LEGAL EDUCATION

Learning trial advocacy: an outsider's experience

TUREEN AFROZ, a Bangladeshi lawyer, relates what she learned about trial advocacy in Australia.

The Road goes ever on and on
Down from the door where it began.
Now far ahead the road has gone,
And I must follow, if I can,
Pursuing it with eager feet,
Until it joins some larger way,
Where many paths and errands meet...

JRR Tolkein

Starting with a legal career in Dhaka Bar, Bangladesh, now here I am, in Australia. I left behind not only a country but also a continent. The law school in Bangladesh where I went, always taught me to be sincere and dedicated towards my academic pursuit so that I could become a successful lawyer. My law professors used to say: 'Unless you burn the midnight oil, you can never become a good lawyer'. Believe me, in my student life I ended up with innumerable sleepless nights to decipher the critical sections of law with utmost sincerity!

However, as I entered the legal profession in Bangladesh I found immense difficulties to rhyme theory with the practice. I realised for the first time that trial advocacy does not mean only knowing the law. It means much more than that. Knowing the law and its application is of course a necessary condition but not a sufficient one. Advocates[1] should more importantly know how to present their case in the court. It requires skill and that was never taught in law schools.

I must admit that there is very limited institutional scope in Bangladesh to learn the techniques of trial advocacy. Therefore, I was very much eager to attend the *Intensive Trial Advocacy Workshop*, jointly organised by the Bangladesh Bar Council and the Australian Bar Association in Dhaka.[2] I attended the 1998 workshop and I was fascinated by the Australian trial advocacy techniques taught by the senior members of the Australian Bar and the Bench (especially the late Mr Justice Robert Kent, Judge Ann-Ainsle Wallace and barristers John Watts and Dan O'Gorman) who visited Bangladesh in that year. I wished that the workshop could go on for a few days more but that was not possible. Hence, I sailed across the continents in quest of learning the difficult 'art of advocacy'.

Advocacy, as I have learnt now in Australia, is just like a 'performance' perhaps a theatrical one. A courtroom is like a 'stage' for trial advocates where they have to do their 'final performance'. Of course they have a definite costume (gown) to wear, a theme (theory of the case) to establish, dialogues (arguments) to communicate and above all, an audience (judge, jury, colleagues and clients) to impress. Advocacy is like an art and if I may refer to George Bernard Shaw's words, 'is the art of making the audience believe that real things are happening to the real people'.

A command over language is an essential ingredient of successful advocacy. Words create an atmosphere in which a trial advocate leads the mind of judge and jury. Therefore, advocates should be very careful about what they say.

It is important that advocates should try to build up a style of their own, different from the rest. They should be courageous but at the same time, courteous in their presentation. They should also give particular attention to matters like the way they stand before the court or moves their hands while addressing the court. Their voices should be distinct and their speech should be audible. They should always try to make eye contact with the judge and the jury.

Trial advocates should be very systematic both in their thought and action. Nothing pays as well as a sound planning in trial advocacy. The art of advocacy is just like the 'art of warfare' because in both cases strategies are as important as capabilities. A successful courtroom performance does not happen by accident. Advocates have to develop this craftsmanship within them. Hence, it is essential that trial advocates design their strategy beforehand. Also, as the trial proceeds, they should be ever ready to adapt to unexpected circumstances and, if necessary, take recourse to a 'cease-fire', namely by asking for an adjournment if the situation demands so.

While in Bangladesh, I used to wonder whether an advocate should be loud and aggressive towards their witness, especially during the cross-examination. I did not get a definite answer from my professional seniors; they were rather divided on the issue. However, after having experience in Australian law schools, I got a definite answer. The answer is, 'no, and a hundred times no'. Cross-examination is the most sophisticated part of trial advocacy — a battle can be won or lost on that ground only. Therefore, while cross-examining, a trial advocate should be very calm and patient as any aimless question asked on the spur of the moment may ruin their case.

I have also been taught that advocates should learn how to deal with the weak points of their case. By willfully shutting their eyes to weak points advocates invite unnecessary doubts in the mind of the court. Therefore, they should try to give a reasonable explanation of such matters at the earliest possible time.

Last, but not least, I have learnt in Australia that persuasiveness is one 'golden thread' that passes through all the aspects of trial advocacy. The role

REFERENCES

1. All professional lawyers are called Advocates in Bangladesh.

2. The *Intensive Trial Advocacy Workshop* is organised in Bangladesh only once a year and lasts only for four to five days. The workshop is organised mainly to teach Australian trial advocacy to Bangladeshi lawyers.

of the advocate is to persuade the court to get relief for their client. A case may not always be that strong, evidence may not always be that supportive and the law may not always be totally in favour, but the 'magic touch' of persuasion can make all the difference. Persuasion does not necessitate adopting unethical practices or dirty tricks by distorting the facts. Rather it means the advocate's argument must be logical, believable and legally coherent. Through their submission an advocate should plead to the court that their client is an essential consumer of justice, and the injustice inflicted on them should not remain unattended. A persuasive argument with convincing overall trial advocacy silently steals away the hearts of the judge and jury.

As I look back, I find myself to have travelled a long, long way from where I began my quest. A few months in Australian law schools really changed my approach towards trial advocacy. Within this time I tried to shape and reshape my ideas, sharpened my thought processes, picked up a definite style that completely suits me and more importantly, learned a handful of tenets essential for a trial advocate. However, this is not an end to my learning process — it is just the beginning. For me, the learning should not stop at any particular point of time but rather go on forever as:

> ...I have promises to keep,
> And miles to go before I sleep,
> And miles to go before I sleep.

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UNITED STATES

Requiring female employees to wear makeup not discriminatory

This was the decision of the Court of Appeals for the Ninth Circuit in the United States (*Jespersen v Harrah's Operating*, 28 December 2004, No. 03–15045).

The plaintiff, Darlene Jespersen, was a bartender at a Casino in Reno, Nevada where she had been a long time employee.

In February of 2002 her employer instigated a new program requiring employees to be 'well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform'. These standards were later amended to require women to wear makeup.

Jespersen objected to being required to wear makeup because 'she found that wearing makeup made her feel sick, degraded, exposed and violated'. Jespersen's employment was terminated on this basis.

Jespersen alleged that the policy of her employer requiring that certain female employees wear makeup discriminated against her on the basis of sex.

The majority, Wallace Tashima and Barry Silverman JJ, granted summary judgment for the employer. They held that Harrah's policy did not constitute unlawful discrimination on the basis of sex because it imposed equal burdens on both sexes.

The majority cited *Baker v California Land Title* to the effect that grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex, provided that the standards do not impose unequal burdens on men and women. As applied to the present case, the requirements were held to be non-discriminatory as men also had to meet dress requirements (for example, having to keep one's hair short and cut one's fingernails) and they reasoned that there was insufficient evidence to conclude that such requirements were more burdensome on women in terms of time or cost.

According to the majority, 'Jespersen contends that the makeup requirement imposes "innumerable" tangible burdens on women that men do not share because cosmetics can cost hundreds of dollars per year and putting on makeup requires a significant investment in time. There is, however, no evidence in the record in support of this contention.'

Justice Sidney Thomas dissented noting that it was open to the Court to find discrimination against Jespersen either because she was dismissed because she refused to conform to gender stereotypes or because there was a triable factual issue that a policy requiring women to wear makeup is more burdensome on women then men.

As to stereotyping, Thomas J noted that 'under Harrah's "Personal Best" policy, Jespersen was required to wear makeup and thus conform to a sex stereotype; when she refused, Harrah's fired her. When an employer takes an adverse employment action against a plaintiff based on the plaintiff's failure to conform to sex stereotypes, the employer has acted because of sex.'

As to the triable factual issue, Thomas J noted that 'while men are held accountable to look as clean, have their hair as neat, and have their clothes as tidy and fitted as in their photo, women are held accountable to do all these things as well as to be "properly made up"'.

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