



Exploring the Law

The Passionate Advocate

Gary Slapper:

Hello, I'm Gary Slapper, Professor of Law at the Open University. With me is Frances Gibb, Legal Editor of The Times.

Do you want your advocate to be passionate? And should judges be emotional? These are very important questions about the way that key personnel within the justice system operate and the way that they're disposed. What do you think Frances? Should judges and lawyers be emotional?

Frances Gibb:

Well perhaps let's take one at a time. Starting with lawyers, I think that the expectations have changed rather haven't they? I mean the whole style of advocacy to take court room barristers, has changed dramatically over a couple of generations. And we don't now have the, the fireworks and we don't have the histrionics and the grand delinquent rhetoric that we used to have.

It's a very different style altogether. And I think some people may well find that boring. But that's not to say that we should go back to that grandiose style.

Gary Slapper:

Mmm, why do you think the style has changed? What sort of things have affected that move from as you say grand delinquency to a more functional style of advocacy?

Frances Gibb:

It's a hard one. I'm not quite sure what's caused it, except that the fashion I suppose is one aspect. I mean that kind of declamatory style of advocacy seems to have gone right out of fashion. Somebody like the late George Karman was one of the last of his kind. But even then when I've seen him in court and he wasn't actually the kind of dramatic sort of lawyer you might see in American television series and so on. He was actually quite quietly spoken. His drama came with the odd flourish. The white rabbit out of the hat of evidence that you weren't expecting. It wasn't so much in the language.

Um, I think it's more probably training. I think barristers are more rigorously trained than they used to be and I think that judges where time is a factor frown upon what they would regard as playing to the jury, or a lot of time wasting flourishes.

Gary Slapper:

Mmm, yeah, I think that must have had an important impact on the minds of barristers, the gallery and that style insofar as it really developed in the 19th century and early 20th century was taking place in the same social atmosphere as the music hall. And, and in an environment where pre television and pre radio, the gallery of law courts was a place where people would often go for amusement an entertainment. And therefore I think, so very understandable that advocates or some of them anyway would pioneer a style of playing to the gallery and having that particularly melodramatic very pronounced style.

Frances Gibb:

[INTERRUPTS] Yes. I think there's another interesting point. There's a bit of a mismatch isn't there? Between what we see on television, which are generally American dramas. Or even here. I'm thinking of things like Law and Order where you, the, the courtroom is quite dramatic. But actually bears very little relation to what you see in a courtroom in this country in reality. So when people come along and they, they actually enter a courtroom, not that many do, but if they do visit a courtroom they, they're rather disappointed. They don't see judges banging gavels, and they don't see barristers in, in dramatic poses.

And I suppose that raises the question, well we don't have television in our courtrooms so there is that mismatch.

Gary Slapper:

Mmm, mmm. Er, reading a, a while ago the observation of commentator on English courts, who regretted the passage of the melodramatic advocate and suggested that law was the poorer for not being practised in that particular way. And it occurred to me that if justice is the only criterion by which a case is being judged and you'd have thought that's a pretty fair way of judging a law case, then you're going to get a more rational outcome either if it was just a civil case before a judge alone or if it was a case in front of a jury, same thing.

If you were more rational outcome if you are appealing to people simply by virtue of what you're saying rather than the way that you're saying it.

Frances Gibb:

I think there's another point. I mean when we say ask the question do we want our lawyers to be passionate? You do want lawyers to be passionate in the sense that you want them to be committed to the case. You want them to be passionate about the cause, you want them to be passionate in a general sense of fighting for justice.

What you don't necessarily want is for somebody to bring that passion into the courtroom to the extent that they over egg the pudding and damage your case.

Gary Slapper:

Exactly yeah, yeah.

Frances Gibb:

And a barrister said to me recently, he said, I would never make a good prosecution lawyer because you have to be far more neutral and detached as prosecuting counsel. It's particularly dangerous in that case to appear to be zealous and wanting to get your client banged up. That would work completely contrary to your wishes.

Um, if there's going - he said, so for that reason I was, he would always have to be a defence advocate because I was far too more, far, far too emotionally involved with the case. But even there, I don't think it's a good thing. I think it, it can work against. Especially with a judge. Possibly not so much with the jury, but I would be interested to see hear what you think. To be over, over dramatic.

Gary Slapper:

No, I, I think it's an excellent point. I, exactly think that, that one of the cases often advanced as being an exemplification of what barristerial work shouldn't be is the 1603 prosecution of Walter Raleigh by Edward Cook. And because Cook showed a certain hatred and animosity towards Raleigh, who was being accused of treason against the crown and hatching a religious plot to take out King James.

Because Cook seemed to feel a personal hatred, everything that he said in the course of the case was animated in a vexatious way, in a personal way and I think this is often used as an

example of lawyering at its worst. Because in order to be good, lawyering needs to be executed in a clinical and dispassionate way, only based on the **evidence insofar as you** start allowing as you said, lawyers to have a personal, a gut reaction, there's something visceral about it, then you're encouraging them to use the evidence in a way to secure that conviction at all costs.

Frances Gibb:

I think that's absolutely right, I mean they then lose the benefit of their detachment and their neutrality. It's the client who's passionate, the lawyer then brings in an extra layer which I suppose is why they always say, you know someone who, a lawyer who has himself for a client is a fool.

And you have to have that element of detachment. A lawyer has to turn round and the, the client might say well why didn't you raise this point and why didn't you make that? because that won't necessarily go down well, it isn't the evidence, it isn't, it isn't the argument.

Gary Slapper:

Yes, yeah. And I tell you, another danger of allowing lawyers to be passionate about the cases is the like the dog that didn't bark. It's when something doesn't happen that they become suspicious. The Hound of the Baskervilles point that if you're saying that it's quite good if society is saying it's quite good for lawyers to be passionate, particularly about say defence lawyers in criminal cases. And to do what their clients might want them to do which is to be tub thumping and to be, to be very melodramatic.

Then it means that you're encouraging lawyers to accept cases more that they would feel that way about than the ones where they would think and this is a fair defence, I am able to put this with impunity. And that means then that if that goes into the social consciousness in that way, if we expect as a society lawyers to behave like that. Most cases don't probably provoke high feelings among lawyers and where someone is standing up in a, you know wet Wednesday afternoon in a crown court somewhere and doing their best in a professional way, but doesn't have that particular passion to it, it would give the impression that that's not such a sound defence. Because the lawyer isn't being passionate and judging cases unfairly in, in that way. ...

Frances Gibb:

Yes, that's a good point and it also raises doesn't it the whole question of the cab rank principle. I mean members of the public as we all know everybody and I'm probably guilty of this as well. You say to barristers when you meet them, how could you have defended that person? How could you bring yourself when you think your client is guilty? How could you take on such a disgusting case?

And it's, it's again that detachment. They are meant to be detached. they might be passionate for justice but they, it doesn't matter actually. Their passion is to make sure the person gets a fair trial. That's what they're there for.

Gary Slapper:

Yeah, absolutely, yeah.

Frances Gibb:

Not, not actually taking on their client's cause. Otherwise you'd only have barristers, you wouldn't have the cab rank rule where they take every case in strict rotation. You would just they have barristers taking the causes they actually believed personally in. Which would be completely wrong.

Gary Slapper:

Absolutely, I think that's an excellent point and, and that it also make in some ways the tribunal of fact, the judge or the jury or the magistrates, depending on what sort of case it was, unnecessary. Because if the lawyers were allowed to prejudge and come to a decision about innocence or guilt, or whether someone was liable or not liable as opposed to as you say as to just putting the case, it would mean that the, the whole other part of the apparatus was unnecessary.

And looking at judges emotional involvement, this expresses itself as occasionally it does. it's never seen to, to me that troubling - judges have been crying in cases periodically for for a number of years Chief Justice Ryder, who in 1754 presided in a case is, is the prosecution of a woman charged with killing her 6 month old baby. And he said that he recorded to in his diary that he'd been so affected by his own speech to the jurors that the tears were gushing out several times against my will. It was discerned he said by all the company which was large and a lady gave me her handkerchief, dipped in lavender water, and to help me. So he moistened his tears.

But he then convicted her and sentenced her to death. And, and so the, emotional was at that time divorced from the outcome of the case. But there have been more modern cases including one at Oxford Crown Court in 2006 where the judge was listening to a particularly well awful rendition of the life of a young female doctor which had been tragically ended by a thug who was racing a car without a licence or insurance and -

Frances Gibb:

Yes, I remember it.

Gary Slapper:

Um, smashed in, into this car. She was a newly qualified doctor and he killed her instantly and shattered a car and her, her body and her life and the life of all of those around her. And her mother gave a very traumatic exposition of the facts in a victim statement to the court and it made the judge become tearful and not, not the only one. And yet in this case one of the people involved, the police officer was critical about it, and I thought that you exphe -

Frances Gibb:

I think, I think that's very unfair. I think probably it's because it's so unusual. but I personally and I don't know, I wouldn't think that many members of the public would be critical of a judge who expressed emotion in that way occasionally. I mean you'd be inhuman if you weren't affected by cases like that.

I think what has changed with judges is that you don't have the kind of histrionics and fireworks that one might have had say 20 years ago from a few of the characters on the bench. And by that I mean you don't have the judges giving vent to anger, irritation and being rude, aggressive, unpleasant. passion in that way. that, that is completely out. It, it's frowned upon. Training has got rid of it and I think a generation of judges has seen a change. So we don't have crusty - well muh mostly we don't. There are exceptions, but mostly we don't have judges who give free vein to their feelings insult bah, barristers and all the people ... coming before them. It's very uncommon. You, they're, they're trained to be neutral, to be sympathetic and I think as, as a generation of judges, they are more like that. They're not impatient, terrifying and intimidating. They are generally more understanding and sympathetic.

Gary Slapper:

That's excellent, thank you so much Frances.