Why Let Windbags Waffle on So Long? *

David Pannick, an English practising barrister, suggests the practice of oral advocacy may need re-examination.

The art of advocacy has received little attention from legal theorists. No doubt they are reluctant to witness pain, and to subject themselves to agony, in the interests of their science. Robert J. Martineau, the distinguished research professor of law at Cincinnati university, is a notable exception. For three months at the end of 1987, he forced himself to study the performance of our advocates in the Court of Appeal at the Royal Courts of Justice.

The result was not, as might be expected, the removal of the professor by men in white coats to a quiet place in which he could make a steady recovery. He survived the ordeal and has now published the fruits of his research, *Appellate Justice in England and the United States: A Comparative Analysis* (William S. Hein & Co, New York, $60).

Professor Martineau is not aiming to win friends in the Temple. He says that few of the barristers he observed understood basic principles of public speaking. Their arguments were unstructured and their preparation inadequate. "Some barristers appeared to think that it was essential to say, 'My Lord' at least once in every sentence", he says. The basic approach of the barrister "was to raise as many issues as possible ... in the hope that some point would find favour with the court". In "most of the appeals" that Professor Martineau heard argued by Queen's Counsel, "the QC was unable to answer even the simplest question about the appeal and had to turn to his junior counsel for advice on how to respond". In the United States, in contrast with England, oral advocacy in appellate courts is confined to less than an hour for each party. Yet Professor Martineau found that the English advocate, who tended to address the court for a day or more, spent no more time than his or her American counterpart in arguing the central point in a case. The remaining court hours occupied by the English barrister were devoted to finding and reading documents and authorities, or by preliminary submissions that could more efficiently be made in writing. Professor Martineau concluded that lengthy oral advocacy in appellate proceedings is ineffective and inefficient.

Even if all English barristers had the skills of Cicero, it is difficult to justify the willingness of the English judge to spend his professional life listening (or at least appearing to listen) to the counsel's long submissions. Legal authorities and documents are slowly recited to judges, whose own ability to read is not in doubt, and who could therefore more efficiently acquaint themselves with the material in private in a fraction of the time, leaving the advocate to draw attention to particular passages on which special reliance is placed.

English barristers have no difficulty in accommodating themselves to the practice in the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg of supplementing written submissions with oral argument of about 30 minutes.

Barristers have not always been prepared voluntarily to obey the essential principle of effective advocacy - keep it short and to the point - so changes are being made in the regulation of advocacy, which will have the welcome effect of cutting the amount of court time occupied by oral argument.

The Court of Appeal applies a Practice Direction, making compulsory the provision of written skeleton arguments. The success of this in limiting unnecessary oral advocacy should encourage other courts to move in the same direction. Lord Templeman has suggested that "the length of oral argument permitted in future appeals [to the House of Lords] should be subject to prior limitation". Professor Martineau's observations about the quality of English advocacy are controversial. He does not record whether the appeal court judges shared his opinions. Any critic must recognise the unusual demands of the advocate's job. Fellow lawyers can only empathise with a United States defence counsel who told the jury in his closing speech that he was doing his job "to the best of my ability with what I have had to work with". However hard the advocate tries, the judge may not appreciate his efforts. In 1982, the Supreme Court of Michigan censured a judge for responding to counsel's submissions by declaring "whether your client is guilty or innocent, you're a despicable son of a bitch".

Professor Martineau's conclusions about the need to confine the amount of advocacy are, however, compelling. As the legal system strains under the pressure of too many cases to be decided by too few judges, serious consideration should be given to whether unlimited quantities of court time should continue to be made available to long-winded lawyers. If advocates are not able to make short submissions, they may find the hitherto tolerant English judiciary imitating the Canadian judge who is said to have dismissed a lengthy legal argument with the short judgment: "Bullshit, costs to the respondent".

❑ David Pannick is a practising barrister and a Fellow of All Souls College, Oxford

* First published in *The Times*, 20 August 1991

Getting It Off Your Chest!

A compensation claim was being heard before Justice D F O'Connor, President of the Administrative Appeals Tribunal. The worker was recalled after the employer showed some film putting in conflict her earlier evidence as to what she could and could not do. When she was called in reply she decided to make a clean breast of it by saying to the Tribunal:

"Your Honour, when I got out of the box yesterday I looked at my barrister and I thought to myself Oh shit I've just committed perjury".

Who said proceedings before the Administrative Appeals Tribunal are not "informal". The case was settled. ❑