Decision-making in trial advocacy

By Chris Marnewick SC, Durban Bar

While paging through a medical journal, I came across an article with the title 'Surgical decision-making.'[1] Terms that caught my eye included the following: *ability to operate; capacity to make sound decisions; mental processes involved; sound decisions; favourable result; unforeseen and unpredictable circumstances; collecting information ... formulated management plan*. I saw in the footnotes that there were articles on subjects such as: *How to make good decisions; Integrating evidence, inference, and experience; Effect of sleep deprivation; Risk attitudes; Audit and feedback; Situation Awareness;* and *Knowing your limits and limiting your risks*. The author drew a clear distinction between the manual skills involved in a surgical procedure and the capacity to make sound decisions before and during the surgery. I couldn't help thinking that it was much the same for an advocate. In order to conduct a trial, we need advocacy skills as well as the capacity to make sound decisions with regard to the conduct of the trial. Like surgeons, we analyse the evidence in order to implement our trial tactics.

The article concluded with the author saying: 'Sound decision making can be seen to result from the acquisition of surgical wisdom, which is achieved through learning, experience and reflection.' I wondered whether it was possible to teach *Decision-making in trial advocacy* and how we could facilitate the acquisition of the advocate's equivalent of surgical wisdom. Experience can only be gained over time and can for obvious reasons not be taught. But the question is whether advocates could be taught how to make sound decisions.

Nowhere in the practice of an advocate is the question more important than in trial advocacy. A trial is a dynamic thing. The situation changes with virtually every question and answer. The advocate has to react very quickly. There is no time for reflection. The decision about what to do or say must be made immediately. It is not like a basketball game where one could call for a time-out. It is more like the surgeon's situation. The patient is on the table and the next cut must be made.

I read somewhere that it takes 10,000 hours of coaching and training to produce an Olympic quality athlete or a top-ranked tennis player. It takes the average advocate 12 to 16 years to rise to the level of silk. The difference between the beginner and the silk lies in the different levels of experience, which in turn is acquired by practice and reflection. But decisions have to be made in the meantime, while the advocate acquires that experience. How can we help the novice to make those decisions so that they will be sound decisions?

I am not convinced that it is possible to teach how to make sound decisions because there are too many factors which might have a bearing on any particular decision. Further, since the individual advocate's experience and natural talent will play a role and affect the quality of the decisions made by him or her, there could be no one model-fits-all teaching manual. At best, I think, one could teach – and the novice advocate could learn – how not to make bad decisions. This approach would be in consonance with the feedback method we use in advocacy training, where the emphasis is on isolating an aspect of the advocate's performance to help him or her to improve in the performance of the skill concerned.[2]

This article will explore the ways in which an advocate can prepare for a trial in such a way that sound decision-making during the trial is made easier and the risks of making bad decisions are reduced.

But first, what is meant by decision-making? And what is a sound decision? Decision-making in the context of a trial means the mental processes involved in choosing between options. A sound decision is one which improves the client's chances of success. In the numerous ways that decisions may be called for during a trial, the focal point is this: Every decision must have as its basic imperative that it should improve the client's chances of success.

Generally there are three classes of factors which may influence the decision-making process. There are factors outside the advocate's control such as the quality of the witness, the strength of the case, the disposition of the judge, the honesty of one's own or the opposing witnesses, and perhaps the assistance received from other members of the team including the instructing attorney or an expert witness. There are factors which are personal to the advocate, such as stress, time pressures, fatigue, degree of preparation and depth of experience. And there are factors inherent in the decision itself, such as the difficulty of the matter, the strength of the case, time pressure, the available options and the accuracy of the information upon which the decision is to be based.

The factors outside the advocate's control and the factors inherent

in the decision to be made cannot be controlled by the advocate. They are, on the contrary, factors which the advocate has to take into account in his or her own preparation to ensure that when the time comes for a decision to be made, the advocate will be in a position to make a sound decision in the face of those factors. On the other hand, those factors which are personal to the advocate or under his or her control need to be faced in order to ensure that the advocate is able to make sound judgment calls and reduces the risk of making unsound decisions. How is this to be done, especially if one is relatively new to practice or without the benefit of a good deal of experience?

The answer comes in three parts: One: Create a suitable Plan. Two: Stick to the Plan. Three: Reflect on the Plan.

Creating a suitable plan

Most decisions affecting the manner in which the trial will be conducted can be made before the hearing when there is no time pressure or stress involved. This is known as preparation.[3] That preparation has to embrace all of the usual components of a trial, namely: (1) Opening statement (2) Examination-in-chief (3) Cross-examination (4) Re-examination (5) Closing argument. It is no exaggeration to say that too few advocates make sufficient use of written advocacy, and even fewer of the written word to help them in the presentation of the case.

A written scheme could – and in the case of newly admitted advocates, should – be prepared to serve as a guide or a plan for the presentation of the case. The decision-making process starts during the preparation. What to say in an opening. Who to call as witnesses. What evidence to lead from each witness. What exhibits to use. What to expect as the opposition's evidence. What themes to pursue in cross-examination. What to say in the closing argument. What objections to anticipate. How to respond to them. And so on. Just as the surgeon plans the operation in advance and then performs the surgery in accordance with that plan, an advocate can and should anticipate the incidents of the trial during the preparation stage and then conduct the trial accordingly.

A scheme for such a plan appears at the end of this article.

Sticking to the Plan

Having the Plan in writing also facilitates its execution when there are interruptions, deviations and letdowns. The opponent may object. The judge may ask a question out of turn. The witness may let you down. There is only one way to deal with the many incidents of a trial. Deal with the immediate issue – answer the objection or the judge's question and then return to the Plan and continue from where the interruption occurred.

The Plan serves as a roadmap through the trial from beginning to end. No new decisions then need to be taken during the trial. Everything – or as much as one could reasonably anticipate – has been taken into account already. Such decisions as need to be made during the trial are made easier and enjoy a greater probability of being sound simply because they have been anticipated when there was time for reflection.[4]

Reflection on the Plan

Afterwards, when the case is over, reflect on everything that happened. Consider what you could have done better. Learn from what your opponent has done – the good and the bad. Learn from the judgment – win or lose. Read, if there is a typed record of the proceedings, your examination-in-chief and cross-examination. Identify mistakes and bad habits in order to eliminate or avoid them in future. Then adjust your Plan accordingly for the next case. But don't stop there. Discuss the matter with a colleague and invite their comment or feedback on your conduct during the trial.

An example of a trial plan

Space does not allow for a detailed plan for each of the trial processes to be included here. The following is intended as no more than a general guide for the novice so that he or she will have a structure around which to create a plan which will produce two advantages. The first is that the advocate will have the opportunity to make the most important decisions well in advance of the trial and under circumstances where there is an opportunity for careful consideration of the pros and cons of any situation. The second is that the decisions to be made during the trial will not have to be rushed or made on an *ad hoc* basis, but rather as decisions made in pursuance of a well prepared overall plan or strategy.

Scheme for an opening statement

Describe the type of case, for example, a claim for delictual damages.

Deal with the Rule 37 conference and deal with procedural issues.

Identify the issues and mention the onus of proof.

Briefly state the facts (in an understated manner and without comment or argument).

Identify the witnesses to be called and briefly state, in an understated manner and without comment or argument, what each witness will say.

Identify the defence and briefly state, in an understated manner and without argument or comment, what evidence will be led to meet the defence.

Adjust this scheme as the circumstances of your case require. Make sure that the opening statement is in writing. Indeed, it may be handed in as a written opening statement. To this end a chronology schedule is most helpful. The chronology schedule should contain at least the following four columns: (1) Date (2) Event (3) Actor, author or witness (4) Page reference (in bundle or record). An extra column can be added later for comment. The chronology schedule should be updated during the trial and the comments column used as part of the closing argument. A chronology schedule is not only essential for an advocate's mastering of the facts, but helpful as a tool in the process of persuasion.

Examination-in-chief

Examination-in-chief is probably the most important and also the most difficult process in a trial. It is the most important because the overwhelming majority of cases are determined by the evidence elicited from the witnesses by examination-in-chief[5]. Examination-in-chief is also the most difficult skill to manage in a trial. You are not allowed to ask leading questions. You need to extract all the favourable evidence from the witness while avoiding adducing inadmissible evidence. You want to control the flow of information so that you get the whole story out of the witness in a chronological, coherent and persuasive form. This cannot be achieved – not by a beginner at any rate – without a considerable amount of preparation.

The starting point is to prepare a timeline (an individualised chronology) for each witness.[6] With that timeline to hand, the advocate may then lead the witness through the following stages in the examination in chief:

Introduce the witness to the court (full names, occupation, experience, etc).

Introduce the witness to the scene (if the evidence is about what happened at a particular scene or at a meeting, for example).

By appropriate questions, elicit each item of evidence identified in the timeline. Deal with exhibits at the same time and in chronological order.

Ask the witness to comment on the defence.

Re-examine the witness in order to repair damage or give explanations where required.

Numerous difficulties may arise during the examination-in-chief. There may be an objection or an interruption by the judge. Or the witness may run ahead, leaving out some important details. Or the witness may deviate from the timeline. Each of these events will require an immediate response from the advocate. The response will involve the taking of a decision – what to do or say next. It is not possible to plan ahead for every potential event or incident which may occur, and the level of an advocate's skill and experience will dictate to a degree whether the response is a sound one. What will help though is a plan to which the advocate can return when the diversion is over. That plan is the timeline.

But the timeline is not enough. The advocate has to know how to ask non-leading questions. Generally questions starting with interrogative words should be used. *When? Where? Who? What? How?* And so on. The piggybacking technique is also helpful.[7] Each question is linked to the previous answer. *I saw that the traffic light was red*. What did you do when you saw the light was red? *I slowed down*. What happened while you were slowing down? If the timeline for the particular witness has been prepared with sufficient care, breaking down the important pieces of evidence as the example suggests, the process of eliciting the evidence could be controlled and executed with near-mechanical efficiency. There is no need for an *ad hoc* decision about the piece of evidence to be sought next as it is next in the timeline.

A scheme which eliminates the need for *ad hoc* decision-making when the advocate is under time pressure and stress leads to sound decisions and is in itself an example of good decision-making practice.

Cross-examination

Cross-examination is far easier than examination-in-chief, just as it is easier to break something than to manufacture it. It is essential to anticipate who the other side's witnesses will be and to do that well before the hearing. Then a separate scheme has to be put together for the cross-examination of each opposition witness. There are five essential steps involved: (1) Identify the potential opposition witness. (2) Determine whether it is necessary at all to cross-examine the witness. (3) Determine whether it would be possible to elicit favourable evidence from the witness. (4) Decide whether it is necessary to engage in the destructive cross-examination of the witness; and (5) Determine whether it will be necessary to put a contrary version to the witness. The overarching idea is that only questions which improve the client's case ought to be asked.

Under the heading of destructive cross-examination, the advocate may have the following themes:[8] Observation. Memory. Recounting. Prior inconsistent statements. Prior bad acts. Bias, interest, prejudice, corruption. Previous convictions or acts of dishonesty.

The more experienced an advocate becomes, the less the need to write the questions out. In respect of the version to be put to each witness, that ought to be written out and put precisely in accordance with one's instructions on the points concerned.

In cross-examination, as opposed to examination-in-chief, the emphasis is not so much in how to frame the questions as in what sort of questions to avoid. Professor Irving Younger's list of do's and don'ts is especially helpful to the beginner.[9] *Be brief. Ask short questions using plain words. Ask only leading questions. Do not ask a question unless you know the answer. Listen to the answer. Do not argue with the witness. Do not elicit adverse evidence. Never ask why. Avoid asking a question too many. Leave explanations for the closing argument.*[10]

Closing argument

Closing argument ought to be prepared in advance of the trial. Everything the advocate does during the preceding phases of the trial is intended to serve that argument. So one has to know what argument is intended to be made before the opening statement is made. The following scheme may be used for a closing argument:

A summary of the issues to be decided by the court.

A summary of the evidence on each issue.

Argument on the facts, keeping in mind the onus of proof, in respect of each question to be decided by the court.

Argument on the law, where necessary.

A final submission with regard to the order or orders sought by the client.

An argument, of course, is a series of propositions which are supported by the law, the facts and the evidence and are connected to each other by a string of logic to justify a conclusion. Heads of argument prepared before the trial are an invaluable help, especially to the beginner. The heads of argument could be refined each evening as the trial progresses, *inter alia* by updating the chronology used during the opening statement. As new facts emerge during the hearing, they may be inserted in the chronology. Since the opening statement may not include argument, the time for inserting comments into the chronology is when the final draft of the closing argument is being prepared.

Conclusion

The numerous decisions which the advocate on his or her feet in court is required to make will be made a lot easier if proper preparation has been done well in advance of the trial. It is only in the repeated process of preparation for trial and the execution of the trial processes in accordance with a structured plan that one acquires what could be described as the decision making skills of a trial advocate. Without such preparation there can be no personal development in the advocate concerned, nor is there likely to be much success in the trials such an advocate conducts.

Endnotes

[1] David M A Francis 'Surgical decision making' (2009) 79 *ANZ Journal of Surgery* 886-891.

[2] The method is known as the feedback method of instruction and requires the trainee to perform an exercise and receive feedback in return. The feedback is given in a 6-step process which involves the following stages: Headnote, Playback, Rationale, Prescription, Demonstration and Replay.

[3] The maxim *proper preparation prevents poor performance* has a lot to it.

[4] It was Louis Pasteur who said that luck favours the well-prepared and Gary Player who translated that into the statement that the harder he practised, the luckier he got.

[5] It is in my view a dangerous myth that cases are won in cross-examination.

[6] There is an example in Marnewick *Litigation Skills for South African Lawyers* 2nd ed at 315.

[7] See *Litigation Skills* at 317-318.

[8] *Litigation Skills* 334.

[9] *Litigation Skills* 335.

[10] These are general principles and one may have to deviate from the literal rule from time to time, but it is best for a beginner to stick to these general principles because doing so reduces the risk of making bad decisions.