Solicitors Association of Higher Court Advocates

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Some thoughts on advocacy and the Courts of the Future

Rt. Hon. Sir Geoffrey Vos, Chancellor of the High Court

Introduction

1. It is a great pleasure to be here this morning to speak to your annual conference. I want to touch today on a number of important issues. First, whether we can expect so much advocacy to be undertaken in the courts of the future, secondly, something about advocacy itself in the courts in the light of the likely technological developments as to the way we do courts in the future, and thirdly, where we should all be concentrating our efforts if we are to maintain the reputation of English law and the UK's jurisdictions in the new technological era after we leave the European Union.

2. Last night, you heard Dame Elizabeth Gloster speaking on "advocacy in commercial dispute resolution – a scourge or a blessing" so you may not want much more from me today on the same subject. On the other hand, you may think that a "compare and contrast" annual conference has benefits too. Let me come back to that subject in due course.

3. I will start then with a short introduction to the future as I see it. It is in that future world that you will need to undertake the advocacy.

4. First, we must all understand that millennials will never accept that justice can only be delivered after years of delay, when everything else is obtained immediately by a couple of taps on the smart phone. As protectors of the justice system, we must all make sure that it is sufficiently adept and flexible to deliver a 21st century product.

5. Secondly, artificial intelligence, digital ledger technology and smart contracts are going to affect every aspect of our legal lives – whether that is in relation to business transactions, crime, employment, properties, or just in relation to consumer relationships. Right now, we can see only a small part of the technological iceberg that is heading our way.

6. Thirdly, we need to adjust the way we train lawyers in the future to deal with the new digital age. We are still training young lawyers as we did in the 19th and 20th centuries and that will not work, when what young lawyers of the future will really need to know is the law in the context of computer coding, AI, LawTech, FinTech and RegTech.

Advocacy in the courts of the future

7. Let me start with a vision of the courts of the future, before looking at what advocacy may be needed within them. I think that in the next 20 years the courts will look very different from how they look now. Let me start with an overview. At the moment, in broad terms, there are court hearings in crime, in family cases, in employment cases, in business and property cases – large and small, in judicial review cases, in PI and medical negligence cases, and in numerous tribunals, but predominantly in immigration and social security cases.

8. We are in the midst, as you will all know, of a major HMCTS court reform project, which will change the way in which many of these types of cases are dealt with. Some will simply be resolved in other ways – either by online dispute resolution systems or by alternative dispute resolution methods.

9. These developments are generally to be welcomed because they will increase access to justice. We should also not think that online justice will reduce the quality of the outcome. It will not, because, as I shall explain a speedy outcome is in many cases a good outcome.

10. Online justice will increase access to justice because it will enable more people to afford to vindicate their rights. We are already seeing this with the surprisingly large number of small money claims being brought online now that that facility is available.

11. Delivering justice requires there to be a balance between three things: costs and expenses on the first axis, speed on the second axis, and the quality of the outcome on the third. It is a three-dimensional graph. The balance lies in a different place for different kinds of dispute. A consumer with a small claim against an electricity supplier will not want to expend any money and will want a speedy outcome, but will not care so much about that outcome provided the dispute is resolved quickly. Conversely the parties to a commercial dispute about €50 million will be prepared to spend money on legal fees, and will care far less how long it takes, provided they obtain what they perceive to be a just result. There are all stages in between, and we should be very sensitive to the kind of dispute resolution that is appropriate for different types of dispute. We need to make sure that we are capable of providing, for appropriate cases, online dispute resolution, arbitration, ombudsman resolution, mediation and traditional court-based resolution, alongside other tools like early neutral evaluation.

12. At present, online dispute resolution is available for divorce, small claims under £10,000 and social security claims. These ground-breaking systems are generally designed in the first place for use by litigants in person, but in time they will cater for represented parties as well. Online dispute resolution will also inevitably extend into all the areas I have mentioned, including resolution of the more complex cases in the Business and Property Courts.

13. In a recent lecture that I gave to the Foundation for Science and Technology, I asked a rather distinguished audience to envisage a truly digital business justice system delivering speedy and dependable outcomes for hard-pressed commercial parties at a proportionate cost. I think it was and

is incontrovertible that that should be the objective. I asked what it might look like and how can we get there?

14. I think the online element is perfectly obvious, with participants having appropriate access to the case record, as is the concept of the Common Platform for criminal cases within the current HMCTS reform project. We already have electronic filing in the Business and Property Courts and that is being rolled out across the country as we speak, and also to the other parts of the High Court.

15. It is equally obvious, as I suggested there, that there are several available options for case determination apart from the traditional physical hearing or a purely online process. Some preliminary and interlocutory issues could surely be resolved entirely justly without gathering all the parties at a physical hearing weeks or months after the case has begun. The lawyers' task in such cases should be to simplify the issues to enable them to be resolved in the most appropriate cost-effective manner.

16. The hearings could be asynchronous and therefore quicker and more efficient. There is no reason why hearing participants cannot log on when they have the time to do so within a time window. They can make their submissions online. Questions can then be asked by the judge online and responded to online. There is no need for much delay as a result.

17. This is not so outlandish. Think how often we check our mobile phones every day just in case someone is contacting us. There cannot need to be 14 days allowed for every interaction between the parties or between the parties and the judge. Everyone's voice can be heard without spending the large sums needed to fly witnesses in from far away. We can resolve many cases and some aspects of the more complex cases without paying for lawyers to sit for hours or days on end listening to material they can pick up online in far less time.

18. In the case of a claim for, say, a freezing order to prevent a defendant from putting his assets out of reach of the claimant, the claim is already lodged electronically in the Business and Property Courts. The relief could also be granted online. The judge could consider the material filed online, ask any questions he wanted, receive the answers, and then make the appropriate order. The party seeking the order would, of course, need to provide full and frank disclosure to the court just as it does today. A real-time hearing whether electronic or in person could be convened only in the cases where it was truly necessary. Another advantage is that the record would show what the court had been told, so that once the defendant was informed of the order, it could apply to set aside the injunction by the same process if it felt it had been wrongly granted.

19. Even cases involving multiple parties and witnesses could be resolved wholly or partially in a similar way. Preliminary issues could be resolved by online argument, questions and answers and a judicial determination occurring without costly court attendances by the parties and by lawyers. Even evidence could be given in writing online or remotely by skype.

20. I understand that in some cases, time in court really is crucial, and I would not be suggesting that in such cases real time hearings should not still take place. But there are many cases where parts of the trial process are costly and unnecessary. I ask just 4 questions about our current process:-

    (1) Why do we still have the written submissions reiterated orally before and after the oral evidence?

    (2) Why do we need days of evidence, when in reality there are very rarely more than a handful of substantive factual disputes?

    (3) If the judges were more participative online, asking questions, directing evidence and resolving cases

stage by stage, could they not decide the majority of even lengthy trials by an iterative online process?

(4) Could greater flexibility not cut through most questions and mean that oral evidence at a synchronous hearing could become the exception rather than the rule?

21. On this last point, when a traditional hearing was needed, it could be conducted by a judge who was already totally *au fait* with the issues and the stage that the online "trial" had reached and what was truly needed to resolve the issues that really divided the parties in the case.

22. So, what does all this mean in practice for advocacy? I think it means that there will be less of it, more of it will be written, and oral submissions will need to be much more concise and focussed.

23. Advocacy has to be tailored to the process in which it is deployed. It would be absurd to conduct a murder trial in the same way as a claim for £1,000, and equally absurd to think that cross examining a driver in a road traffic accident case should be in any way similar to the cross-examination of the Chairman of RBS in a recent very lengthy class action.

24. Advocacy will be required in online courts. Written advocacy will undoubtedly be required in these claims, even if oral advocacy will be less common, if not unheard of. The idea is that, if the claims made online are not mediated successfully by the online process, they will end up in court like a normal case. That is not expected to be particularly common, but it will happen, and indeed the fact that it can is crucial to the integrity of the whole process.

25. In the process I have envisaged to resolve an interlocutory injunction, advocacy will again be written and more continuous in the sense that the advocate will be engaged in a conversation with the court. This will not depreciate the skill of persuasion. It may even enhance it. It will just require a slightly different approach

26. But even in cases that are ultimately resolved in a synchronous hearing, I am certain that oral advocacy is going to need to be more confined as technology develops. Courts and judges will need to rely on the artificial intelligence that is rapidly becoming available in all sectors. This material will provide the foundation for judicial decisions. It will undoubtedly cut out the donkey work and mean that submissions will need to be more confined to the ultimate legal issues that the judge has to decide. The facts will be electronically determined in any smart contract, for example.

27. Let me just explain what I mean. Smart contracts in real life are likely to develop incrementally. If, for example, I have a contract for a derivative or for the sale of goods, in either case the payments may depend on either market developments or the quality of the goods. The smart element of the contract could in each case automate the measurement of the market values on the one hand or the temperature of the goods during shipment or the level of infestation by insects on the other. If the parties agree that automated measurement of any variable shall be determined electronically, that will take one element out of the debate that might need to take place in court.

28. In all types of case, we need to think hard about when oral advocacy is really an advantage. It is costly and sometimes the least efficient way of resolving contentious issues. So, I will with that introduction turn to give you my take on advocacy now and in the future. The watchword throughout is that advocacy is not for its own sake. It is only useful if it helps the judge. It is not an opportunity to grandstand for your client, even if he is paying.

Advocacy for the future

29. Some of the lessons for future advocacy hold good in today's world. I think that good advocacy is largely the simple application of common sense.

Written advocacy

30. This must be genuinely concise and intelligible. Long written perorations are to be discouraged. Moreover, you simply must not repeat the same point in half a dozen different ways. Even written advocacy has to be tailored to the audience. Your clients may want a repetitive lengthy argument, but judges do not.

31. In the world of online argument, brevity will be even more important.

32. Written advocacy will become more responsive and interactive than it is at the moment. It is often wasteful to produce lengthy skeleton arguments that pass like ships in the night. It is far better to make advocacy interactive allowing direct responses to be provided in areas where the real dispute lies. This goes back to my suggestion that all cases will be determined in a more interactive manner throughout their life.

Oral advocacy

33. There will even in a new technological world still be some much shorter synchronous court hearings. When they take place, the rules will be the same as they are today:-

    (1) **Timing** is crucial. Tell the court right at the beginning what you have agreed with your opponent about how long each of you will be and when the case will finish.

    (2) **Listen** carefully to what the judge says. This is your chance to divine what is going on within the court. It may be positive and it may be negative. But whatever it is, it is crucial.

    (3) The key to success in advocacy is **flexibility**. You may have detailed notes of what you think you are going to say. Only rarely will you be able or will it be sensible for you to say what you have noted down. It

is always going to be better to tackle head on what is worrying the court.

(4) At first instance, always start with your very **best point**. If possible, this should be short, crisp and compelling.

(5) In the Court of Appeal, always start with where the judge went wrong.

(6) If you are referring to authorities, tell the court **first** the proposition which the authority is meant to elucidate.

(7) Only go to authorities that are truly in point in relation to the precise issue in the case. Then take enough time with those **crucial cases** to ensure that the court understands the facts, the case, and the point you are getting out of it.

(8) Avoid at all costs creating huge bundles of authorities that are never looked at.

(9) Cases can be and often are won in reply. The biggest mistake advocates make is not to realise that. To prepare a **proper reply**, you have to listen carefully to the other side – however demanding that process can be. It is only by listening attentively to the other advocate that you can hope to work out where the holes are in his or her argument. You should then mercilessly expose those logical fallacies or *non sequiturs* in your reply. So it is absolutely crucial not to waste your reply. It must be short, and punchy. Make enumerated points that you have written down to address head on the points your opponent has made. Don't assume the court has got the answers to these points to hand from your opening. It is your last and most important opportunity to get the case decided in your favour.

Cross-examination

34. I am sure that cross-examination will still sometimes be required in the brave new technological era. But it will be less common than today. It really should only be directed to a real and identified factual issue that the judge is required to decide. Artificial intelligence and LawTech will make it less frequent, because there will be fewer facts to argue about once data is recorded under every contract.

35. All that said, it will remain very difficult to cross-examine well. The basic rules are:-

    (1) Establish the uncontentious parameters first. You will want to use these later when, as you will know in advance, the witness is going to have to contradict some of them in order to maintain his case.

    (2) Don't ask open ended questions: only closed questions that are answered with a yes or a no.

    (3) Don't ask composite or lengthy questions that are hard to understand.

    (4) Don't ask that final question which will kill your case.

    (5) On each topic or each document, know precisely in advance why you are asking about it and where you are hoping to end up.

    (6) Don't bully witnesses. The court will then have sympathy for them, however bad you may think they are.

    (7) Don't go through documents just for the sake of it, unless you have something specific to ask.

36. This is all pretty basic and far easier to say than to do. I think, once again, that timing is everything. A long-winded pointless cross-examination is worse than not bothering to do it. Obviously you must put your case, but that can be done quickly and succinctly.

37. The key actually is to have a plan – here notes do pay off even if you don't follow them precisely.

(1) Bear in mind that the truth is often not as clear cut as your client may have told you. It is generally a very bland shade of grey. And also bear in mind that almost all witnesses believe they are telling the truth even if they are not. This is for a variety of reasons including the fact that they have persuaded themselves they are right, whatever actually happened – now rather a long time ago. Only quite rarely are witnesses essentially dishonest.

(2) But even more importantly, try to find and identify the grey middle area, because that is often good enough for your case. The black or white conclusion is not always the only way of winning.

(3) Finally, try to get the witness to like you. It doesn't always work, because the other side will have painted you as an ogre. But it never hurts to be nice through as much of the cross-examination as possible – even when you are calling the witness a bare-faced liar.

A word on the merits

38. Remember in all your advocacy that judges are human. They like to ensure that the good guys win if at all possible – within the law.

39. The merits are important, and if they look as if they are against you, you need to spend some time explaining why your victory would not be the disaster that the judge might at first sight think.

<u>Maintaining the reputation of the UK jurisdictions after Brexit</u>

40. I take the view that the courts of England and Wales still have much to offer. As I always say, Brexit will not affect the common law at all.

41. In these circumstances, we need to make sure, if we want to offer a legal system that will continue to attract international parties, that our dispute resolution services are offering what the businesses and individuals using them actually need and indeed are entitled to expect.

42. This applies as much to arbitration and our ombudsmen services as it does to mediation and court-based dispute resolution. We must not forget the diverse means of delivering justice, because they are important. In the Civil Division of the Court of Appeal, we actually only resolve some 1,100 fully contested appeals every year. There are thousands of other cases that need to be resolved in other more speedy and more targeted ways, particularly as more and more people in our society quite rightly come online and have disputes that need to be speedily and efficiently determined.

43. I return to my balance between cost, speed and the reliability of the outcome. To produce the highest quality range of dispute resolution services for the modern era, we need to consider that balance in all of them. In Belgium, they have a very advanced portal, called Belmed, that allows any party to find the most appropriate dispute resolution service suitable to their needs by visiting one website.

44. In the UK, there is a gap between ombudsmen in particular industries, arbitration and the courts. Mediation is available in all those areas, but not always consistently.

45. We cannot afford to be complacent. We need to keep our systems under constant review to make sure they are serving the tech savvy community of real businesses and individuals rather than a community of business people used to a bygone age.

46. There are a number of things we can do as I have already indicated:-

    (1) First, we can review the training of lawyers for the new technological era. This is, I think, very important.

(2) Secondly, lawyers and judges must make superhuman efforts to ensure that they understand the new technologies. I am doing all I can to make sure that the judges of the Business and Property Courts are familiar with the principles and issues raised by FinTech and LawTech and by smart contracts.

(3) Thirdly, we must be prepared to revise our procedures so that they are fit for the online age. This will be an ongoing task. It will be necessary to ensure that proceedings remain transparent, but we must not be hidebound by the systems that we were brought up with. They will be too slow and too cumbersome for the digital age.

(4) Fourthly, we must develop our online courts quickly to provide a service fit for the generations to come.

47. More importantly than any of this, we need to keep all our dispute resolution processes under constant review so as to ensure that we can provide across all ADR and court-based dispute resolution procedures, genuine access to justice in all the fields I have mentioned and for all people.

48. If we do these things, I believe that English law and UK jurisdiction will remain attractive to international parties across the world as much after we leave the EU as they have been before.

Conclusion

49. There is a brave new world out there. Lawyers and judges must deliver in that changing world. The common law is a great system, but we must protect it and ensure it works well for business and individual parties in the new technological era.