Passion and the advocate, a superabundance of law, the courts in overtime, running the criminal courts as a business

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Passion and the advocate

Lawyers have sometimes done dramatic things to assist their cases. On 27th March, 1979, without notice to the judge, the trial attorney T. David Burns was brought into court on a stretcher, wearing his pyjamas. He was keen to get another delay on a trial that had already been delayed more than once before, and he evidently took the view that sending a medical certificate would not do the trick.

Later, in a case arising from disciplinary proceedings brought against Burns, Chief Justice Sundberg ruled that the sudden onset of Burns' condition was worthy of note as he had been well the day before when he had been driving and walking as normal. Sundberg and his fellow judges in the Supreme Court of Florida ruled that the courtroom stunt of Burns should result in 30-day suspension and a public reprimand (*The Florida Bar v. Burns* 392 So.2d 1325 Fla., January 15, 1981).

In ancient Rome, Quintilian commended the use of dramatic court techniques such as introducing the children and parents of defendants to the court, and, when prosecuting, of introducing blood-stained swords as "the impression produced by such exhibitions is generally enormous" *(Institutiones Oratoriae* VI.i.30, trans H. E. Butler 192, Loeb). In one 19th century American case, the attorney William F. Howe, who was associated with the criminal fraternity and could evidently cry in front of juries at will, made an entire summation, hours long, on his knees (*Advocates*, David Pannick, 1992, p. 27)

In a barrister, faux fervour is awful. But is it desirable for an advocate to manifest true passion? Passion, after all, fuels most of the best human achievements. Should advocates be emotional or histrionic in court?

Marcel Berlins recently lamented (*The Guardian*, Monday 13 July 2009) that these days barristers are dull and emotionless.

> "A few years ago I took some students into the Old Bailey to watch a sensational murder trial. Later, they delivered their verdict. They had been bored. There had been no tension, no excitement, no drama. In particular, they had been bored by the eminent barristers' performances. Accustomed to fast-moving criminal trials on film and television, and the televised proceedings of high-profile US cases such as that of OJ Simpson, they found the real advocates most disappointing. They were right. Barristers these days address a jury as if they were accountants explaining a balance sheet. Oratory has disappeared from the English courtroom."

Berlins does, though, concede that advocates might well have become more effective:

> Gradually, the vocal and behavioural tricks have been abandoned, as have the excesses of language. Common sense, matter-of-fact and monotone have taken their place. Much more effective, no doubt. And so boring.

If boring means unflamboyant at work then barristers should be boring in the same way that surgeons should be boring and aircraft maintenance engineers should be boring. Legal arguments and the building of cases are works of rational balance and precision not stagecraft and melodrama.

Berlins says that "oratory has disappeared from the English courtroom". I do not think that is true although what counts as good oratory might have changed since the celebrated Edwardian barristers used to pull adoring crowds into the public galleries.

Cicero noted that the effective advocate is always mindful of the fact that people decide far more problems "by hate, or love, or lust, or rage, or sorrow, or joy, or hope, or fear, or illusion, or some other inward emotion" than by reality or legal standards or laws. But the 21st century courtroom is much more a palladium of rationality. People can see through an advocate who wants to sell a dodgy argument using rhetoric as clearly as they can see through a double-glazing rep who wants to do the same thing.

Jurors, judges, and magistrates have got the X Factor on television or political hustings to watch if they want to be entertained by colourful personalities or florid rhetoric. It is desirable that we moving away from the trial as an event in which 12 citizens judge which side has the more dramatically engaging advocate.

At root, the practice of law in a courtroom from the practitioners' point of view is to win the case in which he or she is instructed. Iain Morely QC puts the point in this way (*The Devil's Advocate*, 2009, 2nd ed., p. 13):

> Adversarial advocacy is not really an inquiry into the truth. It is a well-mannered contest, in which there are rules, and it is possible to win, even in the face of seemingly overwhelming evidence if you play the rules better than your opponent...Advocates try to win their cases within the rules, irrespective of the truth.

Finding 'the truth' is something for police officers, private detectives, judges, juries, and philosophers but the job of the advocate is to do the best he or she can for their client within the law and without fear, favour, televisual histrionics, pyjamas or tears.

Too much law?

Taking into account all the rules and regulations under English statutory and common law, and those that apply via European law, we have over one million legal rules that apply in the UK. You will, of course, be delighted to know that you are not expected to know all of these by heart by the time you graduate. Whether society needs that many rules in order to work properly, however, is an important question.

Speaking (14th July, 2009) at the Lord Mayor of London's annual dinner for judges to an audience including Justice Secretary and Lord Chancellor Jack Straw, Sir Igor Judge, the Lord Chief Justice, made a plea to future governments to reduce the number of laws being made, especially in the field of criminal justice.

Chief Justice Judge cited 2003, when six major criminal statutes were passed, including the Anti-Social Behaviour Act, The Extradition Act, The Sexual Offences Act and the Courts Act. Parliament also legislated what Chief Justice Judge called "the great Daddy of them all" – the Criminal Justice Act which runs to 1,169 paragraphs. He said:

> "My. . .request is one which has been frequently addressed, but so far without success. Can we possibly have less legislation, particularly in the field of criminal justice"

The cascade of new laws in recent years has been enormous. Speaking in Parliament last year, Chris Huhne MP noted that (*Hansard* – House of Commons, 4 Dec 2008: Column 171)

> We are to have the 26th criminal justice Bill and the seventh immigration Bill from this Government since 1997. Various of those Bills have been shovelled through this House so hastily that whole sections and clauses have not been considered at all and have had to be reviewed in the other place. We now know ...that no fewer than 3,600 new criminal offences have been introduced by this Government since 1997, yet extraordinarily, the Home Secretary...assures us that one of her key priorities is to reduce the need for police paperwork and bureaucracy. The extraordinary creation of offences by the Government is massively complicating the job of law enforcement and of the whole criminal justice system.

Some of the new specific offences are arguably the sort of thing without which it would still be possible to live in a state of civilisation. These include disturbing a pack of eggs when instructed not to by an authorised officer; obstructing workers carrying out repairs to the docklands light railway; and offering for sale a game bird killed on a Sunday or Christmas day.

Courts working overtime

Nothing can stem the growing flow of court business in the 21st century, not even ancient traditions. Even the Spanish siesta yielded to afternoon court sittings. 'Judges will not only have to stay awake in the afternoons now, they will be expected to work' Angel Acebes, Spain's minister of justice, announced in 2001.

The courts of the English legal system now face having to sit for an extra two hours a day as they struggle with rising workloads coupled with an unprecedented drive to cut costs. In 2009-10, judges will be obliged to accept more sitting days, and a recruitment freeze is being imposed on all but exceptional posts as part of a cost-cutting drive across courts in England and Wales (Frances Gibb, *The Times*, July 10, 2009).

Traditionally, courts have one 'sitting' from 10am to 4pm a day. Now, the option of having a two-session court day, starting at 9am rather than 10am and ending at 5pm or 6pm, not 4pm, is likely to be tested at a Crown Court in London. Trials involving serious crime are currently taking up to a year, after charge, to be brought to some Crown Courts in London. Delays in children's cases in family courts are at what judges call unacceptable levels. Earlier this year, Sir Mark Potter, President of the Family Division of the High Court, called for urgent action to tackle growing delays in child abuse cases. He warned (*The Hershman/Levy Memorial to the Association of Lawyers for Children*, 2 July 2009) that

> "...judges and the HMCS [Her Majesty's Courts Service] administration up and down the country are now faced with the formidable problem of accommodating this block of extra cases through an already strained system. Quite apart from the problems which that presents to the limited number of judges up and down the country available to try those cases, the strain upon Cafcass's guardian service [which provides the personnel essential to the safeguarding of the interests of children in the course of the litigation, namely the child's guardian appointed under S.41 of the Children Act 1989]. will be all the more acute".

In July, the Public Accounts Committee in Parliament reported that performance in the courts was nationally varied and in six of the worst-performing areas only 56 per cent of trials were started within the target period of 16 weeks.

The Courts Service has brought in a series of measures to protect "frontline" services and has made £300 million in "efficiency" savings to ease the worst backlogs. However, the crisis in public spending across the civil service means that the Ministry of Justice has had to make an additional £70 million in cost savings for 2010 on top of £1 billion already imposed for the current three-year spending round.

John Howson, deputy chairman of the Magistrates' Association, said that problems would arise if serious crime, which is tried in the Crown Court, rose farther.

> "There is a large backlog in parts of the South East and you can't get a trial on before a year in some places. In the end, if there is no more money, cases would then take longer; suspects will spend longer on remand and then have to be released when sentenced because they will already have served their time." (*The Times*, 9th July, 2009)

An increase in the delays, he added, would result in more defendants pleading not guilty, knowing that by the time their case came to be heard, witnesses' memories would have faded. "So they reckon on gambling that they will get off altogether rather than taking the 30 per cent discount for a guilty plea."

The Crown Court is based at 77 centres across England and Wales. Most of the centres have several courts. Some have over 10. If one judge sits on a single day beyond his or her set number for the year that is one extra court day for the system and this year Crown Courts are sitting nearly 2,400 extra days to cope with the rise in work. In some areas part-time judges are being asked to increase their workload to help out the full-time judges. In the family courts there has been what Sir Mark Potter said had been a "dramatic upsurge" in work after the Baby Peter case (*The Times*, 3rd July, 2009). The rise in the number of care proceedings commenced by local authorities followed a downward trend over the preceding six months while local authorities came to terms with the provisions of *The Public Law Outline: Guide to Case Management in Public Law Proceedings* (April 2008) and the large increase in court fees payable by them as the price of issuing proceedings in the course of their child safeguarding duties. The recent upsurge in applications to take children into care was triggered by local authorities becoming anxious to avoid the sort of complacency that was evident in the Baby Peter case.

Sir Mark noted that everyone involved in the family justice system was working flat out to make improvements but they were hampered by a lack of resources and the need for cuts. He called for urgent action to tackle delay "hot spots" and warned that while the government had pledged continuous improvement, it had failed to mention resources or the "eventuality that a system already struggling under the constraints of limited and reducing budgets may prove unequal to [the] task".

Chris Mayer, chief executive of the Courts Service, said (*The Times*, 9th July, 2009):

> "Crown Court timeliness is improving. Nationally the average waiting time for a Crown Court case fell from 16.1 weeks in 2007-08 to 15.2 weeks in 2008-09. Last year was the best ever, with 79.7 per cent of cases dealt with within national targets against a backdrop of an increasing workload."

She accepted that London had particular problems with a rising caseload as well as dealing with more complex cases such as fraud, high-profile murders and terrorist cases. "This makes timeliness harder to achieve. However, 68.5 per cent of cases in London were still dealt with within their relevant targets and 69.2 per cent of the most difficult cases within 26 weeks."

Running the criminal courts on business principles

The purpose of the criminal law, according to Sir William

Blackstone's elegant encapsulation, is to condemn and punish acts which "strike at the very being of society". He said that civil wrongs were wrongs that affected "individuals, considered merely as individuals" whereas crimes were wrongs which struck at the whole community "in its social aggregate capacity." (*Commentaries on the Laws of England*, IV, 1, 5; ed. Wayne Morrison, 2001, London: Cavendish)

There has in recent times been a growing concern over what can be seen as a legal downgrading of much conduct previously categorised as within Blackstone's formula. Cuts in court funding have meant that many types of criminal case previously tried in magistrates' courts are being diverted away from the court system as offenders are being dealt with by "on-the-spot" fines and cautions. Almost half of all offences are now dealt with in this way (*The Times*, 10th July, 2009). Lawyers are noting crimes being undercharged or simply cautioned, with the consequence that some serious offenders simply 'walk away' from their offence. The workload of magistrates has dropped by an average of eight per cent. Magistrates are reporting cancelled sittings across the country, either because of no work, or disposal of cases out of court.

However, John Thornhill, Chairman of the Magistrates' Association, has noted that costs are not saved in the long term because nearly half of 'on-the-spot' fines went unpaid. "Many of these cases come back to the courts in the end, because the offender has failed to pay". The use of out-of-court penalties is very common. Across England and Wales in the 12 months to March, 2009, only 724,179 of the 1.4 million offenders "brought to justice" actually came before the courts.

The budget for the Courts Service has already been cut from £799 million in 2008/09 to £755 million in 2009/10. The Courts Service will have to make savings in the current three-year spending round of £1.85 million.

In the civil courts, government ministers are making savings by requiring litigants (who have already notionally paid for the court services in taxes) pay high court fees. Lord Justice Jackson has said moving civil justice system costs from taxpayers to litigants was "wrong in principle" (BBC, 8th May, 2009). Trying to run the *criminal* court system on tight business principles (shunting hundreds of thousands of cases away from the courts to a cheaper instant-fine system) is even more problematic. Mr Thornhill said: "We do not accept that the court budget should be dependent on income from fines and fees."

The criminal law is indispensably valuable in maintaining social cohesion – Blackstone's "very being of society" – so the extent of its operation should not be directly articulated to the changing state of the economy. Shares and unemployment levels might go up and down but the quality of the legal system at the core of a civilised society should not oscillate. Justice is not an index-linked phenomenon.