

EXTENDING ADVOCACY SKILLS IN THE AGE OF THE “VISUAL”

Precis of some principles mentioned in a lecture that displayed many working examples of imagery used in criminal trials.

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In my view advocates need to add to their suite of skills:

1. Instruction and management of the work of expert computer animators and illustrators.
2. Control/ creation of visual imagery through computer use.
3. Operation of computer displays in court rooms.

Advocates will still persuade courts by oral skills alone. Even against an opponent who has put on dazzling visual displays. However, to rely on oral skills alone disregards the persuasive force of visual imagery. Never a truer saying than “A picture is worth a thousand words”. Not to adapt to and adopt the power of computer aided visuals is to take a risk of losing cases that might otherwise have been won.

But before you stop me with the very good point: “Advocates can have no role giving evidence” – let me define an important limitation. It should be noted that an advocate can create schedules of data from primary materials: a schedule of relevant text messages that has been drawn from a mass of computer print outs. Similarly, the advocate can create a presentation of visual images if strictly drawn only from primary sources of evidence.

Try to find coherent legal authority for the admission of visual evidence in its many forms and you will find surprising little attention has been given to this area by the courts. And no Criminal Procedure Rule has been introduced either. The position in England and Wales should be contrasted with the detailed legal positions established in the various States of the United States of America.

In the US juries still hold sway in many civil actions in the US. Crucially juries often award high damages from which lawyers take their rewards. So motivated lawyers deploy the best visuals they can to persuade juries. *New York v McHugh* 476 N.Y.S.2d 721 (Sup.Ct.1984) " A computer is not a gimmick and the court should not be shy about its use when proper... .. What is important is that the presentation should be relevant ... that is fairly and accurately reflect the oral testimony offered and that it be an aid to the jury's understanding of the issue."

What do we appear to have in England and Wales?

Criminal Justice Act 1988 Section 31 - Form of evidence and glossaries.

For the purpose of helping members of juries to understand complicated issues of fact or technical terms Criminal Procedure Rules may make provision—

(a) as to the furnishing of evidence in any form, notwithstanding the existence of admissible material from which the evidence to be given in that form would be derived; and

(b) as to the furnishing of glossaries for such purposes as may be specified;

in any case where the court gives leave for, or requires, evidence or a glossary to be so furnished.

The advocate must be trained to answer the question: Is the imagery an aid to help the jury understand facts or is its underlying purpose or effect emotional and irrational? If the latter, objections will be or should be raised by the opponent. Section 78 Police and Criminal Evidence Act 1996 may be of application here. The power of the court to exclude evidence which prejudicial effect outweighs its probative value.

It appears to be essential for all proposed imagery to be served pre-trial. This improves the chances of reaching agreement with your opponent to its admission. Where your opponent will not agree to admit the imagery pre-trial disclosure makes it more likely you will get the Court's leave to use it.

In a facial mapping Lord Steyn in R –v- Clarke House of Lords 1995 stated: “It would be entirely wrong to deny to the law of evidence the advantages to be gained from new techniques and...advances in science.” This statement is regarded as a spur to the adoption of other imagery techniques, computer managed or otherwise, that properly conveys evidence to juries.

In addition to developing computer mastery over the presentation of imagery to be used when the court is receiving the evidence an advocate should be skilled at using computers to create images that may assist closing arguments.