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2023 Pegasus Scholar Report

My Pegasus Scholarship got off to an auspicious start when I snagged a window seat on my flight to Washington DC. Arriving on a gloriously sunny day in late October I had a wonderful view of the trees that surround the city in their spectacular autumn colours.

Once I had landed and ticked off some of the key sights (the White House, Washington Monument and the Lincoln Memorial) my visit officially started in style with the American Inns of Court Celebration of Excellence Gala at the US Supreme Court. The evening began with the awards ceremony, which recognised the achievements of lawyers and judges from around the United States before a reception, which provided a great opportunity to speak to the other attendees, including former and current Pegasus Scholars.

Together with the other English Scholars my week in DC continued with visits to the Capitol, Howard University and Georgetown University, and the US District Court for the District of Columbia. A particular highlight was observing arguments in the Supreme Court. We observed two cases surrounding the use of social media by public servants which raised First Amendment free speech issues. I then moved on to New York and Philadelphia where I spent my time attending various courts. I met lawyers and judges from a wide variety of practice areas and discussed matters ranging from diversity in the legal profession, particularly in civil and commercial law, to the impact of litigation funding and the differences in civil procedure rules.

Similarities and connections between England and Wales and the US were everywhere, including the retention of the term 'sovereign immunity' to describe the immunity of government from lawsuits (derived from the traditional immunity of the Crown in this jurisdiction). However, what I found more interesting were the differences that forced me to reflect on the approaches we take in our jurisdiction and what we could learn from the US.

The arguments at the Supreme Court illustrated one such major difference. Within appellate advocacy in particular, there was a much greater focus on written argument – the purpose of hearings was to answer questions that the judges have about the issues they are considering, rather than to set out and argue the case in full. Lengthy written briefs were the norm and many judges and practitioners I spoke to were surprised to hear that our written skeleton arguments were often subject to strict page limits!

This focus on written advocacy is also perhaps one reason so many junior lawyers take time to work as clerks for judges – conducting research, drafting documents, and helping to draft opinions. Those that I met explained that one of the many advantages of clerking was the opportunity to do a large volume of drafting, a key skill in practice in the US. While of course legal drafting is important in England and Wales, given the focus on written briefs (especially in appellate advocacy), it makes sense that junior practitioners would value so highly an opportunity that allows them to hone this skill.

Another effect of the focus on written advocacy was that the time for oral submissions was quite short – in the Supreme Court arguments last around 30 minutes and the advocates only get a short period of uninterrupted submissions before the nine Justices start asking them questions. In the US Court of Appeals for the Second Circuit, each advocate was given 10 minutes, while within the First Department of the Appellate Division of the Supreme Court of New York some of the advocates had less than 5 minutes to make their submissions! The effect of this was that in the latter court, five judges were able to hear argument in around 13 cases in a single afternoon. This also meant that many advocates were arguing their cases in a room filled largely with their peers (and not simply their opponents).

Arguing before peers is something that appears to be regularly done in the US. Mooting is not confined to students and lawyers regularly test their arguments before peers and academics. This process was something that interested me as a practice that could be helpful at the English Bar – not only does it seem to help foster links between universities and the legal profession, but for junior barristers facing their first trip to an appellate court the opportunity to run your arguments past more experienced members of the profession would no doubt be helpful and (hopefully) reassuring. Although a very practical issue that arises is the fact that oral arguments in the UK tend to last for hours, not minutes, meaning a moot would likely be a much lengthier process!

A notable difference in the appellate division was that in most instances, permission or leave of the court was not required in order to bring an appeal. This meant I heard appeals on a range of issues – on issues of law and procedure in final and interim decisions in both civil and criminal matters. There were a few cases that, based on the questions posed by the judges, I suspect may have been filtered out if there were such a permission or leave to appeal stage.

Perhaps another reason why those appeals were pursued is because of the very different costs regime in civil litigation in the US. With a few exceptions, each party in a case bears the cost of its own legal fees, even if they win. This is in stark contrast to the approach in England and Wales, where the losing party will normally be ordered to pay the legal costs of the other side. The effect of this seems to be that parties who can afford to do so make applications or motions, such as for summary judgment, even if they are unlikely to succeed - something most parties in this jurisdiction would likely avoid due to the costs consequences of losing such an application.

A final major difference was the continued use of juries in civil proceedings – while some civil cases proceed with only a judge, the involvement of a jury clearly changes the approach of the advocate in a number of ways. This includes more extensive use of examination of chief (or direct examination), a practice which is now somewhat unfamiliar to many English civil practitioners due to the use of witness statements in its place. Similarly it was interesting to observe in a civil trial the introduction of an expert and the production of their evidence through direct examination – an approach that seemed alien to me at first but made sense when one considered that oral evidence was likely more accessible to a jury than a written expert report.

The need to introduce evidence in this manner also appears to mean that at trial level (in contrast to appellate proceedings) there are more opportunities for advocacy. It may have been at the forefront of my mind because of the statement released by the English Judiciary in early November encouraging greater participation of junior counsel in hearings, but I noted that where there were a number of lawyers on a team, often different lawyers would examine different witnesses, meaning that most members of the legal team had the opportunity to deploy their advocacy skills in Court.

In between the visits to the various impressive Court buildings I also had the opportunity to see the sights - visiting some of the many museums in New York and DC (as well as the Rocky Steps and Statue in Philly!) and eating bagels and pizza at every opportunity. Looking back, it is difficult to believe just how much was packed into six weeks, but eventually the autumn leaves gave way to the first flurries of snow and before I knew it I was in a taxi on the way to JFK.

I am incredibly grateful to the Pegasus Trust and the American Inns of Court for this once in a lifetime opportunity, as well as to all of those that I met while on my scholarship, especially the judges and lawyers that took the time to show me around and answer the many questions that I had. In particular I would like to thank Ellen del Sole for so generously hosting both myself (and the other scholars) while in DC, as well as Cindy Dennis of the American Inns of Court and those at MoloLamken LLP who took the time to organise such an excellent and enjoyable programme.