THE ROLE OF JUDGES AND ADVOCATES

Introduction.

The aim of this short paper is to briefly set out and examine the roles undertaken by the two central players in the dispute resolution process, namely the advocates and the judges[1]. The objective is to provide a blue print for the structured resolution of disputes for the benefit of those who aspire to dispute resolution practice, be it as client representatives, attorneys (solicitors or barristers), judges, arbitrators or adjudicators.

It is easy for those who set out to study the law to lose sight of the way that the judicial process works as they become engrossed in the business of learning as many legal rules as possible. The type of court and the area of law involved may differ, as demonstrated below, but the basic process is the same.

- The disputing parties may be an individual and the state, as in a criminal trial, where the dispute centres on whether or not the individual has committed a crime
- It may be a public law matter where the dispute centres on whether or not the authorities have acted within the law in the exercise of public rights and duties
- It may be a civil matter where the dispute centres on the respective reciprocal legal rights and responsibilities of the parties arising out of contract, tort, trust, property relationships or family matters.

The Role of Judges.

The final outcome of the judicial process is a decision that states which of the parties has prevailed coupled with the consequences the court determines should follow from that decision.

- In criminal law the terminology involves a decision of guilt or innocence and, if the former, a sentence designed to protect society from the criminal activities of the person convicted and to deter others from emulating that wrongful conduct, rehabilitate the law breaker and punish the wrongdoer as a symbol of retribution and justice.
- The civil suit firstly determines whether or not entitlement is established. Success will lead to an award of damages/compensation for loss, or some other appropriate civil remedy, which protects the innocent party's legal interests. The court thus then rules on quantum – i.e. how much (if any) is due.
- By contrast public law proceedings are designed to regulate the conduct of the state leading to orders that quash the unlawful decisions of the authorities, prevent them acting unlawfully or compel them to comply with their statutory duties. The availability of compensation is limited to interests protected by EC law.

As a secondary matter the decision maker will also address the question of allocation of costs involved in the trial between the parties. The judge also has a role to play in managing the entire trial process.

The final outcome is arrived at by

- Conducting an investigation of the facts followed by a determination of facts (by a judge or jury).
- Conducting an investigation of and determination of the relevant law (by a judge).
- Applying the law to the facts – the judge declares that where XYZ facts are established that conduct amounts to a crime/civil wrong/public wrong etc and requires that ABC consequences should follow.

The Role of Advocates.

The role of the advocate is to advocate, to put their client's case to the court, to persuade the court and to influence it to reach just decisions favourable to their client at each stage of the decision making process.

Before a court of first instance the advocate seeks

- In appropriate circumstances[2] to persuade the court of relevant facts favourable to their client's case.
- In appropriate circumstances[3] to persuade the court that the law supports the client's case.
- To persuade the court by applying the law to the facts, to find for the client.
- To make appropriate orders pursuant to that decision, in order to do justice as between the parties.

1 The term judge is used here to embrace all forms of third party dispute determiner ranging from the judiciary to private practitioners including arbitrators and adjudicators but excluding expert determiners and conciliators.

2 It should be noted that the facts may not be in dispute.

3 It should be noted that the law may not be in dispute.

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Before an appeal court the advocate seek

- To persuade the court that the lower court erred in its finding of law and to overturn that ruling.
- To persuade the court by applying the amended finding of law to the facts, to find for the client.
- To make appropriate orders pursuant to that decision, in order to do justice as between the parties.

The objective of the review of a judicial process, unlike an appeal aimed at overturning a prior decision, is to set a decision aside and thereby render it unenforceable. The advocate seeks

- To persuade the court that the lower court erred in its finding of fact in that no reasonable decision maker could have reached that conclusion in the light of the evidence before it. (factual)
- To persuade the court that the power exercised by the lower court was beyond its powers or alternatively was used for the wrong purpose and hence an invalid exercise of power (legal)
- To persuade the court that some breach of due process took place which renders the earlier decision unsafe or by applying the amended finding of law to the facts, to find for the client. (procedural)
- To make appropriate enforcement, prohibition or quashing orders, in support of the administrative proves.

Determining fact.

Two distinct methods may be employed to determine fact, namely the adversarial or the inquisitorial process.

The adversarial process involves the respective parties introducing evidence, be it of fact or opinion, to the court. The proofs may be in written form, supported perhaps by affidavit or orally. When proof is offered in person the other party is afforded the opportunity to challenge that proof through cross-questioning.

- The judge acts as an umpire, ensuring the parties comply with court procedures. The judge may ask questions to clarify any matters about which there is some element of uncertainty.
- The advocate will summarise the evidence and invite the court to conclude what that evidence has established.
- The basic premise is that there can be no liability without proof, established by the parties. The burden of proof lies with the claimant / prosecution, reinforced by the concept of *"innocence until proof of guilt."*
- The burden of proof is *"beyond all reasonable doubt"* in criminal trials and *"on the balance of probability"* in civil trials.

By contrast

- The inquisitorial process involves the judge taking a proactive investigative role in ascertaining the facts. Proofs may equally be in written form or oral. The judge then presents his preliminary findings to the parties who are afforded an opportunity to persuade the court that the findings are unfounded.
- The burden of proof vests initially with the investigating magistrate to establish a prima facie case, where after the burden shifts to the defence advocate to rebut that finding whilst the claimant/prosecution will seek to reinforce that prima facie finding, or alternatively,
- If no prima facie case is established, the claimant/prosecution will seek to rebut the absence of a prima facie case whilst the defence seeks to reinforce the preliminary finding of the judge.

Law students engaged upon practice courses [4] will have to deal with matters concerning proof of facts. Normally candidates are required to advise and or represent a client. This can include interviewing a client and witnesses as well as acting as an advocate and presenting the proof to a court. However, students on a dispute resolution course will be required to go one step further and determine facts on the basis of evidence presented to a tribunal.

Law students engaged upon academic courses in law are rarely concerned with the ascertainment of facts.

- Traditionally, the examination candidate is presented with a set of facts. The facts are seldom sufficient for a trial but set the scene for an academic exposition of a particular point of law.
- The facts provided will be highly selective and relevant either to the point of law.

[4] E.g. Legal Practice Course, Bar Finals, Part III and Award examinations for the Chartered Institute of Arbitrators.

- A given fact may be a red herring, having no import but designed to test the candidate's ability to identify facts relevant to the legal issue being examined.
- Occasionally facts are provided to ensure that candidates do not discuss matters outside the examiner's chosen topic.
- The absence of facts is frequently deliberate. A legal issue may classically involve several distinct scenario which have different outcomes. Without knowing which scenario applies it may not be possible to provide any analysis. The candidate may therefore be required to speculate, *"if ABC applies, then …. If XYZ applies then ….."*
- Care should be taken not to speculate on any facts not provided which are not required to respond to the question. The danger is that by broadening out a question, the candidate responds to *"the question they would have liked to have been asked"* rather than *"the question they have been asked"*. Thus a student should not turn a question about assault and battery into an examination of murder by speculating what would have happened if the injured individual in a scenario had died.

The relationship between facts and law

Relevant facts are the factual affairs specified by the rules of law concerning the matter at hand. There is a symbiotic relationship between law and facts, preventing a seamless progression from the determination of facts to the determination of law. The existence of certain facts may indicate that a range of different legal principles could apply to a situation. The legal requirements to establish legal liability / responsibility then invites a further examination of the facts required by each legal principle in turn, in order to determine whether or not the necessary facts exist to establish legal liability in relation to each of those legal principles.

For example : an initial examination of facts might indicate that that an incident could involve the criminal offence of grievous bodily harm, the tort of trespass to the person or the tort of trespass. Certain facts such as identity and causation would need to be established for all three hypothesis, viz., whether or not the wrong doer was actually involved as opposed to some other person and whether or not the incident caused the alleged injury. However specific facts would have to be proved in relation to each legal hypothesis.

- Grievous bodily harm requires proof of mens rea in the accused coupled with a specific level of injury.
- Trespass to the person requires proof of intention to carry out the act and an absence of consent.
- Negligence requires an intention to carry out the act.

The state of an individual's mind and in particular awareness of dangers/potential consequences of actions, or whether or not an individual held a particular opinion are facts that may fall to be determined by a court.

Foreign law is treated as a question of fact by an English court, which has to be proved to the court, though it would be a matter of law in the foreign court. Expert witness statements may therefore be used to prove what that law is and what it means.

The contents of a contract are a question of fact. Proof in respect of a written contract may appear to be uncomplicated, particularly when contrasted with the need to call the parties to attest to the terms of an oral contract. However, whether oral or written, it is frequently necessary to establish the meaning of the terms. Different interpretations of the contract can lead to very different results. Somewhat like statutory interpretation, this can involve consideration of the intentions of the parties. Often the terms of long standing contracts have already received judicial attention. In consequence, precedent may play a role in contract interpretation.

Questions of fact and law can be very closely bound up together. Thus, having established that a contract contained an exclusion clause purporting to exclude liability for death and personal injury and having secondly established the meaning of the provision as contemplated by the parties, a legal question as to whether or not that exclusion is lawful and thus effective might also fall to be decided, but that decision would be a legal decision, not a factual decision even though in common parlance one might say that *"everyone knows as a fact that such exclusion clauses are unenforceable."*

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Managing the process.

Care should be taken to distinguish between the inquisitorial process and the modern interactive case management role undertaken by judges, arbitrators and adjudicators. Note however that the management power of the judge arises out of the Civil Procedure Rules whereas the management powers of the arbitrator / adjudicator are default powers set out in the Arbitration Act 1996, the Housing Grants Construction and Regeneration Act 1996 and related Schemes, subject to the right of the parties to otherwise agree.

- Justice can be expedited if the parties are encouraged to agree common facts and relevant law, ensuring that the court does not waste time and effort unnecessarily. The case manager may thus direct the parties to identify in advance any matters upon which they can agree.
- The case manager may identify factors that need to be addressed by the advocates, including areas that need proof or clarification.
- The court may appoint a joint expert or limit the amount of resources that will be expended upon proofs.
- What the court, whilst exercising its management role must avoid, is pursing a course of action that assists one party to the detriment of another, by for instance introducing new avenues of investigation or by averting council to a cause of action that had been overlooked. It is not for the judge to help either party to make their case
- The court will on the other-hand set the agenda, prioritise issues, establish the running order and order exchanges to facilitate the smooth running of the trial.

Determining the law.[5]

Whilst the sources of law differ from civil law codes, which rely exclusively upon codes, to those in common law countries where the law is an amalgam of judicial precedent and statute, the central task remains the same, in that before a judge can apply the law, he has to first understand the established legal principles. The basic task involved in interpreting codes and statutes is the same, but under the common law judicial interpretation of a statute establishes a binding precedent. Where the two systems diverge is in respect of the concept of judge made law.

The judicial task of determining the meaning of a statute and hence, under English law, of the intention of parliament is a consequence firstly of the inherent ambiguity of language and secondly of the legislative device of employing generic categories and adjectives rather than setting out specifics. Thus a statute may prescribe *"noxious substances"* or *"noxious substances such as …."* thereby invoking the ***eusdem generis rule***.

Where an ambiguity or uncertainty exists, the advocate will seek to persuade the court of an interpretation favourable to the client. Whilst the aim is at all times to determine the intentions of parliament, the existence of three classic tests, namely ***the literal rule***, ***the golden rule*** and ***the mischief rule***, recently reinforced by the European concepts of proportionality and context open up considerable scope for persuasion.

Thus the advocate can urge the court to

- Apply the clear, unambiguous intentions of parliament evident in the words of the statute.
- Adopt a meaning avoiding a manifest absurdity (all the time demonstrating that the other interpretation is absurd and thus could never have been contemplated by parliament)
- Adopt a meaning that addresses the intention of parliament revealed by an examination of the evil that the statute addresses.
- Adopt a meaning that matches the spirit of the legislative provision.
- Adopt a meaning evident within the broader context of the legislative provision and not limited to a specific section of the legislation.

An interpretation laid down by the courts and consistently applied thereafter may be immoveable, but there are times when there may be scope to argue that a prior court incorrectly interpreted a statutory provision. A higher court, particularly the House of Lords, may be persuaded to overturn that interpretation.

[5] The following commentary applies equally to problem based course works, problem based exam questions and to moots.

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The role of the court as law-maker may be invoked where a gap exists in the law, in that there is no statutory guidance and the courts have not dealt with issue before. The judge has to make a decision. It is not open to the judge to find that there is no answer to the problem. In order to make a decision, the judge has to apply a legal rule. If there and so legal rule, he will have to discover one. Whilst opportunities for this pure form of judicial precedent are few and far between today, nonetheless the ever changing nature of society continues to bring about situations that require judicial regulation where pre-existing law cannot provide a solution. The many actions that take their name from a precedent such as the ***Anton Pillar Order***, the ***Mareva Injunction***, the Tort of ***Rylands v Fletcher*** are all testament to this. Sometimes the changing attitudes of society are recognised by the courts and a remedy is eventually provided by courts, which have previously resisted invitations to do so, as exemplified by recent developments in the law of privacy.

The role of the advocate is to propose rational rules to the judge and invite the court to apply those rules to the instant case, thereby creating a new precedent. The advocate will draw upon general jurisprudential principles, namely the function and purpose of law, to indicate what the law should seek to achieve in relation to that specific area. In the pursuit of a new test / criteria the advocate can advise for example on

- The balance between the conflicting rights and interests of individuals, organisations and society.
- The need for clarity and simplicity.
- The need for a solution – identification of the wrong in society that needs to be dealt with.
- Ethical, moral and professional issues.
- Modern developments in society and novel imperatives.
- Obiter dicta, dissenting judgements and persuasive dicta from the Privy Council and foreign jurisdictions in support of a proposed test may be offered up.

The existence of a binding precedent will not necessarily act as a bar to further judicial creativity. Whilst it may be difficult to displace a long-standing and frequently applied precedent, there are nonetheless a variety of techniques that may be successfully employed to get around a troublesome precedent.

- A precedent established by a lower court is always susceptible to challenge in a superior court. Thus a high court decision can be over-ruled by the Court of Appeal or House of Lords and a Court of Appeal decision may be over-ruled by the House of Lords, which has the power to even over-rule its own previous decisions. Vehicles for persuasion include
  - The previous decision reflects outdated social mores. Even if apparently suitable for the needs of society at the time the precedent was established, the court produced a rule, which could not past the test of time. For that reason it was incorrect as needs to be changed.
  - The previous court got the law wrong. The law fails to strike the correct balance between the conflicting rights and interests of individuals, organisation and society.[6]
  - The previous court incorrectly interpreted the provisions of a statute and failed to apply the intentions of parliament.
- There are several situations where any court of the Supreme Court of Judicature can develop the law.
  - Cassus omissus : A relevant issue was not raised by counsel at the original trial, when the precedent was established. That omission led the court to err. In the light of this omission the law should be changed.
  - Distinguishing a case on the facts from the facts of the preceding case and advising the court that in the light of the novel facts a different course of action should be pursued by the court.
  - Sui generis : The court may find that whilst a previous case was correct upon its own very special facts, the precedent is not of general application.[7]
  - Conflicting precedents. Where it can be demonstrated that previous precedents provide conflicting rules there is an opportunity to urge the court to adopt the reasoning of one case and to reject the other.

[6] As in **Murphy v Brentwood** with regard to **Anns v Merton LBC** etc.

[7] As with **Junior Books v Veitchie** etc.