

The Lord Slynn Memorial Lecture 2016

Ethics and advocacy in the twenty-first century

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1. I am very honoured and very pleased to be giving the 2016 Slynn Lecture. Lord Slynn's contributions to the law matched his unique professional and judicial career. At the bar, after filling the very distinguished and longstanding role of Treasury Junior, he became the first ever Leading Counsel to the Treasury. He then was appointed a High Court Judge, but after five years he became the first, and so far only, English judge to move to Luxembourg as Advocate General to the Court of Justice. After a notable seven-year career in that role, he was appointed the UK judge on the Court of Justice, and after four successful years in that judicial role, he became the first, and again so far only, judge of the European Court to come back as one of the Law Lords, as Supreme Court Judges were then. He contributed a great deal to the shaping of UK law in his ten and a half years as a Law Lord, and the development of the law in this country enormously benefitted at a crucial time from his experience as a European Judge.
2. I have often cited Gordon Slynn's judgments and opinions when at the Bar and I have often relied on his judgments as a Judge. However, I have only had two direct experiences of him. The first was in 1976, a few months before he became a High Court Judge. He was a silk leading for the Crown in a Court of Appeal case, at the very top of his career as an advocate. By contrast, I was at the very beginning of my legal career, having just joined my chambers: I was a straw junior for the other side. The case involved the question whether legislation aimed at capping commercial rents in order to avoid hyper-inflation and bring down inflation, then running at around 20% per annum,

applied to property leased by the Crown¹. He was friendly to me, when he had no reason even to notice me, and he was a very effective advocate. The other occasion was at the opposite end of his career, when he and I sat together a few years after his retirement from the House of Lords, when I was a Law Lord. How could that be, you wonder. Well, it was a mock trial of Neville Chamberlain for negligence in not preparing this country for war in the late 1930s. I recall that Lord Slynn was very clear that on no account would we find him negligent. My feeble protestations in our post-hearing discussion were quickly and effectively disposed of by his razor-sharp analysis and challenges, and I ignominiously caved in pretty quickly.

3. The prospect of an imminent war with Germany in the 1930s and a worryingly high inflation level of the 1970s, make one realise how much things can change in a lifetime, or even half a lifetime. The current prospect of a war with Germany is so low one cannot even find a bookmaker on the internet who is quoting odds on it – and bearing in mind what possibilities they will quote for, that speaks volumes. As for the risk of hyperinflation, our problem today, according to many economists, is that, if anything, inflation is too low. On the other hand, the fundamental issues of peace in Europe and a stable economy at home are as fundamental to our lives today as they were 80 and 40 years ago. So, despite the passage of time, the basic issues remain the same, while the specific problems arising from those issues can radically change, often within a relatively short period.

¹ *Town Investments Ltd v Department of the Environment* [1976] 1 WLR 1126, which subsequently went to the House of Lords – [1978] AC 359

4. And so it is with the two aspects of my talk today, advocacy and ethics. For many centuries, and maybe for millennia, the rule of law in any civilised society has had a fundamental requirement for advocates, and indeed other lawyers, who are competent and independent, and who also adhere to ethical standards. People rely on lawyers to advise and represent them, just as they rely on judges to judge their cases. Together with judges, lawyers are the quintessential representatives, or ambassadors, of the rule of law so far as the general public are concerned. If lawyers and judges are not competent and honest, who are not independent and ethical, the rule of law is severely undermined; indeed, it is scarcely maintainable.
5. For judges, there is relatively little room for tension or potential for conflict so far as the conduct of their duties are concerned. They have to conduct hearings and decide cases in accordance with the law. There is some potential for conflict, most notably when a judge feels that the application of established common law principles will lead to what he regards as the morally wrong result. In such a case, there is no doubt but that judges must apply the law, but the hard question may be the extent to which it is permissible and appropriate for them to “develop” the law to produce the right result. An important topic, but not one for this evening.
6. That is because I am concerned with conflicts facing professional lawyers, for whom there is substantially more opportunity for tension or outright conflict. That is for the obvious reason that they have clients, to whom they have a duty, and for whom they often feel a strong sense of commitment, for understandable financial, emotional and moral reasons. But every lawyer has a duty to be honest, has a duty to comply with the rules of her profession, and has a duty to the court. These three overlapping set of duties (which I shall refer to as “ethical duties”), very importantly, override the lawyer’s duty to her client. Given these ethical duties, a lawyer’s duty and desire to do the best she can

for her client will inevitably give rise to conflicts. And these conflicts will often be especially acute for an advocate, because she works under the pressure of the cut and thrust of litigation, with its tense adversarial atmosphere and its frequent requirement for almost split-second decision-making, and also because the duty to the court is particularly important in the context in which they work.

7. However, while these conflicts and pressures are relatively timeless (perhaps an oxymoronic expression, though Albert Einstein may not agree) in general terms, the specific demands to which ethical duties have given rise over the years are, inevitably, rather more prone to vary.
8. Many of the conflicts faced by advocates are rendered particularly difficult because it is very often not possible to play safe. We all know that, where the duty to the court and the duty to the client conflict, the duty to the court prevails. However, that does not address the problem of what to do where it is not entirely clear whether there is, in a particular case, a conflicting duty to the court. Thus, if a client shows his lawyer a document which harms his case, the lawyer has a potential conflict when deciding whether it has to be shown to the other side. If she discloses it when she need not have done so, then she is in breach of her duty to her client, whereas if she does not disclose it when she should have done so, she is in breach of her duty to the court. So there is no easy, play-safe, option, as there is in the case of so many dilemmas that we face in life.
9. This makes it all the more important that we judges give clear guidance to the legal profession as to the nature of advocates' duties when a conflict arises. In that connection, the 1996 decision of the Court of Appeal in *Vernon v Bosley*² is a good example of what

² [1996] EWCA Civ 1217 [1999] QB 18

judges should not do in this connection. *Vernon* was a nightmare of a case. The plaintiff claimed damages in tort, for nervous shock after witnessing the death of two daughters in an accident caused by the defendant. The plaintiff's case, supported by expert evidence, and challenged by the defendant, was that he was continuing, and would long continue, to be badly affected mentally. The hearing lasted over 70 days. The trial judge, Sedley J, largely accepted the plaintiff's case and awarded him over £1m, and the defendant appealed.

10. In the Court of Appeal, the plaintiff's counsel maintained that he was still suffering badly psychologically. After the hearing of the appeal, the Court of Appeal decided that the damages should be reduced to around £640,000. The Court of Appeal had made their judgment to that effect available in draft, when the defendant's counsel received from an anonymous source a copy of a judgment in a different case. That judgment was in county court proceedings between the plaintiff and his wife, following a trial which had been held some time after the trial before Sedley J. The purpose of the county court trial was to determine whether the plaintiff was mentally fit, and evidence had been given and accepted by the circuit judge, that the plaintiff had almost completely recovered his mental health, so that he was well enough to have custody of his surviving children. The Court of Appeal withdrew their draft judgments on the basis that the plaintiff should have told the defendant in the tort action of his recovery, and then heard further argument and gave a fresh judgment reducing the damages yet further to around £440,000, less than the defendant had offered. An unusual and tangled tale, which I have somewhat simplified.

11. However, there were two important further facts for present purposes. First, the plaintiff's two expert psychiatric witnesses were the same in the tort claim and the family

claim, and they had given inconsistent evidence in the two cases (although the first instance hearings in the two cases were some way apart). Secondly, before Sedley J gave judgment in the tort claim the plaintiff's counsel in that claim had seen the witness statements from those experts in the family proceedings saying that the plaintiff had largely recovered, which gave a very different picture from their evidence in the tort proceedings. However, the plaintiff's counsel advised him that he was not under a duty to inform Sedley J of this fact before he gave judgment; and they had advised that there plaintiff need not tell the Court of Appeal of this fact in the tort proceedings.

12. In his judgment, Stuart-Smith LJ held that the psychiatric reports in the family proceedings had been disclosable, and that it had been "the duty of [the plaintiff's] counsel to advise his client that disclosure [of those reports] should be made" to Sedley J as soon as the counsel knew of those reports, and in due course they should have advised that it be revealed to the Court of Appeal. He added "[t]here is no reason to suppose that if [the plaintiff] had been so advised in this case, he would not have accepted that advice. If the client refuses to accept the advice, then it is not as a rule for counsel to make the disclosure himself; but he can no longer continue to act." In effect, while he accepted that "plaintiff's counsel did not deliberately intend to deceive the court and believed that the advice they gave ... was sound", he considered that they had "made a serious error of judgment".

13. Evans LJ disagreed on almost every point. On the duty of counsel, he said that "counsel for the plaintiff were correct to advise that there was no obligation to disclose the documents in question in [the tort] proceedings, at the time when they were received by the plaintiff and by them. Moreover, the documents did not lose their privileged status in these proceedings by reason of the confidentiality given to them by statute for the

purposes of the family proceedings”. He thought that counsel “did not ... either mislead the court or act improperly in any way”.

14. The third judge, Thorpe LJ, largely agreed with Stuart-Smith LJ, save, unfortunately, on the issue of counsel’s duty, and in particular what counsel should have done if the plaintiff had refused to take the advice, which he should have been given to disclose the expert reports in the family proceedings. Stuart-Smith LJ had said that counsel should simply withdraw from the case and keep quiet, but Thorpe LJ said that he “would hold that in those circumstances counsel has a duty to disclose the relevant material to his opponent and, unless there be agreement between the parties otherwise, to the judge”.
15. So, there were three different views as to what counsel should do, (i) not advise disclosure (Evans LJ), (ii) advise disclosure and simply withdraw from the case if the advice was not followed (Stewart-Smith LJ), or (iii) advise disclosure and then disclose himself if the advice was not followed (Thorpe LJ). Now, bearing in mind the importance of judicial guidance on matters of lawyers’ duties, surely, and with all due respect, those eminent judges should have agreed some compromise view on the question of what an advocate should do in such a case. And, if they could not agree, they should have simply not dealt with the question of what counsel should do if his advice was not taken, as that question did not have to be resolved for the purpose of disposing of the appeal. The decision left the correct behaviour of lawyers in litigation, a difficult topic in an area which is central to the rule of law, in a state of complete uncertainty.
16. Normally, of course, an advocate is free to continue to act for her client even where the client does not follow her advice: it is only when ethical rules would be breached that the advocate may have to step down. Indeed, the mere fact that a client rejects her advice

may not of itself even justify an advocate throwing up the case. However, a point may come where an advocate can properly decide to refuse to continue with a case because she cannot properly represent her client due to the client's refusal to follow her advice, even where no breach of ethical duties would be involved. In a sense it is a question of fact and degree, but I suggest that there is a reasonably hard-edged test, namely, whether a point has come where the advocate could reasonably conclude that she can no longer do the job of representing the client properly.

17. When it comes to representing the client properly, an advocate can sometimes find that she is at risk of conflict because of competing duties to different clients. In *Ekareib*³, a criminal case decided in December last year, the Court of Appeal led by the Lord Chief Justice, was so concerned about the fact that leading counsel had been doing substantial other work when conducting a "very complex murder trial". They made no findings in that connection, but referred the issue to the Bar Standards Board "for their consideration"⁴.
18. A rather different question is how far an advocate can go in properly representing her client. An extreme version of an advocate who went too far may be found in the *R v Farooqi* in 2013⁵. It is a sad story, but it produced some useful and important professional guidance for advocates.
19. In his closing speech to the jury, counsel for Farooqi, one of four defendants in a terrorist trial, had his conduct described in crisp terms by the Lord Chief Justice giving

³ *R v Ekareib* [2015] EWCA Crim 1936

⁴ *Ibid*, para 57

⁵ *R v Farooqi and others* [2013] EWCA Crim 1649

the judgment of the Court of Appeal. Counsel's cross-examination of two Crown witnesses over 14 days was "prolix, extensive and irrelevant, and, on occasions, offensive, and [much of] its underlying purpose was not clear"⁶. In his three-day closing speech, he "encouraged the jury to regard the judge as a salesman of worthless goods", depicted "the judge and the Crown ... as the agents of a repressive state", and as being guilty of racism and seeking to stop free speech, accused counsel for the other defendants of "sucking up to the Crown and the court", "misrepresented the evidence [and] repeatedly gave evidence himself"⁷, and raised points which were not open to him because they had not been put to witnesses⁸.

20. Counsel's behaviour was such that counsel for one of the other defendants asked the judge to discharge the jury, and the fact that he did not do so led to the appeal, which was based on the proposition that the defendants had not had a fair trial because of the behaviour of Farooqi's counsel. That contention was rejected, but towards the end of their judgment the Court of Appeal explained that an "advocate is not the client's mouthpiece, obliged to conduct the case in accordance with whatever the client 'instructs'". While an "advocate is bound to advance [his client's] case on the basis that what [the] client tells him is the truth", "the advocate, and the advocate alone remains responsible for the forensic decisions and strategy"⁹. That point was taken a bit further in the *Ekareib* case in December last year¹⁰, when the Court of Appeal said that there was "no basis upon which an advocate can be instructed as to what to say in his closing speech by his solicitor or by his client or when to conclude it"¹¹. Another point of

⁶ *Ibid*, para 42

⁷ *Ibid*, paras 73-75

⁸ *Ibid*, para 93

⁹ *Ibid*, para 108

¹⁰ See footnote 2

¹¹ *Ibid*, para 46

concern to the Court in *Ekarib* was “that the practice of making personal criticism of prosecution advocates has become a feature of some addresses to the jury made by defence advocates”, which, they said, is a development “which judges must ensure ceases immediately and not be repeated in any case”.¹²

21. Reverting to *Farooqi*, the Court of Appeal acknowledged that an advocate is occasionally entitled, indeed may be effectively obliged, to submit that the judge is going wrong. In doing so, the Court explained an advocate “is simultaneously performing his responsibilities to his client and to the administration of justice”¹³.

22. The Court of Appeal in *Farooqi* also emphasised the importance of lawyers ensuring that the trial process is efficient and fair. Thus, they said “the trial process is not a game” and “the advocate must abide ... by procedural requirements and practice directions and court orders. The objective is to reduce delay and inefficiency and enhance the prospect that justice will be done.”¹⁴ This is an important point and it is reflected on the civil side by the Civil Procedure Rules, which “require[s]” the parties to litigation “help the court in furthering the overriding objective”, which involves “dealing with a case justly”, an expression which is defined as including “saving expense”, and ensuring proportionality, expedition and fairness¹⁵. Thus, it would seem that the fact that an advocate’s client may want the proceedings dragged out does not justify the advocate intentionally spinning out the interlocutory proceedings. Reverting to *Farooqi*, the final point it is worth making is

¹² *Ibid*, paras 60 and 59

¹³ *Farooqi*, para 109

¹⁴ *Ibid*, para 114

¹⁵ CPR 1.3 and 1.1

that the Court of Appeal ended their general guidance by emphasising the importance of “mutual respect” between the judge and advocates¹⁶.

23. This mutual respect, and indeed mutual understanding, will be particularly important when, or indeed if, the Quality Assurance Scheme for Advocates, known as QASA, goes ahead. In July 2013, the Legal Services Board (which is the overall, or supervising, legal services regulator) approved a scheme which provides for the assessment of the performance of criminal advocates in England and Wales by judges. The lawfulness of the scheme was challenged all the way to the Supreme Court, but the challenge failed¹⁷. In their judgment, Lords Reed and Toulson explained that “[t]he object of the scheme is to ensure that those who appear as advocates in criminal courts have the necessary competence. The scheme was devised because of serious concern about the poor quality of some criminal advocacy. There was a general (although not universal) acceptance that there was a need for some form of quality assurance scheme involving assessment by the judiciary”¹⁸.

24. The scheme requires an advocate who wishes to take cases at a higher level of complexity than she currently qualifies for to satisfy a judge before whom she has appeared in a trial that she is “very competent” at her present level, and then she has to be graded as “competent” by judges in the first two or three cases in which she appears at the higher level. The potential problem for an advocate appearing in a trial is self-evident: for the purposes of her career progression, she will want to impress the judge so she is marked as “very competent” or “competent” as the case may be, but there will undoubtedly be

¹⁶ *Ibid*, para 109

¹⁷ *R(Lumsdon & Ors) v Legal Services Board* [2015] 3 WLR 121

¹⁸ *Ibid*, para 8

occasions when her duty to her client may require her to make submissions or take other steps which may annoy or unimpress the judge.

25. There is no perfect answer to this dilemma. But two points are clear. First, the advocate must forget about her desire to impress the judge for the sake of her own career when deciding whether to make a particular submission or take any other step: her sole guiding lights must be her duty to her client and her overriding ethical duties. Secondly, the judge must always bear in mind the difficulties of the advocate. As the Court of Appeal said in *Farooqi*¹⁹, a trial judge “must respect the ... very wide discretion ... vested in ... the advocate about how best to conduct the trial, recognising that different advocates will conduct their cases in different ways, and that the advocate will be party to confidential instructions from his client from which the judge must be excluded”. As this observation implies, the role of QASA assessor will also present potential conflicts for criminal judges, as well as adding to their already heavy and demanding duties.

26. The fact that I consider that there could still be problems from time to time does not mean that I am implying hostility to QASA. On the contrary, when I was Master of the Rolls, I spoke publicly in favour of it²⁰. The common law has always been pragmatic, and, given that there is a need for assessment of criminal advocates, and no money will be forthcoming for other independent assessors, the alternatives are stark: no scheme or a scheme with trial judges as assessors. Furthermore, the likelihood of conflict between the advocate’s duty and her self-interest is, I believe, far, far less than the likelihood of the two factors reinforcing each other. Except for the hopefully very unrepresentative

¹⁹ See footnote 3, para 109

²⁰ Bar Council Conference address, September 2010 (if I recall correctly)

advocate who appeared for Mr Farooqi, in the great majority of cases, a desire to impress the judge favourably will spur an advocate to perform her professional duties as well as she can.

27. So much for an advocate's duty to her client. A rather different, if not unconnected, issue, is the extent of an advocate's duty to the other side. It is an issue which is particularly pressing in the present environment of increasing absence of legal representation with the cutting down of legal aid in the civil and family law areas, and the consequent increase in litigants in person.

28. The general rule is, as Lord Bingham said in the *Al-Kandari* case²¹, "In the ordinary course of adversarial litigation a solicitor does not owe a duty of care to his client's adversary", and the same is true of counsel. In the *Al-Kandari* case itself, a duty of care did exist, because, again to quote Lord Bingham, "[i]t may nevertheless happen, even in the course of contested civil litigation, that a solicitor for a limited purpose steps aside from his role as solicitor and agent of one party and assumes a different role, either independent of both parties or as agent of both". In that case, the court had made an order at the request of a mother preventing her husband from taking the children of his marriage out of the country. The father had to lodge his passport (which was also the children's passport) with his solicitor, and on that basis he was given access to the children, who remained with their mother. The father's solicitors in good faith sent the passport to the Kuwaiti embassy, but did not tell the mother or her solicitors, and the husband then dishonestly obtained the passport from the embassy, and then kidnapped

²¹ *Al-Kandari v JR Brown & Co* [1988] QB 665

his wife and children, assaulted and tied up his wife, and took the children to Kuwait. In those circumstances, the husband's solicitors did owe a duty to the wife as they "were not acting as solicitors [to the husband], but as independent custodians subject to the directions of the court and the joint directions of the parties", so they owed the wife a duty of care, "since" said Bingham LJ "the purpose of holding the passport at all was to protect her lawful rights". That decision was subsequently cited with approval in the House of Lords²² by ... Lord Bingham.

29. However, the duty of an advocate when it comes to assisting the opposition is a little more subtle, and that is not, I think, so much because of her duty to her opponent, but because of her duty to the court. Every advocate has a duty not to mislead the court, and, to that end, she must not make submissions which she knows are untrue. So she cannot submit that her client did not commit a particular crime or do a particular deed, when she knows that submission is false. Thus, if the client in all seriousness and in his right mind, says to his advocate, yes I did shoot the victim in the head, the advocate cannot submit that her client did not do so, because she knows that he did. She can of course submit that the client was out of his mind, did not know the gun was loaded, was aiming at a tree, or was provoked etc. But she cannot submit that something she knows to be a fact is not a fact. Of course, there is all the difference in the world for present purpose between knowing and very strongly suspecting or very strongly believing. Otherwise, advocates would be in an impossible position, and our system of legal representation could not function.

²² *Customs and Excise v Barclays Bank plc* [[2007] 1 AC 181, para 18

30. The difficulty in this connection comes of course with legal submissions. Here, the normal rule is that an advocate must draw the court's attention to any case or statutory provision which is plainly against a submission of law which she is proposing to make. But this immediately gives rise to a difficulty. If there is no answer to the case or statutory provision, how can the advocate realistically make the submission once she has shown it to the court, and, if there is a respectably arguable answer, how can the case be said to be plainly against the submission? Of course, like many apparently clever points, that point involves oversimplifying the rule, but what it does usefully do is to demonstrate that it is a question of degree as to whether a previous decision or statutory provision is sufficiently to the point to be compulsorily disclosable to the court. I think that this may very well be one of those areas where an advocate can perfectly properly, and indeed should, play safe: if in doubt, disclose a case which may be strongly against your submission.

31. But where one's opponent is a litigant in person, the problems are greater because there may be a line of argument open to the litigant which has not occurred to him or to the judge and which may well result in the litigant winning the case which he would otherwise lose. It is not hard to imagine, or indeed to understand, the indignation which the advocate's client would feel if the advocate torpedoed her own case by informing the litigant of the line of argument. On the other hand, many self-respecting advocates, devoted to the rule of law and to the concept of a level playing field, would have an understandable feeling of distaste at proceeding with and winning a case because a point had not been taken by the opposing party, as he had not been able to afford independent legal advice and legal aid was not available to him. This sort of concern, I may add by way of an aside, demonstrates why it is so important that legal aid or some other form of

enablement has to be available to ensure that legal representation is available to those who could not otherwise afford it. Otherwise, the rule of law is brought into disrepute.

32. In this connection, The Bar Council, the Law Society and the Chartered Institute of Legal Executives last year jointly produced guidance on litigants in person, which included a note for litigants in person which says that “[the opposing party’s] lawyer cannot give you legal or tactical advice but can explain the court procedures to you”²³. That’s probably right, but it does not really address the difficult points.

33. For instance, consider the case of an advocate acting for a landlord seeking possession pursuant to a notice to quit which is plainly defective – eg it purports to take effect on the wrong date – and neither the tenant, who is a litigant in person, nor the judge spots the point? The landlord’s advocate is getting close to misleading the court if, having noticed the problem, she proceeds to present the claim on the basis of the notice to quit being valid. It could be said that, by presenting the case, she would not be misleading the court unless she positively asserted that the notice to quit was valid, for instance in answer to a question from the judge, but, even in the absence of such a question, one could say that, by proceeding with the claim, the advocate was impliedly representing that the notice to quit was valid. I am not here to give advice, but to highlight what I regard as a very difficult question. Just as judicial views differed in the *Vernon* case, so could views respectably differ on that issue – indeed, I regard it as rather more difficult than that which arose in *Vernon*.

²³ <http://www.lawsociety.org.uk/support-services/advice/articles/litigants-in-person-new-guidelines-for-lawyers-june-2015/>

34. If the advocate would have to point out the problem with the notice to quit (and thereby torpedo the landlord's, her own client's, case) if she proceeded to present the claim, perhaps she should take the Stewart-Smith option, and tell her landlord client that she would have to point out the problem to the court, and the client might do better to dispense with her services and act as a litigant in person. The Thorpe view might be that the advocate would be bound to point out the defect to the court even in those circumstances, but I must admit to difficulties with that notion.

35. I mentioned earlier that judges are faced with many fewer ethical dilemmas than advocates, but litigants in person do provide issues for judges too. The obvious problem is how far the judge should go in assisting a litigant in person. Unlike a *juge d'instruction* in the civilian law system, a common law judge does not conduct an inquisitorial hearing: classically, our judges are meant to be impassive referees, calling the shots but never playing them. However, no-one doubts that a judge has on occasion to help a litigant in person, and the difficult question is how far the judge should go, and there must be a degree of judicial discretion involved. In the landlord and tenant example I gave, I would have thought that it would be perfectly proper for the judge to have asked the landlord's advocate to justify the validity of the notice to quit, even if the judge had no idea that it might be invalid. But could the judge ask the landlord's advocate the very broad question whether she could think of any arguments which a competent advocate, acting for the tenant, might come up with?

36. Certainly, it must be tempting on occasion to go too far. That is what happened to the Employment Tribunal in the *Sanders* case a couple of years ago. The claimant, who was unrepresented, alleged disability discrimination against her employer, who was

represented by solicitors and counsel. In the course of evidence, an issue arose as to the dosage of anti-depressants which the claimant had been prescribed. After the hearing, the ET undertook independent internet research on the issue and told the parties what it had done; in its subsequent decision, the ET drew substantive conclusions from that research. On appeal, Langstaff J set aside that decision, on the ground that the ET had wrongly strayed into an inquisitorial role²⁴. He accepted that tribunals were meant to provide “swift, informal justice”, and that litigants in person “are at a disadvantage when confronted by the legal team instructed by another party” and that “[a] Tribunal, given its origins, has to be sensitive to that”. However, he said this did not justify “a fudging of the boundary which must be kept between (i) that which a Tribunal is obliged to do, that which it is not obliged to but can do, and (ii) that which it has no right to be doing at all” (numbering added for clarity).

37. In the tribunals, where an unrepresented citizen very often finds himself up against the state, some guidelines have been developed to enable a more interventionist approach than might normally be thought appropriate for a more traditional court. I am told that the Social Security Commissioners take the view that they should raise any “obvious” legal point which a citizen has not, but could have, raised. That leaves a fairly wide margin of discretion, given how views can differ as to what is “obvious”, but I think that that is inevitable.

38. It is interesting to compare the role of English judges with their French equivalents. In a lecture three years ago, my colleague Lord Reed, referred to a hearing which he attended in the Cour de Cassation of an application for permission to appeal against a criminal

²⁴ *East of England Ambulance Service NHS Trust v Sanders (Practice and Procedure)* [2015] IRLR 277

conviction on the basis of fresh evidence. During the hearing, the President of the court interrupted counsel's submissions to say that she had telephoned the witness who had allegedly provided the fresh evidence and had been told by him that he had no real recollection of the matter and had been pressurised by lawyers into signing the affidavit. The application was dismissed on that basis.²⁵ If an English tribunal had adopted that approach, it is not difficult to predict the outcome of an appeal

39. The *Sanders* decision is relevantly interesting for another reason, in that it gives guidance as to how lawyers on one side should help an opposing litigant in person. Langstaff J said that, when a bundle of authorities is prepared for a hearing involving a litigant in person, the relevant passages should be highlighted as "it can be very difficult for someone without legal expertise to know what point emerges from a particular case, and where within the case". I think that contains the nub of what opposing lawyers and judges should clearly do to help litigants in person: they ought to be helping to focus their time and, in and out of court, on the issues in the case.

40. A difference between the civilian and common law systems which is relevant to the legal profession arises from the fact that we are all used to barristers from the same chambers being against, or in front of, each other. However, it seems, at any rate at first sight, to give rise to an obvious conflict of interest to those outside – and not just in the civilian systems. The point has given rise to somewhat conflicting decisions in the field of arbitration. In *Hrvatska v. Slovenia*²⁶, an arbitral tribunal effectively ordered the respondent to cease employing a barrister who was a member of the same set of chambers as the chair of the tribunal. It said that there was no hard and fast rule preventing barristers

²⁵ Lord Reed, *The Common Law and the ECHR*, 11 November 2013, Inner Temple: https://www.innertemple.org.uk/downloads/members/lectures_2013/lecture_reed_2013.pdf

²⁶ This case and the Romania case are both discussed here: http://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf

from the same chambers from acting as arbitrator and counsel, but it appears to have been influenced by the fact that the counsel in question had been instructed very late in the day and had been arguably concealed from the claimant. On the other hand, in *Rompetrol v. Romania*²⁷, on fairly similar facts the disqualification application was rejected, on the basis that, if a power to disqualify in such circumstances exists, it should only be exercised in exceptional or compelling circumstances that would genuinely touch on the integrity of the arbitral process.

41. However, as I understand it, in the world of international arbitration, there is a great deal of resistance to the notion that the arbitral integrity can be maintained if the advocate for one of the parties is in the same chambers as one of the arbitrators. There is also, I believe, resistance in some quarters, to members of the same chambers being co-arbitrators. Whether this in due course ends up with English barristers persuading foreign litigators and clients to accept that the English system is wholly satisfactory or with arbitrators ceasing to stay in, or join, barristers' chambers, remains to be seen.

42. The Court of Appeal has said that close relationships between the judiciary and the legal profession “promote an atmosphere which is totally inimical to the existence of bias”²⁸. However, there will inevitably be circumstances where barristers appearing in front of a member of her own chambers can give rise to problems, but it would hardly ever, if at all, be simply because the two barristers were in the same chambers: there would have to be a super-added fact. In one case, it was that the barrister-deputy judge had acted more than once for one of the parties in the case he was trying²⁹.

²⁷ See footnote 8

²⁸ *Taylor v Lawrence* [2003] QB 528, para 63 – and see *Saunders and Partners v Alan Bristow* (1987) 37 BLR 92; *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 WLR 113; and *Birmingham City Council v Yardley* [2004] EWCA Civ 1756.

²⁹ *Smith v Kvaerner Cementation Foundations Ltd* [2007] 1 WLR 370 is a case in point.

43. Of course, the position is different for solicitors, who work in partnerships rather than in chambers. Lawyers in the same firm cannot normally act for parties with competing or inconsistent interests. Indeed, a lawyer cannot act against a former client unless there is no risk of her misuse or disclosure of his confidential information³⁰. In an era of large international legal firms, large multinational companies with many subsidiaries, and multi-party large scale litigation, the potential for conflict, and the need for effective and speedy conflict checks has become acute. However, the ethical basic principles are very well established.

44. Two newer causes for concern have arisen this century as a result of fundamental legislative changes. The first change is the introduction of, initially, the success fee³¹, and more recently, the contingency fee arrangements (or damages-based agreements as they are slightly coyly called)³². Both of these arrangements involve a claimant's advocate and lawyers having a significant personal financial interest in the success of the litigation. Basically, they get nothing or very little if the claim fails, and (normally) significantly more than their usual level of remuneration if the claim succeeds. The scope for a conflict of interest, when compared with the traditional position where a lawyer's fee was precisely the same win or lose, is obvious. Lawyers are humans, and there have always been some dishonest lawyers, and no doubt there always will be. However, it is essential that they are kept to a minimum and are rooted out whenever possible, because nothing, except perhaps a bent judge, is more corrosive of the rule of law than a bent lawyer.

³⁰ *Prince Jefri Bolkiah v. KPMG* [1999] 2 AC 222; *Marks and Spencer Group Plc v Freshfields Bruckhaus Deringer* [2007] Lloyd's Rep PN 6

³¹ Although introduced in the Courts and Legal Services Act 1990, they became a common reality as a result of the Access to Justice Act 1999 – see *Callery v Gray* [2001] 1 WLR 2112, *Hollins v Russell* [2003] 1 WLR 2487, and *Campbell v. MGN Ltd* [2005] 1 WLR 3394

³² Legal Aid, Sentencing and Punishment of Offenders Act 2012

45. One must therefore be concerned about a change which increases the temptation for a lawyer to fail to accord with her ethical duties. And it is not so much dishonesty that concerns me. It is more the fact that an advocate (or other lawyer) with a financial interest (often a heavy financial interest) in a case will not be giving entirely disinterested advice. If we really believe that lawyers, and indeed other professionals, should not be placed in a position of conflicting loyalties, the case for success fees and damages-based agreements may appear to many people to look a little shaky. And, while these sorts of arrangements exist in many other jurisdictions, this country prides itself, and I think it rightly prides itself, on being an exceptionally highly regarded provider of legal services.

46. I hope it is not naïve of me to hope, indeed to believe, that the commitment to high professional and ethical standards among advocates, and indeed among all lawyers, in this country is sufficiently robust to withstand the temptations, both conscious and unconscious, to which these developments could give rise. And it is fair to say that these arrangements help ensure access to the courts for less well-off litigants, but to many peoples' way of thinking they are far less satisfactory than the legal aid whose substantial scaling back accompanied the introduction of these developments. Further, as this talk has, I think, already demonstrated, the advocate's role is such that any advocate worth her salt will be very used to dealing with conflicts anyway: it is inherent in the existence of the duty to the client, and indeed the desire to impress and do well for a client, on the one hand, and, on the other hand, the ethical duties. Indeed, the potential for conflict could be said to exist even where an advocate is asked to advise on merits: the more optimistic she is, the more likely she is to get a brief fee.

47. The other recent development which gives rise to potential conflicts is the multi-disciplinary partnerships (MDPs) and, perhaps even more, alternative business structures

(ABSs), which were permitted by legislation nine years ago³³. Lawyers can now go into partnership with members of other professions, and they can enter into arrangements whereby non-lawyer investors can manage and/or own and invest in law firms. The risk of conflict in an ABS, where the law firm is owned wholly or partly by non-lawyers, is obvious: the investors will often have no experience of, or interest in, the lawyers' ethical duties, and will often be ultimately only concerned with the bottom line. The pressure they may put on the lawyers in the firm is likely to be such as to increase the potential for conflicts, but once again I hope that the temptations to which these developments give rise will be resisted as a result of the high standards of the legal profession in this country.

48. Let me end with two thoughts about the future. First, the effect of IT and in particular artificial intelligence, AI. In their recent book on the future of the professions³⁴, Richard and Daniel Susskind predict that, as a result of AI and the Internet, the legal (and indeed other) professions will change more in the next twenty years than they have done over the last two centuries. We are all familiar with routine work being increasingly automated as a result of electronic developments. But the book suggests that professional work which appears to involve the very human qualities of expertise, creativity and interpersonal skills will be capable of being done by robots or AI. The recent electronic victories over the human world champions in chess, quiz games and Go seem to me to support the view that this is not at least an outlandish suggestion. Indeed, there are reports of IT systems that can outperform human beings in distinguishing between fake and genuine smiles, and in the US of an electronic program which can predict the outcome of patent cases better than patent lawyers can³⁵. The Susskinds point out that this potential development has ethical as well as employment implications and they call

³³ Legal Services Act 2007

³⁴ Richard and Daniel Susskind, *The Future of the Professions* (2016)

³⁵ See eg <http://conferences.oreilly.com/strata/hadoop-big-data-ny/public/schedule/detail/51145>

for a public debate on the issue. There are many who are sceptical about the Susskinds' predictions, but there is no doubt but that they could be right. The legal profession should, I suggest, be preparing for the problems and opportunities which would arise from such an enormous potential area of development, and one of the most difficult challenges will be to consider the potential ethical implications and challenges.

49. Secondly, and not unconnected with the first point, I would make a plea for greater prominence for ethics in legal training both on University law courses and on professional legal training courses. I have not referred to regulation much in this talk, but one of the downsides of relatively high profile regulation is that it can easily lead to an attractive culture which effectively takes high ethical standards for granted being replaced by a box-ticking approach, in which, provided she can comply with relatively inflexible rules, an advocate feels free to do whatever she likes. Professional ethics cannot always be reduced to simple rules, and if that leads regulators to produce increasingly complex and detailed rules, I wonder whether we are better off as a result. But, whether those concerns are right or wrong, the earlier and more effectively, we train and encourage potential professional lawyers and advocates to appreciate and understand the importance and nature of their ethical duties the stronger a legal profession we will have, and the stronger the rule of law will be.

50. Thank you very much.

David Neuberger

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