LITTLETON

THE ROLE OF ORAL EVIDENCE: THE COMMON LAW APPROACH

Sir Michael Burton GBE

I come from the point of view of one steeped in the common law, 28 years a barrister, 14 of them as QC, 18 years a High Court Judge and now arbitrator and mediator.

1. Evidence in chief and witness statements:

i. I prefer to have some evidence in chief orally. Otherwise either the witness is simply led into saying what he is not sure about and can be destroyed in cross-examination, or he becomes so dogmatic that the truth is obscured. The Tribunal needs to know it is his evidence and not that of his lawyers. As a Classicist, I am well familiar with the works of Lysias and Demosthenes, writing speeches for the Athenian Court as if in the persona of the defendant.

ii. I remember a case in the early days of witness statements – 30 years ago - before they became the practice. My witnesses would not have been able to give evidence, because their memory was so poor about the events of 10 or more years before, but by careful reconstruction from documents my solicitors were able to put together witness statements for them, and in those early days were able to persuade the judge and the other side to allow the witness statements to be put in in chief and the witness was able to adopt its contents. They would never otherwise have been able to give evidence, but we were home and dry. It was a lesson I learned and I have always been sceptical about witness statements ever since, although they do save a great deal of time. There can be an enormous time-saving by witness statements which clear out of the way an account of facts which are necessary for the understanding of the case but are unlikely to be in contention - I well remember a case I handled as counsel about the manufacture of yoghurt, where screeds of necessary and uncontentious evidence were got on record, read and understood by the parties and the judge, and never referred to in the trial.

iii. In any event, a witness needs to be eased into the witness box and made comfortable by a certain amount of oral evidence, because otherwise he feels nervous and is immediately thrown to the wolves.

iv. If there is a discrete area which is in vigorous dispute and is central to the resolution of the issue in the case, then as a tribunal I always encourage the giving of some oral evidence in relation to that discrete area by both sides, because it is much more likely to be convincing.

2. Order of witnesses

A party's best witness should be put in first to win the tribunal round, even if not strictly chronological.

3. Number of witnesses

There is no harm in tendering witness statements from a number of witnesses all saying the same thing, because your opponent is then left in a quandary as to whether to cross examine them all.

I was, many years ago, appearing in a case as Counsel for a group of musicians who used to play in a band at a holiday camp for older people, and they were dismissed because it was alleged they could not play the music which the customers wanted in tempo. I was unable to risk giving a demonstration to the judge as they had not played together since the dismissal . They sued for damages for wrongful dismissal and the holiday camp had to go first in order to establish their case, and they called witness after witness from those who lived nearby up in Lincolnshire to allege that the band could not play the Gay Gordons or the Dashing White Sergeant or the Old Fashioned Waltz in proper tempo.

After about eight lengthy such witnesses I had run out of cross-examination to put to them, and at half time I offered my opponent that we could both walk away and bear our own costs. He would not agree, so on we went. Fortunately there was a little publicity of the case and a witness came forward to give evidence for my side who had appeared in cabaret with the band. He was R2D2 from Star Wars. When I was about to call him, I said to the judge, "*After all these long witnesses your Lordship will be relieved to know that this will be a short witness*": and indeed, R2D2 was short, no more than 3 feet high, as he waddled into court and had to stand on a chair in order to see the judge. I'm pleased to say that we won. Of course nowadays, with service of witness statements, it would not be possible for a surprise witness to be called but the moral is don't bore the tribunal with too many live witnesses!

4. Cross-examination

I am not a fan of coaching witnesses, and it is indeed not encouraged in the UK, short of a general exposition to a witness of what to look out for and what to avoid. It is very different in the USA, of course, where a full dress rehearsal of a witness is expected.

I vividly recall appearing for RTZ, where my witnesses were to be cross-examined by US lawyers at the US Embassy. They were all to take the Fifth Amendment (including Lord Shackleton, who came to our dress rehearsal straight from a Garter ceremony at St Paul's, with his Garter regalia in a carrier bag) in order to have a rehearsal which consisted simply of refusing to answer questions!

As for an advocate's own cross-examination:

i. It is vital to have an aim in the structure of the cross-examination. The advocate should work out what his closing submissions are going to be and follow them through with the witness. He should let the Tribunal follow the thrust of the questioning even if the witness doesn't.

ii. So many advocates cross-examine by putting a document to the witness and asking if it is right, and then moving on to the next. Nothing is gained and, if anything, it gives the witness confidence. It is much better to work up a cross-examination by reference to the contents of the documents, and then ask questions which lead to the witness agreeing, or, even better, to his giving an answer inconsistent with his or her own document, which can then be shown to him.

iii. Many poor advocates write out their questions in advance and then simply follow the script – it is sometimes possible from a raised tribunal to watch this happening, with the advocate ticking off his questions as they are asked. This leads not only to a lack of spontaneity but to losing the chance to follow up lines of questioning as they develop. Best to have notes but not a script. Some poor advocates simply ask their prearranged questions doggedly, even though they have already have the answer they want.

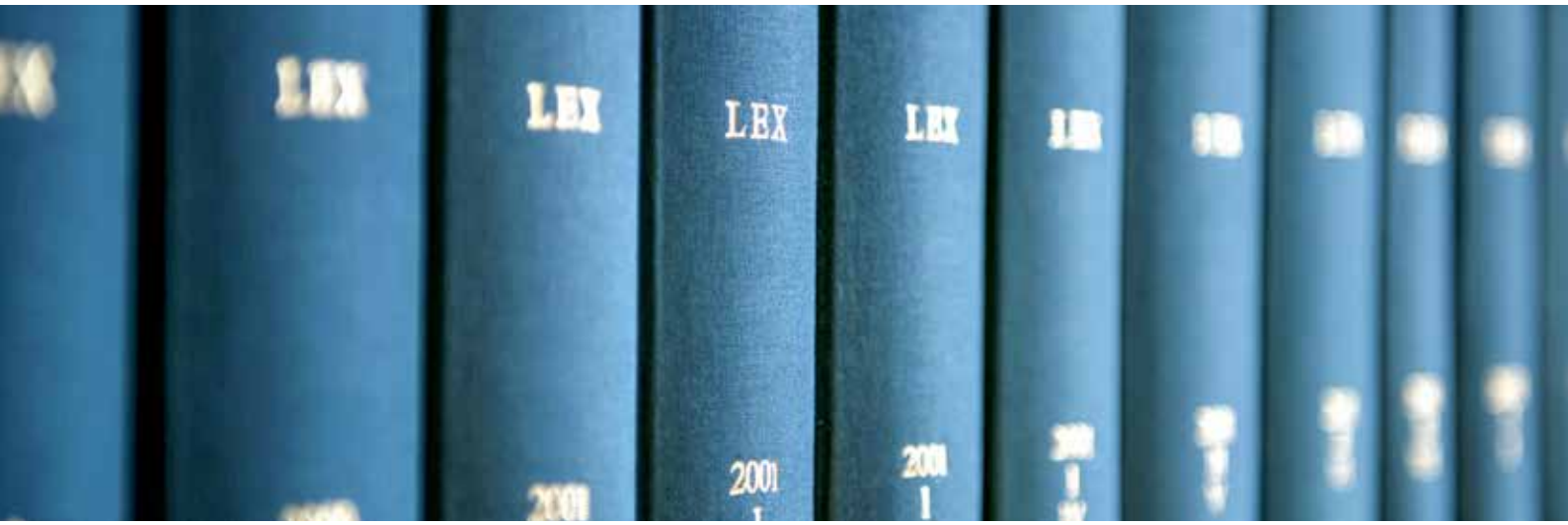
iv. It is important to be ready not to pursue questions. If an advocate gets the answer he wants, it is best to leave it, whatever the temptation. You can always ask one question too many. Save your emphasis for closing submissions or perhaps a sly look at the tribunal. If you go on, the witness may retrench and rethink and you may lose the benefit of your good answer. Even if he seeks to put it right in re-examination, you have had your answer in cross-examination.

v. It is important for the advocate to put his case, but not, as so many inadequate advocates do, by asking the tribunal "Have I put my case sufficiently?". The advocate should know the answer to that himself.

vi. The advocate should not be afraid to make strong allegations: to allege fraud if necessary. There used to be a sort of belief that in arbitration an advocate should

not suggest fraud to a witness – that it was not gentlemanly. If that ever was so, it is not the case now and the advocate must put his case fairly and squarely in order to give the opportunity for the witness to respond, but also to give the opportunity for the tribunal to understand and accept his case.

vii. The common law system is different from the civil one because of the concentration on oral evidence. Therefore an advocate should not feel inhibited, and unreasoned guillotines and time limits are not, in my view, appropriate. Much better for the tribunal to intervene testily by pointing out that the questions have already been asked or answered and that it would not help for them to be repeated. Even then a good advocate may still persevere - '*I am sure it is entirely my fault that I have not yet got my point over, but...*' and occasionally persistence will succeed in winning the tribunal over or making it see sense!



5. Documents

I am greatly in favour of the common law system of disclosure of documents, which seems to me to be a happy medium between the US system of total discovery and the civil law system of limited disclosure of the documents relied upon. Many case are won or lost by the disclosure, often belated, of a document previously undisclosed. When big money is at stake, as in most international arbitrations or the UK Commercial Court, I believe that a Rolls Royce system can be afforded, so that the truth can be arrived at, and skilful cross-examination by an advocate in command of the documents can be the key.

6. Re-examination

This is a very important and neglected art:

i. Particularly in a case where there has been no oral evidence in chief, re-examination is an opportunity for the witness to impress or charm the tribunal and get their personality over.

ii. It is important for the advocate to make sure that in re-examination the witness is enabled to knock on the head any good points that he believes his opponent has made. Very often there is an answer which the witness did not give satisfactorily

or at all. Obviously it is best not to lead the witness, which would in any event gain nothing, but rather to gently massage round the points to give the opportunity for the witness to recollect and realise and correct what he said in a natural and persuasive way.

7. Expert witnesses

In the UK system, expert witnesses owe a duty to the Court or tribunal to give independent evidence, and cross- examination will often be aimed at eliciting that the expert is failing in that duty by being overly favourable to the party instructing him, or ignoring or even concealing evidence or views that are unfavourable.

Cross-examination of an expert witness is another art. It cannot be done without the advocate making himself an expert, albeit only for the one case! One way of discrediting an expert witness is for the advocate to try to push the expert into an extreme position by putting propositions based on the evidence the expert has given and then showing up their irrationality. In one case I appeared in at the Bar, I encouraged the expert to elucidate some of his more extreme theories and gave a name to them. I was then able by dignifying them in that way to lead the tribunal to appreciate that they were insupportable. A tribunal is going to want to find a simple way to reach a conclusion in favour of one expert or the other, and the advocate's strategy is for one expert to appear straightforward and the other to seem to pontificate.

8. From the point of view of the tribunal, I like oral evidence and find it useful to be able to test my own thoughts with the witnesses, usually at the end of their evidence.

9. I conclude, in these Covid days, by expressing a personal view that Zoom hearings are very successful, even in cases where there is oral evidence and cross-examination, and I believe will have an important place in the future, particularly in saving travel costs.

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