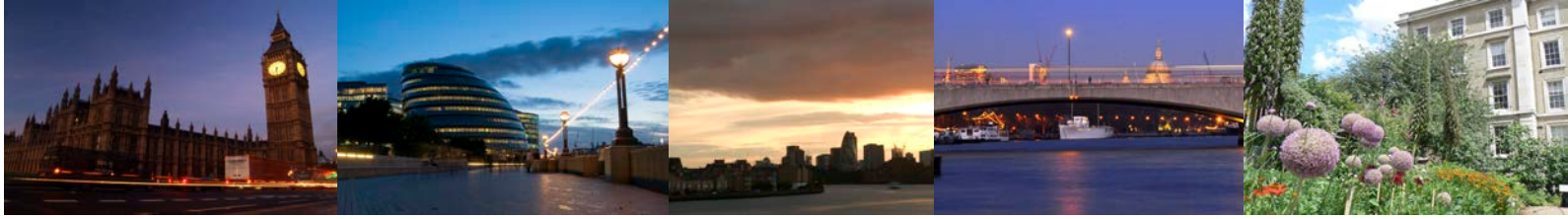
just me. They are not people who take easily to being told what to do or, heaven forbid, to succumb to scrutiny of their own professional worth.

6. The scheme itself must be designed to deal with the risks under consideration: consumer protection, public interest but, most importantly, the scheme must be proportionate. We must design a scheme that is compatible with practice, rather than designing a scheme where professional practice must bow to the will and timetable of the regulator. In order to achieve this aim, we decided to use the judges. Persuading the judges was another matter. Judges are used to the daily ebb and flow of trials and can see and weigh up the individual demands of a particular case. But it's also important to remember that judges are there, they are sitting on the bench, they are already paid for, and it is vital to understand that the costs of the scheme must be kept down.

7. O ne of the drivers for the implementation of QASA is a drop in fees from Government Legal Aid. There is practically no point in putting in place a scheme that will drive people out of practice through its very expense.

8. QASA is the first scheme of its type in the world. The Bar Standards Board believes that it has designed with its partners, the other regulators involved, a scheme that will achieve a level playing field amongst advocates and which strikes a balance between the demands of the professional versus the demands of the regulator. From January we will find out whether that is true.

9. Now, we've had some questions already raised regarding the scheme and the details of its operation, obviously, have been the subject of intense study and scrutiny. One of the points raised already today how to deal with appeals when the client is saying: well, that

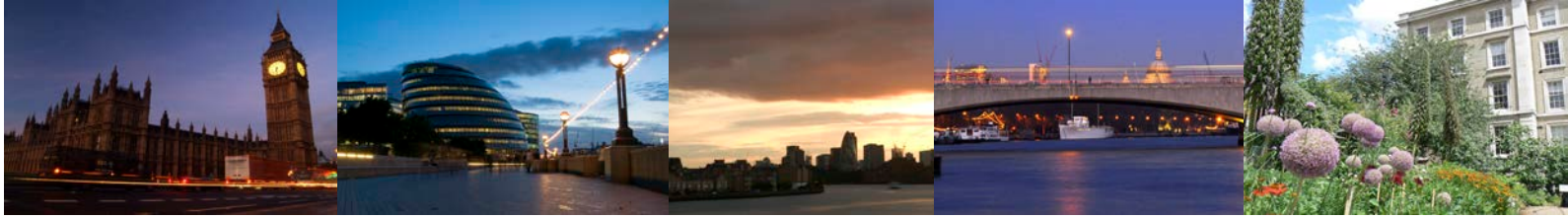


barrister was no good. She or he let me down.

10. Now, obviously this poses a real difficulty. The answer to it actually is remarkably simple, although we have to build it into the scheme. What you do is that, as we are the regulator responsible for the information that we get through the operation of the scheme, you look at each and every applicant in relation to whether there is information that we hire and whether we have that information that would assist in their case. And so each case where that will be raised will be looked at afresh, each case will be looked at new and there should be independent consideration as to whether there should be release of such information.

11. I hope to establish a protocol with the Court of Appeal, so that where there is a system which allows for the Bar Standards Board to consider the question of someone's competence, as to whether we have information that may assist in relation to that particular question, that there be, effectively, an automatic referral. What we mustn't do is put in place something that becomes a barrier to the gaining of information that may assist if there is a proper point in appeal.

12. Other questions that have been raised I'll deal with if I may, please, in the questions session.



MAX HILL

1. MAX HILL: Thank you. I'll speak from here, if I may, to save time.

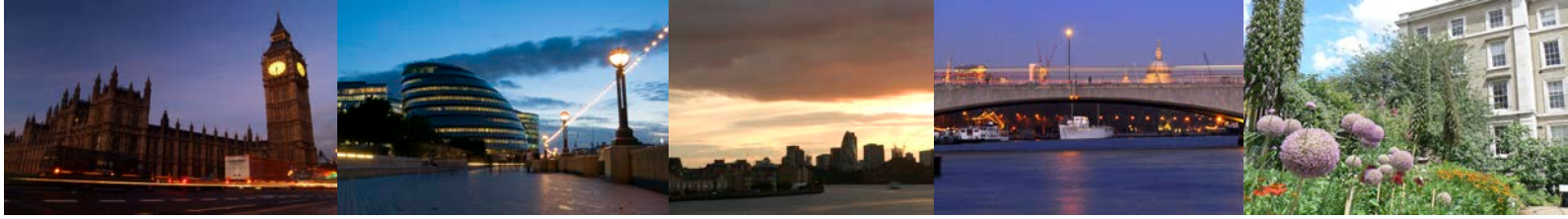
2. The criminal Bar in England and Wales has taken an enlightened and positive stance on QASA. We say that QASA has a place, but only if it is introduced with sufficient rigour to preserve our workplace for those who do criminal casework best, and therefore to expel those who do not belong.

3. We have set out the essential tenets of a regulatory scheme, and they are these: one, those who appear in our criminal courts must be fit for purpose. Criminal cases have the greatest impact upon the lives of those embroiled. If you are a criminal advocate, you must be capable of dealing with every aspect of the case in question, therefore we say that QASA is for trial advocates, not for part-time or part competent advocates. There is no such thing, we say, as a plea only advocate nor a pre-trial hearings only advocate nor a trial ready advocate. Either you can do the job or you do not belong.

4. Two, if we are to be regulated, in addition, that is, to the existing lifelong training and development which all criminal barristers undertake, then those who appear in court must do so on a level playing field. In a modern world, where advocates are not limited to barristers but include solicitors and legal executives, we say that all three groups or professions must have a common regulatory code which applies to all.

5. T he Bar maintains its own high standards because criminal cases demand nothing less. Others are welcome, provided their regulators apply the same high standards.

6. Three, policing the standard must be done by someone if we are to have a workable



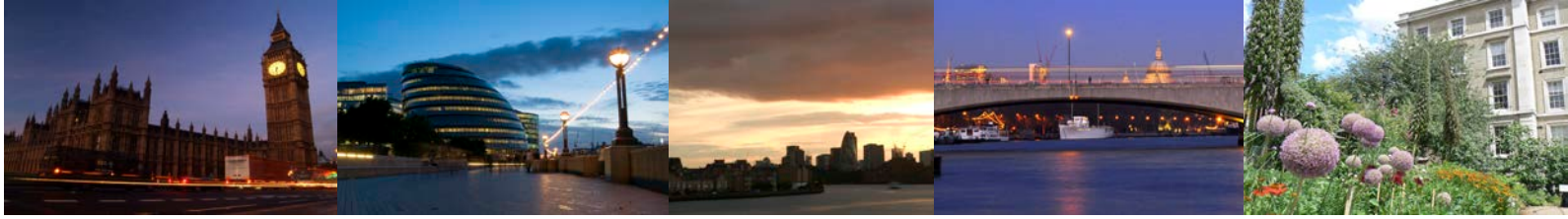
scheme at all. Because there is no substitute for appearing in court, if you do this job properly, we say that policing will have to be done by the judges who are the daily observers of what we do.

7. Solicitor bodies fought hard to be allowed to pay for their members to be policed by out of court assessors or assessment centres on a purely mock trial, model. After a battle, the principle of judicial evaluation of all courtroom advocacy has been won. Pause for a moment to consider what a concession this is for the independent barrister, who fights fearlessly and without favour in every case. We do not lightly concede judicial evaluation when the hallmark of the Bar is independence from the judiciary.

8. But the alternative is unthinkable, so we have to settle for judge's marking advocacy and all must do the same.

9. Four, for QASA to be a proper quality assurance scheme, there must be judicial evaluation. There must be the means for courts to ensure that competent advocates appear in cases at all levels. Therefore, judges who routinely conduct pre-trial hearings must have the ability to question the QASA level of the case and, therefore, to set the level of advocate who will conduct the case. It will make a nonsense of it all if individual advocates can simply decide for themselves what level the case in question might be, perhaps in order that that same individual might self appoint himself to conduct it.

10. Five, our legal system and that of our Commonwealth counterparts takes pride in the fact that we have a unique badge of excellence; not competence, but excellence, which applies to the top tier of those amongst us. This is the Queen's Counsel system, a badge of excellence that is recognised and respected the world over. In England and Wales we are talking about the top 10 per cent of the Bar, no more than that. For those who meet that mark,



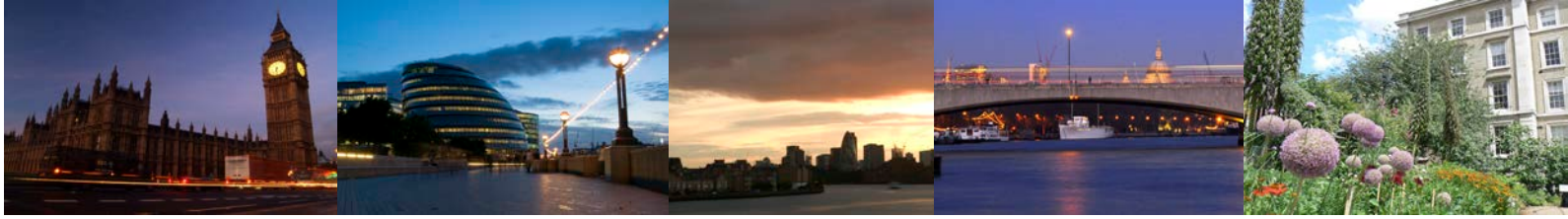
the QASA scheme is simply unnecessary.

11. Those are our principles. The scheme is now almost upon us. If the principles are in, we will support QASA. If not, we cannot. It is as simple as that. Our regulator, the BSB, is at pains to say that they support the independent Bar, so how are we doing with the principles? To my great regret, we find that, of the main principles, perhaps one is in place, but is looking weak, and the others are all in peril. Let me review them again.

12. One, full advocates only need apply. This is not in place. Our regulator tells us that it is necessary to accept a sub category for so-called plea only advocate, or trial ready advocate for, at least, the first two years of QASA. Why? I've heard no satisfactory answer to this question, save that it is necessary to keep the other regulators and professions happy. But I do have an answer from almost 90 per cent of the hundreds upon hundreds of criminal barristers who answered the Criminal Bar Association online survey in March and April: they will not accept QASA with plea only advocates on board. That is the issue of principle. We should uphold it.

13. Two, a common regulatory code. There are still practices rightly outlawed by our code, the Bar code, but permitted by others. One example, our code forbids the payment of kickbacks out of public funds in order to secure instruction in the case. Solicitors allow it. The Government thinks it is fine, so there is an impasse. But we are correct as to the principle: there should be no bartering with public funds.

14. Three, judicial evaluation. This is the one that appears to be in the scheme, but will it be rigorous enough? Judges who evaluate must eliminate those who are not fit for purpose. That would include incompetent barristers -- of course it would -- but I greatly fear that the evaluation system will not go far enough and would amount to toothless grumbling about bad



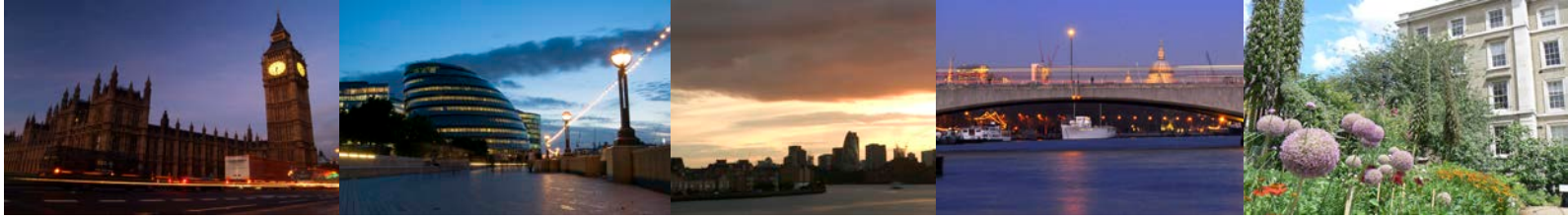
advocacy and nothing more than that.

15. Four, scrutiny of case levels. Without a rigorous system for applying cases to levels, judicial evaluation itself is worthless, yet I'm hearing that the judiciary will not look at case levels for the first two years of QASA. Why not? Representation in court is falling. Cases are not even reaching the Bar when it is obvious that experienced counsel is a must for the case to be done properly. This is a crisis issue.

16. Five, QC or silk accreditation. The evidence suggests that our regulator is intent upon forcing silks into QASA. This is unnecessary overregulation.

17. So where are we now? The BSB continually says that the Bar has nothing to fear from QASA. Their mantra is that most barristers will easily satisfy the standard, so what are we complaining about? The BSB completely misses the point. QASA is pointless if all it does is allow the steady decline in standards where the criminal justice system needs it most: in court.

18. So I urge you to think about the principles I've attempted to explain. I urge the BSB to firm up and get the principles right. We have a Government in this country which cares about money and only money, and is wilfully prepared to sacrifice quality for cheap justice. They have stripped £350 million out of the Legal Aid system but have not saved a penny because of delay and inefficiency elsewhere, through staff shortage and overstretched, underfunded infrastructure. If we do not get it right, QASA, as currently formulated, will play right into Government hands. Thank you.



Sunday 1 July 2012

14:30 – 15:30 Advocacy at public inquiries

Speaker biographies

The Rt Hon. Lady Justice Hallett DBE

Dame Heather Hallett DBE was called to the Bar in 1972. In 1989 she became a QC and was appointed as a Recorder of the Crown Court.

She became a Bencher of Inner Temple in 1993 and Leader of the South Eastern Circuit a year later. She was the first woman to become Chairman of the Bar Council of England and Wales in 1998. She became a full-time judge of the High Court in 1999 and was promoted to the Court of Appeal and made a Privy Councillor in 2005.

Dame Heather Hallett was the Treasurer of the Inner Temple for 2011.

She was appointed as a member and latterly Vice Chairman of the Judicial Appointments Commission. She is currently Chairman of the Judicial College and Vice-President of the Queen's Bench Division.

Tan Sri Dato James Foong

Justice Foong had his early education in the Methodist Boys School, Kuala Lumpur. He graduated from the University of London with LL.B.(Honours) in 1969 and was Called to the English Bar by the Honourable Soceity of the Inner Temple in 1970.

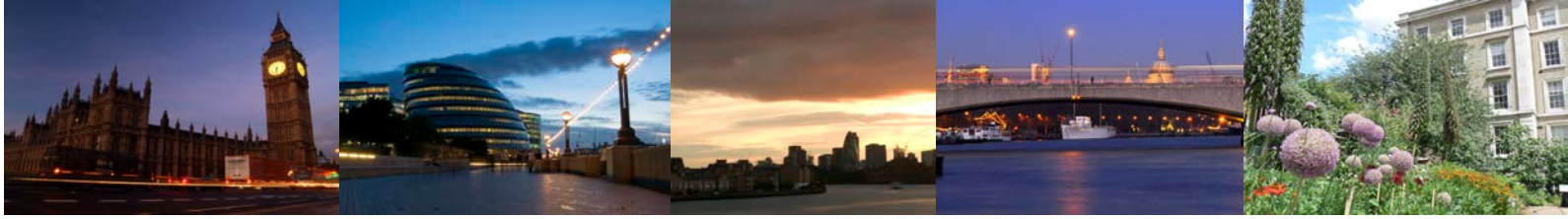
Justice Foong was called to the Malaysian Bar as an advocate and solicitor in 1971. He was engaged in private legal practice in both criminal and civil law, particularly in the insurance law from 1971 to 1990. While in private practice he acted as legal adviser to numerous associations in Kuala Lumpur. He was given a Doctorate of Laws by the University of the West of England and was made a Bencher of the Honorable Society of the Inner Temple, London. Justice Foong was appointed Judicial Commissioner in 1990 and elevated to be High Court Bench in 1992. He was then elevated to the Court of Appeal in 2005 and the Federal Court (Malaysia Supreme Court) in 2009.

In 2009, he was also appointed Managing Judge of the Civil Division of the High Court at Kuala Lumpur and of the High Court and Subordinate Courts in the State of Penang.

James Dingemans QC

James Dingemans QC was called to the Bar in 1987 and took Silk in 2002. He is Head of Chambers at 3 Hare Court. He has been a Recorder since 2003 and a Deputy High Court Judge since 2010. He became a Bencher of Inner Temple Bencher in 2006 where he is an advocacy trainer. He was Chairman of the International Committee of the Bar Council of England and Wales (2008-10).

He has been called to various other Bars (including Northern Ireland, Cayman Islands and the Commonwealth of the Bahamas) and has appeared in international ICSID, ICC and



EBRD arbitrations around the world. He has appeared at a number of public inquiries, and was leading counsel to the inquiry at the Hutton Inquiry in 2003.

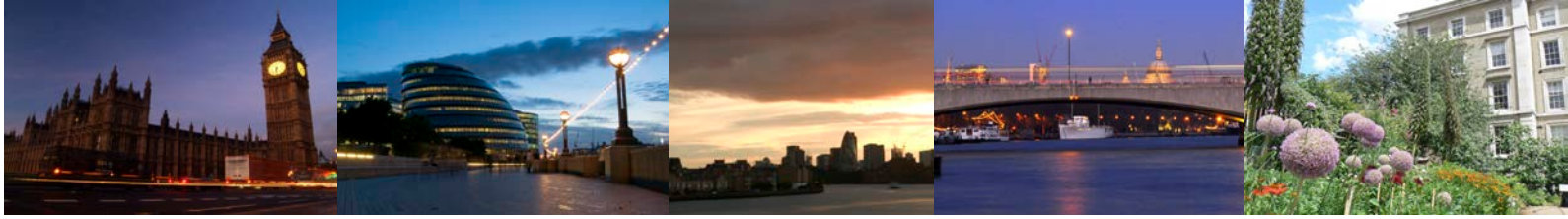
He was consultant editor of "Public Inquiries" (OUP – 2011) and a consultant editor of "Settlement of Investment Disputes under the Energy Charter Treaty" (CUP - 2011)."

Fiona McLeod SC

Fiona is a Senior Counsel practising at the Victorian Bar in Australia in the areas of human rights, commercial, common and administrative law. She was appointed SC in 2003 and led the Commonwealth legal team in the Queensland Floods Commission of Inquiry in 2011-2012 and also the Victorian Bushfires Royal Commission in 2009-2010.

Fiona is currently a Director of the Law Council of Australia, Chair of the Law Council Equalising Opportunities in the Law Committee and Co-Chair of the Law Council Recruitment and Retention Committee.

She is the Senior Vice Chairman of the Victorian Bar Council, a Member of the Commonwealth Attorney General's International Legal Services Advisory Committee, a member of the Sir Zelman Cowen Centre Advisory Committee, Victoria University and a former President of Australian Women Lawyers, 2007-2008.



LADY JUSTICE HALLETT

1. LADY JUSTICE HALLETT: Thank you very much. As you'll see from the programme, I was chosen to chair this session because I was the coroner appointed to conduct the request into the deaths of the 52 victims of the four London bombs on July 7, 2005.

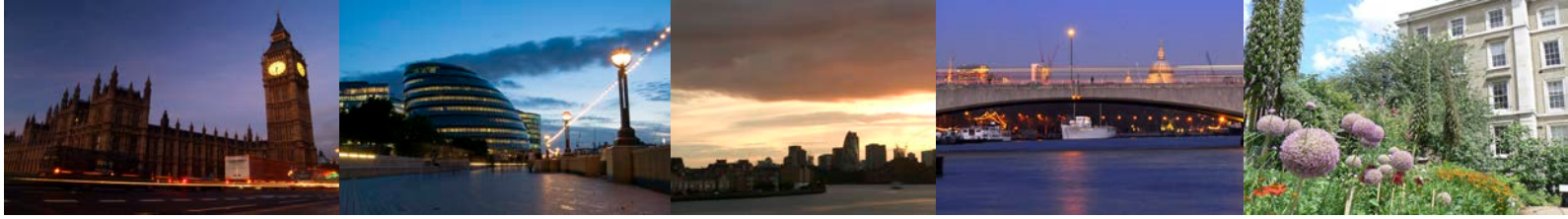
2. There are, obviously, important distinctions between an inquest and a public inquiry, but their functions are essentially the same, and it's only by analysis of those functions one can really resolve what is required of the advocate. It will depend, too, upon which role the advocate is playing.

3. In his book "Public inquiries", edited by Jason Beer QC, to which James Dingemans, one of our panelists, also contributed, the functions of a public inquiry are listed as: establishing the facts; accountability, blame and retribution; learning lessons restoring public confidence; catharsis, developing policy and discharging a State's investigative obligations.

4. Given the huge costs of some inquiries recently, one might add that all those functions have to be performed effectively within a reasonable timescale and within budget.

5. Thanks to the advocate in the 7/7 inquest, in a period of five months' hearing time we got through 500 witnesses, 300 of whom were called to give evidence orally, and we finished to the hour, the day, the minute predicted, and £2 million under budget. That was thanks to the efficiency of the advocates.

6. So I think my first quality that I would require of any advocate, particularly counsel to



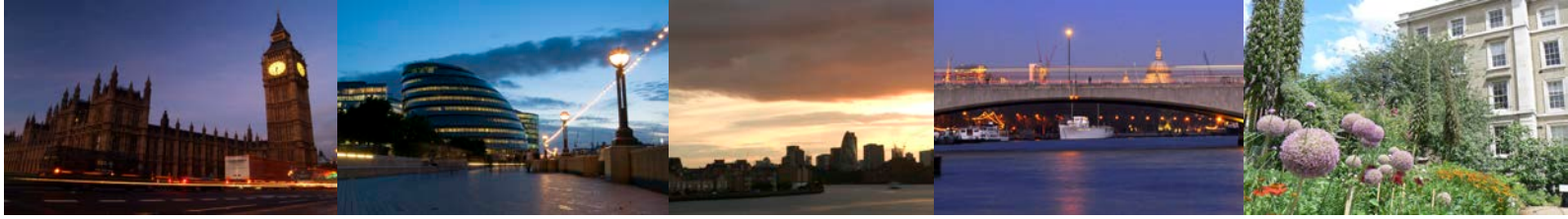
any inquest or inquiry, is efficiency. Those who are chairing inquiries these days are becoming very keen on case management, especially the timetabling of witnesses, and the timetables simply do not allow for meandering or repetitive questioning or the slow development of a point.

7. A second quality I think I would look for, in no particular order of importance, and I'm numbering them, is diplomacy. Obviously it depends upon the inquiry, but if there are a large number of interested parties, some of whom have a very emotional attachment to the proceedings, it is vital that the legal representatives get along. If the parties start to fall out, then justice will suffer. Advocates in an inquiry need to restrain their naturally adversarial instincts.

8. The next quality is a proper sense of priority. In any inquest or inquiry there are likely to be peripheral issues that will be urged upon the advocate. It is essential that the proceedings stay focused on their main objectives. It is too easy, sometimes encouraged by the parties, sometimes encouraged by the press, for some inquiries to wander off piste.

9. In the UK, the next quality that any advocate will require is a working knowledge of public law. In the inquest, I didn't know whether I would have a jury or not, so when it came to selecting the advocates for me, as counsel to the inquest, I chose advocates that I knew could cope if we had a jury -- in the end we didn't -- and those who would also be able to support my rulings in the administrative or the Divisional Court. So we need here advocates who know how, properly, to advance the challenge or support any ruling.

10. Another quality I think is essential for counsel in an inquiry or, indeed, in an inquest, is adaptability. You are likely to have to face, as an advocate, a variety of witnesses. The

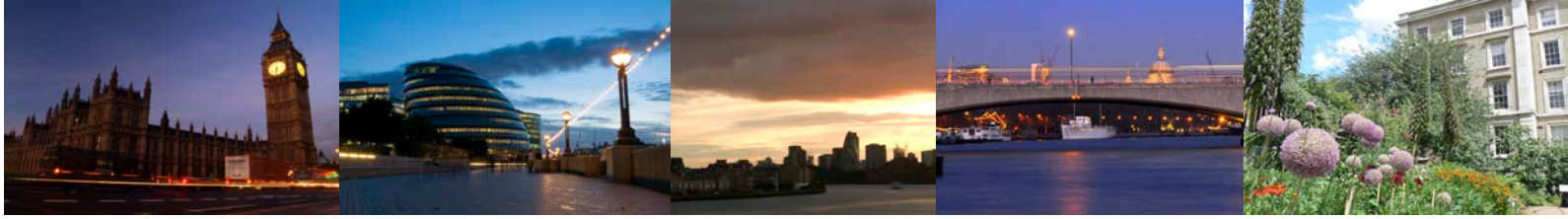


inquest is a classic example. The witnesses range from the bereaved to the survivors, to the rescuers, to those who ran the organisations who were responsible for the rescue, to those experts who provided us reports on how injuries would be caused by bombs, to those who were accused of failing to prevent the tragedy: police officers, people from the security services and the like.

11. Many of those witnesses had suffered such trauma that they were still suffering the effects six or seven years later, and it takes great skill and adaptability to be able to focus on different witnesses when several of different kinds may be called in one day.

12. I think the last quality I want to mention is an ability to use technology. Virtually every inquiry and inquest in the UK recently has used very impressive and up to date technology, and it improves immensely the quality of the advocacy and the presentation. However, it does take, in itself, considerable time and preparation. I suspect it takes the advocates far longer to get to grips with everything when it's on screen than if you just had a whole series of lever arch files and bundles.

13. So those are the qualities that I'm going to mention. I'm sure that our panelists, given their expertise, will mention many more. You will see their expertise from the documentation, so if they will forgive me, I won't repeat the words of introduction because I think it's far more important -- you can read that for yourselves in the programme -- if I just let them speak to you, because you haven't come here to hear me repeat what you can read for yourselves. Thank you very much.



TAN SRI DATO JAMES FOONG

1. TAN SRI DATO JAMES FOONG: Ladies and gentlemen, Malaysia is relatively a peaceful country, in south-east Asia, with a population of 27 million. Like most countries in the British Commonwealth, it has adopted the Westminster style of government and a legal system based on the English common law.

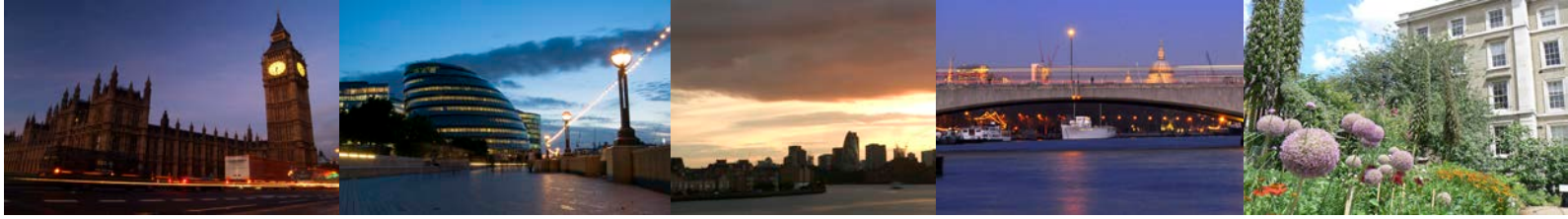
2. Public inquiries in Malaysia were once rare. The reason, perhaps, there were not too many issues to be inquired about, but as Malaysia moved into the 21st century, its citizens became more educated and exposed, and the demand for accountability and transparency for actions taken by public authorities increased.

3. From the year 2000 until now there were four Royal Commissions of Inquiry, out of ten since 1965. I chaired the Royal Commission of Inquiry into the death of one Mr Teoh Beng Hock. I sat with two retired superior court judges, a forensic pathologist, a professor of forensic psychiatry. I was then a sitting judge of the federal court of Malaysia, which is equivalent to the Supreme Court of the United Kingdom.

4. From the perspective of advocacy, there are four things of significance I'd like to share with you, but before I touch on them, allow me to give you a brief background of the case.

5. The federal capital of Malaysia is Kuala Lumpur. Kuala Lumpur is situated in the middle of the State of Selangor. Selangor is the richest and most populous State. The State government of Selangor is governed by the opposition from that of the central government.

6. Teoh Beng Hock, the deceased and the subject of the inquiry was the political



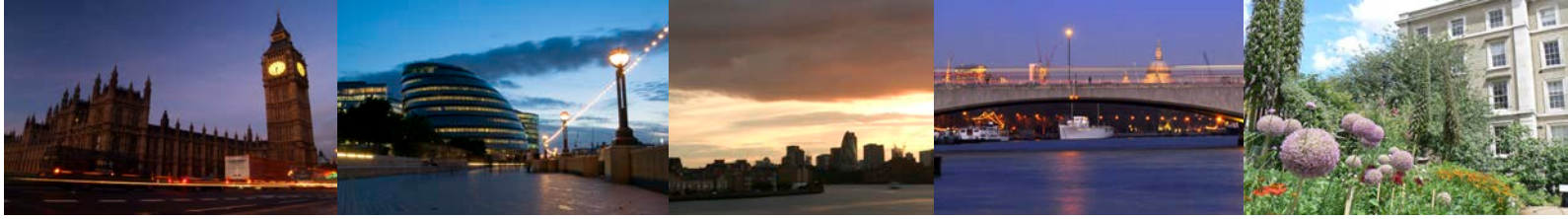
secretary to one of the State executive councillor of Selangor. He died while being interrogated by officers of the Malaysian Anti-corruption Commission. His body was found 13 floors below a window in the office where he was questioned.

7. At the inquest, conducted soon after his death, the coroner, after a lengthy hearing, returned an open verdict. There was public uproar over the rumours, and rumours were adrift that he was murdered. And by whom? At the behest of the ruling party of the federal government.

8. Public dissatisfaction over the matter went unabated and virtually not a single day passed without a comment on it.

9. Now, there were many theories over this, all based on speculation. Many perceived that Teoh Beng Hock was murdered and subsequently thrown out of the window to make it look like suicide. Another set claim that it was misadventure, when the officers of the anti- corruption commission, to secure a confession, dangled him out of the window and the belt snapped. Then there was the third group, who opined that he just committed suicide. With persistent demands from the family of the deceased and political parties of the deceased, which the deceased was affiliated to, as well as numerous public interest groups, a public inquiry into the death of the deceased was inevitable.

10. Now, the most notorious piece of evidence in this case was a preliminary report by one forensic pathologist called Dr Pornthip. In her initial report she declared that the deceased had anal injuries which were not compatible to fall from heights, and possibly strangulation. This caught the imagination of the public when she turned up at the earlier inquest with her flamboyant and flaming hairdo, not often associated with the physical appearance of a pathologist. She became an instant star. Her oft quoted cliche was "I speak



for the dead", or, "The dead have no choice but to fight back".

11. Now, all this makes the inquest extremely difficult. Faced with these sentiments, counsel attempting to discredit her theory had a formidable task.

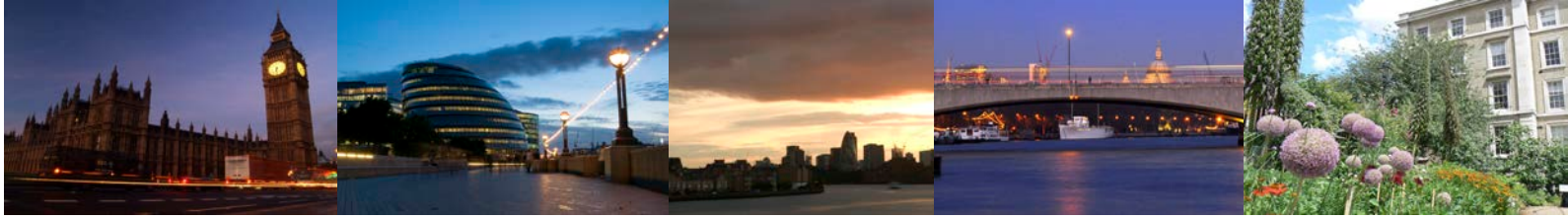
12. Another difficulty which I would like to stress is her purported inability to comprehend questions asked, and providing answers unrelated to questions on the perception that they were related to what was asked.

13. N ow, Dr Pornthip has a reputation at home, ie in Thailand. She was hauled up by the Thai Medical Council for manufacturing evidence and got paid for it. In one instance, an innocent man nearly went to the gallows due to her findings. I happened to be on a flight from Bangkok to Kuala Lumpur two weeks ago and, while waiting at the airport, I picked up a book written by her. If you happen to be there, you can read it, but when I flipped through it, I found very little disclosure of the accusation levelled against her.

14. T hough Dr Pornthip spoke in English, I rated her as slightly above basic communicative skill, but she claimed to have qualifications from the United States, where she attended courses and conferences. Though she was offered an interpreter, she maintained speaking English.

15. N ow, this created a problem for counsel questioning her. It's a very laborious task to ask questions in a very elementary manner. In certain instances the sting in some of the question was lost by her lack of understanding on what was asked. On another occasion, when her answers were not relevant to the question asked, counsel, to avoid embarrassing her, or became too exhausted, allowed it to pass.

16. Now, this is the danger of a public inquiry where one of the witnesses demanded to



speak in a language she is not too proficient in. I suspect that such tactics were to hide material deficiencies in her opinion.

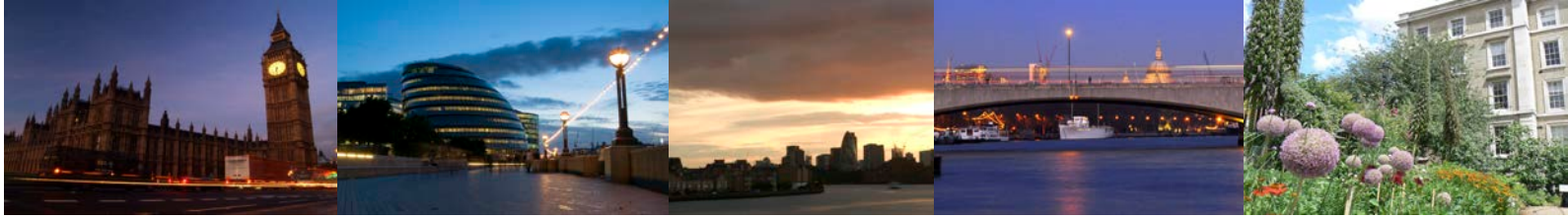
17. Now, I agree that in a situation where a witness is not proficient in a language, an interpreter should be called to assist, but often, even with the assistance of an interpreter, the effect of a question posed is often lost by tone and pace of the interpretation.

18. In most instances, the interpreter would have, in the course of translation, pared down the question to the plainest minimum. This ends up with the question being less effective. Further, there is the loss of tone, or undertone, of what counsel has asked.

19. To overcome this, I would suggest four things: first is to ask short questions; (2), ensure each question is focused and contains a single fact; (3), that the language used is simple and understood by the witness; (4), speak slowly and try to pronounce certain words used by the witness.

20. The next topic I wish to touch on in the Malaysian experience is the time allocated to complete the inquiry. As most public inquiries are set up to defuse tension or anger, on the particular issue that has arisen, it is normally the executive that sets the timeframe to complete it.

21. The Royal Commission of Inquiry into the death of Mr Teoh Beng Hock has a timeframe of three months from the date of royal decree. Although extension is usually permitted, and we got two months' extension, inevitably this affects everyone. No one can escape from it. Whether time limit is set to complete the inquiry is a matter of argument. It is not my intention here to dwell on this, but what I intend to highlight is, with this time limit, counsel should expect little indulgence from the inquiry. Very likely, the inquirer may be



reluctant to permit counsel to ask too many so-called "irrelevant" questions or touch on matters conceded remotely related to the subject under investigation.

22. But, ladies and gentlemen, most of you will realise that many of these questions may assist in shedding light into the main issue. Nonetheless, as a result of time constraints, counsel would have to tailor the advocacy to fit into the set time to complete the inquiry.

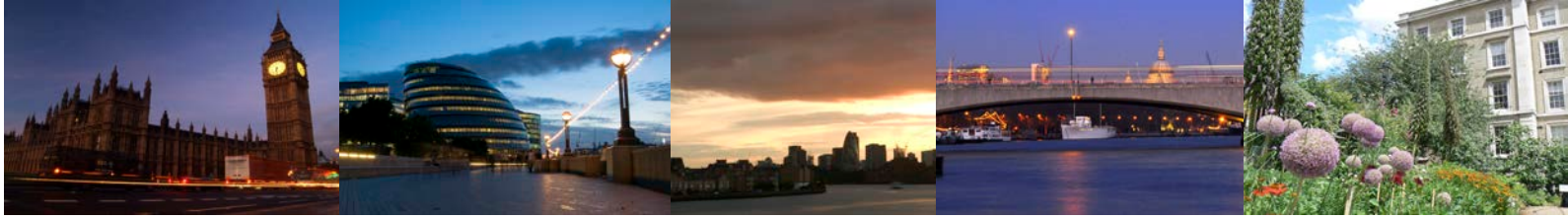
23. In this respect, I would advise counsel to have a keen eye and a sharp ear when he goes fishing to ensure maximum catch within the time period allotted.

24. Now, the third aspect of advocacy in public inquiry from what I observe is to adopt a system that is different from that of the adversarial system which we, down in this hall, are trained in.

25. Though most of us have trained in the adversarial system, where the judge normally plays the role of a referee, with the advocates on each side pitted against each other, members of a public inquiry tend to play a more active role in asking questions themselves, and frequently proceedings change from that of an adversarial role to that of an inquisitorial role.

26. I pause here to examine the reasons. Primarily, I am of the view that it may be due to the purpose and objective of a public inquiry. When it is set up to inquire, then it is only natural that members of the inquiry would be asking questions to ascertain the truth, and since many inquirers were once advocates themselves, they feel that they can do better than those counsel assisting them.

27. T he other reason could well be the reputation of the members of the inquiry. When the reputation is at stake, they would ensure that no stones are left unturned. Inquiries, particularly those involving a single inquirer, or where the chairman is involved, the entire



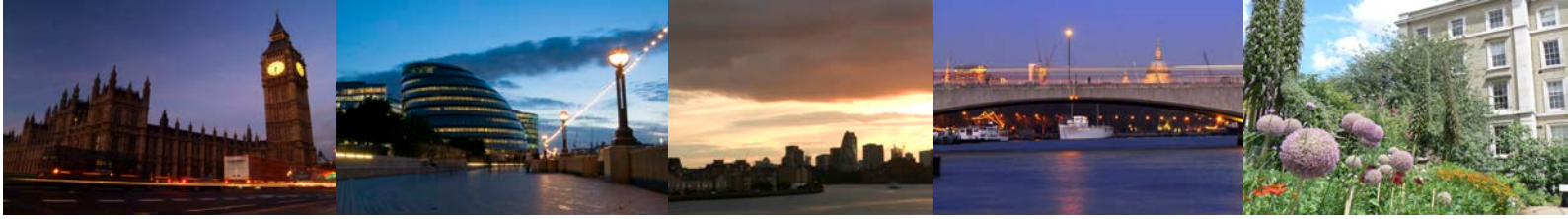
report would carry his or her name.

28. Now, bearing this in mind, it is my view that it is necessary for advocates assisting an inquiry to accept frequent interruptions or interventions by the inquirer. In a situation such as this, I suggest that advocates sit down and allow the inquirer to exhaust himself, and this, I assure you, ladies and gentlemen, will not last very long, since he has little knowledge of the subject matter of facts compared to you.

29. T he approach of an advocate in a public inquiry must change. It must be altered from an absolute right to ask questions and allow the inquirer just to listen, to one of a joint effort to question the witness. Advocates must be reminded that they are there to assist the inquiry and not to protect the interests of the client.

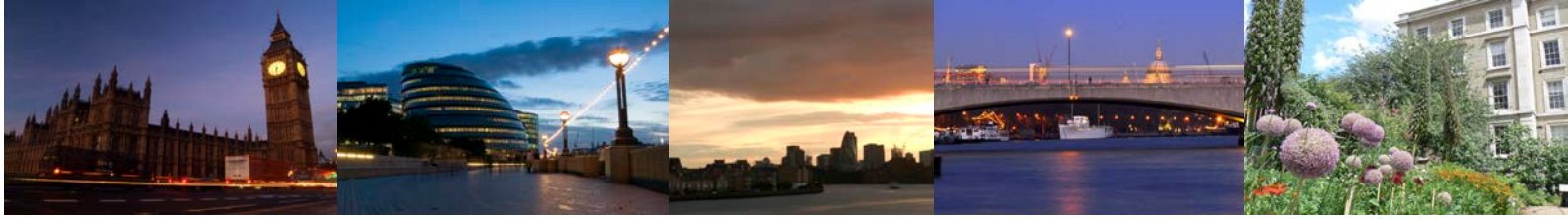
30. The Royal Commission of Inquiry into the death of Mr Atiha was done with the assistance of the Malaysian Bar. The deceased family and the political parties boycotted the Royal Commission of Inquiry. One of the objections for boycotting or the walk out of the Royal Commission was the fact that I was a sitting judge, and they tried to find some precedents, particularly from the United Kingdom, that sitting judges do not sit on the public inquiry, only retired ones do.

31. We refused, we turned down this, and then another objection came from the family and the State government of Selangor, that the assisting officers of the public inquiries were from the Attorney General's office. Since the Attorney General is a member of the government, then the entire lot of officers should be disqualified. Again, we turned this down. And, of course, the third was the fact that they were all engaged in defending the leader of the opposition party, and no time was allotted to this particular Royal Commission of Inquiry.



32. The Malaysian Bar has played a very active role and I must say that I am proud of them. When I heard the speeches of various people just now, in the session before, the attempts from me to regulate the Bar -- we in Malaysia are facing similar problems.

33. Malaysia always tried to copy Singapore when it came to this sort of thing. In Singapore they have created the Academy of Law. It is one body which is said to rival the Bar Council, and I hope in Malaysia this will not happen and there must be an independent bar to assist us in every respect. Thank you



JAMES DINGEMANS

1. JAMES DINGEMANS: Our chairman, Lady Justice Hallet, has said that one of the qualities she looks for in counsel to an inquiry is timetabling and I've been given 10 minutes.

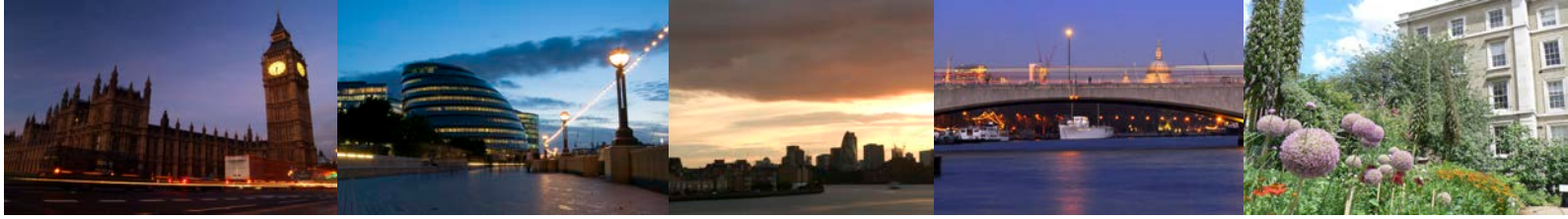
2. As a starting point, anyone can have an inquiry. Although there may not be much interest in an inquiry, I set up into rugby techniques in the front row: I can have an inquiry I can publish the report, and that is an inquiry as much as anyone else's.

3. Bizarrely, members of the House of Lords use that technique very much more often in this jurisdiction than might be supposed. Lord Morris set up the Gulf War Syndrome Inquiry. It was chaired by Lord Lloyd, the former Lord Justice of Appeal, and it reported on the causes of Gulf War illness syndrome. Its findings were rejected by the government.

4. A ny organisation or company can have inquiries, an internal inquiry into the loss of a particularly valuable business contract through to a private inquiry with a third party appointed.

5. Last summer, in news that was very well reported, a child was attacked by a polar bear in Norway and Sir David Steel was appointed by the British Schools Exploring Society to carry out a private inquiry into the circumstances of that, and that is due to report within a month or two.

6. So these private inquiries can also take place in public and invite public participation, but the government is also entitled to set up private inquiries. For example, leak inquiries -- which take place in private and, frankly, appear to achieve nothing and never lead to criminal prosecutions -- are inquiries in very much the same way as some of the more well-known ad

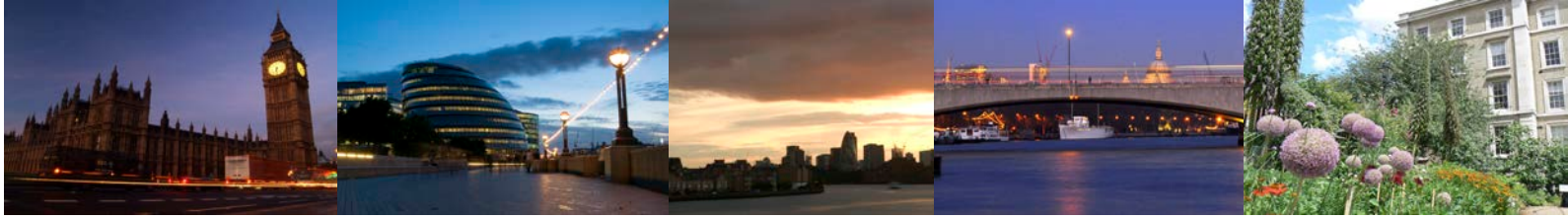


hoc inquiries established by the government. The Arms for Iraq Inquiry chaired by Lord Scott, the BSE Inquiry chaired by Lord Phillips, and the Hutton Inquiry chaired by Lord Hutton were all examples of ad hoc non-statutory public inquiries. They were ad hoc non- statutory inquiries because the Tribunals of Inquiry (Evidence) Act 1921 required resolution from both Houses of Parliament before you could set up a public inquiry and was productive of much delay and expense, and the last inquiry carried out under the 1921 Act was the Saville Inquiry into the events of Bloody Sunday, and the cost and expense of that is a matter of record.

7. A s a result, the government were looking for different ways of carrying out public inquiries, and there were other statutory regimes out there in England and Wales. For example, the Victoria Climbié Inquiry was carried out pursuant to the provisions of the Children Act 1989, the National Health Services Act 1977 and the Police Act 1976. The Marchioness Inquiry, which was carried out after a boat disaster on the Thames, was carried out pursuant to the Merchant Shipping Act 1995.

8. The Southall Rail Accident Inquiry was carried out pursuant to the Health and Safety at Work Act, and Lady Justice Hallet chaired, as she told you, the 7/7 Inquest, and the Potters Bar Railway Inquest was carried out, again as a quasi-public inquiry, and in that case, with a jury.

9. There didn't appear to be any particular point of principle engaged to determine whether a public inquiry should be pursuant to the 1921 Act, some specific statutory regime or ad hoc, and that's what led, in our jurisdiction, to the 2005 Public Inquiries Act, and that established a new regime that was designed to pick up on what were perceived to be procedural efficiencies that had really been piloted in the Bristol Royal Infirmary Inquiry,



where counsel to the inquiry effectively did most of the questioning and was pursued through to the Hutton Inquiry. The 2005 Act followed a review by Sir Roy Beldam and work carried out by the Public Affairs Administration Committee.

10. That was 2005. By June 2010, some 13 public inquiries had been established pursuant to the 2005 Act, so it is worth knowing how to follow these things through. This included the Baha Mousa Inquiry, the Mid-Staffordshire NHS Foundation Inquiry and, of course, the well- known Leveson Inquiry.

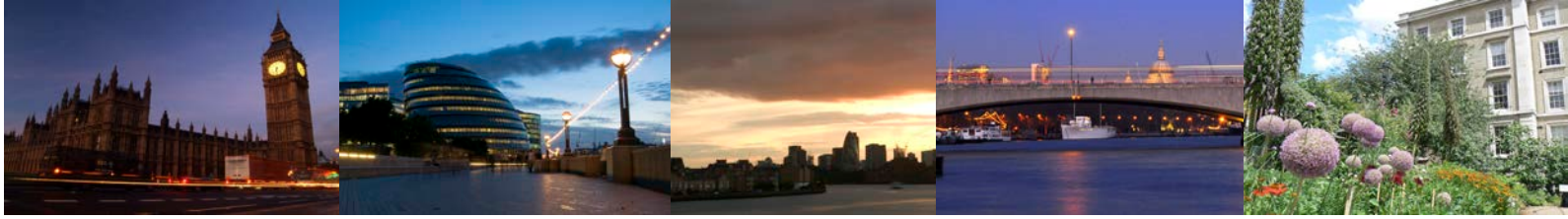
11. As a matter of practice, counsel to the inquiry at all those inquiries has done the vast majority of questioning of witnesses, and I'll turn to that in a moment.

12. But it seems that there are three main aims that a public inquiry has, and it is important to spend one of my minutes saying these before I turn to the role of counsel to the inquiry, because everything should come back to these.

13. The first aim is to establish the truth of what happened, in whatever context that may be: the Leveson Inquiry or the Hutton Inquiry or details of the proposed inquiry into financial services. The second is to provide a forum in which public concerns about what happened can be addressed, and the third is to provide transparency to all to begin the process of providing justice to those who have lost out.

14. So assume you have now your public inquiry established under the 2005 Act and as counsel to the inquiry, what is the proper role as counsel to the inquiry?

15. The first is to review the terms of reference. Very often, appointments will be made after the terms of reference have been dictated by the minister, and there's very little that can be done in relation to that.



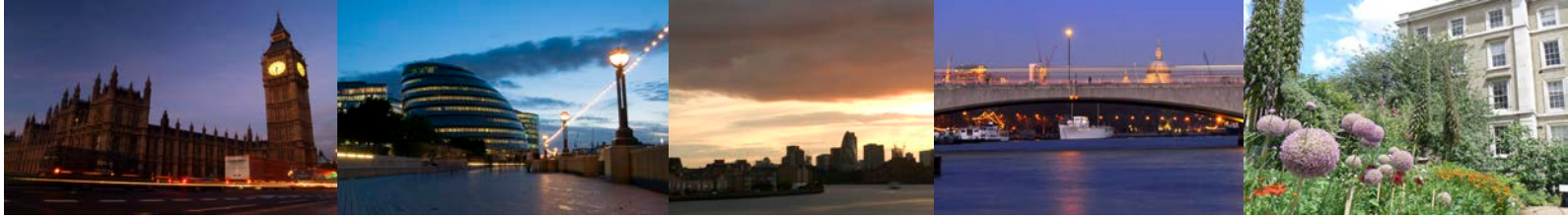
16. The importance of the terms of reference were noted by Lord Justice Salmon when he reported in the Royal Commission back in 1966, and the effect of having very wide terms of reference can be seen, for example, in the Leveson Inquiry where the terms of reference run to about a page and a half, and that's only Part 1 of it.

17. If one is then looking at the terms of reference, there are suggestions that there should be an early session at which an explanation of the approach to be taken to the terms of reference is shared with everyone. Again, if transparency is an important part of a public inquiry, it is very helpful if everyone shares what their approaches to the terms of reference are. Indeed, Lord Justice Leveson had an early session at which he set out his modular approach to the terms of reference.

18. Then, as counsel to the inquiry, you are going to be involved in a number of very important early decisions: first of all, whether the proceedings should be in public or private. That is, effectively, now all statutory and governed by the 2005 Act for ad hoc inquiries. Of course, it all had to be decided on a case by case basis. But something that's not covered by the 2005 Act is whether proceedings should be televised.

19. Lord Hutton televised his opening and closing statements; in Baha Mousa there was very much the same, but less interest, and as everyone probably knows, you have live feeds from the Leveson Inquiry.

20. Where the inquiry is going to be located physically: for example, is it to be in court buildings or will that in itself cause issues of perceived conflicts of interest.



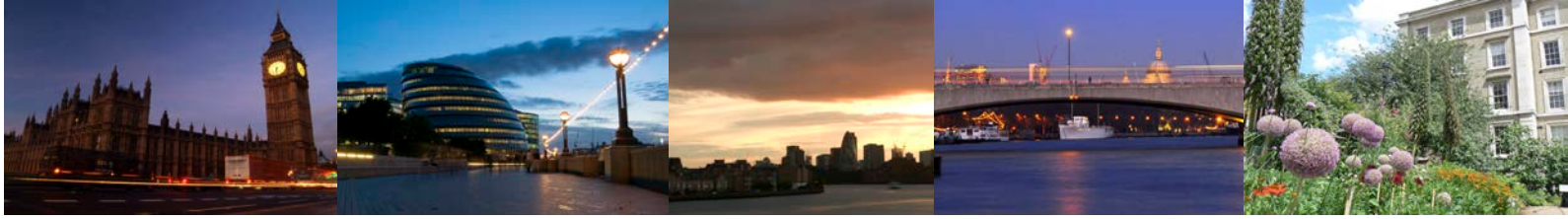
21. Press enquiries: the need to have, for example, someone to deal with all the press enquiries is not something that will immediately engage your attention until you end up with 100 letters and no one dealing with them.

22. Then perhaps one of the most important tasks is to identify the evidence to be obtained, and that will depend on an inquiry-by-inquiry basis. In the Hutton Inquiry, the inquiry was established within a day of the death of Dr Kelly and there was no police file; there were no court proceedings, and everything was obtained from all those parties who were written to and asked to send in documents from which further inquiries could be made, and it became absolutely essential to start compiling a chronology almost immediately so that one could attempt to work out what had happened.

23. In the Potters Bar Railway Accident Inquiry, that took place some eight years after the accident had occurred and there were masses of documents and files to provide a very good indication of where to start.

24. One of the next tasks that will need to be undertaken is timetabling. Lady Justice Hallet has already told you that her inquiry ended on the minute and hour that it had been predicted to end, and there is an awful lot of work that goes into producing the timetable. That is where, in fact, as counsel to the inquiry, you spend an awful lot of time chatting up people representing other parties, trying to ensure that the evidence they want is adduced and that there is a fair timetable that is provided for that.

25. Then -- and I've got two minutes left -- then you have to call the witnesses. If counsel to the inquiry under the new English model is the person doing the questioning then it seems to me that perhaps the most important thing to consider for us this afternoon is the approach



to be taken to the questioning, and there have been different styles adopted by different people, but there are three functions that have to be pursued.

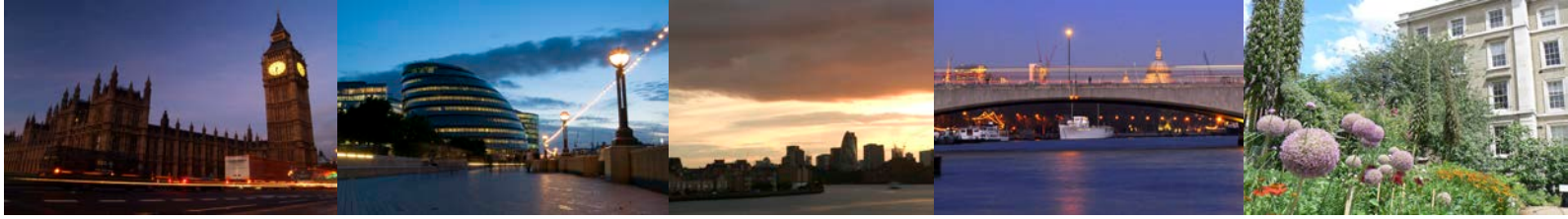
26. First of all, counsel to the inquiry must get out all the evidence the witness wants to adduce, so you are, effectively, doing the examination-in-chief.

27. Secondly, you must ask all the questions that the other parties, or other interests, would want asked, and a lot of that is actually asking those parties to suggest questions. In the Baha Mousa Inquiry there was a very detailed protocol set out by which parties had to say: can you ask about this document; can you ask about this event, et cetera.

28. The third point of importance -- and remember these are public inquiries -- is to ask all the questions that the public, and indeed the media, would want asked. Now that is not playing to the gallery in any sense, but if part of the process of a public inquiry is to bring transparency and the beginnings of justice to those who have lost out, then asking all the questions that people have spent analysing time and trouble is certainly worth doing. And, indeed, in the Hutton Inquiry, if there were any good questions that were asked -- and I doubt it -- all of those came from suggestions from the newspapers.

29. The final two tasks are fairly short and simple: that is that once the evidence has been obtained and adduced, then parties will need to be given indications of the potential criticisms to which they may be made liable in the report.

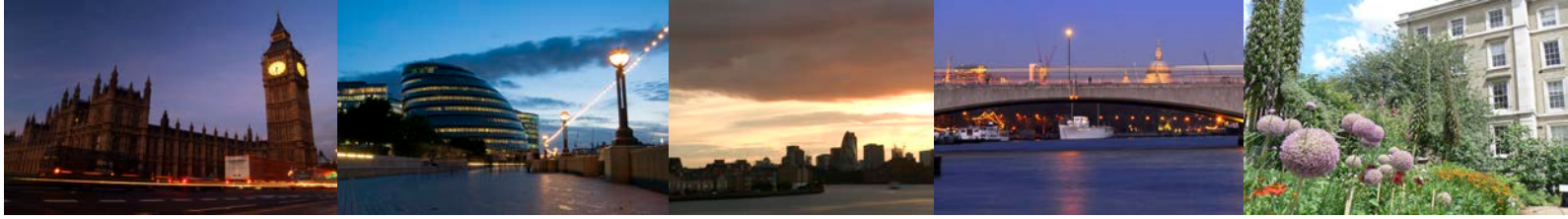
30. Now, in the Baha Mousa Inquiry, those letters were sent out before witnesses had been produced, and as a consequence, and if anyone attended the inquiry you could have seen, there were a lot of very scared soldiers who had been told of a whole series of possible criticisms that could be made, perfectly fairly identified from the papers, and of course it



gave them no help at all because they had no idea whether these were real criticisms or not and, frankly, 21-year old soldiers questioned about events that had happened when they were 17, it's unlikely really to help matters.

31. In relation to the Leveson Inquiry, as is well known from the procedural reporting that has gone on, the Rule 13 letters had still to be sent out, or had still to be sent out in May, when the hearing was heard, in which case one might hope that they would represent more formulated criticisms that Lord Justice Leveson had identified for particular parties.

32. The final role of counsel to the inquiry is in relation to the report. Now that is not, in any sense, to be involved in drafting the report -- indeed, there's a case from Hong Kong which suggests simply you shouldn't be involved with it; there's a case from Canada which suggests you might be involved in certain circumstances, but perhaps the best advice is simply to be involved with it for the purposes of ensuring that any possible criticisms have been fairly notified to the parties before it's published because part of your role as counsel to the inquiry is to try and avoid the whole thing ending up in the judicial review courts. Thank you very much.



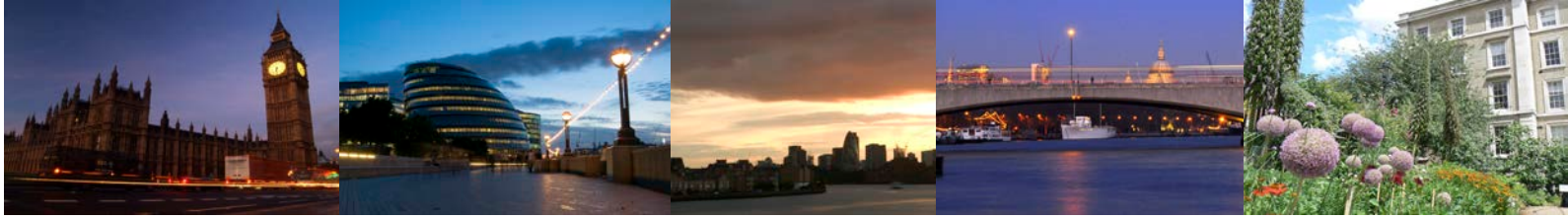
FIONA MCLEOD

1. FIONA MCLEOD: Can I begin with a disclaimer. I inherited this topic from my colleague, Jack Rush QC, who is of course counsel assisting the Victorian Royal Bush Fires Commission. Jack has actually sworn me to secrecy; I am not to tell you that he's sailing around the coast of Turkey, so I won't do that.

2. The Chairman and James have both made reference this afternoon to the Commission as a forum to address public concerns and to provide transparency in terms of process as a means of achieving justice for all concerned. Both are crucial to the work and the outcomes of any Royal Commission or lesser creature.

3. First, can I debunk the premise in my own title: that is that there is no entitlement to participate in commissions of inquiry, including Royal Commissions, in Australia. We have no equivalent of the UK concept of a core participant. Leave to appear depends entirely on a grant of leave by the commission. Whether there should be a grant of leave depends upon the terms of reference, the interests of the party affected -- especially the potential for adverse findings against reputation -- but all too often depends upon those issues of efficiency referred to by our chairman, which include resourcing of the commissions and its procedures; the convenience of the commission in terms of impossibly short time frames for parties appearing; inadequate document management and exchange, and in some cases where the abilities of counsel assisting are somewhat focused on other issues, their abilities to address the needs of other parties.

4. But at least it is reasonably well established in Australia, at the very least, that where adverse findings or comments are likely to effect a witness's reputation or where that witness



has been compelled by law to attend or produce documents, the inquiry will recognise a need to give prior notice of allegations of adverse findings or potential adverse findings and disclose the relevant material relied on.

5. So much would seem to be a matter of common sense.

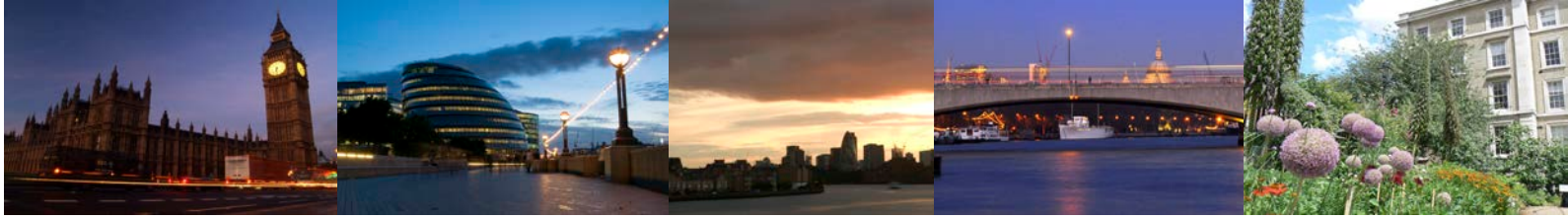
6. I want to refer particularly to two commissions occurring in Australia in recent times into government planning in response to disasters, mainly because I appeared in both of them.

7. The first is the Victorian Bush Fires Commission, relating to the 2009 Victorian bush fires, and the Queensland Floods Commissions of 2010, 2011; that's when those floods occurred.

8. T here have, of course, been a number of other significant commissions in Australia, but these ones, concerning disasters that indirectly impacted upon so many lives and so many communities, were very good examples of commissions in which issues of participation were approached with a recognition that the broader community has an interest in the workings of the commission, even if its members can't all squeeze into the hearing room or take a seat at the Bar table.

9. So first the Victorian Bush Fires Royal Commission. This commission was established after a catastrophic loss of life and damage to Victorian rural communities, given the number of fires that raged across the State in January and February 2009.

10. I think many of you will have seen those fires beamed around the media across the world. They threatened hundreds of communities, in many cases razed them entirely to the



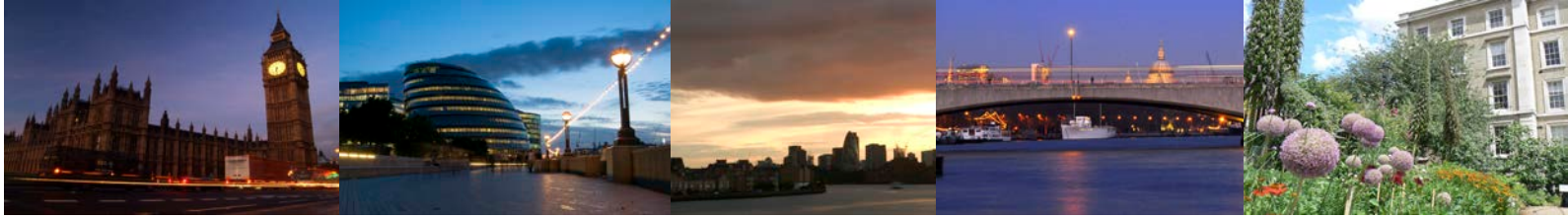
ground. 173 people lost their lives and the impact on rural communities continues today and remains to be profound.

11. The commission experienced a sustained media interest at the outset in somewhat outraged tones, complaining that victims would not be given leave to appear before the commission. They faced approximately 100 applications from individuals and organisations seeking leave to appear across all terms of reference, and these included people who had been directly affected by the fires; those with commercial products on the market who were seeking to get a competitive advantage over governments and their products, for example for a commercial advantage, and those with opinions on everything, including how volunteer services are meant to have operated and how local government emergency response plans were inadequate, right through to those with views about the constitutional funding arrangements between the Commonwealth and the States.

12. So they had to not just manage all the competing issues physically in the hearing room, but also in the timetable of hearings how to decide questions of funding, of representation -- should Legal Aid or the government fund these people -- and how to provide proper support and representation for victims, and so how it will work.

13. T he commission elected to respond with a series of Town Hall-style community meetings to reach wider numbers of affected communities before the formal hearing started.

14. Now, this permitted them some sense of what the communities actually were aggrieved about before the formal hearing started, but they were somewhat unsatisfactory for parties appearing who had no idea what had been said at these meetings.

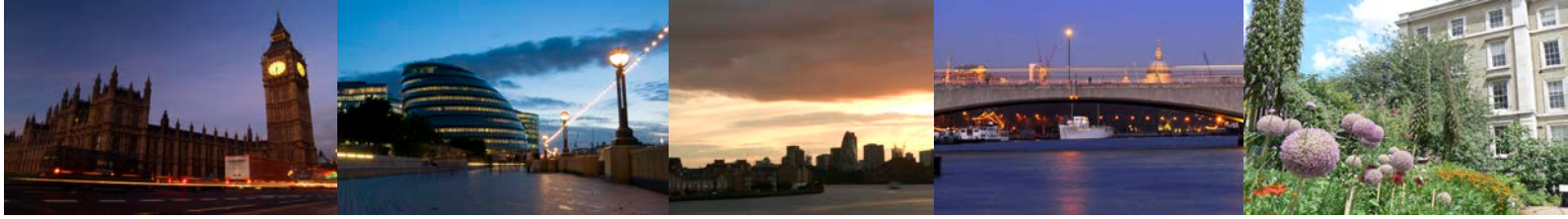


15. They were a mass evidence-gathering exercise, effectively, and the way they influenced the thinking of the commissioners was never known to any of us.

16. It also highlights the role of counsel assisting. Jack and his team of counsel assisting took the view very strongly that counsel assisting represents the views of the community and they decided to call a lay witness, as they were called, every day, first thing in the afternoon, to overcome the complainers who had made life difficult at the beginning. Their intention was to create a direct sense of community participation by those with the greatest investment in the process, the victims themselves, unfiltered by lawyers and broadcast live over the internet to the public.

17. Now, the decision to do this at 2.00 pm every day no doubt had something to do with the convenience of the media and the filing deadlines of the daily news cycle; they were not always convenient to expert witnesses who were interrupted mid-flow and told to come back the next day.

18. The lay witnesses, as they were called, created moments of pure cathartic potential every day, victims retelling their stories of profound trauma and loss, potentially being retraumatised in doing so, some even surprised at their own emotional reactions some six months or more after the events by tapping into this well of emotion at the retelling. Incidentally, it also added to the emotional exhaustion of the group of lawyers, who were not particularly immune to the daily dose of grief and otherwise were battling huge daily service of documents, to manage alongside their own personal reactions.



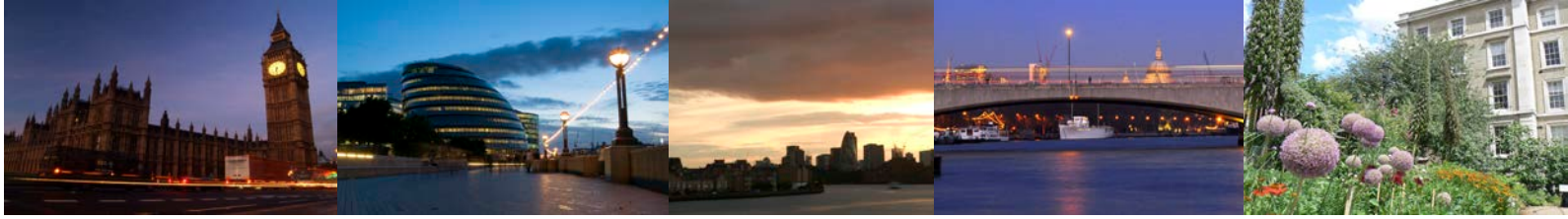
19. But the intention was profoundly important. The demand for and expectation of direct participation had to be balanced with getting through the issues and the interests of the parties appearing.

20. Can I now mention the Queensland Floods Commission of Inquiry. The Queensland floods devastated vast regions of south-west Queensland and many, many communities were effected. An El Nino, it resulted in significant rises in sea temperatures, cyclones and, of course, major rainfall across the State. The commission was called in response to the floods and the extent of property damage, particularly in the major cities of Brisbane and Ipswich, but particularly after the death of a number of people after flash flooding tore through small towns in south-west Queensland.

21. T hree-quarters of the state was declared a disaster zone and the death toll was estimated at 35.

22. I should pause here to acknowledge the presence at this conference of the Commissioner, Justice Kate Holmes. In doing so I'm reminded of one of our speakers yesterday and the courage of FE Smith to carry on, and I should offer, if I offer any criticism of the commission, her Honour the right of reply in the likely event that I am about to offend her.

23. Like the Victorian Bush Fires Commission, the Queensland Floods Commission of Inquiry faced pressure from numerous locals directly affected by flooding who wished to appear. Like the bush fires, the floods inquiry adopted a process of community consultation in encouraging written submissions and many hundreds of these were received. Unlike the bush fires commission, the floods commission elected not to focus on the daily recounting of

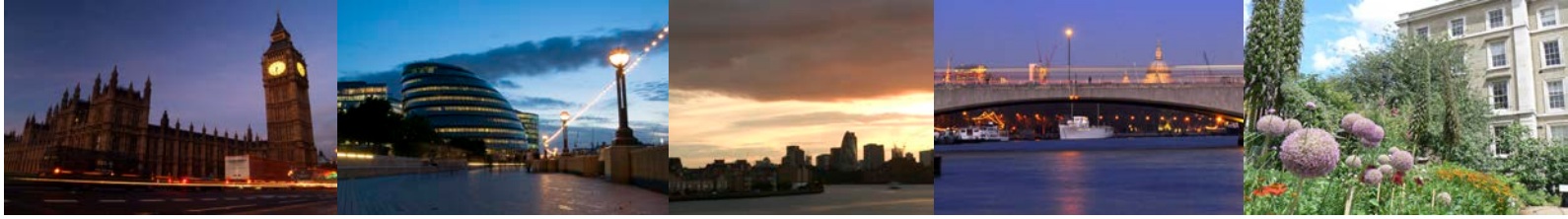


personal loss, except as required to explore the systemic breakdowns and the failures of emergency response crews. The harrowing stories were not presented, therefore, in their own right and with the media interest as a primary motivation, but rather informing the commissioners themselves in the context of the evidence concerning emergency breakdowns.

24. From a legal observer's perspective this was less dramatic but better managed. It was never intended that the giving of that evidence should provide a vehicle of catharsis for those individual victims.

25. There's also a curious footnote to the floods commission of relevance to this topic. At the very end, for a couple of weeks at least, my client, the Commonwealth of Australia, a party who had been granted leave on a particular term of reference, was denied a seat at the Bar table. This occurred after months of hearing, including weeks focusing on operations of the dam situated upstream from the two major cities, Ipswich and Brisbane and the impact of water releases and the dams flooding the cities downstream. The commission was granted an extension of time to conduct further hearings into the operation of the dams.

26. Now, just to put this in context: the Commonwealth had been granted leave on that term of reference and the particular topic. The Bureau of Meteorology had provided regular hydrology and meteorological advice to the dam operators; its witnesses had been called to address the topic and were cross-examined on their forecasts, systems of warning, their role in information sharing with State entities, including the dam operators, and had, in fact, been the subject of criticisms by experts called by counsel assisting about the inability of the Bureau to predict exactly how much rain would fall and where it would fall. So we expected, naturally enough, that we'd be included amongst those regathering at the Bar table.



27. A fter pressing for an explanation, we were told that the issues were not of interest to the Commonwealth. Now I readily confess no counsel likes to think they are dispensable, and we are certainly prone to elevate the significance of our own client's interests above the pragmatic concerns of the Commission. Nevertheless, it was still a surprise to us because we thought we might know what our client's interests were better than the Commission.

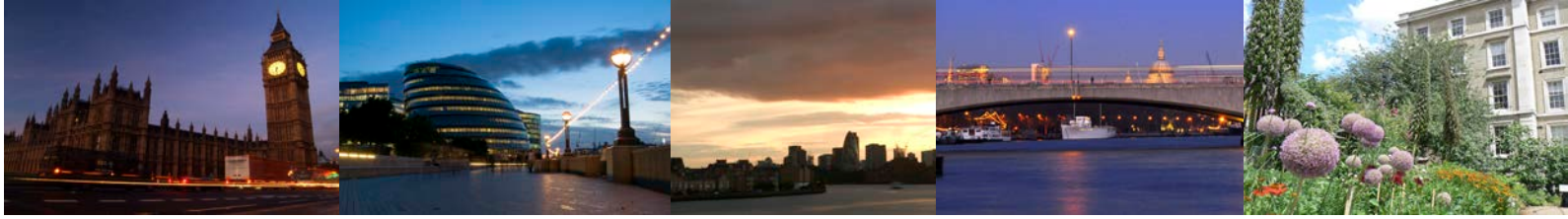
28. Ultimately, however, it provided a curious comfort to us to know we'd secured a sort of immunity from criticism in the final stages. It also created an opportunity for some hilarity from our secretary, who observed me watching the podcast in Chambers and regularly bobbing to my feet to object or announce that I had no questions for this witness.

29. There can be no doubt that multiple deaths and widespread damage arising from natural or manmade disasters do prompt a need for a focus of collective grief and hope, and they are likely, with climate change occurring, to occur with greater intensity and frequency.

30. I'm aware as we speak of the floods in northern England and no doubt they are testing the capacity of systems to respond and the resilience of the affected communities.

31. It can be politically astute to appoint a Royal Commission or some lesser entity to investigate the causes of loss and hurt, to explore issues of fault and failures of policy. It turns out it may not have been so astute for the Victorian and Queensland governments who were promptly voted out of power in the elections that followed the delivery of those commissions' final reports.

32. Commissions promise much to restore a sense of order, but in many cases cannot. The tight timetables mean the evidence is limited and slanted towards issues identified by counsel



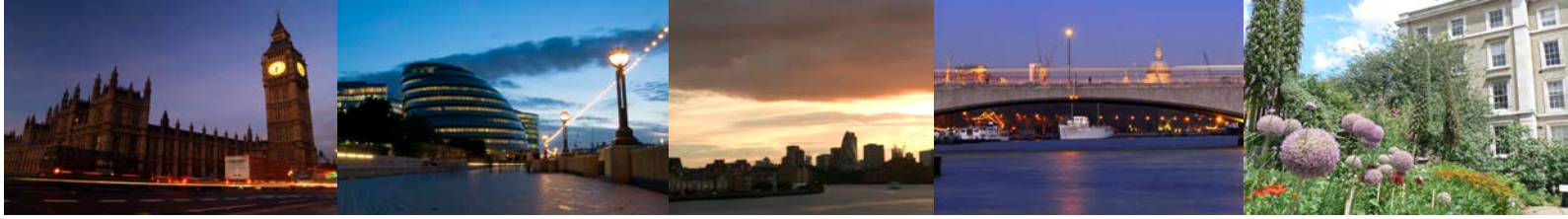
assisting as those of interest. Evidence which may illuminate or answer those issues is simply not called. Many of the findings and recommendations proposed, which will adversely affect the parties in a broad sense because they have to implement them, are therefore founded upon limited evidence, upon submissions of another party you may not have even seen, or in some cases, no evidence at all.

33. The capacity of Royal Commissions and their lesser shadows to reach the truth and reveal systemic failures can often be distracted by a desire to attribute blame to individuals, for political or other motivations, attributing a failure of leadership, a focus on human error, and it is questionable in my view how well the community is served by this act of institutionalized bulimia.

34. Commissions also promise much in terms of the potential for mass catharsis. Governments who establish hope that the "no stone unturned" approach will demonstrate that they care more for their citizens than empty justifications, breakdowns and inaction. But many are left unsatisfied with a sense that the political promise of the commission is unfulfilled.

35. All in all, I think we do pretty well at getting movement from these commissions on stalled government programmes, in cutting through red tape and generating momentum for programmes to continue. But as we were so powerfully reminded yesterday afternoon, advocacy against the odds in many countries can present insurmountable challenges requiring the real courage of the advocate.

36. We must remember that we are indeed fortunate that our governments are prepared to shine the light on their own failings in establishing these commissions at all.

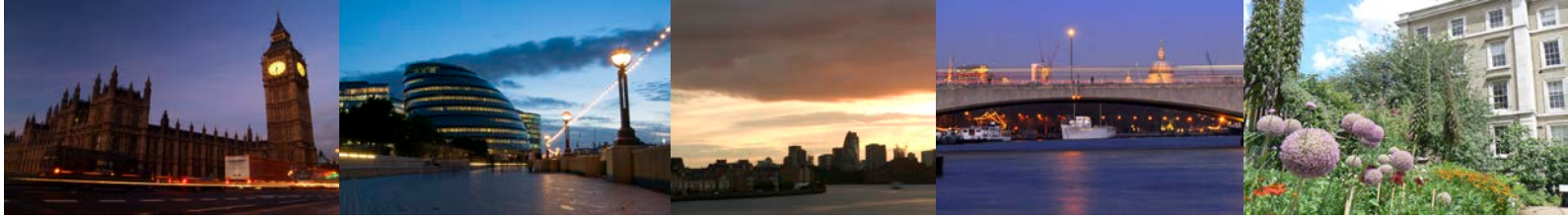


37. A t the heart of the justice process is a desire for truth and at the hand of the State, a restoration of peace and order.

38. H owever, for individual victims the process can sometimes be incomprehensible, more focused on the agenda of the day than their own experience of loss or violation. There's a st range sense of dislocation from the process as they're relegated to the statuses of interested observers without a voice beyond the one permitted in their time slot.

39. But at the heart, and depending on the terms of reference, commissions aim to hold those with authority to account and reconcile sections of the community. Their aim is restorative justice, a search for the truth that may contribute to and accelerate an environment of forgiveness involving the victims and broader community more intimately than a court process, with its focus on the parties or the accused, can possibly do.

40. In this sense, they have a potential to be more holistic; wider ranging with a less strict focus on admissible evidence requiring a broader examination of the issues, the role of institutions and structures with greater potential for the validation of the traumatic experience and through this, catharsis in general and genuine forgiveness.



Sunday 1 July 2012

16:00 – 17:30 The future of advocacy

Speaker biographies

Rt Hon Sir Stephen Sedley

Sir Stephen Sedley gained a BA (Cantab) in 1961. He then became QC in 1983. Sir Sedley was a Judge of the High Court (QBD) between 1992 to 1999; Lord Justice of Appeal 1999-2011; judge ad hoc, European Court of Human Rights, Judicial Committee of the Privy Council. He is now visiting Professor of Law at Oxford University.

Sir Sedley is the President of the British Institute of Human Rights. Sir Sedley has written books including *Freeedom, Law and Justice* (the 1998 Hamlyn Lectures) and *Ashes and Sparks, essays on law and justice* (2011). He is also a contributor to London Review of Books.

Russell Coleman SC

After three years' practise at the Bar in London, Russell moved to Hong Kong in 1990 where he initially worked for a multi-national law firm.

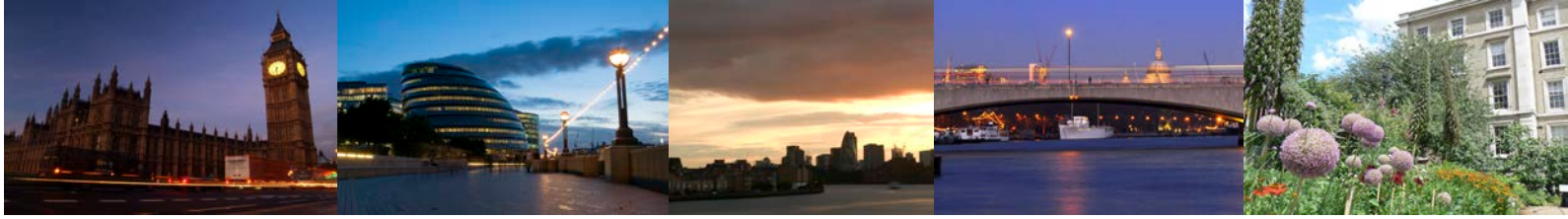
Called to the independent Bar in Hong Kong in 1991, he practised from one set of chambers for eight years before moving to practise in his current set. Russell then took Silk in 2006.

From September 2008 to September 2009, Russell was President of the Hong Kong Institute of Arbitrators, and he is a Council Member of the Hong Kong International Arbitration Centre. In addition to sitting as arbitrator, Russell sits as a Deputy High Court Judge. He hopes to have more success in deciding cases than he has enjoyed in arguing them.

In January 2009, Russell was elected unopposed to the post of Chairman of the Bar Council of the Hong Kong Bar Association and held the position until January 2011.

Miriam Dean CNZM QC

Miriam Dean is a barrister whose practice focuses on commercial and competition law, arbitration and mediation. She was made Queen's Counsel in 2004 and is the current and first woman President of the New Zealand Bar Association. She has also been on a number of government boards (including those dealing with a merger of all Auckland local Councils and the roll out of ultrafast broadband) and a trustee of the New Zealand Royal Ballet Board. Miriam was instrumental in organising in New Zealand a series of seminars: *Civil Litigation in Crisis: What Crisis* on behalf of the New Zealand Bar Association and Legal Research Foundation (of which she is also a Council member). Miriam was made a Companion of the New Zealand Order of Merit for services to law and business in the 2011 New Year's Honours List.



SIR STEPHEN SEDLEY

1. SIR STEPHEN SEDLEY: Ladies and Gentlemen, thank you for having me.

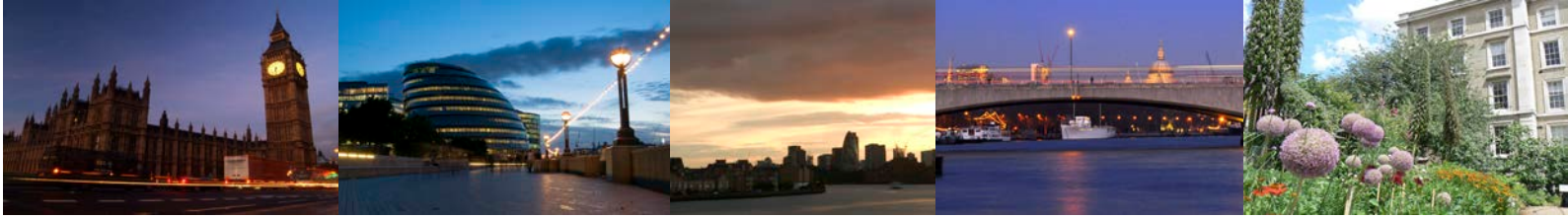
2. Modernising the appellate process is a mysterious task that I have to address because it seems to me, as I think it seems to many of you, having heard Miriam's contribution, that change in the profession of advocacy is increasingly being dictated from outside rather than from inside the profession.

3. It has always been an old-fashioned profession. It seemed to me in my later years as a judge that barristers were not even being taught to articulate properly. There was more muttering at the Bar than ever before. It was only when my wife persuaded me to see an audiologist (Laughter) that it stopped me complaining about that.

4. But I think the Bar has recognised it is not regarded by the wider world as admirable or popular. The grandstanding that can go on at the Bar; the bullying of witnesses -- as Mr Justice Blain once said, "I can't understand why anybody volunteers to come as a witness. You sit around for two days in a drafty corridor and then a man in a wig stands up and calls you a liar."

5. And that is the experience of a great many people who get involved in the justice system. Holding people up to public ridicule, using the status of the advocate and the impunity that it brings to humiliate, although it is contrary to the rules it is very difficult to enforce in practice, and it is something which I think does the Bar no good.

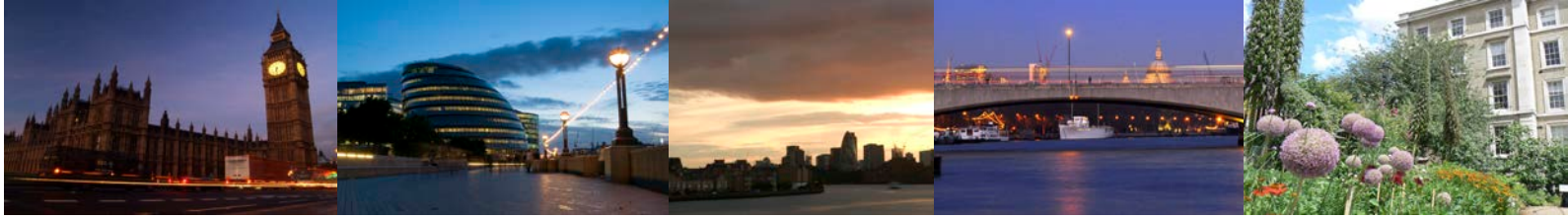
6. As to jokes, Russell, my advice is to leave those to the judge.



7. I forget -- there was a great Italian advocate who once wrote that the joyful client who has just won his case tends to forget as he embraces his advocate that it is the other side's advocate he should probably be embracing. It is much easier to lose a case than to win one from the Bar.

8. But advocacy does have a real effect, and I want to reassure those of you who seem to have doubts about it that judges' minds are regularly changed, sometimes to their own surprise, by advocacy in the court before them. I found this as a puisne judge, which I was for six years, but in the Court of Appeal, strangely enough, you can find -- I don't think I am giving away any secrets -- that the three of you meet beforehand and all have shared the view, on the basis of the skeleton arguments and pleadings and authorities, that the case will go one way. After an hour in court, you change your mind, sometimes all of you, sometimes one or two of you. Good advocacy can make a huge difference to the way in which a case comes out. What I do think is a requisite in every case is brevity, and that includes skeleton arguments. The word "skeleton" has become a bit of a joke. These written arguments can go for 40, 50, 60 pages sometimes and they are not welcome. Having to plough through something which ought to be capable of being put in ten pages with supplementary submissions to elucidate the points is not a good use of judicial time. Clarity, economy and, if I may say so in an Anglophone meeting like this, decent English. It is astonishing sometimes to read a skeleton argument and force yourself to believe that this person has passed exams in the English language. An utter disregard for the elementary rules of grammar, never mind spelling, does not do you much good; it is presentationally poor and it tends to depress the judge, which is never a good idea.

9. The other thing that perhaps matters, and this is something of a cursory concern, is that it is not that easy to be good at advocacy, and it is not easy to stay good at advocacy if

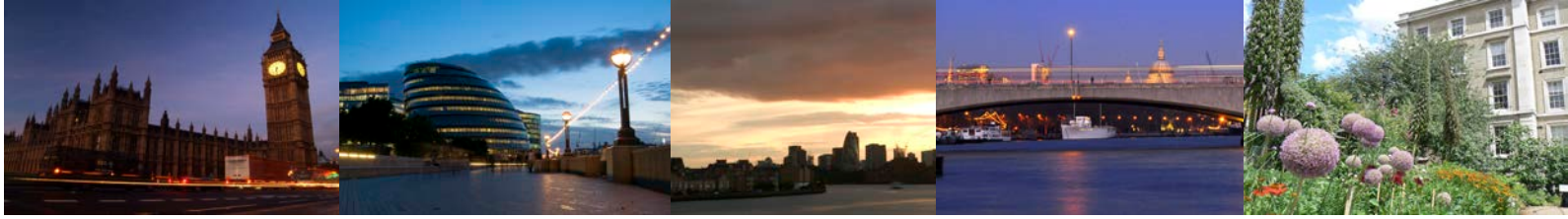


you don't practise regularly. I was on the bench in the years when solicitor-advocates first pursued rights of audience of the higher courts. Even the best of them were not all that good and the worst of them were as bad as the worst of the Bar and the worst of the Bar, let's face it, can be quite bad. If you don't do a job regularly and learn to do it well by regular practice, you are not likely to excel at it: I think that is a form of sectionalism if you like, on which the Bar is entitled to take a stand. But the glory of the English-speaking Bar, because it is a Bar that extends far beyond the bounds of this country, is the English language. I had the great privilege at the Bar of being led on more than one occasion by John Mortimer when I was a junior. John Mortimer spoke as he wrote, it was a pleasure and privilege to listen to him: never a grammatical error, never a solecism; fluency of presentation, clarity, persuasiveness; all the things that good advocacy can be without any attempt at grandstanding, without any attempt to hector the court or the jury.

10. We didn't always win our case -- in fact we usually lost them because John and I tended to be on the wrong side of issues like obscenity and blasphemy, but one learned a great deal about what good advocacy should be like.

11. When I talk to colleagues on the European Court of Human Rights or the European Court of Justice, or the International Court of Justice, they always say they look forward to cases from the United Kingdom because the advocacy is so good. So be of good courage. Advocacy, even among judges who are testy about it is appreciated.

12. Good advocacy is listened to, whether the judge wants to listen to it or not, and it can make a difference, it really can. It can change minds, and I wish you well in your practise of it.



RUSSELL COLEMAN

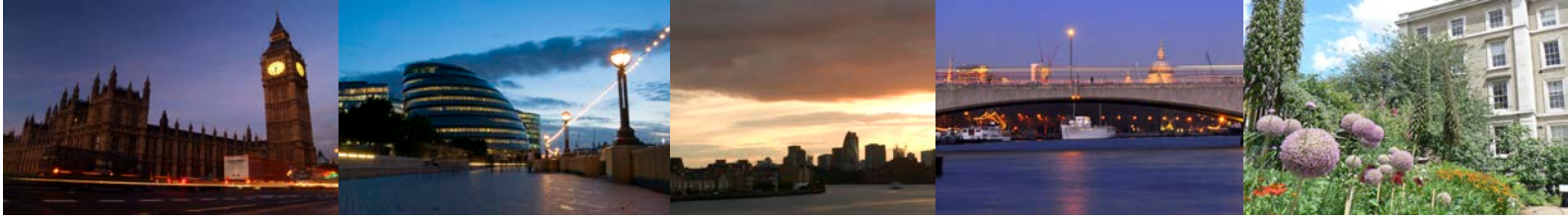
1. MR COLEMAN: Today is 1 July, and it marks the 15th anniversary of the change of sovereignty in Hong Kong, when China resumed sovereignty, the Big Chinese Takeaway, as it was called at the time, or the Handover, as it is normally referred to. It gives me great pleasure, therefore, to give you some view from Hong Kong on this day. I only hope that the pleasure is not entirely mine and that you share some of it.

2. When he is not organising conferences like this -- Desmond Brown is of course the programme director for this conference -- he is a formidable advocate. As such, he is well acquainted with that old advocacy trick of putting towards the end of your skeleton argument one bum point that you can later throw away in the oral hearing to make your good points seem even more brilliant. So when he asked me to give a talk at this conference and he read out the list of legal luminaries who were otherwise going to speak, I immediately knew what my role was. (Laughter).

3. Desmond, of course, somehow got hold of a copy of one of my old school reports. It says:

> "Russell is a boy who sets himself low standards and usually fails to achieve them". (Laughter).

4. N ow, there has been some confusion about how long we have to do these talks. Originally, I was told seven minutes, then I was told 10 minutes. There was a bit of a panic yesterday when I was told 15 minutes, and now I have simply been told: Be Brief. So I promise to be brief, however long it takes me.



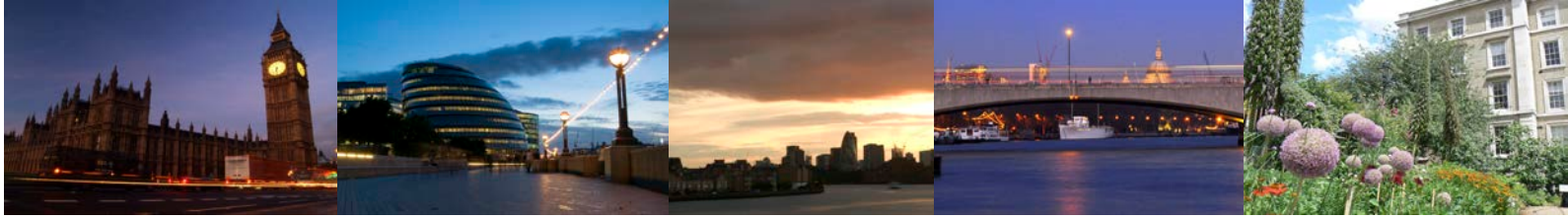
5. Which reminds me, the best story about brevity I ever heard was when John Major was Prime Minister and he met the Russian president, Boris Yeltsin, and he said to Yeltsin, "Mr President, I wonder if you could briefly tell me something about the economic conditions in Russia at the moment." And Yeltsin said, "Good." And Major said, "Well, I know I asked you for a brief version, but could you possibly expand slightly on that explanation?" And Yeltsin said, "Not good." (Laughter)

6. I will first, if I may, deal with some specific points, and then turn to something which, perhaps like some of these other points, is an almost universally interesting subject of debate.

7. Firstly in Hong Kong, just as someone I think mentioned from South Africa yesterday, we have an issue relating to language. We have two official languages in Hong Kong, English is one of them. I am afraid for my purposes, chat in slow English is not the other one. The other one is Chinese.

8. It is not Cantonese, it is not Mandarin, it is Chinese, which can be any one of a number of different dialects. But of course, that does make a difference to advocacy. Most of the advocacy in the lower courts is dealt with entirely in Chinese. The higher you go up through the courts, the more law there is argued, then the more English there will be.

9. But one thing is for sure: I take a lot of evidence through witnesses whose evidence is interpreted. However good their English is, they will choose to speak their first language, usually Cantonese, for which no criticism can be made -- and I think it is something that, Philip, you might pick up for one of your advocacy training courses: there is no better way to teach you to ask short questions in cross-examination than to have all of your questions and all of the answers come back through interpretation.



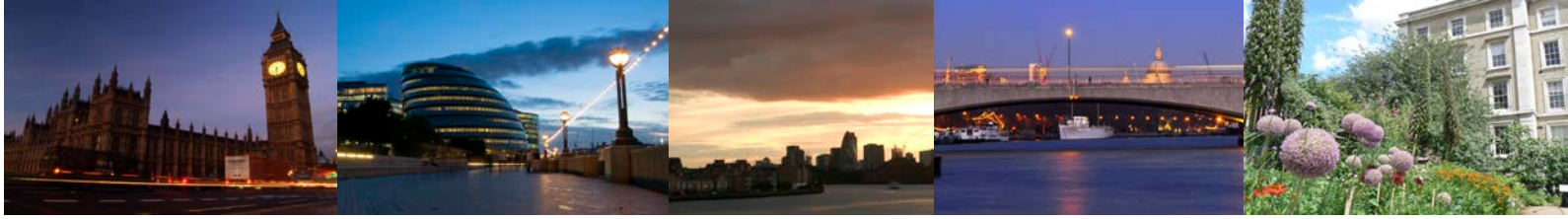
10. But it is something we are alive to in Hong Kong, the need to train advocates both in English and certainly in Cantonese.

11. The second point to make is that we have no CPD requirements at the Bar in Hong Kong, none at all, apart from during pupillage when there are a number of core points that have to be obtained, four of which are points which you obtain through doing a core advocacy training course which is modelled on the Hampel Method.

12. We have problems, I am afraid, in getting senior counsel to take part as trainers. I believe I am the only one who does it in Hong Kong, as senior counsel. A lot of other senior counsel, I think, take literally what Groucho Marx is reported once to have said: "Why should we help them? What have the future generations ever done for us?"

13. But it seems to me that only CPD being made compulsory will then actually require people to come out and help to the extent that they should, but if you know people there and you can encourage them to help, then we would like to have that.

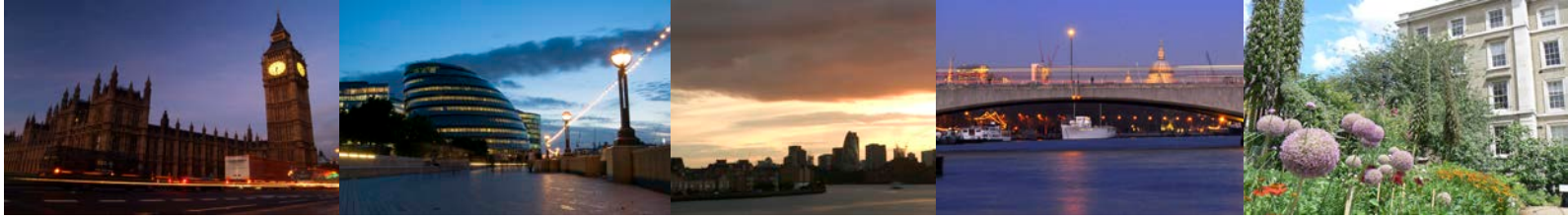
14. The third point I would mention is in relation to mediation and mediation advocacy. We have a practice direction that has been in place since January 2010 that says in every civil case, the parties and their solicitors have to sign a certificate saying they have advised, or been advised, as to the possibility of mediation and choosing whether or not they want to mediate, and making proposals for a minimum degree of participation in the mediation. And so mediation advocacy is something we are starting to focus on in our training as well, because mediation is pretty much flavour of the month. We are going to have a mediation bill soon and will soon be making a broad framework for mediation in Hong Kong.



15. The fourth point I wanted to mention is higher rights of audience. Well behind the times in this jurisdiction I know, but in Hong Kong we have legislation that has now come into force, we have rules that have just been promulgated -- if I might say so they have been beautifully drafted -- and they will allow the assessment and accreditation of the first solicitor advocates in Hong Kong in the last quarter of this year. That is obviously a concern, which I think was mentioned by Kate Chan earlier, at the lower end of the Bar. Normally, when I talk about the lower end of the Bar, I am referring to my practice, but on this occasion I am talking about the youngsters.

16. Now the common theme that I think one has heard in the discussions and one has had in debate over a cup of tea over the excellent meals we have been enjoying, is that relating to the decline in orality, the greater use of written materials in advance of, and sometimes still at, the hearings themselves, and the shortening of time. Let me tell you a little bit about the Hong Kong experience.

17. There are some judges who are more evangelical about reducing orality than others. There is one judge in particular in Hong Kong -- I will not name him, his initials are AR -- and he has taken it to the sublime art form. I discovered this the first time when he showed me this art form. He came into court; we all stood up; I was about to say something but I hadn't got to my feet. He said, "There is no need to stand up, you may remain seated." I mistakenly understood that to give me the alternative, so I stood up and said, "I prefer to stand up." He said, "No, you may remain seated." So obviously, I sat down. But then he said, "I have two questions for you, and I have two questions for you." And he proceeded to ask those questions on the basis of the statement that we hear judges make: "I have read all the papers; I have read your skeleton argment and I have even read the authorities." Now in his case, that was definitely always true. It is not a statement that we at the Bar tend to take



automatically as being correct when judges say it, but for him it was certainly true. So he had read everything; he had just two questions for each side -- sometimes three, sometimes none -

- and then he would read out the judgment that he had typed up a little earlier.

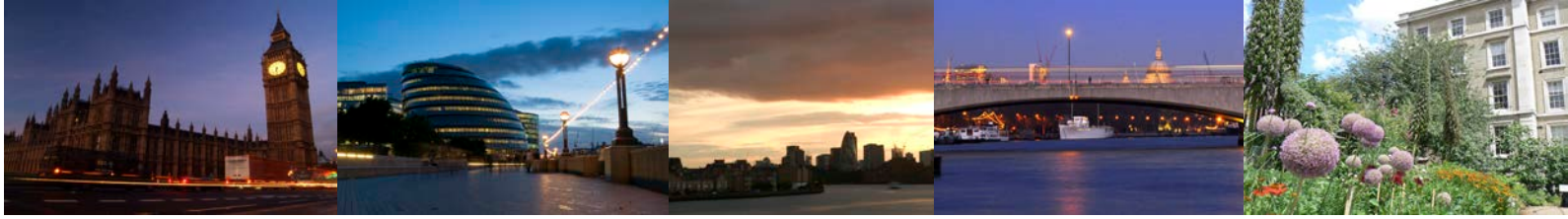
18. So notorious was this particular judge in this way that when he was invited to give a speech at the Judicial Studies Board in Hong Kong -- I cannot remember what the speech was about, probably something to do with admiralty law or something -- he was introduced by the chairman of the JSB in Hong Kong in the following way: "This is, of course, Mr Justice So- and-So, whom you all know. The title of his talk today will be 'Oral Submissions and Cross- Examination - An Exercise in Futility'."

19. Now, justice in his court and in those of other judges who behaved in that way, perhaps not to that extreme, is often done. The right answer is often achieved, but it seems to me that justice is not seen to be done, and when you go out of court having won an application or won a case and your client starts asking you, "What happened in there?" and is worried about the process that has just occurred, even though he or she has won the case, then I think it is time to start looking at that process.

20. I was taken yesterday with something that David Calvert-Smith said, I don't know whether you spotted it as well. He said, in the Criminal Court of Appeal in England, you can be satisfied that the judges will have read the papers. And then he went on to say, I think I quote:

21. "...even if they have not agreed what the answer is before they go into court."

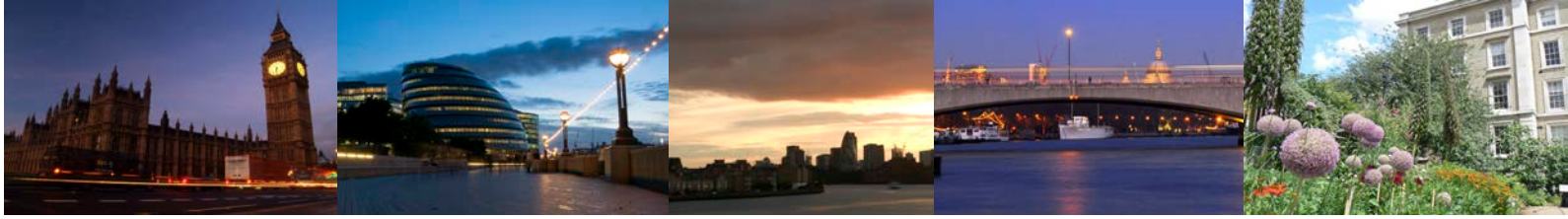
22. A nd I thought to myself, well I really hope they haven't agreed what the answer is before they have gone into court; is that not why they go into court? I am sure he was just



loosely saying they had formed a provisional view subject to hearing all the submissions from counsel, but there is a danger that even if that is what is actually happening, that is not what is seen to be happening, it seems to me. And justice, as is often said, must be done and must be seen to be done.

23. Of course, I like dialogue with a judge. As an advocate, there is nothing worse than a silent tribunal or a silent judge. You have no idea what they are thinking; in fact, often you have no idea if they are thinking. So a judge who engages in a dialogue is useful, although for the judges in the audience, can I say that personally, I am usually willing to wait until the end of each sentence.

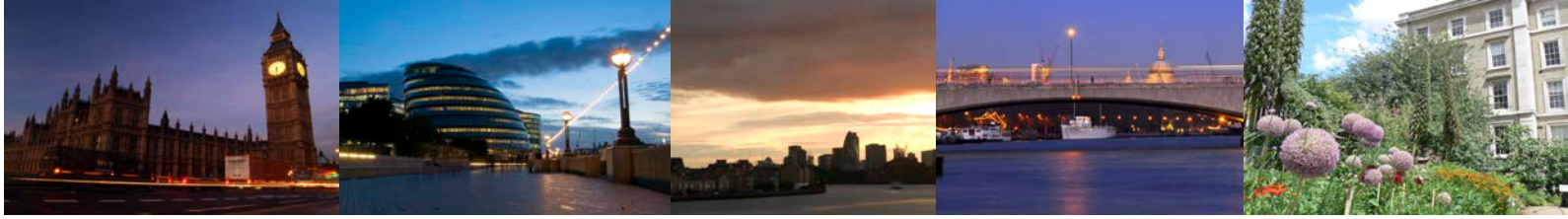
24. What do you do with written advocacy if everything is front-loaded into the written advocacy forms? In court, you can react to the judge; you can react to the questions; you know the personality, and you can sense what is going on. People were talking -- I think Stephen was talking about "in the moment"; in the moment of court, you can deal with it in that way. How can you do that with written advocacy? It is much, much more difficult. Of course, there are things you must do in a written advocacy document, but you cannot treat the tribunal as an individual. I know when I go into court and I see a particular judge, there are certain words that I will use because that judge likes those words and thinks he thought of them. There are other judges where I certainly will not use those words and I will take a different line. That is fine if when you hand in your skeleton argument, or your written submissions, you know who the judge is, and there is no -- I will borrow your phrase -- late substitute from the bench. But if the judge changes, then what happens? I have written a really long skeleton for Judge A, because if I haven't made the point in writing, I will not get a chance to make it orally. Unfortunately, there is a last-minute change to Judge B, who actually likes oral advocacy, hates skeletons, doesn't really find them very helpful and wants



to come into court and debate the matter with me. I made the mistake there that in writing you can't deal with it, and I think that is something we have to think about, particularly when we are talking about training people for written advocacy in the future.

25. Also, how do you make a joke in your written submissions? How to judge which is the right time to try something slightly humorous to lighten the mood or to take the judge's mind off the bad point that you have just made; how do you do that in writing? You can't really do it, I don't think.

26. I would like to tell you that speaking for myself, I have over a number of years now been trying to improve my advocacy by occasionally using humour in court. I think I'm very funny, and I think I am starting to have some success with this technique, because only last week, in the Court of Appeal, one of the judge's told me that my submissions were laughable.



MIRIAM DEAN

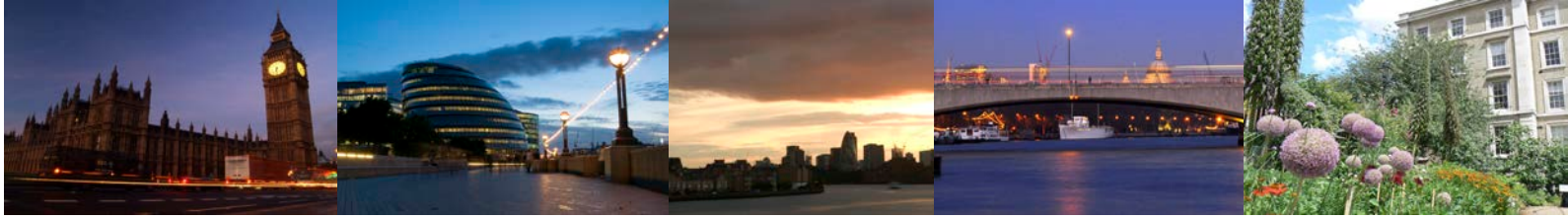
1. MIRIAM DEAN: Let me provide a brief snapshot of the way forward in New Zealand, particularly in relation to civil advocacy. Like Russell, I too will be brief because for me, the words of the lovely Stephen Hockman are still ringing in my ears: "Keep to time and no waffle."

2. In February 2008, our New Zealand Bar Association drew together speakers from the judiciary, legal profession and academic world in a conference entitled, "Civil Litigation in a Crisis: What Crisis?" The result was widespread albeit unanimous concern that there is indeed a crisis in New Zealand with our civil justice system. It is too expensive; it is too slow, and it is too burdensome procedurally.

3. A pervading theme was the need for the courts to recognise that cases do differ and no one size rule fits all. In fact, as one retired judge observed at the conference, a Rolls Royce is not required to make a local visit; it may be that a Lada or a bike will do.

4. So the theme of the conference was that major improvements were required, and consistent really with overseas trends, the advocates' role in New Zealand was seriously in peril unless something was done about our civil justice system.

5. In part prompted by that conference in New Zealand, now our government, judiciary and legal profession are working together to implement reforms with a strong emphasis on practicable and flexible rules. We have a Rules Committee in New Zealand, which is chaired by a high court judge and that Rules Committee is driving a lot of this change. And what was particularly important or particularly significant was that last year, it did in fact initiate



nationwide forums and engaged with the legal profession, including the Independent Bar to talk about what form the reforms should take?

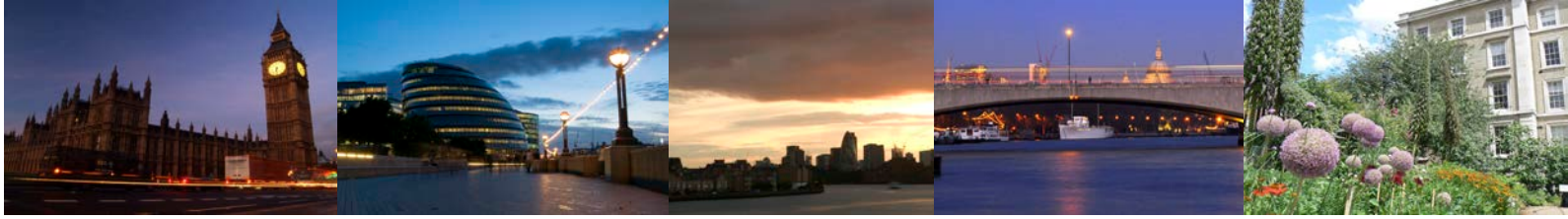
6. T he upshot: some significant developments include a sweeping overhaul of our case management system. We are about to embark on some new High Court rules, which are really going to get away from the very rigid formulaic rules we had in the past, and to have much more flexible rules acknowledging that cases do differ.

7. A particular change, one that was long advocated by our Bar Association and the Independent Bar generally, was to schedule what we would call "issues conferences" very early on in proceedings, so that actually early on in the proceedings, particularly for complex matters, counsel should be brought together, potentially with the parties, with a judge, not a registrar, or an associate judge, and really spend up to a day to actually debate what are really the issues in this case; how can we refine them; how can we best dispose of them, and we are particularly delighted that the Rules Committee has responded to that view that we had.

8. Electronic discovery is now going to be the norm in New Zealand, and there's going to be a lot of pressure on parties to actually agree discovery in a proportionate and cost- effective matter.

9. We had a major debate over written briefs, which was actually very interesting. Ultimately the Rules Committee decided to retain them but to allow for viva voce evidence where credibility is in issue.

10. It was interesting because the Bar Association on the whole favoured phasing them out. The law firms fought to keep them. Of course, only lawyers would describe a lengthy narration of who, what, when and how as a "brief".



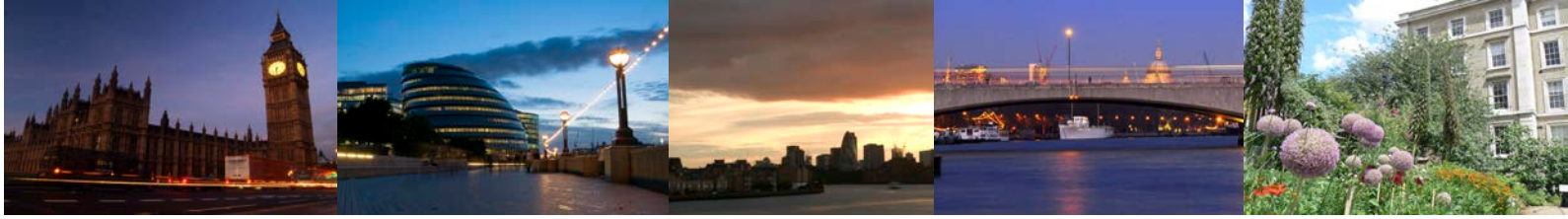
11. Other changes have included a high court mediation pilot project and what was so significant about this was that the government actually funded the mediators; it was a very successful project but, regrettably, at this stage, taken no further.

12. We are also now recognising that the strong reluctance to date of both the courts and the legal profession to embrace technology cannot continue. What is happening is that our Ministry of Justice is formulating an operating model for electronic filing, so I guess our documents are going to be filed in a iCloud somewhere shortly, and our Rules Committee is working on protocols for written submissions and, Russell, we do have written submissions in all our cases; it is a mandatory requirement. Authorities and agreed bundles will all be in electronic format; there will no longer be hard copies.

13. Our association has also focused this past year, and I confess it is something dear to my heart, on the role of the female advocate and it was something the Baroness touched on briefly earlier this afternoon. I am not entirely sure what the experience is elsewhere, but it is fair to say that in New Zealand, women advocates still find it difficult to get the really good court experience, particularly the complex commercial cases.

14. I think that is partly through lack of opportunity, but I think also partly through a lack of confidence perhaps in putting ourselves forward, so later this year, what the New Zealand Bar Association has organised with the judges is a seminar that will be for women advocates and women advocates only, to really explore how women advocates can be encouraged and assisted to take a greater share of advocacy work, another good example in our jurisdiction, where we are very much trying to work together with the judiciary to implement reform.

15. We are, I think, in New Zealand, at a bit of a crossroads. There is no doubt that without change our trial system is really at risk of no longer being viable for litigants because

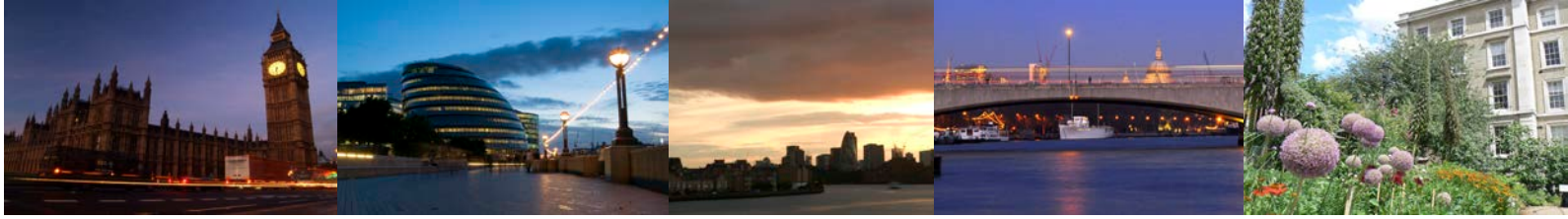


of its slowness, expense and so on. All of this change plays out at a time too when for us, the Independent Bar, our intervention rule is up for review. The Bar Association seeks its retention, although we recognise the need for greater scope of doubt in criminal and family work. Opponents are seeking its abolition, possibly a compromise might be a voluntary opt-in rule.

16. Unfortunately the review, I suppose, is causing some tension within the Bar and I would be interested to hear comments on this, because for every email I get - and I am getting a lot of them at the moment as Chair of our Bar Counsel - from a civil lawyer that says if I allow the rule to be abolished, it will be the death knell of the Independent Bar, so be it on my head; I am also getting emails from criminal and family law barristers who say that I will be acting contrary to the interests of the Bar if I don't allow for barristers to compete directly with law firms for the work of the lay clients, so I am not sure I will win either way.

17. So against that background, I suppose the question is: in New Zealand, is the advocate a dying breed? No. But I do think with this new highly case-managed system, our role will certainly markedly differ from the advocacy of the past. We simply will not be able to procedurally or mechanically move along a track to a full trial and just be the most competent advocate in the court room, because that just will not any longer cut the mustard.

18. M oreover, as in other jurisdictions, and I know also Hong Kong, we have witnessed very much the growing popularity of mediation. It hasn't actually translated into a reduced civil workload for the courts, but there is no doubt the emphasis is changing, so predictions that there may be fewer opportunities for New Zealand advocates seem wide of the mark, and in fact we just had our High Court release a report, which shows that over the last five years, the number of cases being disposed of is in fact increasing despite the attractiveness of ADR.



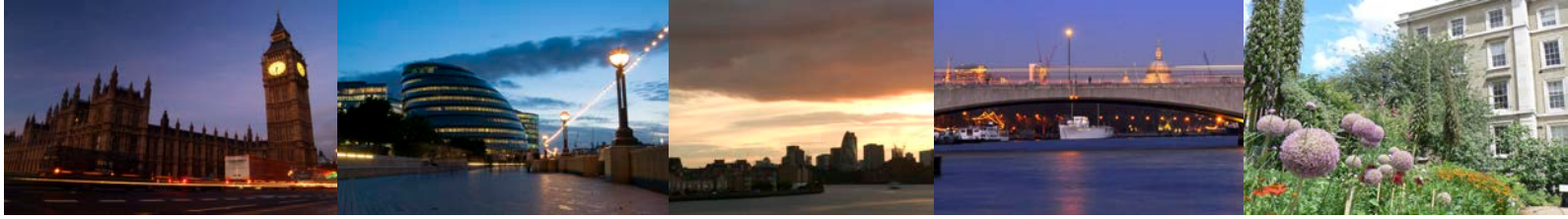
19. One particular telling feature I think was that there was a 400 per cent increase in this last five years in summary judgments, and commentators are certainly speculating on the link to the avoidance of high legal fees so I think that probably tells us something: that we are simply becoming too expensive.

20. Despite all these changes that I have outlined, as I have just mentioned, the other side of the coin is that in New Zealand, lawyers and clients are turning to ADR with an increasing eagerness. It would be fair to say that in New Zealand, mediation is now the norm, so as well as ensuring agility in the courtroom, in future there is no doubt that we advocates will have to sharpen our skills to be highly proficient in ADR.

21. I was struck by Lord Sumption mentioning that we barristers are very good at talking but of course in mediation, we do have to learn to be good listeners, not something so easy I think for us.

22. In the years ahead, certainly I think the view in New Zealand is that the emphasis on good negotiation skills for the advocate can be expected to increase. Internationally renowned lawyer and mediator, Robert Benjamin, who recently visited New Zealand, uses the phrase "predictable irrationality" to describe the functions of the human brain.

23. What he had to say was quite interesting, that after 30 years he felt that mediation was actually less popular than would have been expected as some clients still do fear that if they go to a mediation they will be played for a fool and they will be forced to compromise their case. So his message to the advocate is that we do need to understand how the human brain actually works; we do need to integrate the analytical as well as the emotional aspects of human behaviour.

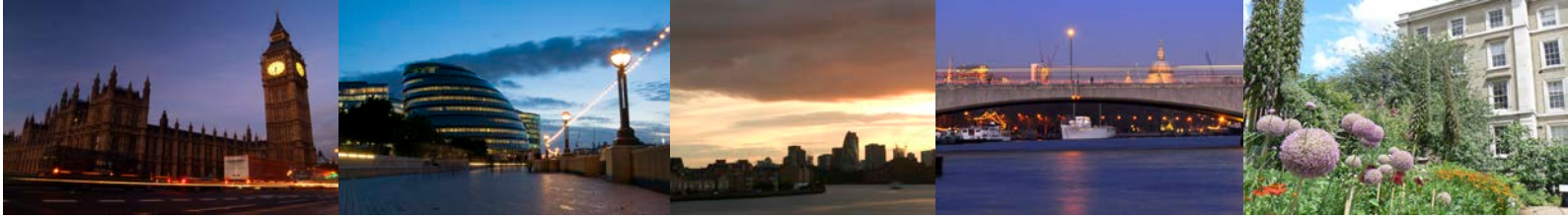


24. That, of course, has profound implications for training future advocates because clearly, it is not enough to simply teach advocates about the law and good oral advocacy skills, but clearly advocates will now have to be adept at high level negotiation and mediation, and that is something that our New Zealand law schools are now picking up.

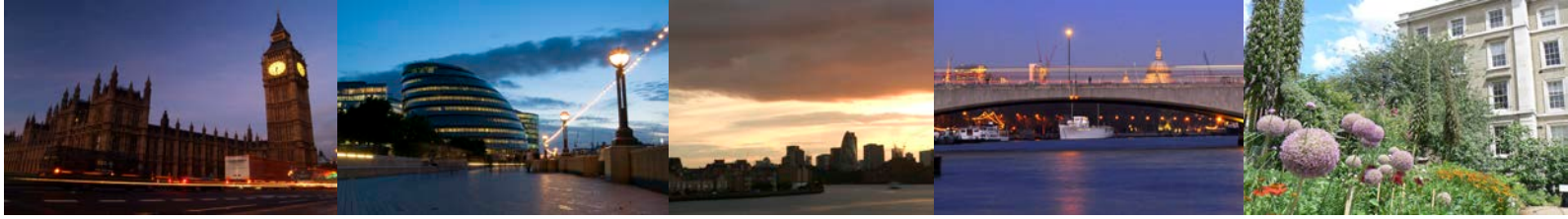
25. Persuasive, simple, written arguments are now also more important than ever, not just for the judges but also for the people we represent. And even, of course, judges are not immune and witness the popularity of American Professor Raymond, who now tours the world to teach judges, including our own, how to write their judgments, and we at the Bar Association have had a couple of sessions now to assist in training our advocates in written submissions. As Raymond puts it, "When lawyers write long sentences, they seem less like garden paths than jungle trails - interminable and branching off in bewildering directions".

26. I always think Judge Alex Kozinski of the United States 9th Circuit Court of Appeal summed it up well when he said, "Lawyers' convoluted arguments are like sleeping pills on paper."

27. In an article in 2009, an associate professor of law at Bond University, Bobette Wolski, examined the implications of two years of civil justice reform. She noted that changes had required the judges to take on the burden of case and hearing management and to be much more hands-on in the pre-trial processes. But advocates also, she says, have to make major adjustments. In addition to broadening our repertoire of skills, we really have to think about reorienting our attitude and approach to contentious matters from that of zealous advocate to what she calls the cooperative problem solver, because it is arguable, she says, that there is really a new ethos of cooperation pervading our civil justice system and if it isn't pervading it, then it most certainly should do so.



28. I suppose on that note, I would venture to suggest that what all this might mean is that future advocates must be superhuman, but then maybe that is what our clients have always expected of us. Thank you.



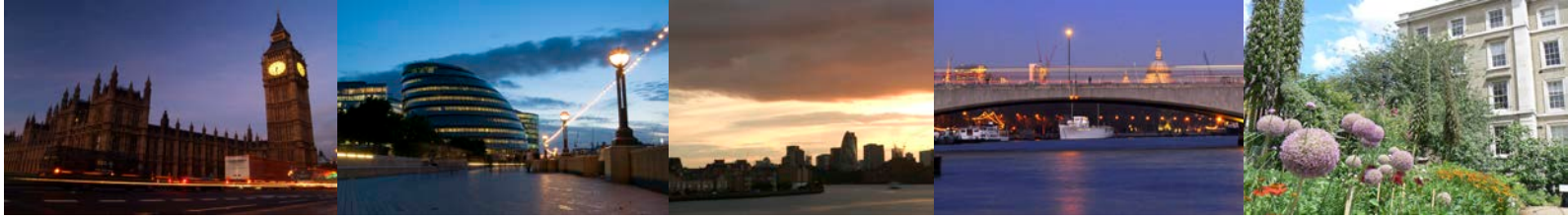
Sunday 1 July 2012

17:30 – 17:45 **Closing address: Why the Bar matters and will go on mattering**

Speaker biographies

The Rt Hon. Lord Clarke of Stone-cum-Ebony

Lord Clarke was called to the Bar in 1965 specialising in maritime and commercial law, and became a Recorder in 1985 and a Bencher in 1987. Appointed to the High Court Bench in 1993 and in April that year succeeded Mr Justice Sheen as the Admiralty Judge. Appointed to the Court of Appeal in 1998 he conducted the Thames Safety Inquiry and the Marchioness and Bowbelle Inquiries. On 1 October 2005 he was appointed Master of the Rolls and Head of Civil Justice. He was given a life peerage on 1 June 2009 and appointed as a Justice of the Supreme Court with effect from 1 October 2009. He is Treasurer of Middle Temple for 2012.



LORD CLARKE OF STONE-CUM-EBONY

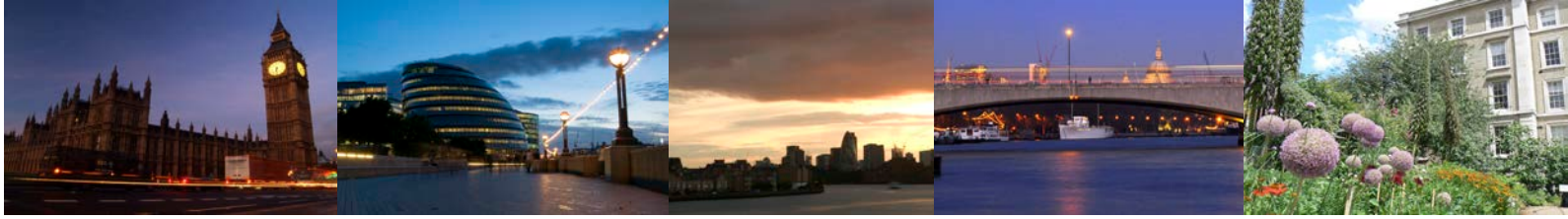
1. LORD CLARKE OF STONE-CUM-EBONY:

2. Well, I wasn't here yesterday when Lord Judge addressed you on the court's expectations of the advocate, but I have seen a note of what he was going to say, and all I am saying is something of a postscript to it. I was asked to address the question of why the Bar matters and continues to matter.

3. Well, the reason the Bar matters and continues to matter can be shortly stated: the existence of an independent Bar is central to the working of the courts and thus the rule of law, and without the rule of law, justice and democracy are nothing. There it is in a nutshell.

4. I know that the motto of the Bar Council is: integrity, excellence, justice. Well, precisely so. So, as you can see, I am already redundant. But I was called to the Bar as recently as July 1965, which even I can see is a very long time ago. Now, that was long before glittering conferences like this, and at a time when nobody was taught advocacy or ethics. It was not thought that advocacy or, indeed, ethics could be taught. Indeed, it was thought that ethics was so obvious that every member of the Bar would act ethically and would know what ethics was. And as to advocacy, it was undoubtedly thought that good advocacy depended upon experience.

5. It has, however, become appreciated in recent years that although good advocacy is likely to owe much to experience, its essential principles can be taught, as we heard just a few moments ago. And I think it is very sad that there is only senior member of the Hong Kong Bar who is teaching advocacy, so I hope more will step forward.

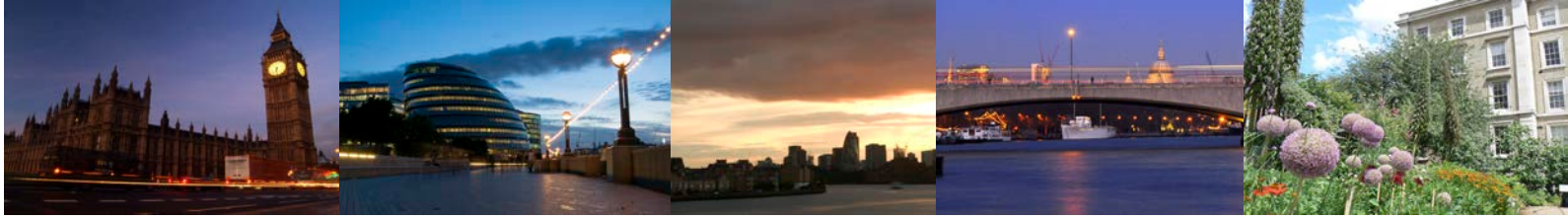


6. Now, while the importance of ethics has always been appreciated in a general way, in recent years, here and, I suspect, elsewhere, both the courts and Parliament have emphasised the advocate's duty to the court and the Bar's Code of Conduct has no end of detailed provisions about it. The truth is that ethics are central to the integrity of the Bar and thus to the integrity of the judicial process.

7. I would also like to say a word before I close about judicial behaviour since I am sure you will agree that it is not only advocates who should adhere to appropriate standards of behaviour, so too should judges. Not all judges know that, but that is the case.

8. The existence of ethical problems with regard to both advocates and judges is not of course limited to this jurisdiction; these problems arise everywhere. But I would like to start with the importance of ethical behaviour among advocates. By this I mean all advocates, not just members of the Bar. I know this is a Bar conference, but if you are the judge, you are obviously interested in the integrity and the skill and the competence of the advocate in front of you, regardless of whether he or she is a member of the Bar. I would like to start with two statements of principle by one of the greatest advocates of the 20th century, not on Baroness Deech's slides of earlier. Norman Birkett QC. He later became Mr Justice Birkett and then Lord Justice Birkett, and indeed was one of the United Kingdom judges at the Nuremberg war crimes trials. But it is as an advocate that he was principally remembered. And he said this:

> "The court must be able to rely on the advocate's word. His word must indeed be his bond and when he asserts to the court those matters which are within his personal knowledge, the court must know for a surety that those things are represented. The advocate has a duty to his clients, a duty to the court and a duty to the State. But he has above all a duty to himself that he shall be as far as lies in his power a m an [and thus, of course, a woman] of integrity. No profession calls for a higher standard



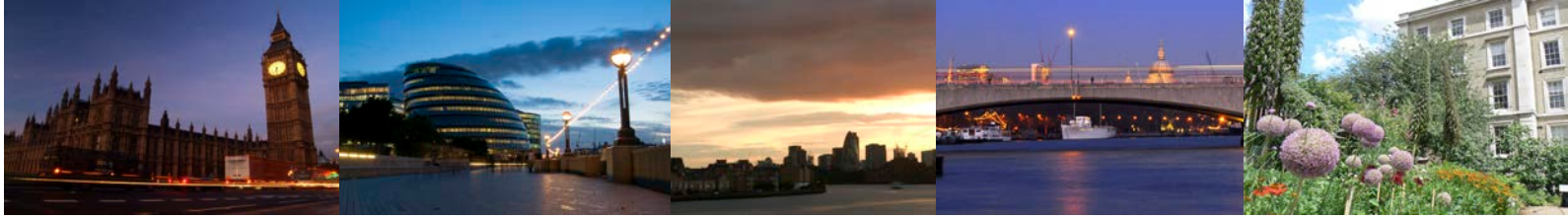
> of honour and uprightness and no profession perhaps offers greater temptation to forsake it. But whatever gifts an advocate may possess, be they never so dazzling without the supreme qualification of an inner integrity, he will fall short of the highest standard."

9. Now that is stirring stuff. I didn't invent it myself, I am indebted to the Recorder of London, Peter Beaumont, for providing me with it.

10. But I recommend these words to you all. I do so because it is of the utmost importance that judges should be able to trust counsel when they say that something is the case.

11. The principles are not of course unique to this jurisdiction. In the course of last year, as, perhaps, one or two others present, I went to a conference in Washington organised by the American Inns of Court on professionalism and ethics. One of the papers included this on ethics:

12. "Loss of reputation is the greatest loss that you can suffer. If you lose it, you will never recover it. Whether other lawyers or judges or clerks trust you and take your word, whether you are straight with your clients, whether principles and people matters to you, whether your adversaries respect you as honest, fair and civil, whether you have the guts to stand up for what you believe. These are some of the hallmarks of integrity. Personal integrity is at the heart of every law career. You can't get it out of a computer or from a law book or from a commencement speaker, or even the grave slot speaker. You have to live it and practice it every day with every client, with every other lawyer, with every judge, and with every private or public body. If your reputation for integrity is alive and well, so will your career and so will your well being."



13. That I believe all to be true. I could put it this way: I agree and as they say in the Court of Appeal, there is nothing I can usefully add. There are a lot of judicial statements along these same lines. As one might expect, a bit of Lord Denning in 1966:

> "Counsel has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause: it is the cause of truth and justice."

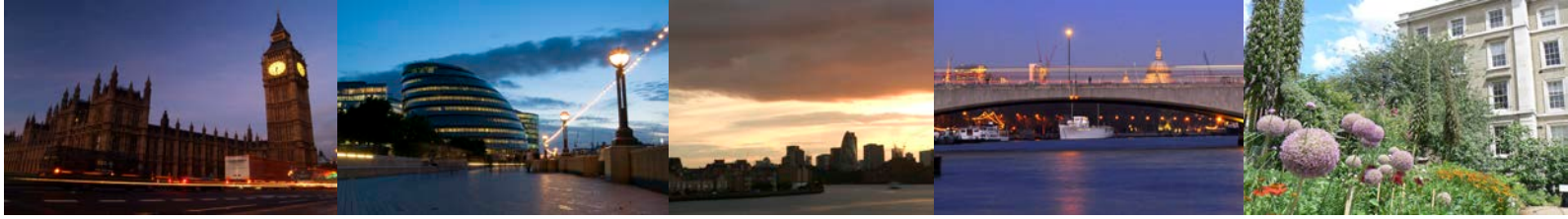
14. Chief Justice Mason also, in a famous case, said much the same.

15. And finally, not long ago, in 2002, Lord Hoffmann said this:

> "Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice. They may not mislead the court or allow the judge to take what they know to be a bad point in their favour. They must cite all relevant law, whether for or against their case. They may not make imputations of dishonesty unless they have been given the information to support them. They should not waste time on irrelevancies, even if the client thinks they are important. Sometimes the performance of these duties may annoy the client."

16. I think we all know that.

> "I have no doubt [this is still Lord Hoffmann] that the advocate's duty to the court is extremely important in the English system of justice. The substantial morality of the English system of trial and appellate procedure means that the judges rely heavily upon the advocates appearing before them for a fair presentation of the facts and adequate instruction of the law. They trust the lawyers who appear before them, the lawyers trust each other to behave according to the rules, and that trust is seldom misplaced."

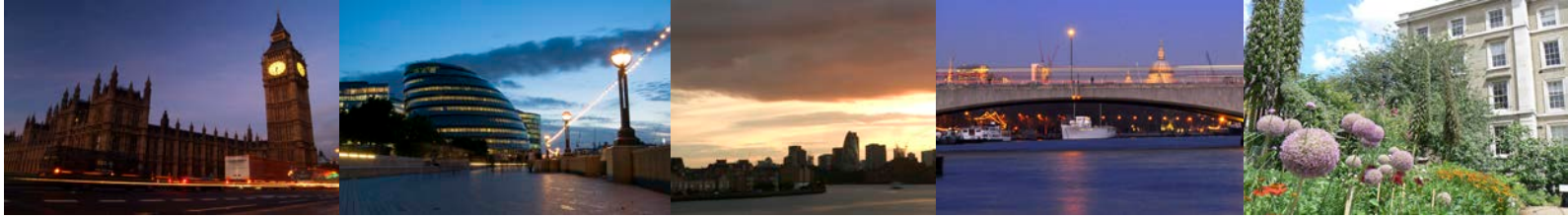


17. Now, these duties, these principles are easy to state, but it can readily be seen that they are not always so easy to apply. But it is the principles that I just wish to state, and I know they are obvious, and I know it is nearly time to go home, but they underline the importance of the independent advocate and thus the independent Bar, both now and in the future.

18. T hey now have a statutory foundation here, in both statute and rules of court, but it is far too late in the day to refer to them.

19. I have some little experience of some of these points, and I will mention only two -- well, three perhaps.

20. First of all, in all my 19 years on the bench, I have never been offered a bribe, which is perhaps a little disappointing. But you never know. But one thing I think I can say about the judiciary that I have been a part of is that some of us are pretty hopeless; some are no doubt incompetent but nobody so far as I know, at any rate in my time, has been accused of corruption. And that, I think, is a very, very important point to bear in mind in relation to the administration of justice. I remember when I first started I was the pupil of somebody called Barry Sheen, who later became Mr Justice Sheen and he did shipping collision cases. He had a case for British Rail, who owned a ship, and British Rail was an entity of the State. He was against British Rail; his client was a Spanish ship owner, and the Spanish ship owner came to him in a conference before the case started and said, "We want to send something to the judge." And old Barry was a bit of a stickler and he was absolutely appalled by the suggestion that his client might be sending something to the judge. And he said to these Spaniards, "Well, why do you want to do that?" "Well," they said, "we'll never win against an entity of the British State unless we send something to the judge." And he was so appalled, he



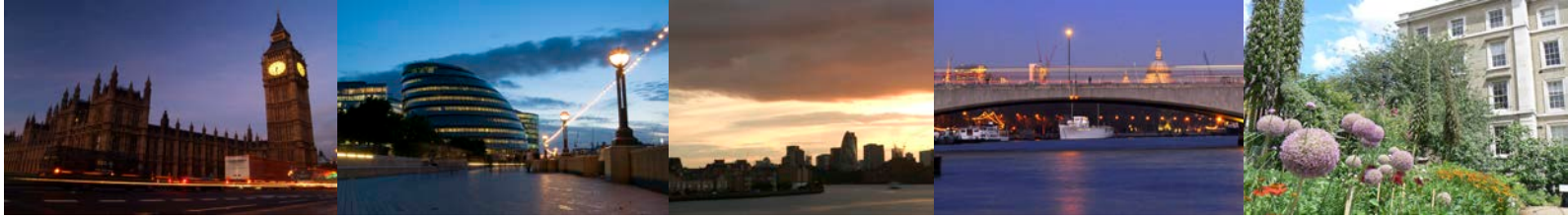
said he would not talk to them or act for them for another minute unless they gave a clear assurance that they wouldn't, and they did give him a clear assurance. Whether they actually did send anything to the judge, we never discovered, but the case was won. (Laughter)

21. But hopefully, that is a good example.

22. T hese high standards are not just a matter of the public interest. There is an element of self interest in maintaining high standards because if you are an advocate, especially if you operate in a small area like I used to, namely the maritime area, everybody knows everybody else, everybody knows who is honest and who is not very honest. You don't last very long if you are known to be a bit sharp; you soon find that your practice dwindles away, so actually integrity is a very good thing and reputation, as the previous person I quoted from said, is critical for every advocate.

23. I have just two short examples now:

24. I was once counsel in a maritime case against Nicholas Phillips, now Lord Phillips of Worth Matravers and ex-Master of the Rolls and Lord Chief Justice. I handed him a document in the course of the trial which I intended him to have, but unfortunately, being somewhat incompetent, attached to this document was a whole series of statements of my clients' witnesses, which I certainly had not intended him to have. He had a look at them, he saw immediately that this had been a mistake and he simply handed them back then and there. At that time, there was no jurisprudence about this; now there is quite a bit of jurisprudence about what you are supposed to do in those circumstances. But that was just a good example of somebody doing what was absolutely the right thing to do and an example of what I have been trying to preach.



25. One other example: I was once sitting the day before a case started trial the next day with my leader, Michael Thomas QC, more recently Attorney General in Hong Kong and Michael Mustill QC was on the other side. We always thought we had a good case and that we really ought to win, but we couldn't really establish it. And all of a sudden, we received a letter, a brown envelope which we opened, and it said:

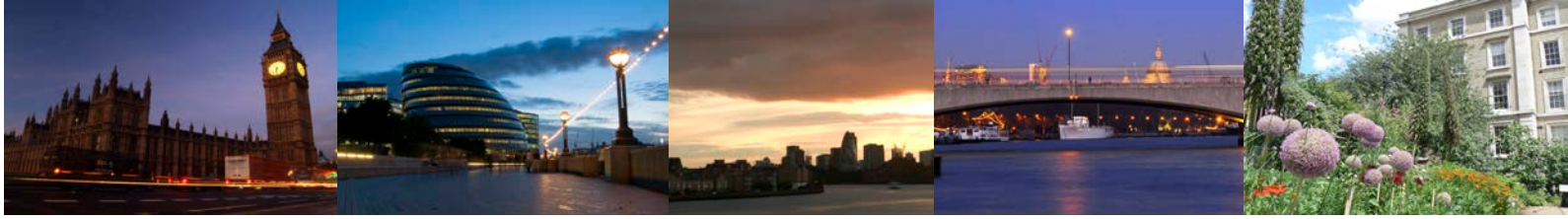
> "Dear Michael, you might be interested in the attached.
>
> Yours ever, Michael."

26. And the writer of the letter was Michael Mustill, counsel on the other side. Attached to the letter in the envelope was a document which showed without a shadow of doubt that our client was right and the other side had to cave in, and they had found this document, handed it over and as a result, again, of the high standards of the Bar, justice was done. It was a bit of luck from our client's point of view.

27. That is just an example. I am sure this happens all around the world, but these are very important standards to try and maintain.

28. I was a High Court judge for a time and I had never really done any criminal law and I didn't really know anything about crime at all, and it was the most terrifying thing to do, to find yourself trying these High Court cases, which are quite serious, and you were absolutely stuck unless you could absolutely rely upon what counsel for the prosecution said. And my experience was that they were either very, very skillful and pulled the wool over my eyes without my noticing, or actually they maintained, I think, to a person these high standards.

29. And I just really want to underline them today. I think they have served our jurisdiction very well, and so the integrity of the Bar is alive and well, and it will be alive and



well for many years into the future. Finally, just a word about the behaviour of judges. One of the topics we discussed at the Washington Conference was entitled: "Professionalism and civility on the bench". And there is a great deal of learning in the United States of America on this point. A particular quote from Justice Anthony Kennedy:

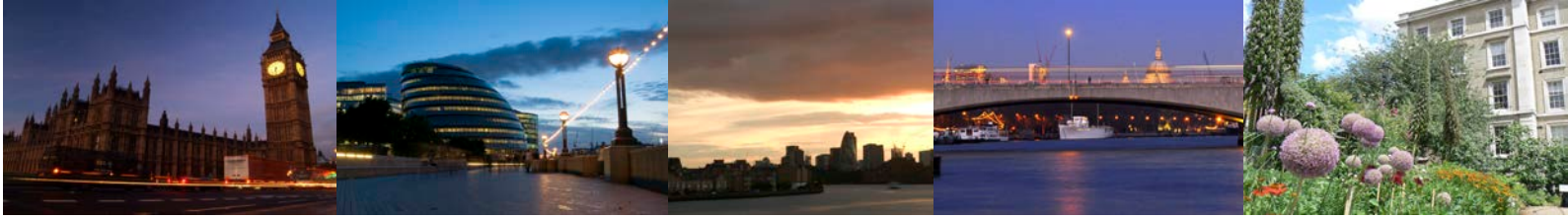
> "Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself. Civility has deep roots in the idea of respect for the individual. We are civil to each other because we respect one another's human aspirations and equal standing in a democratic society. We must restore civility to every part of our legal system and public discourse. Civility defines our common cause in advancing the rule of law. Freedom may be born in protest but it survives in civility."

30. He also said:

> "Civility is courtesy, dignity, decency and kindness."

31. And there are in fact many codes across the United States which puts these principles into practice. The America Bar Association has guidelines of conduct under the heading, "The Court's Duties to Lawyers", but I especially like the judge's duties to each other:

> "1. We will be courteous, respectful and civil in opinion, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.
>
> "2. In all written and oral communications we will abstain from disparaging personal remarks or criticism, or sarcastic or demeaning comments about another judge.
>
> "3. We will endeavour to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice."



32. There you are.

33. N ow, as I see it, the reason that the Bar matters and will continue to matter, in whatever jurisdiction we may operate, is the same. An independent Bar of high integrity appearing before judges who apply high standards and are themselves uncorrupt and incorruptible is essential for the wellbeing of the societies in which we live. It is essential to the freedom of the individual and the suppression of tyranny. That may seem a grandiose claim, but I believe it to be true. Thank you very much.

Further information

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