LORD CHIEF JUSTICE
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THE KALISHER LECTURE 2009

DEVELOPMENTS IN CROWN COURT ADVOCACY

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Michael Kalisher was a fine advocate, one of the finest criminal advocates of his generation. Advocacy is an art, and something too, of a mystery in the Elizabethan sense. Of all the professional skills which may have an effect on the life of others, probably none is more personal and individual than the skills of the advocate.

Let me explain what I mean. You may need, let us say, a major operation to your elbow. There will be 10 surgeons specialising in the field available to help and advise you, each with his or her own bedside manner, there to encourage and help you with the aftermath of the operation. All that reflects their own personality and character. But the actual process of getting in to the elbow joint and working at the structures to be found there probably proceeds from a process which, allowing for the minutest variation in technique, is more or less identical and takes place in private. I am not for one moment decrying the care, the dedication, the skill and the professionalism involved in this process, but it is not personal in the sense that the personality and character of the surgeon will be of direct importance to the operation being performed.

Give the same brief in a criminal trial to 10 advocates, and he or she – and when I say "he" in future, please do not assume I am confining myself to men – will study it, think about, approach it, come to court with it, and there will be 10 different ways of advancing the same case. It will indeed be the same case, but the way in which those different advocates approach it will be different. In the end, the advocate has to be comfortable with his own personality, with his own style, and his style in court is a reflection of his personality and character. This can be seen in the way in which the client is handled, a witness is handled, a judge is handled, pressures are handled, public attention is handled, the moment when the client gives some damn fool unexpected answer to a perfectly simple question is handled, and where and how in a very public arena where your every mistake is obvious to the professionals around you, you handle yourself when, as we all do, you make a mistake. All these are handled in a unique way by the individual, adapting to the changing need of a situation which is constantly fluid, and of which you have to be but cannot always be in control.

My belief therefore is that the technique of advocacy of every advocate at least in part reflects his or her own personality and character. To the informed observer the technique of each advocate can be extremely revealing about the kind of man or woman the advocate is. What Michael Kalisher revealed about himself was that not

merely was he a fine outstanding advocate, but that he was a warm-hearted and generous spirited man. For me it is an honour to be giving a lecture in his name.

Notwithstanding the title of this lecture, it is not intended to be a kind of updating in advocacy training. That would be presumptuous of me, but if I tried, I should need a week. I do, however, want to reflect on the profession of advocacy, and the challenges which lie ahead, and by reminding some of the more mature members of the audience, and informing some of the younger about some of the changes to advocacy technique in my lifetime, perhaps offer one or two thoughts for reflection. I am not, I emphasise not, a revisionist. I do remember the clarity of the prose with which my inarticulate clients "confessed" to offences, and how rapidly their English deserted them when they spoke to me. On the other hand I also remember the incredible accuracy with which many witnesses for the Crown were so blessed that they could remember verbatim every word of a 20 minute conversation when it was written down 3 hours after it had happened for the purposes of memory refreshing.

So, what is advocacy? Advocacy is about the art of persuasion. The best advocates use words which are fitted to the moment at which the words are being spoken: they respect and understand the moment, and are alert to its needs, and flexible to its changes. In every hour, throughout every court day, each moment is significant, and that is what I mean when I say that the best advocates respect and understand the moment. At its best this ability is a gift which comes from within.

As I repeat, advocacy is about the art of persuasion. Let us take a few examples about the use of language and its importance in a different context. Real life. Real war. D-Day. Literally, therefore, life and death. Anthony Beevor's book of that title describes what different commanding officers said to their men before they set off across the Channel to the ghastliness that lay ahead and which we in this generation can only begin to imagine. Which one of these commanders would you follow? The one who said to you:

> "Look to the right of you and look to the left of you. There is only going to be one of you left after the first week in Normandy."

Or the second:

> "What you are going to go through in the next few days, you won't want to change for a million dollars, but you won't want to go through it again very often. For most of you, this will be first time you will be going into combat. Remember that you are going in to kill, or you will be killed."

Finally, the officer who pulled a large commando knife out, flourishing it above his head and shouting out:

> "Before I see the dawn of another day, I want to stick this knife into the heart of the meanest, dirtiest, filthiest Nazi in all of Europe."

Before you answer the question - which of these three commanders would you follow? - can we please remember that the first was factually correct. Casualties were indeed horrific. The last was utterly untrue. The meanest, filthiest Nazi of all, together with his closest allies, were in Berlin: they were nowhere near the D-Day beaches. But which would inspire you, at that moment when you were about to embark on a journey to injury or death? In the Supreme Court or the Court of Appeal, the first might have represented the best form of advocacy: for the trial judge, perhaps the second, and for the jury, perhaps the last, although passion and emotion

suitable for the battlefield can seem somewhat overblown when the combat is forensic. But it does illustrate my belief that the art of persuasion respects the moment, and each successive moment. It also and equally respects the audience.

In the Crown Court it means that, as I was advised very early on in my career, that you have to have a genuine understanding and sensitivity of what is going on in the mind of the jury, and the likely impact of the evidence, of your questions and the answers, of your opponent's speech and your own speech to them, as if you were a member of the jury yourself. Like the ability to respect the moment, this level of insight and sensitivity also comes from within. A paper qualification does not mean that you are blessed with it. And what I am underlining is not achieved by saying "good morning" to the jury at the start of the day: that was not a habit I ever encouraged my pupils to adopt.

Just as advocacy can be inspiring, do not underestimate the ability of some advocates to dull the interest even of an enthusiastic Court of Appeal.

I have heard submissions running along these lines

> "I know that your Lordships have my skeleton argument, and my supplemental skeleton argument, and my super supplemental skeleton argument in answer to the supplemental skeleton argument of the prosecution and this nation under God, shall have a new birth of freedom – are your Lordships with me – and that the Government of the people, by the people, for the people, shall not perish from the earth. "

It is I do assure you, possible for a bad advocate to kill off interest even in Abraham Lincoln's noble, eloquent speech for the dedication at Gettysburg. And the increased focus on written skeleton arguments has diminished the talent for spontaneous eloquence which is another hallmark of the great advocate.

I was called to the Bar in 1963. I left it in 1988. It was a privilege to have been a barrister. In 25 years in practice in what is a very competitive profession only one dirty trick was played on me by another advocate. But, and it is important to emphasise this: some of those who started with me made careers as advocates in criminal courts, but a large number who wanted to, did not. It was then, as it is now, a cruel profession. I became a barrister because I wanted to be an advocate. In those youthful days, I always assumed that I would be defending innocent people, wrongly charged. I hoped that if successful I would be briefed in major cases, including major criminal cases. The Bar was the only route to serious advocacy. With the exception of remote areas such as Holland and Kesteven in Lincolnshire – does anyone here remember those names? - solicitors did not act as advocates at Quarter Sessions. None acted as advocates at Assizes. Solicitors instructed barristers to be the advocates. A representative of the solicitors firm was always, invariably present. There was no CPS. There were no PCMHs. Every advocate was self-employed. Advocacy required fast clear thinking, economy of language, and speed. Cases had to be finished. The Assize judge or Chairman of Quarter Sessions would be leaving. On three occasions in my first few years I was involved in two separate cases which both began and ended on the same day and by that I mean, from arraignment to verdict. In the civil court, the High Court Judge would expect to finish three civil actions in the day. Returning to the Quarter Session and Assizes, the Clerk of the Peace or Clerk of Assize sat in court throughout the whole trial. And he fixed the fee. And if in his judgment, or on a tip off from the Chairman or the Assize judge, you did the case very well, you got an extra guinea. That is, £1 and 5p. But the point was, that he was

there, with years of experience about the weight and difficulty of a case, and the attention which it needed and was given, and your effort was acknowledged.

Today there is no such person in court. Today the court is in permanent session. Listing in front of a Recorder proceeds on the basis that unless it can be guaranteed that the trial will finish before the end of the week in which the Recorder is due to sit, it should not be listed before him, but before someone else: that is a far cry from earlier days when, the case would be listed, and everyone would make sure that it was completed. Times wingéd chariot does not hurry as near as it did.

During one of my very first trials before a jury, my client had come from a town to a leafy suburb in middle England, a street of beautiful tree-lined avenues, lovely large houses with big gardens. And he happened to be caught at 2 o'clock in the morning standing very close to a little pile of belongings, a neat little balaclava, and a jemmy. He didn't quite have a bag that said "swag" on it, but you've got the impression, haven't you? Any way he refused to accept my youthful advice that it might be a good idea to plead guilty for going equipped to burgle. No, no, he was there because it was a tree-lined garden and he was a very, very shy boy and he wanted to pee at 2 o'clock in the morning, so he had to go into a garden and find a tree, and it was a complete accident that the tree was in a garden which belonged to a rather elegant house. This was the story I produced out of him in chief. Extracting teeth would have been easier. But that was his story to the jury at Warwick Quarter Sessions. My opponent stood up. I was told that he was one of the great advocates of his generation. And nothing happened. I thought, "I am told this chap is one of the great advocates, yet he can't think of a question to ask my client". Even in those green days I could think of a question or two I should like to have asked him! And nothing happened. And then as the seconds ticked by and I noticed that one or two of the jury members were smiling. Then a lot more of them were smiling. I looked up at my opponent, and he was looking at my client and smiling at him. And still he did not ask a question. At the end of about a minute and a half everybody in the court was laughing. All the jury were laughing, the judge was laughing, even the usher was laughing. Although I didn't share the joke, and my client didn't know what was going on, at the end of this, when everybody was beside themselves with laughter, my opponent confined his cross-examination to three short words:

> "Come off it."

And he sat down. And the golden thread, the burden on the prosecution, the safety of the citizen, the natural needs of a young man, this ten minutes of impassioned advocacy by me was duly reflected in the two minutes it took the jury to return their guilty verdict.

But I just have a question. Would that ever happen nowadays? Would the CPS brief an advocate who cross-examined like that nowadays? Would someone say, probably a barrister for the defence, that the prosecutor had treated the defendant in a demeaning way, intimidating him. I ask again, would such a cross-examination happen? Probably not, and yet it was the most effective cross-examination of which any client of mine was the victim. Just stand up and let the jury quickly work out for itself that they had listened to a complete cock and bull story.

As it seems to me, modern advocacy no longer involves overmuch use of those six wonderful friends about whom Rudyard Kipling spoke. I very rarely see a transcript of questioning which reflects this advice.

"I keep six honest serving men,
They taught me all I knew,
Their names are "what" and "why" and "when" and
"how" and "where" and "who"."

Virtually any question in chief can begin with one of those words. For cross-examination "did" should be added to them, and certainly on occasions the "why" can become "why not". Rather, too often comment is wrapped up in the question, and often, in reading a transcript, the only basis for concluding that a question has been asked is that the shorthand writer has had the courtesy to put the question mark in.

What has changed in the technique of advocacy? Trying to think of a way to describe it, perhaps I can, even at the risk of a very broad generalisation, express it in this way: the rapier is no longer the weapon of first choice: this is much more likely to be the bludgeon or the boot. If I am right, why should this be?

There are today as many wonderful advocates as there have ever been, and very high numbers of competent advocates. But it is no less true today than it was when I started, there are a number of very poor advocates. And there are many more advocates, very many more advocates.
Well, times change. They always do. Time has its revolutions. We live in our own times. Life is very much more complicated. So are criminal cases. That is the context in which I draw attention to a number of features which, in my view, either singly or cumulatively, have had an impact on developments in Crown Court advocacy.

- We no longer have Quarter Session and Assizes. We have Crown Courts sitting permanently. There is much less of an imperative to finish the case.

- Lay clients are much more demanding and less deferential. They expect to be consulted at every stage. On conviction they issue complaints, both to the Bar Council and the Court of Appeal. These have to be dealt with. Not only does it take time, but it creates stress on the trial advocate. The perceived need for defensive advocacy adds yet one more complication to the manifold problems of conducting a trial. This consideration has its impact on my next point.

- An observation I make based on the number of times when the advocate in my court wishes to take instructions on a matter which in my view is entirely within the advocate's professional judgment, and based also on anecdote - I wonder whether there is in some advocates a misunderstanding of what is meant by taking the client's instructions. The client's instructions are what he tells you the facts are, and on which you therefore present his defence. The client cannot instruct the advocate how to advance or conduct his case. The advocate is not the client's mouthpiece. When he allows himself to become the mere mouthpiece of those who are instructing him, whether for the prosecution or the defence, he is no longer acting as a professional advocate.

- The advocate, certainly when instructed by the CPS is no longer, for all effective purposes, in charge of the prosecution. If you read Farquarson you would see that one member of that committee, in accordance with the practice throughout all the circuits of the country, recorded his belief that once the brief was delivered counsel was responsible for every aspect of the conduct of the case. I was unable to persuade my colleagues on that committee to agree with me.

- I have complained publically about the volume of legislation affecting the criminal justice system. It certainly does not enhance the speedy resolution of issues in the Crown Court.

- The arrangements by which advocates are paid for trial work do not proceed on the stark premise that those who work efficiently and well should be better remunerated than those who do not.

- Quite apart from the complications of new and yet newer legislation, we should not overlook the impact on forensic techniques of well publicised unsafe convictions, many of which but not all of which occurred before the implementation of the Police and Criminal Evidence Act 1984, and the changed approach to disclosure. Disclosure, together with PII issues, and the possibility of using special advocates, and similar issues, are necessary, and the care taken over them helps to reduce the chances of the ultimate failure of the criminal justice system – the conviction of the innocent. And maybe, too, these considerations mean that today's judges are perhaps more tolerant of forensic excursions into areas of a case which appear to be of doubtful relevance and more reticent to interfere than perhaps they should.

- There are a number of other considerations which are open for discussion, but perhaps I should move on by asking this question.

How does this all impinge on the criminal justice system in the Crown Court?

There is a fundamental premise to which the entirety of Michael Kalisher's life was dedicated: the administration of justice in the Crown Court depends on the quality of the advocacy deployed on each side. The jury will do its conscientious best. The judge will make the decisions and give the directions believed by him to be appropriate. But the analysis of each sides's case, and all the evidence, and its importance to the case, so as to enable both judge and jury to exercise their own responsibilities, depends on high quality advocacy. And we are not discussing some disembodied theory. This is the day to day stuff of reailty. It is in the public interest that the guilty should be convicted: it is in the public interest, as well as the interest of the innocent defendant, that he should be acquitted. For a truly innocent defendant, to be convicted is a disaster. These disasters happen even in the best run trials with the best quality advocacy. Poor quality advocacy by either side simply increases the prospects of the guilty being acquitted, or the innocent being convicted. In the process of adversarial trial before a jury it really is as stark and simple as that.

Again, however, as I have emphasised, unless you have discerned in what I have said so far some hint of possible changes in your advocacy, this is not a lecture about how any individual advocate should polish up his or her technique, or how to achieve the impossible of infusing the Promethean spark which nature has omitted to bestow on him or her. But, again reflecting on this issue over the holiday, in the final analysis, perhaps the most striking change in the arrangements for advocacy in the Crown Court, is the way in which the advocates are actually chosen to do the case.

Let us think about this for a moment. For years both sides were represented by a member of the self-employed Bar instructed by a solicitor. Now, for the prosecution, ignoring the very few distinguished men and women who have the privilege and burdens of appointment as Treasury Counsel, the CPS, or the prosecuting equivalent, may chose to instruct an in-house advocate, who may be qualified as a barrister or a solicitor. The CPS may also choose to brief a member of the independent profession. Sometimes you will see a Silk from the independent Bar leading an employee of the

CPS who may be a solicitor or barrister. If that employee is a solicitor different professional rules will apply to the same advocates appearing for the same side in the same case. That would surely strike an outsider, as it strikes me, as odd. For the defence the situation is more complicated. The defence advocate may be a member of the independent Bar, always instructed by a solicitor: he may be a solicitor with an HCA qualification or a barrister employed by that firm in effect responsible for deciding whether or not to instruct himself: he may be a solicitor or barrister from that firm which has paid a referral fee to another firm. Yet the member of the Bar in independent practice cannot pay a referral fee: he certainly cannot pay money to obtain a brief: he cannot invite a client to have direct access to him: he cannot be in partnership: he cannot go into partnership with a solicitor, unless he gives up independent practice: he cannot brief himself. It therefore follows that in a competitive and difficult field there are different starting points in the race for work.

So dealing with it briefly, we have CPS lawyers, HCA solicitor advocates, and barristers in independent practice or employees of solicitors' firms all exercising rights of advocacy. Now that is a remarkable change. Whatever the historical reasons, and there are many, and they have been traversed with passion for a number of years, there is no avoiding the coincidence that at a time when more men and women than ever have qualified as barristers there are increasing numbers of men and women qualified as solicitors who wish to act as advocates in the Crown Court. At the same time there is no more work, and it is difficult to anticipate a time when yet more work will be transferred from the Magistrates Court to the Crown Court.

There is, I venture to suggest, no point whatever in the legal professions discussing with themselves or arguing with each other or indeed self-destructing about why and how we have reached the situation we have. We are where we are, and it is where we are today that, in my time, is the most important development in relation to advocacy in the Crown Court. The given remains. Members of the judiciary, whether they were in practice as barristers or solicitors, welcome good competent advocacy, whatever its professional source, and deprecate incompetent, inefficient advocacy, whatever its source.

I wonder whether the present arrangements for the practice of advocacy in the Crown Court are appropriate for the profession of advocacy in the Crown Court to work? Let us just briefly look at how indeed it does work. Consider how many competency frameworks now exist. Among those of which I am aware are:

- The QC competency framework
- The BSB pupillage handbook
- BPTC curriculum in respect of advocacy training
- Advocacy Training Council with assessment criteria and procedures for the training and assessment of pupil advocacy tutors.
- The CPS National Standards of Advocacy
- The standards of competencies for the accreditation of solicitors as HCAs.

In other words the advocate appearing before the judge or the jury will have arrived there via one or more of this, dare I say it, PYO of competency frameworks and a confetti of training and continuing training arrangements. Yet all have the same rights of audience. The CPS lays down its standards of advocacy, the accreditation of solicitors as HCAs is a matter for the solicitors profession, and the ability to practice as a barrister depends on criteria and training laid down by the Bar Council.

The situation is even more complicated than that: in addition to these different routes to the right to practice as an advocate in the Crown Court a series of different professional rules of conduct apply. As I have said, the referral fee cannot arise in the case of a barrister in independent practice. There is no arrangement for direct access to such a barrister. But no less significant, quite recently in the CACD we were invited to decide a question of professional ethics arising in a Crown Court case where it was suggested that the rules of the profession binding on the defence solicitor were different to those binding on the barrister who he instructed at trial just because the rules which govern the two professions were different. At this stage I am not contending that one or other set of rules was more or less in the greater public interest. What I am saying is that this simply cannot be. And we said so. So far as judges are concerned, all advocates, whichever profession they come from, should, when acting as advocates in the Crown Court, be subject to identical duties and responsibilities and discipline.

These are the issues which need to be addressed, and rapidly addressed. In those mythical ivory towers that judges are supposed to inhabit, we are perfectly well aware of the reasons why an increasing number of solicitors have sought rights of audience in the Crown Court, and equally well aware that, together with the increased exercise by the CPS of rights of audience, as well as considerations relating to the provision of legal aid and, putting it starkly, how to make a living, have impacted on the self-employed Bar, and its recruitment. The "how" and "why" and "who" questions must, as I have already said, address the future structure of the advocacy profession. Because the reality must be spelled out: we now have an advocacy profession which is quite differently structured to the way it was structured when I started at the Bar. I believe that the changes have been haphazard and consequential on a number of different unconnected events but the changed structures are here and must be addressed by the legal professions.

This is an issue of fundamental importance to the judiciary throughout the country. While the stark issues are being addressed, and as I would urge, urgently addressed, and if, as we believe, the quality of justice in the Crown Court depends on high quality advocacy, as a judge I reject any suggestion that the way in which the professions which provide advocates in the Crown Court should govern themselves, or their training, or their discipline, are matters for the exclusive consideration of the professions, or indeed the Legal Services Commission, or the Ministry of Justice or the Government of the day, whatever its political hue. Until recently the exclusive control of rights of audience was vested in the judiciary. Nowadays rights of audience are governed by the Courts and Legal Services Act. Nevertheless the proper and fair implementation and operation of this Act is of cardinal importance to the judiciary, and so is the method by which high quality advocacy in the Crown Court is assured.

It has never been the case, and it will never be the case, that success as an advocate follows from the possession of a qualification in advocacy. Again, it has to be faced that not all those duly qualified can or will succeed in their chosen profession. What the interests of justice in the criminal justice system require is that independent minded men and women of moral courage and personal integrity should appear as advocates at all levels in the Crown Court on both sides. For this purpose there must be a career structure which enables such men and women to gather the experience and develop their capacity so that ultimately they are available and willing to take on the enormous and demanding burdens involved in prosecuting and defending the most serious criminal cases. These men and women will be at the top of the advocacy tree. But the top of every tree

needs roots, and every tree needs a trunk, and branches, and without roots and a trunk and branches there can be no top.

I have no doubt that on this last point I should have had the enthusiastic support of Michael Kalisher and, as I have tried to, he would have told it as he saw it.
