

365 Daily Advocacy Tips

Leslie Cuthbert

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Book review by Sally Ramage¹

Introduction



Leslie Cuthbert
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This book is divided into ten sections:

Preparation

The mechanics of advocacy

Psychology

Questioning: Examination-in-chief/ Direct examination

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Questioning: Cross –examination

Decision makers

Trial strategy

Constructing arguments, rhetoric and submissions

Useful quotes

Resources to improve your advocacy

Advocacy

Advocacy remains the most important part of preparing for a successful outcome in any court case and tribunal hearing.

It is more difficult to read a book about cross examination than to attend a face-to-face training session on advocacy but many lawyers are hard-pressed for time.

The beauty and surprise in this book is that one is not swamped with words, giving one space to stop and think. Every law writer knows that it is more difficult to be constrained by the number of words than to write loosely. This is when one appreciates learning how to précis at school.

What is an advocate?

In ancient times, an advocate was a patron of a cause, assisting his client with advice and pleading for him. In those days, advocates were men only. *Ulpian* (Dig.50, tit 13) defines an advocate as ‘any person who aids another in the conduct of a suit or action.’ In modern times, the word ‘advocate’ is confined to persons professionally conducting cases in court.² In the ecclesiastical courts and the Admiralty Court until 1857, certain persons, learned in the civil and canon laws, were called advocates and they had the exclusive right of acting as counsel. They were members of a college at Doctor’s Commons.³

Strict adherence to the procedure rules

However, no matter how good advocacy is, strict adherence to procedure rules is necessary at all times and we are all aware of the consequences of breaching these rules.

² Solicitors and barrister-at-law.

³ Burke, J. (1977) *Jowitt’s Dictionary of English Law*, London: Sweet & Maxwell.

⁴These rules exist for a fair trial, as per article 6 of the European Convention on Human Rights⁵ ('ECHR') and even long before that- by the *Magna Carta* 1215 which states: 'To no one will we sell, to no one will we refuse or delay, right or justice'.

Some argue that a principle which underlies article 6 as a whole is that judicial proceedings must be adversarial.⁶ The right to adversarial procedure has two prongs: firstly, the requirement that the accused be present (bypassed in the UK for absconding defendants⁷) and secondly, the requirement that the defence be able to challenge the submissions and observations of the prosecution and to lead its own evidence.

Tribunals- advocacy

Advocates contribute valuably in tribunal cases also. Tribunal hearings are not court trials but a round-table hearing with tribunal rules separate to criminal procedure and civil procedure rules. There is much in common among the many types of tribunals and this commonality will reveal itself if you study the tribunal procedural rules and their overriding objective. Do not speak too fast or incoherently. Remember that it is up to the panel (usually the chair) to make handwritten or typewritten notes of the proceedings. A good strategy is to use your opening address to hand out key documents to the tribunal panel which will make them familiar with your key documents before you launch into the evidence and cross-examination. Do not swamp the witnesses with questions. Rather, allow the witnesses the time to listen and to think before replying to you. Do not swamp the witnesses with bundles of documents. Rather, be very patient with witnesses when requesting that they refer to your bundles of documentation.

Psychology

The section on psychology is a most intriguing section.⁸

⁴ In the recent case of *Abdourahman Mohamed Boreh v Djibouti; Autorite Des Ports et Des Zones Franches de Djibouti; Port Autonome International de Djibouti; Gibson, Dunn & Crutcher LLP* [2015] EWHC 769 (Comm); QBD (Comm) (Flaux J) 23/03/2015, the court considered the duty on litigants and their representatives of full and frank disclosure. It set aside a freezing injunction made against a defendant who had been convicted of a terrorist offence because it found that the claimants' solicitor had deliberately misled the court by failing to disclose that information used to secure the defendant's conviction had been used on a false basis. The court also commented upon the equitable 'clean hands' doctrine.

⁵ Domestically enforceable under the UK Human Rights Act 1998.

⁶ Harris, D, O'Boyle, M and Warbrick, C. (1995) *Law of European Convention on Human Rights*, London: Butterworths.

⁷ The judge is 'ultimate guardian of fairness' (see *Cuscani v United Kingdom*, no 32771/96, 24 September 2002)

⁸ In their 'cognitive-affective system theory of personality' Mischel and Shoda (1995) assert that what is stable about an individual's approach to the world is not a set of global traits that predispose behaviour across time and situations, but rather particular patterns of behaviour-situation contingencies. Their theory focussed on 'if-then' statements about the individual that clearly relate that person's behaviour to particular environmental circumstances. See also Bennett,

TIP 22 in this book

Court cases are riddled with emotion and emotional cues and whilst justice prevails, as lawyers, you must always prepare well for your case, as the author states in Tip 22 (page 23):

‘A key aspect of preparing for trial is being organised. You need to organise the papers, the witnesses, the exhibits and your points’.

Take, for example the emotional cues displayed in this court case against Michael and Mairead Philpott and Paul their accomplice. Here I will only illustrate with the cues after the case, rather than during the case, but the essence of the importance of cues is the same.

Tribunal hearings- preparation is vitally important

The recent case of *Bakary Danso v Secretary of State for the Home Department* [2015]⁹ concerned a foreign criminal who became subject to deportation after being convicted of two serious offences. He appealed to the First-Tier Tribunal on the grounds that deportation infringed his article 8 rights to a family life under European Convention on Human Rights (‘ECHR’).¹⁰ His case had been decided by the First-tier Tribunal under the Immigration Rules as updated in 2012. However, after careful study, the tribunal decided that there was no facility to have article 8 ECHR matters determined outside of their scope. The tribunal had used slightly different terminology from that in the Rules, but had followed the correct processes and examined the necessary factors.

Studying the law carefully

In another recent tribunal case, *R v Onur Simsek* [2015]¹¹ the court had examined the transitional provisions in the Anti-social Behaviour, Crime and Policing Act 2014 regarding the replacement of Anti-Social Behaviour Orders (‘ASBO’) with a Criminal

W.J. (1995) *Moral compass*, US: Atlantic Books. See also Hartshorne, H. and May, M.A. (1928) *Studies in the Nature of Character, vol. 1. Studies in Deceit*, Macmillan, New York.

⁹ EWCA Civ 596, CA (Civ Div).

¹⁰ Article 8 is a broad-ranging right that is often closely connected with other rights such as freedom of religion, freedom of expression, freedom of association and the right to respect for property. The obligation on the State under Article 8 is to refrain from interfering with the right itself and also to take some positive measures, for example, to criminalise extreme breaches of the right to a private life by private individuals. Article 8 provides the right to respect for one’s *established family life*. This includes close family ties, although there is no pre-determined model of a family or family life. It includes any stable relationship, be it married, engaged, or de facto; between parents and children; siblings; grandparents and grandchildren etc. However, the court found that the relationship with the girlfriend under which his article 8 claim fell, was not as strong as to be considered as ‘family’.

¹¹ EWCA Crim 1268 CA (Crim Div).

Behaviour Order ('CBO') and found that, according to the new Criminal Behaviour Order rules, the lower court judge did not have the power to make the ASBO into a CBO and sent the case for retrial.

The Philpott case in 2013: the facts

This Advocacy book is essential when one considers criminal cases such as the Michael Philpott case in 2013, the facts being that a fire was started in the early hours of the morning as part of a plan to frame Philpott's former live-in mistress, Lisa Willis, who lived at 18 Victory Road for 10 years with her five children, four of whom Philpott fathered. (Philpott had fathered 17 children and now six were dead by his arson). On February 11 Lisa Willis she walked out for the last time, taking those five children with her. A bitter custody battle ensued. Philpott and Ms Willis were due in court in Derby for a residency hearing on the morning of the fire. Jade Philpott, 10, and her brothers Duwayne, 13, John, nine, Jack, eight, Jesse, six and Jayden, five, all died at the home at 18 Victory Road, Allenton, following the fire which started at 3.46am on May 11. The dangerous plan was that Philpott poured petrol on the floor of the hallway inside the front door of his home whilst the children were asleep upstairs.

Paul Mosley's role was to remove the containers before Philpott ignited the petrol. It became clear that there was no chance of a successful rescue and the children perished. Neighbours, firefighters and police all tried to save the young children but five of them were declared dead when they arrived at the Royal Derby Hospital. Duwayne died the following day at Birmingham Children's Hospital. The cause of death for all six of the children was smoke inhalation.

Judge's summing up in the Philpott case

Michael Philpott was 56 years old when he was sentenced to life imprisonment for the manslaughter of six of his 17 children and told that it would be 'a minimum of 15 years' before he could apply for 'parole'. His punishment was in fact a lengthy sentence of 30 years in prison. During sentencing, Philpott remained emotionless in the dock through this criticism by the judge in summing up. Even as she told him she was jailing him for life he looked down without any of the crying, sobbing or theatrical collapses that he displayed during the prosecution's evidence against him in the seven-week long

trial at Nottingham Crown Court. Dame Justice Kate Thirlwall QC said to Michael Philpott:

*'You were and remain the centre of your world and it is plain that you require the women in your life to make sure that you remained at the centre of their world. Everything was done for the pleasure of Michael Philpott. It has been said on your behalf that you were a good father. I cannot give that description to a man that acted as you did. You are a disturbingly dangerous man. You have no **moral compass**. 'I have not the slightest doubt that you, Michael Philpott, were the driving force behind this shockingly dangerous enterprise. You, Mairead Philpott, the mother of all those children and you, Paul Mosley, a family friend, assisted him. Let me be clear. What you did intend plainly was to subject your children to a terrifying ordeal. They were to be woken from their beds in the middle of the night with their home on fire so you, Michael Philpott, could rescue them and be the hero. Their terror was the price they were going to pay for your callous selfishness. In fact, they paid with their six young lives... You were obsessed with Lisa Willis. Indeed, it was plain to me when you were giving evidence over more than three days in the witness box that you still are. The evidence shows you tried sweet-talking her. You tried cajoling and then bullying her. Sometimes you moved between the three tactics but she would not come back and you could not stand the fact that she had crossed you. You were determined to make sure that she came back and you began to put a plan together. The plan, which you had plainly been considering for some time, was to set fire to your home on the night before the court hearing, making it look as though the fire had been set from outside. It became clear that there was no chance of a successful rescue and the children perished. You lied to the police and you lied to the jury. Ever since the fire your life has been a performance for the public, the police and then this court. You made sure that Mairead stuck to the story, checking with her at every opportunity that she wasn't going to stray, as you put it. You knew that Mairead would do almost anything for your approval, to please you, to get your attention. The maximum sentence for manslaughter is life imprisonment. You are a disturbingly dangerous man.'*

Michael Philpott cried only for his wife

The only time that Defendant Michael Philpott appeared to weep was when Justice Thirlwall told the silent courtroom that she was jailing Michael Philpott's wife, Mairead Philpott, with a 17 year-sentence for her part in the plan that went tragically wrong.

Michael Philpott's own sister poured scorn on him with her words

Michael Philpott's sister, Dawn Bestwick, had attended court for each day of the murder trial. As he was being escorted away from the courtroom she shouted out at her brother: 'Die, Mick, die', from the public gallery.

Michael Philpott's retort displayed his violence and continuous anti-social behavior

As he heard his sister's shout, Michael Philpott screwed up his face and aggressively stuck two fingers up to her and at the rest of the people crammed into the public gallery.

Mrs Philpott, mother of the six dead children wept to hear her 17 year prison sentence

The judge then turned to Mairead Philpott who looked shocked and wiped tears from her eyes after the judge told her that she would serve half of her 17 year sentence behind bars before being eligible to be released 'on licence'. Justice Thirlwall said:

'The risks of the fire were obvious and overwhelming and anyone who has heard the harrowing wailing from you on the 999 call can hear your realisation that this has gone horribly wrong and your children were in mortal danger. Your first responsibility surely, was to your children. Instead you joined in with this plan. You put Michael Philpott above your children and as a result they have died.'

Defendant Mosley surprised by his lengthy prison sentence

The judge then sentenced Mosley, who has children of his own aged eight and six. As she sentenced Mosley he shook his head in disbelief. She addressed third Defendant Mosley:

'You have young children of your own. You must appreciate the appalling risk to which these six children were to be exposed when this fire was started in their home. Yet you were prepared to go along with the plan.'

Justice Thirwell was brief with Press mob waiting for her to leave the court

Normally judges do not speak with the media but Justice Thirwell spoke just one sentence to them, as they had waited 45 minutes before she exited the court. She addressed the media scrum thus:

'Victory to the children, they have gone down; RIP, that's all.'

For justice to prevail, lawyers could do well to take note that it is incumbent on them to keep to high standards of preparation. In a way, these three defendants were lucky that their sentences were not lengthier. Who sets fire to a house full of sleeping children unless one is not very bright; or one is very bad? The three defendants were represented by lawyers who emphasized the unforeseen way that this fire became quickly out of control. By so emphasizing the error or stupidity, they drew less attention to police covert surveillance evidence.

Being organised in preparing your case

Justice prevails, but as lawyers, you must always prepare well for your case¹² as the author states in Tip 22 (page 23):

'A key aspect of preparing for trial is being organised. You need to organise the papers, the witnesses, the exhibits and your points'.

Conclusion

This book is a very sensible purchase for solicitors and barristers and I do recommend it. The author, Leslie Cuthbert¹³ has also left you much space to elaborate on his tips for you. Pondering on only one tip every day gives the brain time to absorb and then apply it.

¹² There has been a raft of changes in the Criminal Procedure Rules 2015 and one of the main changes in force from 5 October 2015, relates to Case Management, its objectives being - better case management; reduced hearings; maximum participation; full engagement and efficient compliance with the Criminal Procedure Rules. The new BCM procedure will be operating in all courts from January 2016. This BCM operation from January 2016 introduces two main case management initiatives, namely, a uniform, national Early Guilty Plea Scheme and Crown Court Disclosure in document-heavy cases. Other changes include increased obligations on Expert Witnesses to comply with court directions (see new Part 19, CrimPR).

¹³ Leslie is a criminal law solicitor-advocate, now consultant at McCormack LLP, who also lectures on criminal law and constitutional law for the Open University, that unique and versatile university; a visiting law lecturer for College of Law and as a trainer for Central Law Training. He has also presented courses for Bond Solon whose business is the training of expert witnesses. He later became a Congestion Charge Adjudicator, a Tribunal position and later became a judge. He was also appointed vice-chair of the Law Society's Solicitors Association of Higher Court Advocates.

Further Reading

Cuthbert, L 'Giving evidence', *Frontline*, 6 December 2015.
See <http://frontline-ireland.com/giving-evidence/>, accessed 6.12.2015.

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