Contents

Chapter 1

An introduction to mooting

1.1 Structure of chapter 1

This chapter will essentially deal with **three** main issues.

First, the bulk of this chapter will consider what mooting actually is and what is involved for the participants in a moot. This will include a sample moot problem, the criminal case of *R v Owen Owens*, and some explanation of what it contains. This will enable you to get started on mooting in a practical way in the context of a real moot. **The pages dedicated to this moot problem are edged with grey for ease of reference.**

Secondly, there will be a brief look at the history and origins of mooting.

Finally, the chapter will deal with how mooting is useful and relevant to law students and practitioners today.

1.2 What does mooting involve?

In very simple terms, a moot is a simulation or mock version of a hypothetical case in one of the appellate courts. In England and Wales, this would therefore mean either the High Court (sitting in its appellate capacity), the Court of Appeal (Civil and Criminal Divisions), or the House of Lords. Even though a moot is a fictitious case, without real parties and without (in most cases) fully qualified lawyers, it can still be a fairly realistic reflection of what goes on in the appellate courts if it is done well.

A moot is different from a mock trial in that, as with real life appeals in the appellate courts, the hearing is not normally a complete rehearing of the case, with all the evidence and witnesses being heard. Mooting does not involve the cross-examination of witnesses and arguing about the facts. Instead, the hearing in a moot usually consists of the following.

1.2.1 Legal submissions on behalf of the appellant

This is the party appealing against the decision(s) of a lower court, and therefore submitting that the appeal should be allowed.

1.2.2 Legal submissions on behalf of the respondent

This is the party who will be arguing that the decision(s) of the lower court should be upheld, and that the appeal should therefore be dismissed.

1.2.3 A reply by counsel for the appellant

Because counsel for the appellant will not have heard the submissions from the respondent until after they have spoken, some extra time is normally allowed for them to respond to the submissions made.

Note that the appellant is the party who is bringing the case and who is asserting that the decision(s) of the lower court should be reversed. The respondent is the other party in the case who is, presumably, happy to let the decision(s) of the lower court stand. The respondent will, as the name suggests, respond to or contest the submissions made by the appellant and argue that, on the contrary, the appeal should be dismissed.

At the end of the submissions, the judge(s) will then announce the winner of the moot. This will not necessarily be the side with the winning legal argument, but will be the side that has demonstrated the best mooting and advocacy skills. Winning the case is not, therefore, the same thing as winning the moot.

The law may often, unless the moot is brilliantly written, favour one side more than the other. For example, the appellant may have a stronger case than the respondent, but this does not mean that the appellant is bound to win the moot. On the contrary, counsel for the respondent may demonstrate far greater mooting and advocacy skills than counsel for the appellant. As a result, counsel for the appellant will receive lower marks from the judges, and counsel for the respondent will win the moot. Thus, even a mooter who has a very difficult argument in legal terms can still emerge victorious in a moot. The judges will generally be aware that one side may have an easier argument than the other and will normally take this into account when judging or assessing the moot. As well as mastering the relevant law, much of the skill in mooting is to adopt a style that is persuasive and appropriate to a court setting. For some, this comes naturally; for others, this requires much thought and practice.

1.3 Mooting, mock trials and debating compared and distinguished

Whilst there is a degree of overlap between these three activities, there are also some very important differences.

As has been stated above, a moot is not the same thing as a mock trial. The moot hearing is never a trial of the factual issues in a case, as one would see in a court of first instance. Mooting never involves the calling of witnesses and their subsequent examination in chief and cross-examination. It does not involve making speeches to juries on which version of the facts to accept. As a result, the style expected in moots is a rather less impassioned style than might be expected from an advocate in a trial or mock trial. In the English and Welsh context, you are trying to simulate the type of advocacy that you would see in the Court of Appeal or the House of Lords. There is more on this in chapter **3**, but you should visit a range of courts in order to get a flavour of the differences between trial and appellate advocacy.

Nevertheless, there are some similarities between mock trials and moots. The most obvious is that both involve simulating a real-life case in a court of law. The mock trial simulates the trial at a first instance court, and the moot simulates a hearing in one of the appeal courts, as stated above; and both involve the participants demonstrating the important skill of adopting the mannerisms and speech that are appropriate to appearing in court as a lawyer.

The reality is that the legal practitioner may have a mixture of cases, both trials and appeals. It is therefore recommended that, time permitting, students attempt to involve themselves in both activities. Finally, both mooting and mock trials will involve students demonstrating some ability to understand and argue the law. A general understanding will rarely be enough with either of these activities, particularly in mooting. Instead, it is necessary to engage with the law in a more detailed way than most law students do in preparation for tutorials etc.

Perhaps more obviously, a moot is different from a debate, in that a debate can be on any issue, not necessarily a legal one. Like mooting, debating involves public speaking in the form of speech making and responding to points made by the other side. Unlike mooting, debating does not involve a highly stylised form of speech. As will be discussed later, mooters do have some freedom in terms of their own personal style. However, debaters undoubtedly have more freedom than mooters in terms of adopting a style which suits their own

personality and way of speaking. The obvious reason for this is that the debater is not confined by the conventions and traditions of courtroom speaking.

1.4 The moot problem

When you first take part in a moot, the organiser (either the organiser of the competition or, if you are doing mooting as part of a course of study, a lecturer) will give you the moot problem, along with other guidance.

This will usually consist of:

1) The **facts of the case**, including which court(s) the case has already been heard in.
2) The **decision(s) of the lower court** on those facts.
3) The **legal reasons** for the decision(s) of the lower court.
4) The **legal authorities** relied on by the judge(s).
5) Details of **the court** in which the appeal (and therefore the moot) will be heard.
6) What **your role** in the moot will be (moots normally have four participants, excluding the judge(s)).
7) What the **grounds of the appeal** are. The moot problem should normally make clear which grounds of appeal should be dealt with by each of the participants.

For example, in a criminal case, such as *R v Owen Owens*, the original trial could have been heard by a Crown Court judge sitting with a jury. The appeal for such a case (and therefore the moot) would normally be heard in the Court of Appeal (Criminal Division). You might be given the role of senior counsel for the appellant. In the case of appeals to the Court of Appeal (Criminal Division), the appellant is, more often than not, the original defendant from the trial. If you are senior counsel for the appellant in the above example, it would therefore be your role to argue/submit that the trial judge at the crown court had made a mistake in terms of point 2, 3 or 4 listed above. An example in the criminal law context above might be that the judge misdirected the jury on the law in his or her summing up, and that the conviction is therefore unsafe. Counsel for the respondents would be representing the Crown, and therefore submitting that the appeal should be dismissed and that the conviction is safe.

Points 1 to 7 listed above will now be considered in more detail.

1) The general rule is that you are stuck with the facts of the moot problem that you are given. The skill of mooting is not disputing the basic facts. It is not a good argument to say that the facts are wrong, or to dispute facts that appear to be concrete in the moot problem. If there is some evidence that is unclear, or if a dispute on some facts is specifically disclosed by the moot problem, then it is fine to raise these issues in your submissions. If not, please do not waste your own time, or that of the judges, by getting involved in this sort of dispute.

An important difference between a moot case and a real case is that, in the latter, the advocate is attempting to win the case, or get the best result possible for the client. In a moot, the motives of the advocate are completely selfish. The mooter's aim is to win the moot and get through to the next round, in the context of a mooting competition, or to get a high mark in the context of an assessed moot which is part of a student's course of study. The problem is fictitious and the client does not exist, so the mooter has no reason to care about the actual outcome and whether the appeal would be allowed or dismissed. Being declared the winner in the moot, or getting a good mark, is everything. It is of little consolation to the client in a real case to be told, after he or she has been sent to prison or ordered to pay damages, that their lawyer would have won the moot.

2) This information will tell you how the decision of the judge(s) in the lower court affects the parties to the moot, that is the appellant and the respondent. The appellant is, it follows, going to be the party who was, for some reason, unhappy with the decision of the lower court, and is therefore appealing to have that decision reversed. The respondent, on the other hand, will be keen for the status quo to be maintained.

3) The key to mooting is the ability to use the law to argue either that the lower court got things wrong (counsel for the appellant), or that the lower court got it right (counsel for the respondents). As stated above, the moot problem will not simply tell you the decision of the lower court, but it will also give you the legal basis for the decision, and the authorities upon which the decision was based.

Mooting is not about saying what one believes or thinks; it is about making submissions based on legal argument. As a mooter, once you know why the judges(s) at the lower court arrived at their decision, you immediately have the basis of your case. If you are counsel for the appellant, your job will be to use the law (primarily cases, statutes

and delegated legislation, in England and Wales) to submit that the decisions or pronouncements of the lower court were wrong in law. The respondent's job is to use the law to submit that the lower court was correct in its application of the law to the facts. Whichever side you are representing in the moot, one of your first tasks will be to look carefully at the legal reasons for the decision of the lower court, as provided by the moot problem.

4) The authorities relied on by the judge are vital to the mooter. Counsel for the appellant will want to read the authorities referred to, in order to ascertain whether the judge(s) of the lower court made a mistake in applying them in the way they did. For example, counsel for the appellant may try to argue that cases which seemed to be treated as binding by the judge in the lower court can actually be distinguished from the present case. As a result of such submissions, they will ask that the appeal be allowed. Counsel for the respondent will be looking at the same authorities to find the passages on which the judge(s) may have relied, in order to argue that the appeal should be dismissed. It is in using these authorities, and any others that are relevant, that the mooter will build the arguments that suit the case being made.

Indeed, it should be stressed that mooters are not confined to referring to the cases and other authorities mentioned by the judge(s) of the lower court. On the contrary, the basis of a mooter's submissions may be that the judge(s) did not refer to the authorities that they should have. From the above, it hopefully goes without saying that mooting involves a great amount of engagement with primary sources of law, such as case law. A superficial engagement with a source, such as a case or a treaty, will usually not be enough. The mooter will normally be required to read the full judgment or text, and to be able to refer to passages therefrom in order to support his or her submissions.

5) Your knowledge of the court hierarchy and the doctrine of judicial precedent will tell you that point 5 above is important, because the level of court in which you are mooting will determine what arguments can be employed.

For example, if you are mooting in the Court of Appeal, as in the example above, you will be bound by any relevant House of Lords' decisions and, possibly, by decisions of the Court of Appeal in previous cases. If your moot is in the House of Lords, then you have more freedom, as the House of Lords is, of course, free to depart from its own previous decisions since the Practice Statement [1966] 3 All ER 77.

Some law students, quite wrongly, seem to regard these basic principles as somewhat beneath their radar. The reason for this is that these issues are normally studied at the very beginning of most law courses. By the time that most students start mooting, they will already be immersed in the detail of substantive legal subjects, such as contract and tort. As a result, these vital principles can sometimes be forgotten, or relegated in the mind of the law student, to a lower level of importance than should be the case. This applies especially to less meticulous students, who rely solely on secondary sources of law, such as the recommended texts for their course of study. For more on knowledge of aspects of the legal system, and their relevance to the mooter, see chapter **2**.

6) Clearly this is vital as, without this information, the mooter would have no basis for his or her preparations and submissions. This will also tell you who your opponent is and who, if applicable, are your teammates.

7) As with the facts, as stated above, you are pretty much stuck with the grounds of appeal. If you are counsel for the appellant, these will tell you the legal basis on which you should argue that the decision(s) of the lower court were wrong. If you are counsel for the respondent, these are the grounds that you will be opposing in your submissions.

The golden rule here is not to argue outside the grounds of appeal. The reason why you should not do this is simple: in a real-life case, a party wishing to appeal against a decision of a lower court, whether in a criminal or civil case, is required to state precisely the grounds on which they are seeking to challenge the decision. This is so that the other side has notice of the arguments they will face, and can prepare accordingly. If the appellants were to draft their grounds of appeal, and then decide to change them at the hearing, this would mean that the respondents would probably not be in a position to continue, as they would be unprepared. If the respondents tried to argue outside the grounds of appeal, the appellant would have the simple retort that the arguments are irrelevant, because they do not address the reasons why the decision of the lower court is being challenged.

The same is the case in a moot. Both sides must stick to the grounds of appeal, as laid down in the moot problem; otherwise, the moot simply will not work.

There may, however, be some room for disagreement as to what matters fall within the grounds of appeal. Wherever language is involved, there is always room for argument about interpretation of

that language. As a result, if you are raising a matter that may be of borderline relevance, you must ensure that you can justify its inclusion in your submissions. If a judge deems a matter to be irrelevant to the grounds before the court, he or she will probably not wish to hear submissions on it.

1.5 A sample moot problem

The sample moot problem below is to help you to identify points 1 to 7 in the previous section, and to get you started with preparing a moot. You will see that points 1 to 7 are covered again after the problem, so that they can be understood in the context of this specific moot problem.

This moot problem is referred to throughout the following chapters of the book to illustrate a number of the points made. It is also the basis for the recorded moot, which can be accessed by visiting www.palgrave.com/law/hill, and the accompanying analysis in chapter **8**.

IN THE COURT OF APPEAL (Criminal Division)
R v Owen Owens

In January 2008, Megan Morgan, aged 18 and unmarried, gives birth to conjoined twins, Glen and Glenys, in a small hospital in a remote country district in Mid-Wales. The twins are joined at the waist but are otherwise perfectly formed, although Glen, the weaker of the two, has substantial and serious breathing difficulties and is diagnosed as requiring major heart surgery in the near future if he is to have any long-term hope of survival.

A week after the birth, Dr Owens, the senior consultant at the hospital, who has the reputation of being a brilliant but unorthodox surgeon, informs his junior colleagues that he intends to operate in order to separate the twins. His colleagues are uncertain whether the hospital has adequate facilities for such an operation, either in the form of equipment or surgical and nursing staff with the necessary expertise, and that, irrespective of where it takes place, the operation should be delayed until the twins have grown stronger, particularly Glen who would have little chance of surviving such an operation at this time.

However, Dr Owens insists on performing the operation, asserting that, if Glen were to die before the twins are separated, Glenys would die also, and that a successful operation of this

nature would be of enormous benefit financially to the hospital and to the medical careers of all concerned. Megan refuses to give her consent to the operation and applies for a court order restraining the hospital from carrying it out, but before any judicial hearing can be arranged the operation is performed by Dr Owens with the unwilling assistance of his colleagues. Glenys survives the operation, but Glen dies as a result. Dr Owens is subsequently charged with murder in respect of Glen's death.

At the trial at Llareggyb Crown Court before Evans HHJ, expert medical evidence is given for the prosecution to the effect that it was extremely inadvisable to undertake such an operation in such circumstances so soon after the birth of the twins. On the other hand, the defence was able to call evidence that there was an immediate danger to both their lives at the time, as Glen was so ill and could have died at any time. It was accepted by both experts that, had Glen died at any time before the separation, that would have been fatal to Glenys.

Dr Owens pleads that he had no intention to cause any physical harm to Glen, but he believed that it was necessary for the operation to be performed so soon after the birth because there was a serious risk that both the twins would die if they were not separated.

Evans HHJ held that:

1. Following *R v MOLONEY* (1985), HL, the jury must convict of murder if they conclude that Dr Owens intended the operation to result in Glen's death or to cause him really serious physical harm.

2. Alternatively, following *R v HANCOCK & SHANKLAND* (1986), HL, and *R v WOOLLIN* (1998), HL, if the jury conclude that it was a highly probable consequence that Glen would die or suffer really serious harm as a result of the operation, and that Dr Owens must have been aware that there was such a risk, they may infer that he must have intended that the operation would have such an outcome and convict him of murder on that basis.

3. Following *R v DUDLEY & STEPHENS* (1884), DC, and *R v HOWE* (1987), HL, the defence of necessity is not available on a charge of murder, nor is the common law plea of self-defence or private defence admissible in the absence of any

present immediate threat to the life of either the accused himself or any third party at the time of the act which results in death.

Dr Owens appeals to the Court of Appeal, asserting that:

1. Evans HHJ was incorrect in his direction as to the basis of liability for murder where there is no evidence of any intention to cause death or really serious bodily harm.

2. Even assuming the existence of a legally acceptable basis of liability for murder, Evans HHJ misdirected the jury as to the non-availability of a defence of necessity since, in the light of *RE A (CHILDREN)* (2001), CA, the situation in *R v DUDLEY & STEPHENS* is distinguishable from the circumstances of the present case.

3. There was equally a misdirection as to the inadmissibility of a plea of self- or private defence.

Leading counsel for each side should argue point 1 of the appeal; junior counsel should argue points 2 and 3.

1.5.1 Guidance on R v Owen Owens

From the case of *R v Owen Owens*, you will hopefully be able to spot the things mentioned in points 1 to 7 above. Here, however, is some basic guidance on how those points apply to this specific moot problem:

1) The **facts of the case** are provided in a reasonable amount of detail. As was stated earlier, you are pretty much stuck with the facts of the moot. However, you may have spotted that, on these facts, there is some room for argument on the medical evidence, which is contradictory.

2) The **decision** of the lower court, in this case Llareggyb Crown Court, was to convict Dr Owens of murder. Evans HHJ was the judge who will have directed the jury on the relevant law.

3) As this is a decision of the Crown Court, we do not know the jury's precise **legal reason(s)** for convicting Dr Owens. However, we do know the pronouncements that Evans HHJ made on the law, presumably in his summing up to the jury, and at other points during the trial.

The basis of an appeal in this type of case will normally be the appellant alleging that the jury made their decision with the wrong

law ringing in their ears. Because the wrong law was given to them it would, no doubt, be argued by an appellant that the jury were unable to direct their minds to the correct legal issues. As a result of this, they reached the wrong verdict. Alternatively, it might have been that the judge made rulings on the applicable law in the absence of the jury, which the appellant now wishes to contest in the Court of Appeal. Evans HHJ gives his legal reasoning in points 1 to 3 of the part of the moot problem that starts with the words "Evans HHJ held that". Here, the judge gives his views on the applicability of the law on intention in murder, and the defences of private defence and necessity, to the facts of the case. The appellant will presumably be submitting that this application of the law was incorrect.

Note that, as the case is now an appeal, Dr Owens transforms from being the defendant at the original trial to the appellant. The party contesting the decision of the lower court is always the appellant, and the party defending it is always the respondent.

4) As well as providing his views on the application of the law to the facts, Evans HHJ also provides **legal authorities**, in the form of cases, to support the pronouncements that he makes. It goes without saying that a mooter would wish to read the judgments in these cases to ascertain whether they really do say what Evans HHJ thinks they do. The basis of mooting is not simply to ramble on about your opinions, but to back up the submissions you make with relevant law. The cases used by the judge(s) are the obvious starting point for building your case.

5) In criminal law terms, this is a straightforward appeal, against conviction from a decision of the Crown Court, to the Court of Appeal (Criminal Division). As noted previously, knowledge of the **court** hierarchy will be relevant to you to help you decide which precedents are binding on the Court of Appeal (Criminal Division) and, therefore, the moot court.

6) The moot problem concludes by dealing with the **roles of the participants** in the moot, stating which grounds leading and junior counsel should deal with. You will be allocated a role by the organiser of your moot. You must stick to these roles and the grounds of appeal that go with them, and you must not divide things up in your own way with your partner.

7) The precise **grounds of appeal,** which the mooters should stick to, are set out in the part of the problem that starts with the words "Dr Owens appeals to the Court of Appeal asserting that". These grounds of appeal relate clearly to the pronouncements made

by Evans HHJ at the trial, as mentioned at point 3 above. Whilst the grounds of appeal are based on the judge's legal rulings at the trial, they should not be confused with them.

1.6 Before the moot takes place

There are two things that, depending on the rules of the competition or institution, may be required of you before the actual moot hearing.

1.6.1 Exchange of authorities

A) What is exchange of authorities?

Exchange of authorities is the requirement that all participants in the moot send a list of all the authorities they intend to use in the moot to both their opponents and the judges. Some competitions and institutions do not require this, but many do. The organisers of your moot will inform you as to whether this is a requirement that you have to comply with.

B) What is the reason for exchange of authorities?

A general principle that is often followed in the real courts is that, if a party is intending to use legal arguments and authorities, they must notify the other side and the judges of them in advance. The idea behind this is that none of the above will be unduly surprised at points raised and that, as a result, cases will not have to be adjourned to give the parties, or the judges, time to prepare. Exchange of authorities in moots imitates this, and provides mooters with a valuable insight into what the other side might say. Clearly, exchange of authorities is something you will be avidly waiting for if you are involved in a moot where it is a requirement. For more on using exchange of authorities as a valuable source for your preparation, see chapter **5**.

C) Limits on numbers of authorities

The rules of the institution you are mooting with may have restrictions on how many authorities you can use in a moot. You should check this with the organisers if they have not told you. Numbers may well differ between institutions, but it is common for mooting rules to allow about 10 authorities per mooter. This number should normally be more than enough, bearing in mind the fact that most moots will normally put a time limit on your submissions. If you propose to refer to an authority, such as a case, more than once during

your submissions, it will only count once on your list of authorities. The same applies with statutes, where you intend to refer to more than one section. If the institution where you are mooting has a stricter approach in this respect, you should be informed of this by the organisers.

D) Do not use authorities that are not on your list

It hopefully goes without saying that you should only refer in your submissions to authorities that are on the list that you have exchanged with the other side and given to the judge. If you attempt to use other sources, you will not only be acting unethically as a mooter, but you will also leave yourself open to reprimand from the judges and comments from your opponents when they are responding to you. The authorities you wish to rely on are there in black and white for all to see. The judges will not be amused if you try to shift the goal posts by referring to hitherto unmentioned authorities during the moot. Even if you are only using an authority very briefly, and only to make what you think is an uncontroversial point, you must include it on your list of authorities.

E) When does exchange take place?

This will vary depending on the rules of the institution you are mooting with, but it is usual for exchange to take place long enough before the moot to allow you to do some extra research on the authorities mentioned on your opponents' list. Obviously, there is little point in being given a long list of authorities as you are going through the door of the courtroom, as you will have little chance to consider them.

F) Deciding not to use an authority that is on your list

It may be the case that, in the latter stages of your preparation, you will decide not to use an authority that you have already included on your list. If so, whilst you are not bound to use such authorities in your submissions, you should still exercise a degree of good manners in the way that you deal with the issue. If you do not, you risk creating a poor impression, not just with your opponent but with the judges as well.

The first thing that you can do in this situation is to let your opponent know, as soon as possible, which authorities you will no longer be referring to. A quiet word just before the moot hearing will probably suffice, although it is arguable that, with communication methods such as email, you should probably make contact with your opponent as soon as you decide not to use an authority.

Secondly, you should also make it clear to the judges that there are authorities on your list that you will now not be using. A simple announcement to the judges along the following lines will normally be appropriate:

> "I would be grateful if your Lordships would briefly refer to my submitted list of authorities. There are two cases on that list upon which I no longer intend to rely. They are the Crown and Smith and the Crown and Roberts. I have already informed my learned friend of this, my Lords, and apologised for any inconvenience caused."

Note that, if you do make an announcement of this sort, you should be prepared for the fact that the judges may ask for further explanation as to why you are no longer using the authority.

G) Listing cases that you do not intend to refer to

It has been known for mooters to include some authorities in their list when they have no intention of referring to them in the actual moot. As a result, their opponents waste much time researching issues that are not part of their case. Needless to say, this is not an ethical way to go about mooting. The legal profession only operates effectively on the basis of the integrity of its members. If you intend to join the legal profession, you must develop a good sense of what is ethical.

Additionally, most judges will take a very dim view if they suspect that such sharp practices are being employed. Some judges may also deduct marks if you do not refer to authorities you have listed, without adequate explanation. The basic rule is, therefore, that you should only include authorities in your list if you really do intend to refer to them.

1.6.2 Submission of skeleton arguments

There are some moots that require all participants to submit a skeleton argument at some point before the actual moot hearing takes place. The idea behind this is that the judges will know in advance what the nature of the submissions for both sides will be, as well as what authorities they will rely on to back up those submissions. For more on skeleton arguments and how to go about writing them, see chapter **12**.

1.7 The format of a moot

Most moots have four participants, who could make their submissions in the following order:

1) Senior counsel for the appellant
2) Junior counsel for the appellant
3) Senior counsel for the respondent
4) Junior counsel for the respondent.

After the main submissions from the four participants, counsel for the appellants are normally given a brief **right to reply** to the submissions raised by the respondents. The reason for this is that one of the skills of mooting, and advocacy generally, is the ability to respond to submissions made by the other side. When the appellants make their submissions (if done in the order above), they will not have heard the respondents' submissions. As a result, they are given a brief amount of time to do this at the end of the moot. Counsel for the respondent are expected to deal with points raised by the appellants in the course of their submissions as, by the time they speak, they will already have heard the appellants' submissions.

Note: some institutions or competitions may deviate from the running order of speakers suggested above.

An alternative running order may be as follows:

1) Senior counsel for the appellant
2) Senior counsel for the respondent
3) Junior counsel for the appellant
4) Junior counsel for the respondent.

In the above running order, the **rights of reply** for both counsel for the appellants could either be at the end of the moot, or after each of the respondents' submissions.

The running order of speakers is usually given to you in advance but, if in doubt about this, double check with the organisers of the moot you are involved in.

Also, whilst most moots will have four participants, as in the example above, this does not have to be the case. A moot could consist of **any even number**, so that every participant will have an opponent, who will be dealing with the same ground(s) of appeal. As a result, each participant will have some submissions to respond to. As will be discussed in chapter **5**, the ability to respond well to your opponent is an important skill that the judges will be looking for you to demonstrate evidence of.

After submissions have been made by the participants, the judge(s) will decide what marks to give each participant, if the moot is a formally assessed part of a course of study. If the moot is part of a mooting competition, the judge(s) will decide which team or which advocate is the winner of the moot, and therefore will progress in the competition.

The judge(s) may also give a **judgment on the legal aspects of the case**, which will consist of their legal reasons for either allowing or dismissing the appeal. Sometimes, particularly if a moot is part of a formal assessment process, the judge(s) may refrain from giving a judgment on the legal issues. This is because other students, who have yet to be assessed on the same moot problem, may find out about the judge's reasons for either allowing or dismissing the appeal. These students would then clearly have an unfair advantage. In assessed moots, the most important issue for the participants is the marks that they receive. This differs from competition moots, where the main concern will be progression to the next round.

1.8 The timing of mooting submissions

It is normal practice for moot organisers to put a time limit on submissions. There are two reasons for this. The most obvious is to prevent counsel from rambling on for too long, and the moot thereby becoming a marathon. Perhaps another reason is that having a time limit imposes a certain discipline on mooters, in that it forces them to complete the main submissions they wish to make within the allotted time. This requires some skill and planning ability.

Having a time limit also obliges the mooter to distinguish between the relevant and the irrelevant, and to prioritise the points they wish to make in the order of their importance to the case being put.

The time limits for moots will vary according to institutions and competition organisers, so you must check the rules of the moots you are participating in on this. In most cases, however, the time limit for submissions will be somewhere between 10 and 20 minutes. The

extra time given to appellants for their right of reply will normally be around five minutes.

It is highly desirable that you use as much of this time as possible. If the time limit is, for example, 15 minutes, and you only speak for six minutes, the likelihood is that this will make a poor impression on the judges. It will probably mean that you are poorly prepared and short of material. Good preparation should ensure that you fill the allotted time with useful submissions that are relevant to the ground(s) of appeal.

Whilst it is difficult to be precise, it is advised that you should aim to conclude your submissions close to, but still within, the time limit. If you run over your allotted time, and the judge has to stop you in your tracks, this is not a very impressive way for your case to end. It is much better if you can conclude strongly and on your own terms. For more on concluding your submissions, see chapter **3**.

Usually, one of the judges, or the clerk of the court if there is one, will be responsible for time keeping. They will normally have a **stop-watch** of some sort for this purpose, and may stop the clock at the times when the judges are asking questions and the mooters are answering them. You should check with the organisers of your moot whether the clock will be stopped for this reason.

The person in charge of time keeping may also hold up **reminder cards**, telling the advocates how long they have left, for example "Five minutes remaining". Be prepared for this, as some mooters can be distracted by these cards. Others, such as those who are reading their submissions with their head down, do not even notice these reminders. This generally creates a bad impression on the judges, for reasons already mentioned above.

1.9 The chronology of a moot

The following diagram gives you the chronology of a whole moot from beginning to end. As discussed in chapter **10**, parts of this chronology may vary between institutions.

A) Receive moot problem
See section **1.4** above for more on what this includes.

B) Preparation for the moot

C) Exchange of authorities
If required, according to the rules of the institution where you are mooting. See section **1.6** above for more on this.

D) Submit skeleton argument
If required, according to the rules of the institution where you are mooting. See chapter **12**.

E) Final preparation after exchange of lists of authorities

F) The moot hearing
Submissions and replies to submissions given by the participants. See sections **1.7** and **1.8** above. For more on what specifically the judges will be looking for in your submissions, see chapters **3** to **8**.

G) Announcement of who has won the moot, possibly including the legal reasons for why the appeal has been allowed or dismissed
If the moot is an assessed part of a course of study, the judges may refrain from this until all assessments are complete.

H) Provision of feedback
If the moot is part of a competition, the feedback will probably be oral. If the moot is assessed, feedback can be verbal, written or in the form of a recording of the moot. For more on the importance of feedback, see chapter **9**.

1.10 The origins of mooting

A detailed history of mooting as an aspect of legal education and training is beyond the scope of this book. However, it will certainly do no harm to the prospective mooter to know a little bit about the long tradition of mooting in English legal education.

In the English and Welsh legal education context, mooting originates in the four Inns of Court (the institutions that still enjoy a monopoly over calling law students to the bar). Moots still take place in all four inns, namely Lincoln's Inn, Gray's Inn, Middle Temple and Inner Temple, on a purely voluntary basis. In the past, however, mooting played a much more pivotal role in legal education.

The Inns of Court are ancient institutions, thought by most legal historians to date back at least more than 600 years. In the past, the inns bore something of a resemblance to a kind of legal finishing school, where student barristers would live, eat and study. The aim of all this was, of course, call to the bar. It was only in the twentieth

century that the path to becoming a barrister became highly formalised, culminating in the current Bar Vocational Course. Prior to the more formal approach to vocational legal education that students experience today, call to the bar, by one of the four Inns of Court, was arguably, on a more ad hoc basis.

The principal forms of legal education on offer by the inns were readings, which were similar to the modern-day lecture, and participation in moots. The format of the moots was somewhat different to moots done by students today, in that mooters would also be tested on their knowledge of the many different forms of writs and summonses which were used to begin different types of case. Moots would take place before the "benchers" or senior members of the inn and, on the basis of a student's performance in these moots, the student may eventually be called to the bar. He or she would then be eligible to join a set of barristers' chambers as a pupil.

Today, mooting is not required as a compulsory element of training for either barristers or solicitors, although advocacy assessments do have to be undertaken on the Bar Vocational Course and the Legal Practice Course. Nevertheless, mooting obviously provides excellent background and practice for those intending to practise as either a barrister or a solicitor.

For students interested in the history of the Inns of Court and the history of mooting, there is a wealth of material available. For more information on this, see chapter **13**.

1.11 The benefits of mooting

In spite of what some students think, involvement in mooting is not compulsory for those wishing to practise as lawyers. Some students wrongly believe that mooting is a formal requirement for those wishing to embark on the vocational stage of training. It is quite possible to do no mooting, gain a place on either the Bar Vocational Course or the Legal Practice Course, and be a successful practitioner thereafter. However, whilst it is certainly not the end of the world to do no mooting as a law student, there are many good reasons for engaging with mooting during your student years, or when you are a junior practitioner.

Some of the main reasons why the modern law student should give serious thought to mooting are considered below.

1.11.1 Useful practice

The most obvious reason is that, for those intending a career in the law, mooting provides an excellent way of practising one's advocacy, and familiarising oneself with the mannerisms and etiquette of the courtroom. Some take to this highly stylised form of speech like ducks to water, whilst others find it incredibly difficult to adopt an appropriate style and to actually sound like a lawyer. For such students, mooting is a chance to make mistakes at an early stage, where the consequences of a mistake are not nearly as grave as they would be in practice.

When I read for the bar, I was astonished in my first term at the poor standard of some students' public speaking skills, and the fact that many of them had never been on their feet before. This is why mooting is such a good idea at the academic stage of legal education, and why more and more law students are becoming involved in it. Any student who is really serious about a career as an advocate should ideally have had some public speaking experience before embarking on either of the legal vocational courses. The reasoning behind this is obvious. Some experience of advocacy or public speaking will give you a good indication of whether advocacy really is for you, in the sense that it will indicate (a) whether you have much ability as an advocate, and (b) whether you derive, or could derive, any pleasure from the activity. If a student feels that he or she has little ability as a speaker, and does not enjoy advocacy, then it may be better to consider practising in an area where advocacy is not commonly resorted to, or possibly a career outside the law.

It is important, however, despite the above, not to draw negative conclusions about mooting and advocacy too early. Many students find their feet only after a few attempts at mooting, and only after some humbling experiences. Mooting is a new and difficult skill to most students, and requires perseverance and hard work. Be realistic about yourself, but do not give up too easily. For most students who are prepared to put in the hard work, the rewards are usually there to be had.

1.11.2 Confidence

Mooting can sometimes be a humbling experience, but it can also be a great confidence builder, for those who work hard and do well. The confidence gained from participation in activities like mooting, mock trials and debating, it goes without saying, can be highly beneficial to those beginning a legal career. Even for those students who

do not go on to a legal career, the benefits of these activities can still be considerable.

The Bar Vocational Course and the Legal Practice Course both require a degree of confidence. The same obviously applies, to an even greater extent, when you go into practice. If you are experienced at being on your feet and speaking in public, you are much more likely to thrive in these environments.

1.11.3 Pleasure

For many law students, the reason for wanting to be a lawyer in the first place is the desire to be an advocate. Prior to being involved in mooting, the closest that most students will get to lawyer-like activities is the writing of essays and answers to problem questions. Whilst there is certainly a lot to be said for these activities, they can seem somewhat remote from the business of practice as a lawyer.

Mooting is, therefore, the first opportunity for many law students to do something which really feels similar to the practice of law. It goes without saying that, for those students who engage with mooting properly, and who put in the necessary hard work, it can be a highly pleasurable and rewarding experience. Perhaps for the first time, students experience the pleasure of using legal sources to construct an argument from the point of view of one side in a case. Because of this, mooters have to approach the law in the same creative way that lawyers do, in that they have to make the best of the available legal authorities to suit the argument of their fictitious client.

Additionally, the mooter experiences the tension of being an advocate and presenting an argument in a court environment, along with the difficulties and pleasures associated with responding to their opponents' submissions and answering judicial questions. In short, students learn to take pride in their advocacy and legal skills. As a result, irrespective of how successful they are, most students enjoy mooting, at least to some extent. For those who really master the art of advocacy, mooting can be the beginning of something that will be with them for the rest of their lives.

1.11.4 Career enhancement

As noted above, mooting is in no sense a compulsory pre-requisite to a successful legal career. However, there is little doubt that engagement with activities like mooting is the sort of thing that law firms and barristers' chambers are looking for when they look at applications for training contracts and pupillages. Students who have been

very successful as mooters, either in competitions or in assessments, therefore have a great advantage over students who have no such experience.

It is also recommended that students engage in mooting as an extra-curricular activity, whether or not they are involved in mooting as an assessed part of their studies. The reason for this is that it demonstrates to prospective employers a willingness to do more than the bare minimum to get through a course of study. The legal jobs market is highly competitive, and employers can therefore pick and choose. The law student who comes across as a student who has only done the bare minimum is therefore less likely to impress, especially bearing in mind the fact that most employers do expect their successful candidates to have a high capacity for hard work. For more on extra-curricular mooting opportunities, see chapter **10**.

Students who wish to go on to practise as lawyers are well advised to get into the habit of hard work during their student days. If you are in the habit of hard work from an early stage, you are much less likely to resent it when it is forced upon you in later life.

1.11.5 Teamwork

It should be noted that some of the best advocates have been anything but good team players. Advocacy, at the end of the day, is a highly solitary activity. When you are on your feet, speaking in court, the help that can be given to you by others is highly limited. If an advocate is going to make a hash of their submissions, then there is very little that their friends or team members can do to save them. Having said all of this, it is certainly true that teamwork can play a big part in the way that a mooter prepares.

Normally, in a moot there will be a senior and a junior counsel for both the appellant and the respondent. It is advisable that you should use your partner or team member during preparation as somebody to "bounce" your ideas off. Two heads are normally better than one, and it is likely that some submissions or ideas, which strike you as a good at first, will not seem as good after some discussion with a team member. Many students, of course, do not avail themselves of this potential advantage, perhaps because they do not know, or trust, their partner. This is unfortunate as, in practice, it is often the case that more than one lawyer will be involved in a case. For example, in many cases, a client will instruct both a solicitor and a barrister, who will have to try to work together effectively as a team, whether they like it or not. As a result, even the greatest of advocates do sometimes suffer from a lack of ability to work as an effective part of a

team. Try to develop this ability early in your career through mooting, if possible.

1.11.6 Engaging with primary sources of law

One excellent aspect of mooting is that it obliges you to really engage with primary sources of law such as cases and statutes. Many law students, and some practitioners, are far too reliant on secondary sources of law, such as textbooks and practitioner texts. As a result, they seldom actually consult a primary source without the help of a middleman, in the form of an author. One of the big benefits of mooting is that it obliges you to use primary sources, and use them in a creative way to actually construct submissions for your fictitious client.

All of this is essential if you are to practise as a lawyer. It simply will not do to stand up in court and refer to a case simply by reference to what a textbook says on it. The judges will expect you to have read the case and be able to refer them to passages in the judgments that support your submissions. Additionally, it may be that, if you are dealing with a new aspect of the law, there will be no available textbooks to help you.

The best lawyers are not afraid to consult primary sources to find and interpret the law themselves. Instead, they relish the opportunity to do so. Weaker lawyers always require guidance from secondary sources like textbooks, and are often uncomfortable without this safety net. Mooting allows you to become one of the former, by developing good habits early on.

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