
DO PRIDE AND PREJUDICE STAND IN THE WAY OF PERSUASION?: EMBRACING OTHER DISCIPLINES FOR THE ADVANCEMENT OF ADVOCACY TEACHING

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“But the art of eloquence is something greater, and collected from more sciences and studies than people imagine. For who can suppose, that amid the greatest multitude of geniuses among men, the infinite variety of causes, the most ample rewards offered to eloquence, there is any other reason to be found for the small number of orators other than the incredible magnitude and difficulty of the art? A knowledge of a vast number of things is necessary without which volubility of words is empty and ridiculous; speech itself is to be formed, not merely by choice, but by careful construction of words ;and all the emotion of the mind, which nature has given to man, must be intimately known; for all the force and art of speaking must be employed in allaying or exciting the feelings of those who listen..”

Cicero, *On Oratory and Orators*³

“How does Rumpole carry on in court? Answer. Rumpole woos, Rumpole insinuates, Rumpole winds his loving fingers round the jury box, or lies on his back purring “If his lordship pleases.”

John Mortimer, *Rumpole and the Married Lady*⁴

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³ Cicero *On Orators and Oratory* Translated JD Watson (1860) pg 10

⁴ Mortimer J (1978): From *Rumpole of the Bailey*, Penguin Books

In 55 BC, in perhaps the single greatest treatise on the education of the advocate ever produced, Cicero commented with surprise that the detailed study of oratory had attracted little in the way of detailed academic study. In his reflections and dialogue on the subject he concluded that although observation of experienced orators and practice were important, that to truly succeed the orator needed to understand many different subjects of which the most important was human emotion.

Cicero would have been delighted to realise that over 2000 years later, there would be a wealth of literature readily available which allowed a detailed insight as to how words could be used to excite and allaying the human mind. He would however have been equally astonished to discover that many advocates and orators are trained with little or no reference to them. For although advocates in England and Wales are trained to “persuade” they are provided with very little guidance as to what “persuasion” is. This is despite the fact that there is both quantitative and qualitative research being published (albeit in other disciplines - primarily psychology) which provides an insight into how evidence can be presented and arguments deployed in a manner which maximises their potential impact. It is our aim in this paper to establish that this material is relevant to the teaching of advocacy and that used properly it can provide a depth to advocacy teaching which is currently lacking. We go on to identify how to discuss how this literature can inform assessment criteria to ensure advocates can be trained and assessed in this crucial skill.

We begin on the pretext that we are training advocates to work in an adversarial system. In such a system a decision maker (be they a judge or jury) is required to make a decision on the merits of two conflicting versions of events and exercise their judgment as to which of these versions they prefer. In making this decision the function of the advocate is to persuade them through a combination of oratory, evidence presentation and witness questioning that their case is the most meritorious. Those bodies who charged with the assessment and training of advocates place “persuasiveness” at the heart of their process. The rules which define the

standards by which advocates will be accredited under the Quality Assurance Scheme for Advocates, state that an advocate cannot be allowed to present cases at even the lowest level (grade 1) unless an established that they were “persuasive.”⁵ The Bar Standards Board state that students successfully completing the Bar Professional Training Course must possess;

“a high level ability to (i) persuade orally and in written argument using cogent legal and factual analysis (ii) develop reasoned argument and (iii) deploy forensic skills with evidence (both written and oral).⁶”

However there is little additional guidance provided in either example as to how this elusive quality is quantified. That is not to say that as parties who are observing advocacy performances and thereby putting themselves in the position of the decision maker advocacy tutors assessors are not able to gauge whether they feel “persuaded” but the absence of commonly accepted criteria on how someone is persuaded makes formative feedback imprecise and assessment criteria dangerously subjective.

The literature that is recommended to trainee advocates in this jurisdiction is similarly lacking in scientific rigour . Many of the main texts which are recommended in reading lists on advocacy courses are, perhaps understandably, written by experienced trial lawyers (often from the Bar) drawing on their own perceptions of the qualities which make an effective advocate. These shortcomings are often readily admitted by the authors. For example we considered three texts which are regularly recommended as essential reading for students studying for the Bar;

⁵ Solicitor’s Regulatory Authority, *Quality Assurance Scheme for Advocates (Crime) Scheme Handbook (Draft)* v1.9 12th June 2012 Annex D at page 78

⁶ Bar Standards Board, *Course Specifications Requirements and Guidance* September 2012 at page 15

Iain Morley QC begins his work *“The Devil’s Advocate”*;

*“This is not a reasoned academic text. This is a polemic”*⁷

Keith Evans states in the introduction to his work *“Advocacy in Court – A Beginner’s Guide”*;

*“In writing this book I do not set myself up as any kind of authority or lay any claim to having anything other than average powers of advocacy myself.”*⁸

In his review of advocacy performances of the last 200 years, Richard Du Cann QC states that;

*“The qualities essential to the art of the advocate cannot be acquired like pieces of furniture. Without some natural gifts, the technical rules are useless, and without practice, precept too will be of little assistance.”*⁹

That is not to say that the authors of these works are not well equipped to dispense this advice or that the advice that they give is inaccurate. With their wealth of experience as practitioners and judges they will have observed other advocates being persuasive and, at times less than persuasive. They will have assessed and assimilated, in their own minds what common themes which unite the former and distinguish them from the latter. This subconscious “research” is perfectly capable of generating academically valid conclusions. However if we recast persuasiveness not in terms of the acts of the advocate, but rather in terms of how a decision maker would respond to those acts then this research moves away from being a review of the actions of a large number of advocates, and becomes merely an account of the experiences of a single observer in the position of a decision maker. This then becomes a less academically rigorous piece of work.

The relevance of this subject to the training of advocates in this jurisdiction (in particular those training for the Bar) was identified by McPeake in 2007 who noted;

⁷ Morley QC, I.(2009): *The Devil’s Advocate* 2nd edition, Sweet and Maxwell at page 1

⁸ Evans K. (1995): *Advocacy in Court- A Beginner’s Guide*, 2nd edition, Blackstone Press at page 5

⁹ Du Cann, R (1993): *The Art of the Advocate*, 3rd Edition, Penguin Books at page 54

*"We are not good at acquainting students with the theory and practice of story-telling, nor examining why story-telling is important for advocates to know about and be able to do."*¹⁰

Despite this, little progress has been made in introducing advocates in England and Wales to the notion that there are scientifically measurable factors which have a bearing on how decision makers (be they judges or juries) retain and analyse information. The intense pressure on those who train advocates to impart a wealth of information in a short period of time (for example 30 weeks in the case of the BPTC)¹¹ means that any attempt to try and introduce additional material to the syllabus, is unlikely to be a popular one. This reticence is likely to be increased when that material is drawn from disciplines outside of the law. Indeed the idea that psychology should play any part of the training of lawyers is an unpopular one. In the Legal Education and Training Review survey of 250 stakeholders in legal education, 59.3% of respondents considered Psychology to be "unimportant" or "somewhat unimportant." However when asked about skills which required an understanding of how to communicate information between parties effectively the results were markedly different; 91.1% of respondents said that it was important that trainee lawyers should be taught "how to explain things in a way clients understand," and the same percentage indicated that it was important that there was teaching of "communicating effectively in person". Of oral advocacy, 77.2% of respondents considered the teaching of it to be "important" or "somewhat important" to trainee lawyers¹². This would tend to suggest that although the importance of transferring complex information by lawyer to third party is recognised, the validity of using other expertise from other disciplines to assist with this is not. Certainly the notion that advocacy training should be taken out of the hands of experienced practitioners and placed in the

¹⁰ McPeake R (2007): *Fitting stories into professional legal education – the missing ingredient*, *The Law Teacher*, 41:3, 303-313

¹¹ Bar Standards Board op.cit. at 75

¹² Legal Education and Training Review, *Research Update 12/02*, <http://letr.org.uk/wp-content/uploads/2012/11/headline-findings2-31102012.pdf>, at pages 3-4, accessed 22nd February 2013

hands of psychologists is not one which is sustainable as persuasiveness is only one of a suite of skills and competencies that an advocate must possess, albeit an important one

But the unwillingness of lawyers to engage with empirical evidence is surprising. The law is not the only discipline where information needs to be conveyed to a third party in way which is designed to influence the decision making behaviour of that third party. If one considers the pedagogy which underpins modern teaching it can be clearly seen that practice is based in part on psychological research which assists in identifying how learning techniques differ and how an understanding of these differences enables the teacher to maximise the students potential to learn. An understanding of consumer psychology is central to advertising and marketing strategy in business. And yet despite this advocates seem unwilling to look beyond their own profession for instruction and guidance.

Nor is this disciplinary insularity a worldwide phenomenon. Other advocates in other jurisdictions appear more willing to look to other disciplines for support. In the USA the role of science in persuading juries has long been recognized and debated. In 1987 Victor Gold wrote;

“For centuries trial lawyers have exploited psychological principles derived from intuition and experience. But amateur courtroom psychology is now giving way to science. For a price professional psychologists are available to advise lawyers on all aspects of trial advocacy including what to say, where to stand, how to select a jury, when to object and what clothes to wear. In the words of one expert, “all in all, we help lawyers position their cases to juries in much the same way you would sell a bar of soap¹³.”

Whilst few in this jurisdiction would welcome the introduction of psychologists as paid trial consultants who seek to exercise influence over every aspect of the trial process this does not mean that there is not research available which would assist advocates in understanding how

¹³ Gold ,V (1987):*Covert Advocacy: Reflections on the use of psychological persuasion in the courtroom*, 65 North Carolina Law Review page 481

they might optimise their chances of fact finders making decisions in favour of their client. The greater access that researchers in other countries have to jurors may mean that the literature is centred in legal systems with which advocates in England and Wales are unfamiliar but this does not mean the findings of these researchers are not of universal application. The work of Pennington and Hastie has provided a descriptive model for juror decision making supported by empirical research, which has demonstrated that there is a correlation between the ease with which jurors can “construct stories” from the information presented to them and the likelihood of them favouring that story as opposed to a less ordered narrative¹⁴. They proposed and proved through experimentation that jurors impose a narrative story organization on trial information. They concluded that;

“this constructive mental activity results in one or more interpretations of the evidence that have a narrative story form. One of these interpretations (stories) will be accepted as the best of explanation of the evidence. The story which is accepted is the one that provides the greatest coverage of the evidence and is the most coherent as determined by a single juror¹⁵.”

In order to ensure that their story is the most coherent, advocates need to understand how to ensure that the “trial information” the jury have to construct the story from is presented in a way which optimises this. This includes ensuring that at the time the jury come to reach a verdict, the information supporting the advocate’s case has been retained in the juries memory in a form which is consistent with a coherent story. This research has paved the way for authors such as Miller¹⁶ to provide more detailed guidance on the mechanisms of effective story telling. A realisation of the importance of presenting evidence in a way which maximises the chances of the decision maker retaining important facts has enabled advocacy specialists to provide detailed guidance on amongst other things, the power of emotional

¹⁴ Pennington N and Hastie R (1991) *A cognitive theory of juror decision making: The story model*, 13 Cardozo Law Review 519 -557

¹⁵ Op.Cit at 527

¹⁶ Miller,P (2003):*Storytelling: A technique for juror persuasion*, 26 American Journal of Trial Advocacy 2002-2003 489 -504

priming¹⁷, the most dynamic use of language¹⁸ and the importance of categorising facts into clusters of three¹⁹. This canon of literature is accessible, easily comprehensible and relevant, however it has yet to become established in the consciousness of this jurisdiction's advocates.

That is not to say that using psychological evidence to support evidence presentation is anathema to trial lawyers in this jurisdiction. Advocates have embraced and supported moves to ensure that vulnerable witnesses are treated in a way which maximises their potential to give best evidence. The special measures provisions of the 1999 Youth Justice and Criminal Evidence Act²⁰, The Home Office guidance - "*Achieving best evidence (ABE) in criminal proceedings*"²¹ and the mandatory training that prosecuting advocates are required to undergo if they wish to prosecute rape cases²², are all underpinned by detailed empirical psychological evidence. For the most part this is motivated by the need to prevent further trauma being occasioned to the victims of these serious offences through their giving evidence in the trial process. However in the case of rape prosecutions there is also an expectation that advocates will understand the preconceptions that exist in the minds of the jury and counter these accordingly²³. The serious nature of these cases and widespread concern about the perceived rate of

¹⁷ Stanchi K (2011) - *The Power of Priming in Legal Advocacy: Using the science of first impressions to persuade the reader*, 2010-2011 Oregon Law Review 305

¹⁸ Voss, J(2005) - *The Science of Persuasion: An exploration of Advocacy and the science behind the art of persuasion in the courtroom*, Law and Psychology Review 2005 29 at 301

¹⁹ Clermont, K (1987) - *Procedure's Magical Number Three: Psychological bases for standards of decision*, 72 Cornell Law Review 1986-1987 at 1115

²⁰ Youth Justice and Criminal Evidence Act 1999 c23

²¹ Home Office 2002 (revised 2007)

²² Speech on the prosecution of rape and serious sexual offences, Alison Saunders, Chief Crown Prosecutor for London, 30/01/2012, archived at; http://www.cps.gov.uk/news/articles/speech_on_the_prosecution_of_rape_and_serious_sexual_offences_by_alison_saunders_chief_crown_prosecutor_for_london retrieved 22/02/2013

²³ Saunders op.cit (quoting Finch and Munro (2005) *Juror Stereotypes and Blame Attribution in Rape cases involving intoxicants - The findings of a pilot study*, British Journal of Criminology 25 - 38)

acquittal of dangerous offenders has seemingly allowed an acceptance of a need to understand some of the factors which will underpin a jury's decision making process. If this jurisdiction can recognize that using psychological research is a valuable resource which can be used to ensure effective case presentation then perhaps it is time to explore widening its ambit.

But if we are to introduce this material to improve the quality of our advocacy training how is this to be achieved? Over-burdened and under-resourced law schools are unlikely to welcome a requirement that a psychology module becomes part of every advocacy course. We would suggest however that what is needed is an approach that is not revolutionary but evolutionary.

The first step involves fostering a culture where training in vocational skills is not seen as existing in isolation from academia. At Nottingham Law School we were the first university in the country to award the degree of "LLM in Advocacy Skills" which has allowed for intense and extensive advocacy training to be coupled with a thorough analysis of literature and the development of an understanding of the assistance which can be provided from outside the discipline of law. We have introduced an understanding of psychology into the training of lawyers through reading and by having (amongst others) psychologists teach on the course and we have seen positive results in terms of enhanced performance and student satisfaction. The capacity for experimentation which is afforded by having a post-graduate degree devoted to one skill is unfortunately not a luxury that can be readily resourced on many courses of which advocacy is but an element. However this does not mean that the door should be closed to the subject. It is our belief that in addition to regular practice of advocacy and observation of others performance in the courtroom and classroom that there is scope for an introduction to other materials and that by widening the scope of reading lists we can

inculcate a culture amongst advocates and legal academics that views advocacy as a multi-disciplinary skill. Not only will this deepen the student's understanding of the subject but hopefully it will engender research within this jurisdiction which many of our lawyers may feel more comfortable with adopting. It will hopefully lead to a dialogue between disciplines which will lead to a canon of background reading which is based as much on empirical evidence as it is on the subjective experience of individual advocates. In the appendix to this paper we propose a list of papers which we suggest as recommended reading for anyone with an interest in establishing a detailed understanding of how to "persuade." This is by no means a definitive list but merely an indication of the ease with which such material can be found.

However simply providing a reading list is, of itself, of limited value if the knowledge contained within it does not find its way into the teaching and assessing of the subject. For this to happen advocacy teachers must be alert to the need to ensure that they are providing consistent constructive feedback which incorporates learning and allows for student development. Although course and module learning outcomes often place persuasiveness as key outcomes which an advocate must demonstrate in order to be deemed as competent, we find that this frequently does not often translate into assessment criteria. As such the criteria which are used to assess advocacy, and against which students progress and development is measured, lack the precision and objectivity to be of real value. In our experience the assessment criteria used to assess advocacy rarely delves into any greater detail than "was persuasive", "followed a logical structure" or "told a clear story." The result of this is formative feedback of advocacy performances which identifies that the performance is "unpersuasive" but is unable to iterate why this is so or how it can be improved. On the assumption that the teaching of advocacy will be measured on a criteria based assessment system there is a clear need

for these criteria to be clear and objective to ensure student motivation and development.

As Gibbs and Simpson comment;

“Criteria need to be explicit and understood by students, and demonstrably used in forming grades. Often criteria are not accompanied by standards and it is difficult for a student to tell what standard is expected or would be considered inadequate.”²⁴

Criteria which do not provide guidance as to how persuasiveness can be quantified and measured cannot be sufficiently explicit and therefore risk providing insufficient feedback to the students and potentially impeding their development. There is also a risk that these criteria do not allow for the objectivity which is essential when measuring a practical skill. Brown and Pickford have identified the need for lecturers who assess practical skills to be scrupulously clear about the criteria they use and have absolute certainty that;

“any assessor will come to the same conclusion given the same evidence.”²⁵

An assessment criterion which is iterated simply in terms of “persuasion” cannot achieve this. Consider this example; students are set the task of presenting a closing speech in a trial in which the weight of the evidence is against them. The tutor who is assessing places themselves in the role of the trier of fact. The criteria used is that the candidate must present a persuasive submission. A student makes a submission which is structured in such a way as to highlight key facets of the evidence which support their case and diminish the importance of damaging evidence. They use their voice in a way which is dynamic and engages attention. They use language which creates an appropriate sense of drama and tells an engaging story. Tutor A viewing that

²⁴ Gibbs G & Simpson *“Conditions under which assessment supports learning”* Learning and Teaching in Higher Education, Issue 1, 2004-05

²⁵ Pickford, R and Brown S (2006): *“Assessing Skills and Practice”* Routledge

performance may take the view that this was a persuasive submission even though as a judge they would still not exercise their discretion in favour of the student's client. Tutor B viewing the same performance could legitimately say that although those aspects were present the fact that the trier of fact did not ultimately change their mind meant the submission could not be regarded as being "persuasive". Clearly this cannot be correct. We need to be clear in our criteria that we are assessing on the process and not the outcome.

We believe that that a more detailed set of criteria are required to provide a more rigorous and educationally sound means of measuring the quality of "persuasiveness" in advocacy. The potential subjectivity of it as a concept means that to produce a set of criteria for measuring it which are sufficiently objective we need to draw upon empirical evidence rather than personal perspective. By drawing on the available literature we have identified some common features which research has shown assist decision makers in remembering information provided to them and using this information in their decision making process. We do not intend this to be a definitive list but rather an attempt to provoke discussion with a view to crystallising what we expect from advocates.

- Use of language - use of nouns and verbs to create an image which appears objective. Avoids using filling words, intensifiers, terms of personal reference, complex language and hypercorrect speech.
- Tone of voice -timbre, inflection and volume are used to create emphasis and maintain interest.
- Ensuring points which are central to the advocate's case are emphasized through devices such as repetition and pauses.
- Displaying confidence through maintenance of eye contact and through appropriate body language. Avoiding body language which is distracting.

- Ensuring that there is a case theory which is consistent with evidence and instructions but which tells a story. Language is used in a way which portrays individuals in a positive or negative light in accordance with the case theory. Significant events are presented in a way which highlights and dramatizes events which are consistent with the case theory and neutralize events which are not. Evidence is presented in a way in which allows the listener to understand how individuals and events fit in to the context of the case.
- The presentation is structured in a way which has beginning a middle and an end. Points which the advocate will wish the listener to remember are positioned within the advocacy in such a way as to maximize the chance of it being retained in the listener's memory.
- Where ideas or evidence are likely to be outside the comprehension or experience of the tribunal the advocate uses analogy and comparison as an aid to explanation.
- The advocacy creates an emotional mood which is appropriate to the nature of the case theory. The emotional mood is maintained throughout the performance.

It is of course not to be forgotten that "persuasiveness" is only one of the traits that an advocate must possess. They must be legally literate, ethical and well prepared and these also must be addressed in the training of advocates. But a lawyer who possesses all of these traits without persuasiveness can never become a Horace Rumpole and certainly not a Cicero. Persuasion is a quality which can and has been measured and defined but by ignoring the material which provides this definition we risk limiting the depth of our student's understanding.

Appendix A: Proposed reading list

- CLERMONT, K. Procedure's Magical Number Three: Psychological bases for standards of decision.
72 Cornell Law Review 1115 1986-1987
- GOLD, V. Covert Advocacy: Reflections on the use of psychological persuasion techniques in the courtroom.
65 North Carolina Law Review 481 1986-1987
- LINZ, D.G. AND PENROD S Increasing Attorney Persuasiveness in the Courtroom.
8 Law & Psychology Review 1 1984
- LUBET, S. The Trial as a Persuasive Story.
14 American Journal of Trial Advocacy 77, 1990 - 1991
- MILLER, P.H. Storytelling: A technique for juror persuasion.
26 American Journal of Trial Advocacy 489, 2002-2003
- OHLBAUM, E.D. Basic Instinct: Case theory and courtroom performance.
66 Temple Law Review 1, 1993
- OLCHOWY, J.R. Battling for the Judge's or Jury's Imagination: Evidence, storytelling, and effective trial advocacy.
16 Windsor Law Review, Legal and Social Issues 1, 2003
- PENNINGTON, N. AND HASTIE, R. A Cognitive Theory of Juror Decision Making: The story model
13 Cardozo Law Review 519, 1991 -1992
- STANCHI, K.M. The Power of Priming in Legal Advocacy: Using the science of first impressions to persuade the reader.
89 Oregon Law Review 305, 2010-2011

VOSS, J.

The Science of Persuasion: An exploration of advocacy and the science behind the art of persuasion in the courtroom.

29 Law & Psychology Review 301, 2005