THE HONOURABLE MRS JUSTICE AUDREY CAMPBELL-MOFFAT: LANGUAGE AND COMMUNICATION: DOES ONE FIT ALL?

Okay, everybody, I'm going to start with something slightly off-piste, simply because I wanted to move on from what Rajesh and his group were doing, which was mentioning the judge. Because I've only been sitting as a judge now for a year and a half, so I'm talking to you really as a barrister which I was for twenty seven years and a trial barrister, a trial lawyer almost completely. But now that I'm sitting as a judge, I am doing an awful lot of trial law, but in order to just have a little bit of diversity, I'm doing the odd civil matter, which is a learning curve for me.

So I wanted to just go to what was mentioned, which is that we have been focusing upon questions and answers in submission advocacy. I'm going to talk to you in fact about trial advocacy, questions and answers with experts, questions and answers with witnesses, totally different exercise. But I wanted to talk about questions and answers from the bench, and I want to support what has been said. If the bench asks a question, it wants the answer. It does not want a total fudge back. It does not want bullshit. They have, I hope, read the papers and so a direct answer back is the only way forward because I doubt very much that there are very many judges that I know who will let you get away with sticking it in your back pocket and coming back to it later. So if you have to stick it in your back pocket, because you haven't thought about it, because it's come from left field, say so. That's the way to deal with it. You say, 'I'm terribly sorry, My Lady/My Lord/Your Honour/Sir. I'm terribly sorry. I haven't actually got an answer for you for that at the moment, but I will come back to you on it. Please may I move on?' Honesty will get you everywhere. Being shifty will get you nowhere and you will lose credibility. So can I just say that and put that marker down for everybody that we can tell, it's in the eyes every single time. And we have this incredible… It's something that's occurred to me since sitting. It's a totally different feeling.

I was in trial for twenty seven years. The courtroom is my home. I'm very, very comfortable in a courtroom. And the minute I sat on the bench, it was as if I was in a goldfish bowl. I felt like everybody's eyes were on me. I felt like I couldn't breathe most of the time. I think everybody's eyes mostly are still on me because I'm the person who has to make the decisions most of the time, but the point is that what you think the communication should be shifts when you become the person being communicated with. It shifts significantly. And so what I'm going to try and get over to you today is that difference in the communication and I'm not going to do the one-on-one. I want to

make a point about the triangle of communication, which is the person who is asking questions in civil trials or criminal trials of a witness because what is important for you to understand is this: that although you are asking a question of the witness, you are communicating something quite different to the judge. You are telling the judge: here I am on my roadmap, Judge. The style of my questioning, the chronology of my questioning is telling you what my roadmap is because I haven't necessarily had the opportunity to tell you, especially if you're a defense counsel. These questions, Judge, have neon lights on for you. They are telling you where I am going. And in fact, especially as defense counsel when you are cross-examining, you don't really give a stuff what the answer is because the witness is never going to give you the answer you want if you're a defense counsel, are they? It's very unlikely they're going to go, 'It's a fair cop gov', I'm sorry. I did it.'

So what you are doing is saying, 'Here you are, Judge. Here are my building blocks. This is where I'm going with my ultimate submission.' And it's important for you to understand that because just as anybody that's ever been an advocate, and had to be on that feet, we go back to the thinking on your feet the whole time: what I'm doing as an advocate is I know where I want to go, I know what I want to get after of my witness, and I'm starting on that roadmap and I'm putting all the right signposts up because I'm trying to take the witness with me where I'm going. At the same time, I'm only half listening to the answer because I'm saying to myself, 'Am I going to get the answer I want? What is my next question? Is it the question I thought it was going to be? Is it going to be a different question? Has the judge written down what the answer is? If I've got a jury, is the jury actually paying attention to what the answer is?' All of that is going on, even although all I've done is ask a question so far. Then I'm going to wait for the answer to come back whilst at the same time, of course, making a note of my question and making a note of the answer because otherwise I'm going to come up unstuck later and then I've got to go to the next question, so there's a lot going on in your head at that time. Because most of the time, you haven't had the opportunity to settle into your witness. You don't know how this witness is going to take to you. If you have an expert witness, which I will come to it in a minute, that's fine, you've got your language and your rapport going. But with a lay witness, he's a completely new creature, and you may think, 'I'm asking a very simple question that there's a fairly obvious answer to. I have an affidavit or witness statement which has it written down there and he signed it. So he must be able to give me this answer,' and he doesn't.

And I've had that happen quite often, all right? He doesn't.

So already you're having to change what you thought was going to be your relationship with the witness in order to just get out of that witness the case that you want to establish your case, which now is starting to be a little bit of an uphill battle, whereas you thought this was going to be a done deal, whilst at the same time, you're talking it to the judge about the law and the facts mingled into it and establishing your case.

So there are difficulties even with a lay witness as how you go about being an advocate and how you manage to change that stance. If we go back again to tone, pace, volubility, all of those things: some witnesses who are very timid need you to start fairly timid. You need to be assertive. You need to show them you're in control and will take care of them if they're your witness. But you have to start perhaps in a style that doesn't suit you in order to start to create that rapport. But at the same time, you may find you have the type of judge that doesn't like that. There are a number of judges – some people here will have definitely seen them – there are a number of judges where you start asking a question and the judges all the time going, 'Move on, move on. I've got that point. Move on.' Yes? And there's you trying to establish this rapport with your witness to get the best start of them and then you've got pressure from the bench, which is why I talk about the triangle because the rapport goes both ways as well and you've got to create the balance between the two in order to establish that rapport. At the same time as – and again the young practitioners will know – being terrified. Being absolutely terrified because you're on your feet and you know everybody is looking at you and especially the judge who might have a bad reputation for being really snotty with people.

So a tip that I try to give people and it's very hard is you can never be too slow, ever. Take your time. Because if you take your time, you take control back of what your performance is and you take control back from the judge. Hate to say this, don't use it against me. You should be in control. I'm a great believer of this as a barrister, it's when you're on your feet, that court is yours, not the judge's. The judge would give it to you if you are prepared. If you have the right legalese, if you present your case like you know what you're doing, the judge will give you their court. They will allow you that to

run the cases you wanted to be run. If you shuffle, if you are timid, if your head is down, if the papers are all over the place and the judge can see everything, yes, then the judge won't give you the court. You won't even have got on your feet before the judge is taking it back and saying, 'This is my court and I'm going to do it my way now because you've already lost me. I don't trust you anymore.' So you can see that even from the beginning before you ask a question, you've created a relationship, a positive or a negative relationship, with your bench. So it's very important. Goes without saying, everybody, I'm sure people were saying this morning: preparation is everything, absolutely. You can never, ever, ever be too prepared, but if you are prepared, it shows. It shows outwardly and it shows inwardly. Because you know, 'I don't care what she's going to ask me, I know the answer.' It shouldn't be 'Don't worry about that, young man. I didn't know the answer. I'll come back to it later.' It should be 'I knew the answer. I might need some time to gather my thoughts while I think about how I'm going to verbalize that answer so it's effective, but I prepared, so I know what the answer is.' So it's inside and outside. And the whole thing is a presentation that you need to instill into students. And the inside bit comes from the presentation. It also comes from what Rajesh said, which is really important: allowing them trusting themselves to use their instincts. We can't, even after thirty years, know all the law. Even if we've only done the rules of evidence in criminal trials, I still think, 'Is that right? Isn't that right?' But instinctively, I will come up with an answer. Common sense underpins most law. Allow your students to use their common sense when they're trying to be advocates because they have to be on their feet all the time and they have to think quickly, and they don't have the ability to have ten minutes for surrebuttal. They won't, you know, 'Oh, I haven't thought about what I'm going to say yet, so Judge, just go out and have a cup of coffee, will you? Well, I'll think about it and then I'll come back and give you this whizz-kid answer,' which the judge is going to blow out of the water anyway, chances are.

So that sort of thing needs to be thought about for them. How you instill into them a degree of confidence within their abilities to begin with because it will grow, won't it? It's the same with lecturing. When you're first lecturing, when you're first doing your teaching plan, you deliver it, don't you? And you think, 'That didn't work,' or, 'Wow, they were all wonderful,' or, 'I've got the nine o'clock in the morning slot. That's going to be hard work to get them all awake.' Or you've got the late night one and you change how you deliver it.

You change your pace. And I want to go back to pace. A witness's answer to you is directly proportional to the quality of the question. It never changes that rule. If you ask a crap question, you'll get a crap answer. If you ask the question in a timid and uncertain way, the witness will not give you a confident answer. If you become aggressive, the witness will become aggressive back. Everything that you don't do has an equal and sometimes opposite reaction, that's something they need to understand in the relationship. It isn't just 'Have I written down three hundred questions here?', which is what all Hong Kong students do, everybody. All right? They have a whole list and they start at the beginning and they ask the questions and they don't listen to the answers and then they go on to the next question and they think they've done a wonderful job. Yes? So… Yes. Rule number two, listen to the answer first before you move on to the second question. But they do need to create a relationship. If you create a relationship with the witness, just as if you create a relationship with your colleagues, you get on better with them, don't you? That you're more likely to say, 'Can I have some funding for something?' and get them to at least listen to you about the funding, then if they think you're an idiot, and they don't want to give you any funding for anything. It's the same thing – a witness won't open up. And so you will have heard a number of times, anybody that's in teaching of advocacy, that cross-examination is not cross examination. If you want a cross with the witness, that witness definitely not giving you any information. But if you are charming with the witness, then the witness might, maybe, once in your career, give you the answer that you want. But if you are charming with a judge, you'll almost always at least get… They will listen to you. Charm will get you an awful lot of places. If you are just pleasant and professional and listen to the judge and answer the judge charmingly with charm, then the judge may listen to the rubbish answer you give them. All right? And at least give you the benefit of the doubt and the judge may then give you a hint at where you need to go in order to answer the question that they are putting to you.

And can I say this because certainly when I was on the other side of the bench, I always thought when a judge asked me a question, they were playing with me, you know, 'Let's see if she really knows what she's talking about,' or, 'Let's see if she's read the papers.' And I can think of a few judges, but I'm not going to mention them now, who did that. I certainly have not come across that the other side. Speaking to judges now on a daily basis over coffee and everything else, if they're

asking questions, they really just want to know the answer. Yes? They just… If they say, 'Look, I don't need you to tell me about American Cyanamid. No, I know it backwards. Please don't do that. But isn't your problem this?' They want you to answer that problem and they've given you a heads up. So what do you do? You throw it back at them and you've put it in your back pocket and go, 'I don't care that I've got a heads up. I'm actually just going to go off and do the bit that I've prepared, now that you do have just told me you don't want, so that I can think about and panic, about the fact that I can't answer the question.' You know, if… Going back to what I said at the beginning, if you can't answer the question and if it's that bad and it's that important, say, 'I'm terribly sorry. Please would you give me five minutes to take instructions now? And I'll answer you now if Your Ladyship would rise.' If it's that bad. But bullshitting won't get you anywhere.

So, I'm sorry. I'm going back to the witness and the advocate and questions and answers in court and what your students should be looking to do. We've talked about the fact that you have to establish rapport. We've talked about the fact that you have to let the judge know what your roadmap is. That is a different piece of communication if you happen to be, but it may be little way down the line, happen to have a jury there as well, you've got to be keeping a weather eye on the jury.

But going back to rebuttal and surrebuttal, when you're establishing your questions with witnesses, you have to also think about what your opposition is going to ask. And you should be saying to yourself, 'Shall I take the wind out of their sails?' And I'll ask it anyway because at least then I've got my first bite of the cherry. I've seen if I can resolve whatever problem comes out. They're going to pick it up and run with it, but then I get to re-ex. So I'm looking to the judge, as if I'm not scared of this point, and that's quite a good tactic in some situations. Obviously, there're other situations where you could say to yourself, 'My opponent's a bit of an idiot, so if I keep quiet, he's never going to think of it and then that way the point will never come up.' It's another thing, isn't it? About thinking on your feet. What do I ask and what don't I ask? How far do I go in establishing both my case and rebutting the case against me within the question and answer technique.

So I want to take that because I want to move on and take that point into expert witnesses, which is

something I did quite a bit of. Expert witnesses are prepared. They aren't a creature that you've to work out as soon as they come into court. They are somebody you're going to have to have a conference with and you are going to be able to chat to them and they are going to be able to educate you. You will never know as much as an expert witness. And so you have to be humble enough to be able to say to your expert witness, 'Right. I've got this issue. Please explain it to me.' And then you have to be humble enough to say, 'I didn't understand that. Please can you come down another level?' And you keep going down to another level to the point which you understand. And that is the level that which is delivered in court. You can't start going back up again. It has to be basic because I, as the judge, listening to an expert, I don't want to be embarrassed with saying, 'Mr Wong, I didn't understand that. Can we do that again?' You've got to be able to present the case in a way that that's going to be attractive to the judge. And so with expert witnesses, you need that conferencing, so that you can learn about his expertise without trying to surpass him. But also, so he learns about your expertise. He learns about your language: the way questions are asked and answered, the sorts of things that are being established, understanding the issues, the legal issues, in the case against the facts. He needs to be made comfortable, and that's what the conferencing is for and that is a different dynamic than the question and answer dynamic in court. It requires a much more personal, much more professional and equal and respectful relationship, which is perhaps a different dynamic than you might have with a lay witness. You might never be this respectful to any witness, but it's a different dynamic to a lay witness. It's equally a different dynamic to the one you have with a judge because the respect needs to be shown from you towards the bench. If you show the bench disrespect, you're going to be slapped against a wall and never to be seen again. So you need to understand that the language you use differs, depending upon the type of the witness you've got, what you're trying to achieve and who you are trying to actually communicate with, and your communication is rarely only going towards the bench.

I can actually talk for an hour, I'm so sorry, but that's all you're getting today.