

JUDGE DAVID EDWARD ORAL HISTORY

Interview With Judge David Edward

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Session II: The Practice Years: 1962-1985

DS: This is the David Edward oral history.¹ This is taping session number two. I'm Don Smith. I teach European Union Law & Policy at the University of Denver Sturm College of Law. I'll be the interviewer for these taping sessions.

We are with Judge Edward in his home in Edinburgh, Scotland. In this session I will be asking Judge Edward about his years at the Scottish bar, which dated from 1962 to 1985, and his activities during that period. Judge, let's begin with the early years of your legal practice. Maybe you can tell us about your first job, where it was, what you did, your first case and so on.

DE: In those days the bulk of the practice of the Scots bar was personal injury litigation. That is what most of the members of the bar did most of the time.

Criminal law was not at all a lucrative area of practice because at that time there was no legal aid for criminal cases. That did not start in Scotland until 1964. So criminal cases were done by junior members of the bar pro bono. The Crown paid traveling expenses and if one was away overnight then they would pay hotel expenses but otherwise you got no fee for the work. And so criminal work was not something one did enthusiastically, so to speak, except as experience to get into court.

Personal injury litigation, as I said, was the mainstay of practice and the solicitor's firm that I had worked in during my time in a solicitor's firm while I was studying law were amongst other things solicitors for the National Union of Mine Workers. So a lot of my cases at the beginning were coal mining cases and other cases involving other types of mines including clay mines and shale mines, all of them closed and gone now. But in those days I suppose there were 60 or 80 working mines in Scotland and there was

¹ Copyright 2006 David A.O. Edward and Don C. Smith.

a lot of work in coal mining cases. So I did a lot of coal mining cases for the National Union of Mine Workers.

Then gradually I started to be employed on the other side in personal injury cases for insurance companies. However, the unusual thing about my practice was that the advocate for whom I had been a pupil during my last year at university had been instructed in a case called the Harris Tweed² case, which concerned the question of what could be called Harris Tweed. Essentially it was a dispute between those who manufactured tweed entirely on the Outer Hebrides and those who carried out most of the processes of making tweed on the mainland but had it woven in the Outer Hebrides.

The big issue was what was the characteristic of Harris Tweed. It was a very early case in developing the theory of passing off³ in relation to geographical denominations of origin. The first one had been the Spanish champagne case in about 1957 when the issue had been whether a fizzy wine made in Spain could be called champagne and it was held that it couldn't and that champagne had to come from the champagne district of France.

This was something entirely new in the law because although the continental countries had had a well developed system of registering denominations of origin, the common law had not and there had been issues in the [United] States about California oranges and so on. So the Harris Tweed case was one of the first cases in Britain on this issue after the Spanish champagne case.

As I said the advocate for whom I did my pupillage had been instructed in that case as the junior counsel. It was felt that the case was so important that they needed a second junior to help with the work and I was brought in to do that. So unlike many people, I was given this opportunity at the very early stage and my early months at the bar were taken up with this case, which turned out at that time to be the longest civil litigation in Scotland. By modern standards it was pretty short. The litigation began in 1961 and was all over in 1963 with judgment a year later. The judgment was enormous and very detailed. The judgment was delivered in 1964. So it was only a three year case. I think there were 52 days of evidence, which by modern standards is pretty small. But it was at that time the longest civil litigation in Scotland. And that consumed a great deal of my time.

² *Argyllshire Weavers Ltd. v. A. Maccaulay (Tweeds) Ltd.*, 1962 S.C. 388 and [1964] R.P.C. 477.

³ "Passing off" goods takes place when a trader causes or attempts to cause buyers or potential buyers to conclude that goods being purchased are of a quality or kind or – as in Harris Tweed – from a source other than what they actually are. See STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES 4TH EDITION, Sweet & Maxwell Ltd. (1974), p. 1952.

DS: During your career practicing law you were involved in eight proceedings⁴ before the House of Lords.⁵ What can you tell us about your first appearance before the House of Lords?

DE: My first appearance before the House of Lords was rather remarkable in a way because it was at the beginning of my second term at the bar. And it arose in this way. The junior counsel, who had been instructed in this case, found a conflict and couldn't go to London for the House of Lords. The solicitor's firm with whom I had done my time while I was studying law thought it would be nice to send me. They were the instructing solicitors.

The day before we were due to go down to London I received a telephone message to say that the Queen's Counsel who was instructed had upset a pan on the cooker and had burnt his arm and might not be able to go. So I had a rather frantic weekend preparing in case I actually had, in my second term at the bar, to open a case in the House of Lords which was a terrifying experience. Luckily he recovered sufficiently to do the case.

I do remember that the House of Lords in those days was chaired by Lord Reid,⁶ who became a very famous judge, and it was a very solemn, sedate affair. The winter of 1962-1963 was extremely cold and I remember we were required to plead in a committee room in the House of Lords with all the curtains shut and a fire blazing. It was extremely hot. But it was a strange experience altogether.

DS: Were there other memorable occasions when you appeared before the House of Lords?

DE: I appeared four times as a junior – [*Cole-Hamilton v. Boyd*⁷] was the first time – and four times as a Queen's Counsel when I had to do the pleading.

Three of the four that I did as a Queen's Counsel were memorable in their own way. One was on the question of the extent to which the relatives of a deceased person could get compensation for pain and suffering after the person who had actually suffered the accident was dead.⁸

⁴ *Cole-Hamilton v. Boyd*, 1963 SC (HL) 1; *O'Hanlon v. Stein*, 1965 SC (HL) 23; *McKew v. Holland & Hannen & Cubitts*, 1970 SC (HL) 20; *Jenkins v. Allied Ironfounders*, 1970 SC (HL) 37; *Robertson v. Turnbull*, 1982 SC (HL) 1; *Brown v. Hamilton District Council*, 1983 SC (HL) 1; *Cormack v. Crown Estate Commissioners*, 1985 SC (HL) 80; *Lister v. Forth Dry Dock*, 1990 1 AC 546.

⁵ The House of Lords: Judicial Work and Judgments, <http://www.parliament.the-stationery-office.co.uk/pa/ld/ldjudinf.htm>.

⁶ James Scott Cumberland Reid, member of the Law Lords from 1948-1975.

⁷ *Cole-Hamilton v. Boyd*, 1963 SC (HL) 1.

⁸ *Robertson v. Turnbull*, 1982 SC (HL) 1.

A second case⁹ was a very important case in Scotland because it was the first case in which the process now known as judicial review was argued. Up to that time there had been no recognized system of judicial review and the issue in the case was whether there was a basic difference between decisions of local authorities which could be appealed against and decisions of local authorities which could only be annulled as an administrative law process rather than as an ordinary civil law process. It was a case called *Brown* against *Hamilton District Council*. Effectively we had to create the law or argue that the law had always been there but had been forgotten about.

The last case I did before the House of Lords was a European law case. The issue was whether the British regulation implementing an employment directive had to be read in such a way as to give effect to the directive even though its apparent terms seemed to be different.

DS: And what was the name of that last case?

DE: *Lister* against *Forth Ports Authority*.¹⁰ It's quite a well known case in British law.

DS: In 1974 you were appointed Queen's Counsel. Can you tell us about that appointment and its significance?

DE: In Scotland until the early years of the 20th century there was only one category of advocates. You were an advocate unlike England where you were a barrister or a Queen's Counsel.

Various problems had arisen in Scotland because of the absence of a rank of Queen's Counsel and in the early years of the 20th century the Faculty of Advocates¹¹ petitioned for the creation of a roll of Queen's Counsel in Scotland, but it was never quite as significant in Scotland as it was in England. There was no ceremony of admission as Queen's Counsel.

In England Queen's Counsel go to the House of Lords and they are admitted to the rank of Queen's Counsel by the Lord Chancellor. No such ceremony existed in Scotland. One simply applied and one was told whether the rank of QC had been given or not.

The significance of it really was, and still is, that Queen's Counsel don't draft pleadings so they do less paperwork and more assumption of pleading in bigger cases. And that's the basic distinction.

⁹ *Brown v. Hamilton District Council*, 1983 SC (HL) 1.

¹⁰ *Lister v. Forth Dry Dock*, 1990 1 AC 546.

¹¹ Scottish Faculty of Advocates, see <http://www.advocates.org.uk/>.

DS: From 1967 through 1977 you were clerk and treasurer of the Faculty of Advocates. What did you do in these roles?

DE: The Faculty of Advocates in those days was a relatively small body. When I was admitted to the Faculty in 1962 I think there were about 80 practicing advocates altogether. The numbers increased latterly, but it was a very small bar.

We had no full-time employees except a gentleman who ran the accounting, one who ran the library, and one who ran the general day-to-day work of the Faculty. So all the responsible jobs were done by unelected office bearers.

I became the clerk, which is really the secretary general if you like of the institution, and then about three years later became treasurer, responsible for the building and employment of the staff and for the running of the money. It was really in that capacity that I became involved in a complete change in the system by which advocates' fees were invoiced and collected.

We created a company to invoice and collect advocates' fees which remains unique, but is I think the reason why the Faculty of Advocates has been able to grow over the past 30 years without running up against serious financial problems.

DS: You also represented the Faculty of Advocates as a delegate to the Consultative Committee of the Council of Bars and Law Societies of the European Community.¹² How did that role come about?

DE: That consultative committee, which later came to be known as the CCBE – which is the initials of the title in French – that committee had been started in the 1960s when the European Community had six member states really to study the effect of European law on the legal profession, on the profession of advocate.

For a period there had been an observer from the English Bar. I heard about this and I thought we ought to be represented too. When I was clerk I got in touch with them and they said yes they would welcome an observer from Scotland. Lord MacKenzie Stuart, who later went to the European Court, was appointed our observer on the committee.

¹² Councils of Bars and Law Societies of Europe (also known as Conseil des Barreaux Européens), see http://www.ccbe.org/en/accueil/accueil_en.htm. For a detailed history of the CCBE, including a description of the prominent role played by David Edward, see A HISTORY OF THE CCBE, Councils of Bars and Law Societies of Europe (2005), at http://www.ccbe.org/doc/En/history_ccbe_en.pdf.

When he went to Luxembourg as the first British judge of the European Court, I was sent there [to the CCBE] because I was the only faculty office bearer who, at that time, could speak French. So I became involved in that way in what you might call the European politics of the profession. That hotted up considerably just about the time I became the Faculty's representative because the Court of Justice decided a case called *Reyners*,¹³ which held that the profession of advocate was not excluded from the free movement provisions of the treaty and therefore in principle advocates from one country should be able to practice in another which of course was anathema to us at that time. We couldn't understand how that could be so. It's now regarded as self-evident. But in those days, the idea was if you wanted to practice in another country, then you had to requalify totally in that country. So the politics of the legal profession in Europe really began to change during the 1970s when I was the Faculty's representative.

In addition of course the politics of the legal profession in Britain had begun to change because the Monopolies Commission began to look at aspects of practice which had been going on for centuries. The tension between the professional bodies and government had begun to increase at the same time.

DS: From 1978 to 1980 you were president of the CCBE. Can you share with us what you did in that role?

DE: The CCBE worked on the basis of national delegations and each delegation had a leader. In 1976, I think, I became the leader of the British delegation. That meant I had normally to speak for the delegation on the various issues which came up.

And then in 1977 there was the presidency for 1978. It had to be decided who was going to be president for at that time two years, '78 and '79. I was

¹³ 2/74 *Reyners v Belgian State* [1974] E.C.R. 631, [1974] 2 C.M.L.R. 305; http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61974J0002. *Reyners* was a Dutch citizen who earned his legal degree in Belgium. Nevertheless, he was refused admission to the Belgium Bar solely because he was not a citizen of Belgium. The decision was also important in its explanation of the conditions where direct effect would apply. "In this case the Court appeared determined that, despite the slow pace of harmonization of national laws in the field of free movement and establishment of self-employed persons, the Treaty could be directly invoked by individuals in order to challenge obvious instances of nationality discrimination against them. The basic principle of non-discrimination was deemed to be directly effective, even though the conditions for genuine freedom of establishment were far from being achieved. Whereas many cases on direct effect concern the enforcement of obligations against a Member State which has failed properly to implement Community requirements (*Van Gend, Costa v. ENEL*, and *Defrenne II*), the *Reyners* case shows the Court employing the direct-effect concept to compensate for insufficient action on the part of the *Community* legislative institutions." Paul Craig and Gráinne de Búrca, *EU LAW: TEXT, CASES AND MATERIALS* 3RD EDITION, Oxford University Press (2003), p. 187.

put forward by the British and elected because at that stage the British had not had the presidency.

[It] actually consumed an enormous amount of time because I was much younger than my predecessors and I think I'd been elected for the purpose of changing the direction of the body and making it much more active as a representative for the legal profession.

Sadly my prospective successor died so I had to do an extra year while they decided who should succeed me so I did three years in all which was longer than normal.

DS: It has been written that you “played a decisive part in negotiations among the bars of Europe concerning mutual recognition of the legal professional qualifications and rights of audience in courts throughout Europe.”¹⁴

Can you tell us about that effort?

DE: After the decision in *Reyners*, it became clear that the legal profession was not exempt from the normal rules of the treaty. Lawyers were going to have to be able to provide services in other member states and to become established in other member states according to the rules of the treaty.

It was clear it wasn't going to be easy to do this and the first stage was the negotiation of the directive on provision of services by lawyers. That was really in the process of negotiation when I joined the CCBE in 1973. The negotiations continued until the directive was eventually passed in 1977. As a member of the British delegation, and latterly as leader of the British delegation, of course I was involved in putting forward the British point of view.

Our situation differed from all the others except Ireland because only in Britain and Ireland was there a separation of the two branches of the profession. We had to negotiate special rules to take account of the peculiarities of the profession in Britain and Ireland and I was closely involved in that and also in negotiating the fine print of the way in which the rules would apply and which rules would apply to an advocate crossing a frontier and appearing in another court. Would that advocate be bound by the rules of the bar to which he belonged or would the rules of the host country apply? So there was quite a lot of fine print to be negotiated.

I think a reasonably satisfactory result was achieved. And as soon as that was over then began the discussion about establishment and that wasn't

¹⁴ Royal Gold Medals for outstanding achievement, The Royal Society of Edinburgh, 14 Oct. 2005, http://www.royalsoced.org.uk/rse_press/2005/royal_medals.pdf.

settled for another 15 years plus. But I was involved in the early stages of negotiating that and establishing at least some of the basic ideas that eventually turned up in the directive on establishment.

DS: Judge, you also appeared four times¹⁵ before the European Court of Justice¹⁶ [ECJ]. When did you first appear before the Court of Justice?

DE: I think the first time I appeared was in a case called *AM & S*.¹⁷ The issue in that case was what is called in common law legal professional privilege and what is called in the most of the continental countries the professional secret. The question is to what extent are lawyers' communications – communication between lawyer and client – protected from disclosure in legal proceedings. And the issue in this case was the extent to which legal advice given by in house counsel and independent counsel to a commercial body – a company – was protected from disclosure in competition anti-trust proceedings.

In the middle of the 1970s I had written a report¹⁸ on this issue – or rather on the nature of legal professional privilege and the professional secret – in which I had examined the law of the then nine Member States in order to see to what extent they rested on a common principle. I established, I think to everybody's satisfaction, that although the law was different – and substantially different between the common law counties and civil law countries – nonetheless there was a basic common thread that the client is entitled to communicate with the lawyer without the nature of the communication or the contents of the communication being made available in legal proceedings.

When this *AM & S* case arose CCBE asked to intervene in the case, which is possible in the European Court – a sort of an amicus brief if you like – and I appeared for the CCBE having written this report to represent the position of the legal profession. We were, I suppose, 75 or maybe 80 percent successful in that.¹⁹

¹⁵ [Case 155/79 *AM & S Europe Ltd. v. Commission*](#) [1982] ECR 1575 [represented CCBE]; [Case 270/80 *Polydor v. Harlequin Record Shops*](#) [1982] ECR 329 [represented European Commission]; [Case 60/81 *IBM v. Commission*](#) [1981] ECR 1857 [represented IBM]; [Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd*](#) [1987] ECR 3719 [represented U.K. Government].

¹⁶ European Court of Justice, see <http://www.curia.eu.int/>.

¹⁷ [Case 155/79 *AM & S Europe Ltd. v. Commission*](#) [1982] ECR 1575.

¹⁸ [David Edward, "The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community" published by the C.C.B.E. 1976](#) (the "Edward Report" - see [Case 155/79 *AM & S Europe Ltd. v. Commission*](#) [1982] ECR 1575, at p. 1622).

¹⁹ John Temple Lang, a professor at Trinity College in Dublin and a Senior Visiting Research Fellow at Oxford and former legal advisor for the European Commission, has written, "There can be few lawyers who have contributed as much to a single judgment on which so many lawyers all over Europe rely every day as David Edward contributed to the *AM & S* judgment." John Temple Lang, "The *AM & S* Judgment,"

DS: Judge, you also played an important role in a major case involving IBM and the European Commission.²⁰ A colleague, Sir Jeremy Lever,²¹ has written, “In that case, David’s knowledge of public international law as well as of [European] Community law was of great value to other members of the legal team (one might almost say army of lawyers) working on the case.”²² Claus-Dieter Ehlermann²³ has described that “army of lawyers” as a legal “dream-team.”²⁴

What was the significance of this case?

DE: The significance of the case was – and it’s curious that it’s replicated now in many respects in the Microsoft case²⁵ – the significance of the case was that IBM at that time had about 30 percent share of the market for mainframe computers. The issue was the extent to which IBM should make available to competing manufacturers of what were called peripherals the information necessary for them to produce peripherals – disk drives, printers, and so on – which would work with IBM mainframe computers.

The question therefore was competition in the area of peripheral products. The complaint against IBM was that IBM was not revealing how to connect a peripheral to the mainframe. And so the peripheral manufacturers were having to reverse engineer – they had to get hold of IBM products and then

in Mark Hoskins and William Robinson (eds), *A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD*, Hart Publishing (2003), p. 153.

²⁰ Joined [Cases 60/81R and 190/81R](#) *IBM v Commission* [1981] ECR 1857 and 2639.

²¹ In June 2003, Jeremy Lever QC was honoured in the Queen’s Birthday Honours list with a KCMG for services to European Community and competition law. At the time, he joined only two other barristers to have ever been awarded this honour while still in practice and is the first to be knighted for services to European Community and competition law. Sir Jeremy served as a Fellow and Senior Dean of All Souls College, Oxford and has been a member of the Council of Management of The British Institute of International and Comparative Law.

²² Sir Jeremy Lever, “Foreword,” in Mark Hoskins and William Robinson (eds), *A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD*, Hart Publishing (2003), pp. xi, xiii.

²³ Claus-Dieter Ehlermann was a member, and during his last year of office, chair of the World Trade Organisation Appellate Body. Prior to that, he was the European Commission’s Director General of Competition and of the Legal Service.

²⁴ Claus-Dieter Ehlermann and Nicholas Lockhart, “Standard of Review in WTO Law,” in Mark Hoskins and William Robinson (eds), *A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD*, Hart Publishing (2003), p. 267.

²⁵ On 24 March 2004, the European Commission concluded after a five-year investigation that Microsoft Corporation broke European Union competition law by leveraging “its near monopoly in the market for PC operating systems (OS) onto the markets for work group server operating systems and for media players.” Among other things, the Commission fined Microsoft €497 million for abusing its market power in the EU and ordered it to turn over some source code to competitors; see

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/382&format=HTML&aged=1&language=EN&guiLanguage=en>.

work out how IBM made its peripherals work with its mainframe.

The argument of the Commission, which had been the argument that had been advanced by the Justice Department in the United States, was that IBM ought to be disclosing the codes which enabled the mainframe to talk to the peripherals. And to a certain extent, the same issue arises in the Microsoft case as to whether Microsoft's basic Windows Operating System [and whether] Microsoft ought to reveal details of its system in order to enable other people to produce software which will work with that system. So it was an important early case in that area.

Of course very soon, while the case was still going on, suddenly the personal computer burst upon the world and the mainframe ceased to be the be all and end all of computing. But at that time the IBM case was a test case for the power of a market leader and the obligation of a market leader with more than a minimum market share to make it possible for other producers to compete.

We had, as is said, a dream team led by Jeremy Lever. He's called in Britain the father of competition law, because he'd been a leading competition lawyer since the 1950s. He and I went up to Oxford the same day actually. He had done national service and I had not. And after we'd been together and he was lead counsel for AM & S in the *AM & S* case. I'd been appearing for the CCBE so that we came together at that point [and] he invited me to join the IBM team with specific responsibility for the public international law and a few other aspects of the case. The case was eventually settled.

DS: Were there some American lawyers on the dream team?

DE: There were hoards of American lawyers.

There was the in-house team which was led by Nicholas Katzenbach, who had been I think attorney general for Lyndon Johnson and responsible for the civil rights legislation way back in the 1960s.

Lloyd Cutler of Wilmer, Cutler, and Pickering was particularly interested in the issue of comity and the extent to which the fact that the Department of Justice had settled with IBM should, as it were, dictate what would happen in Europe.

There was a man called Tom Barr who'd been the lead counsel in the case before the Department of Justice and there was a long-running case in the Southern District Court of New York against IBM and Tom Barr, and I can't remember the name of his firm was, and Tom had been the lead counsel on

that.

So there were the in house and real leaders of the American bar and also counsel from California from O'Melveny and Myers, a chap called Mark Steinberg, who had represented IBM in the proceedings in California.

DS: How much of your time did the IBM case take?

DE: The team was based in Paris because that's where IBM's European headquarters were. We had an office in Paris and we worked there. I went there from time-to-time for a week or a fortnight at a time. It took me out of practice in Scotland for the best part of a year anyway.

DS: At the time you appeared before the European Court of Justice, did you have any idea that some day you might be a member of that body?

DE: None at all. I just assumed I would continue in practice in Scotland and perhaps go on the bench in Scotland.

DS: Judge, now I'd like to ask you about your overall experience practicing law beginning with the things that you enjoyed about the practice.

DE: The great thing about practicing law in Scotland as an advocate when I did so was that you had to be prepared to do everything. [However,] the one thing I really didn't do was tax. I really didn't know about tax and I didn't take tax cases. But otherwise you had to be prepared do everything.

I've done trusts, patents, trademarks, and I've also defended someone on a charge of murder and defended people on dangerous driving and everything in between including latterly European law cases.

One of the great advantages of the Scots bar in those days was you did have to have some acquaintance with various areas of the law and see the law as a whole. I never did very much crime however.

The other thing about practicing law in Scotland in those days was that you were in court a lot. So first of all you had to learn the techniques of examination and cross-examination of witnesses. A lot of people frequently don't understand that those are very, very different techniques. And also the techniques of pleading before juries because we had civil juries in those days, hardly used at all now but they were used a lot in personal injury cases in those days. And argument of procedural issues and appeals right up to the House of Lords. And these again were very different techniques. It was

challenging because it was heavy work. I used to go up to court at 10 in the morning – the court sat from 10 till 4 with three quarters of an hour break for lunch.

At 4 o'clock I had to come down from court and then had consultations in this room, probably two consultations in the evening one at 4.30 and another at 5.30 or 6 and then have supper and then work till two in the morning most days of the week. So it was hard going and it was testing.

You get a shot of adrenaline if it's going well. It's pretty hard if it's not going well. The enjoyable thing was when a cross examination was going well or in a very big case when everything was falling into place and the judge was clearly coming to your way of thinking and so the case was going well. Much more difficult when the case wasn't going well and then having to fight to see if you could make it come right. I enjoyed that.

Put it this way – it was hard going because in those days there was little opportunity in Scotland for somebody to, as it were, opt out of general practice and only do a few specialist cases. You were either doing it day and daily or you weren't. I used to find it was one of the oddities of going to the IBM case was that even an absence of one month, some of the skills had begun to get rusty. Court practitioner skills really keep going by doing.

DS: Were there some things about the practice that you just didn't like?

DE: No, I don't think so.

I think I began not to like myself if I was successful in cross examining a witness and I sometimes felt that I was using my skills, as it were, against an unequal adversary. It's jolly easy actually, if you've had a lot of experience in cross examination, to make somebody look silly even if they are not silly and even if they are doing their best. But if they're not very skilled at answering questions, you can run rings round them. And sometimes I felt I had been unfair in that respect. So there were elements of self doubt if you like.

And of course – and I don't know whether this is true of all court advocates – that one does sometimes have the feeling that you're not doing it as well as you could be doing it. If you begin to feel that you're really the best thing that ever trod the boards of a court, it's time to give it up. So it's testing in that respect too.

DS: Were there aspects, if any, that surprised you about the practice of law?

DE: I wouldn't say surprised me. I think I'd go back to what I said before. Looking from outside it may appear that the practitioner has immense confidence, immense skill, knows where the case is going and that's not my experience. My experience was that the unexpected often happened and you've got to be able to cope with a changing situation.

One of the simplest things is you go into court thinking you have a very good case and, for one reason or another, the judge doesn't happen to agree with you. And you went in thinking you had a good case and you have a fight on your hands. So every case is a bit different.

If you say what aspect of the law surprised me, I suppose it's – as compared with the public image – the fact that cases are different and cases are difficult. It's not as easy as it looks.

DS: Was there one particular case or event during your practice that comes to mind as a highlight of your years of practicing?

DE: I suppose a case I've mentioned before, the case in the House of Lords where we established that there was a notion of judicial review of administrative action which was completely new. What we sought to show – and I think did show – that had been there in the law since the earliest times and simply had been forgotten about. I suppose that was a very important case.

One of the nicest cases I had was a case against Coca Cola. Coca Cola had raised a trademark infringement action against a small firm in Renfrewshire in Scotland who had made a fizzy drink which has a long, long history called Scotch Cola.

One of the brothers had been in Australia. When he came back he said, "I think we should call our cola Koala Cola." They bottled it in a big clear bottle with a yellow label with a Koala bear on it. It could not have looked less like Coca Cola than was possible. It wasn't the same colour. The bottle wasn't the same colour or shape. The label was totally different. But Coca Cola claimed Koala Coal was an infringement of Coca Cola.

It was a very distinguished lineup of counsel. One became Lord Chancellor. Two of them became judges of the House of Lords and two became judges of the European Court. So we had a very big lineup of people who had a career afterwards.

But at any rate we won and showed that it wasn't an infringement of Coca Cola. The clinch moment was actually when a witness who sold soft drinks in the cafeteria in the ordnance factory in Renfrewshire was asked whether somebody would not be liable to be misled when offered Koala Cola when

they had expected to get Coca Cola. Her answer was, “Don’t be silly.” At that point the whole of the Coca Cola case collapsed. But I gather it was one of the very few cases until a very recent Mexican case where Coca Cola didn’t win. They were very angry.

DS: On a more personal note during the practice years, you and your family were living in Edinburgh in this house actually. What did you family like to do during those years?

DE: Very soon after I qualified and went to the bar we bought a small cottage in the country. We tended to go there for the weekends and most of the holidays. In addition we used to go to the westerns isles for our summer holidays. I suppose we did a lot together at the weekends and in the holidays, but once I’d become involved in European affairs I suppose I was less about than I had been earlier.

But on the whole the children were in school in Edinburgh, they had their friends in Edinburgh, they had their diversions of one sort or another in Edinburgh. So during term time they were at school and they were with their friends and so on.

This house being in the centre of Edinburgh tended to be the place where they and their friends congregated because many of their friends lived outside the centre. So there were always children coming and going in the house.

DS: Judge Edward, thank you very much for spending this time with us.