PREPARING THE CRIMINAL CASE FOR TRIAL

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It is a risky business offering thoughts about another country's legal system. And not necessarily of much use–since legal systems, and criminal justice systems in particular–have their own particular characteristics which usually make foreign experience, however "interesting", largely irrelevant. Certainly successful transplants from other systems are rare. Readers of this paper should be aware that it is written from the perspective of the English system and with little or no knowledge of the way the system operates in the Republic.

The paper is focussed especially on pre-trial matters.

I. PRELIMINARY

As a preliminary I would mention three important aspects of our system that I believe have no exact equivalent in the Republic.

A. The Police and Criminal Evidence Act, 1984 (PACE) and the PACE Codes[1]

The 1984 Act is not simply a convenient modern statement of police powers. (The Act was the result of the Report of the Philips Royal Commission on Criminal Procedure, 1981.) When the Bill was going through Parliament it was hotly contested but only a few years later it had settled down to become an integral part of the system. The Runciman Royal Commission on Criminal Justice (1991-93), for instance, received no submissions urging anything other than tinkering changes. In other words the Act appears to have struck about the right balance between the different interests and values. Not that it has not needed

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[1] The Northern Ireland equivalent is the Police and Criminal Evidence (Northern Ireland) Order, 1989 (N.I.12).

amendment but the amendments have mainly been additions rather than changes.[2]

Perhaps just as important as the legislation, is the impact of the Codes which are part of the PACE system. There are now six Codes: Code A on Stop and Search, Code B on Entry of Premises, Code C on Detention and Questioning of Suspects, Code D on Identification Procedures, Code E on Tape Recording and most recently Code F on Video Recording. The Codes are drafted by the Home Office and are then published as consultation drafts. When the consultation process is complete they have to be approved by Parliament. The latest revised version was approved by Parliament for implementation as from 1 April, 2003.[3]

The Codes consist of detailed rules. (The current booklet runs to some 140 pages. The Northern Ireland equivalent runs to nearly 150 pages.) They have had a profound effect on police operations–despite the fact that the sanctions backing the Codes are seemingly weak. A breach of the Codes does not give rise to any criminal or civil liability and there are virtually no disciplinary proceedings brought for breaches of PACE. The only real threat of "penalty" is that a court may exercise its discretion under s.78 of the Act to exclude evidence obtained in the context of[4] a breach of the rules. The main reason is that, unlike their attitude to the Judges' Rules, the police take them seriously. Compliance is obviously not 100%–it is, for instance, much better in regard to Code C which applies in the police station than in regard to Code A which operates on the street. But the Codes are regarded by the police, at low and middle, as well as senior, management level as "the norm". In other words, they are not seen as "best practice"–something to be aspired to but not

[2] Though there have been some major changes. They include the reforms in regard to the "right to silence" in the Criminal Justice and Public Order Act, 1994 (allowing adverse inferences to be drawn from silence); and the recent change no longer requiring the police to destroy DNA samples if someone is acquitted.

[3] For the text see http://www.homeoffice.gov.uk/pcrg/plpu.htm.

[4] The courts have not required a causal relation between the breach and the evidence.

observed. Rather they are seen as the rules that basically have to be complied with.

B. Recording of Police Interviews with Suspects

I understand that in Ireland there are facilities for recording of interviews in some but not all police stations where interviews with suspects are likely to take place–and that even when available the facility is not always utilised. Also that *voir dire* hearings about the propriety of police behaviour are common. I gather that the Gardaí fear that tape recording would require retraining of interrogators and that it might also have the effect of causing suspects who currently talk not to do so–either about their own involvement or about the involvement of others–and that recording would cause the flow of information generally to diminish.

As to the first of these concerns, research into recording of interviews in England did show that too many police interviews were poorly prepared and ineptly handled[5]– so improved training and perhaps more effective interviewing could be a useful side effect of recording of interviews.

As to the second cause for concern, the English police (I personally thought very understandably) had precisely the same fears when tape-recording was first mooted here.[6] But these fears proved to be groundless. The flow of talk did not dry up. Surprisingly, it seemed to be unaffected. In fact the police found that although tape recording was basically introduced for the benefit of the suspect, it actually worked as much, or even more, to the advantage of the prosecution.[7] The reason was that if the suspect made an admission or

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[5] Baldwin, *Video Taping Police Interviews with Suspects–an Evaluation* (Home Office Police Research Series, Paper No. 1, 1992).

[6] The Philips Royal Commission (1981) proposed a very limited experiment. The Conservative Government undertook a much larger experiment in 1984 which to the surprise of many proved a great success. From 1992 tape-recording became compulsory for all interviews with persons charged with offences that can be tried on indictment. It is not required for interviews with suspects in summary only cases but in practice such interviews are usually also tape-recorded.

[7] For an account of the sea-change in the attitude of the police see Baldwin, "The Police and Tape Recorders" [1985] Crim. L. R. 695.

confession and it was on tape, it was much more difficult to deny that it had been made or to argue that it was the result of improper pressure. (The tape shows not only what was said but the tone of the whole exchange.) The result was not only far fewer challenges to police evidence in court but an increase in the proportion of guilty pleas.

The police are in the vanguard of now extending recording to video recording. (An official trial is being conducted in some ten police districts.)

C. The Discretion to Exclude Evidence in Section 78 of PACE

I understand that the admissibility of evidence in the Republic follows the traditional common law approach – the voluntariness test in respect of confessions and the exclusion of evidence that is more prejudicial than probative. There is also the "poisoned fruit" doctrine enunciated in *Attorney General v. O'Brien* that prosecution evidence should not be admitted that has been obtained or procured by the State or its servants or agents "as a result of a deliberate and conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exist".[8]

Until PACE we too had the voluntariness rule in regard to confessions[9] plus in addition and generally, the "more-prejudicial-than-probative rule".[10]

The Philips Royal Commission argued that the voluntariness test was flawed in that all confessions are to some degree involuntary. PACE introduced a new (and complex) rule for the inadmissibility of confessions.[11]

Philips rejected an American-style, "fruit of the poisoned tree" exclusionary rule and did not propose any

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[8] [1965] I.R.142 at 170.

[9] Though it had been largely negated by the two decisions of *DPP v. Ping Lin* [1976] A.C. 574 (HL) and *Rennie* [1982] 1 W.L.R. 64 (CA).

[10] *Sang* [1980] A.C. 402 (HL).

[11] Under s. 76, a confession is inadmissible where the prosecution fails to prove beyond reasonable doubt that it was not obtained "by oppression", or "in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made in consequence thereof".

alternative. But right at the end of the parliamentary debates on the Bill the Government introduced section 78 which has proved to be by far the most frequently used section of the Act.[12] The section gives the court a wide discretion to exclude evidence:

> [T]he court may refuse to allow evidence ... to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

I am not sure if the Irish courts have (and exercise) an ultimate discretion to hold evidence inadmissible on the ground that its admission would simply be "unfair". If not, such a rule as is enshrined in section 78 of PACE might be worth considering for the Republic.

II. Other Topics

A. Pre-Trial Case Preparation

The English system has been much exercised in recent years with the problem of "making the trial system more efficient"–particularly by better pre-trial preparation.

See for instance:

- the elaborate pre-trial system proposed by my colleagues on the Runciman Royal Commission[13] (and my Note of Dissent[14]);
- the Court Service's Consultation Paper, *Transforming the Crown Court*, September 1999;

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[12] For cases where the discretion was exercised and was not exercised see Zander, *The Police and Criminal Evidence Act, 1984* (4th. ed., 2003), para. 8-110-8-126.

[13] *The Royal Commission on Criminal Justice, 1993*, ch. 7, paras. 1-36.

[14] *The Royal Commission on Criminal Justice, 1993*, pp. 223-233.

- the National Audit Office's document, *Criminal Justice: Working Together* (HC 29, Session 1999-2000); and
- Auld L.J.'s *Review of the Criminal Courts*, 2001– especially chapter 10.

One of the influences behind this has been the comparable effort to make the civil justice system more efficient–reflected primarily in the package of reforms flowing from Lord Woolf's two reports on *Access to Justice* (1995 and 1996), implemented as from April 1999. Thus the Press Notice accompanying the setting up of the Auld Review said, "This Review is a complement to the highly successful review that Lord Woolf undertook of the civil courts".[15] Whatever the merits of such efforts it is important to have in mind the many differences between civil and criminal process. (In an earlier piece[16] I identified 18 relevant differences.)

My own take on the "efficiency" drive is that it needs to be approached with great care and with considerable scepticism lest the cure proves to be worse than the disease There are a variety of reasons. They include:

- inadequacy of accurate information and research as to how the system is currently working;
- often the reforms are fuelled by myths about the system (the assertion, for instance, that ambush defences are a serious problem) or by unreal expectations from reform strategies (for instance that practitioners will complete and return questionnaires about the case, which experience shows is to a regrettable extent not necessarily so);
- the players are likely to be resistant to change; and
- the "criminal justice system" is not a system. The different interest groups will tend to pull in different directions.

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[15] Lord Chancellor's Department Press Notice 386/99, 14 December 1999.

[16] "What on earth is Lord Justice Auld supposed to do?" [2000] Crim. L.R. 419, 422-25.

It is vital to have before and after research, to pilot innovation and to be ready to modify the model.

B. Early Identification of Issues

In his report, Auld L.J. set out what he saw as the basic aims as regards preparation for trial. One was the early identification of the likely plea, and, if "Not Guilty", of the issues. The culture of last minute decisions had to be attacked. The parties had to prepare the case properly.

I believe that Sir Robin places excessive emphasis on the importance of early identification of issues. Not that there is anything wrong with such early identification. If it can be achieved, fine. But I would give it a lower priority than he does. My main reason is that it is very difficult to achieve and I am not persuaded that the necessary efforts involved are worthwhile–and the more so since to a considerable extent they are likely to fail.

I believe that, however desirable it may be, it is not possible to eradicate the culture of last-minute decisions in the criminal justice system. It is endemic for a variety of reasons, many of which cannot be altered.

One obviously is human nature–the tendency to leave things to the last minute and to put off the evil day. This is true in every walk of life but there are features of the criminal justice process that make it especially likely.

Another is that delay often benefits the defence–the victim makes up with his assailant and declines to give evidence against him; delay means more time to get the defence case together; the defendant finds a job or a girl friend so as to put himself in better odour when it comes to being sentenced–and so on.

Another reason for the culture of late decisions is that, at least in England, clients so often only get to see the advocate at the last minute.[17] In the main that is not the

[17] Zander and Henderson, *The Crown Court Study* (Royal Commission on Criminal Justice, Research Report No. 19, 1993) reported that the defendant saw his barrister for the first time on the morning of the trial in 55% of contested cases and in 70% of cases that "cracked" (*i.e.* became guilty pleas at the last minute)–section 2.6.2. The sample for the study was every completed Crown Court case in every Crown Court (excepting

client's fault. Nor is it usually the lawyer's fault. It is the result of the way the system works. In the case of solicitors' firms it is mainly the result of the pressure of work and inadequate resources, though poor work and poor organisation are decidedly also factors.[18] In the case of the barrister it is mainly because instructions are commonly delivered late,[19] and that, if delivered earlier, they are often returned.[20] That may be undesirable, but it is a fact of life for which no one has yet found a solution–I believe because there is no workable solution.

Returned briefs, like late preparation of cases, are an integral part of the system which is based on the priority given to avoidance of delay. To promote maximum through-put of cases, the principle is that when a case finishes there should, so far as practicable, be another case waiting to start at short notice. Returned briefs generally result from the unavoidable fact that cases sometimes run shorter or longer than was anticipated. When a case runs short and a new case is brought on to fill the gap, the lawyer earmarked for the case now cannot do it because he is "part-heard" in another case. When a case runs long, it is the same problem in reverse. It is extremely rare for courts to grant an adjournment to permit an advocate who appeared at an earlier

three used in the pilot) for two weeks in February 1992. Lengthy questionnaires were completed by the judges, the lawyers, the police, the court clerks, the defendant and the jurors.

[18] See generally the sobering study of defence lawyering by McConville, Hodgson, Bridges and Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain*.

[19] In the *Crown Court Study* (Royal Commission on Criminal Justice, Research Report No. 19, 1993), half (51%) of all prosecution barristers and one third (31%) of defence barristers in contested cases received the brief in the case on the day before the hearing or on the day itself (section 2.1.3). It is remarkable that despite this, 95% of prosecution barristers and 93% of defence barristers said they had enough time to prepare the case (sect. 2.1.4). In fact, in contested cases when the barrister got the brief *on the day of trial*, 78% of prosecution barristers and 81% of defence barristers said they had enough time (section 2.1.4).

[20] The Crown Court Study showed that close to half of all briefs were returned. Prosecution barristers in contested cases said their brief had previously been returned in 59% of cases. For defence barristers the proportion was 44% (section 2.1.6).

stage to act. Nor would it help if adjournments were granted in that situation as that would merely increase delays and the same problem of one or other lawyer in the case being part-heard could occur again.

Another reason for change of lawyer during a case is the fee structure. Auld L.J. said that the system of payment must be altered so that pre-trial work is properly rewarded. But even in the unlikely event that payment for pre-trial work were significantly improved, it is inconceivable that publicly funded pre-trial work will be paid at a higher rate than trial work–from which it follows that the pre-trial lawyer will often be less senior than the trial lawyer. That again is a fact of life and railing against it will change nothing.

All this last-minute work looks bad. One would not want to be the defendant for whom the work was done in that way. But the reality is that not only does the system work in that way, but that it probably works better than one might think. In the Crown Court Study, the judges generally thought that counsel was well or adequately prepared[21] and that view was overwhelmingly shared by those who instructed them.[22] Again, for what it is worth, jurors when asked what they thought of the presentation of the case by the lawyers in terms of "knowing the facts", "putting the case across" and "dealing with the points in the opponent's case" overwhelmingly thought they did a good job. (There were positive ratings in 85-90% of instances.[23]) Needless to say, these opinions do not mean that the work done *was* satisfactory–but they are somewhat encouraging.

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[21] Nearly half (47%) of the judges thought both prosecution and defence counsel were "very well prepared" and the same proportion thought that they were "adequately prepared"– Royal Commission on Criminal Justice, Research Report No. 19, sections 2.4.13 and 2.5.21.

[22] No fewer than 98% of CPS respondents said that the barrister had sufficient knowledge of the prosecution case; and 99% of defence solicitor respondents said the same of the defence barrister–Royal Commission on Criminal Justice, Research Report No. 19, section 2.4.10 and 2.5.19.

[23] Royal Commission on Criminal Justice, Research Report No. 19, section 8.7.1.

Another reason why it is difficult to achieve early identification of issues is what Sir Robin referred to critically as the "uncooperative or feckless defendant and/or his defence advocate who considers that the burden of proof and his client's right to silence justifies frustration of the orderly preparation of both sides' case for trial".[24] Sir Robin appears to suggest that the defendant and his lawyer are to be blamed for being uncooperative. I take a different view. I do not believe that it is the job of the defendant to be cooperative. The process is adversarial. He is not to be blamed for taking advantage of every opportunity the system gives him to escape conviction, to lessen his sentence or in other ways to ease his situation. The system may of course offer him inducements to encourage him to be cooperative of which he may or may not avail himself. But the idea that the defendant should be cooperative out of a sense of good citizenship seems misconceived. One should work on the basis that the defendant will be cooperative only if he thinks it to be to his advantage–and that that attitude is not only understandable but wholly legitimate. (How would one act oneself in the defendant's situation?)

As to the defendant's lawyer, his task is to represent his client within the rules. Subject to those rules, if in the client's view it is to his advantage that his lawyer be cooperative, he should be so; if not, he should not.

When Sir Robin says that early identification of the issues depends crucially on lawyers doing their job properly, that may be true–but there are an infinite number of reasons why they may fall short. To say that the prosecutor must be "strong, independent and adequately resourced" and that there must be "an experienced, motivated defence lawyer adequately paid for pre-trial preparation" is unrealistic.[25] It is the right objective but, in the nature of things, it will often,

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[24] Auld, *Review of the Criminal Courts*, p. 397, para. 8.

[25] Just as an example, consider the CPS Inspectorate Report for 1999-2000 cited by Auld, *Review of the Criminal Courts,* p. 470, para. 181. He says it found frequent weaknesses in the CPS's review of cases going to the Crown Court, "in particular, that the quality of instructions to counsel was generally low, that too many indictments needed amendment and that there had been little improvement in the management of its files".

perhaps usually, not be realised. To make it "an essential" is therefore not sensible. People will do their job according to their lights to the best of their ability in the circumstances. Usually the circumstances will be difficult and their ability will be average. That is how it is.

C. Pre-Trial Hearings

Auld L.J. was very sceptical about the value of pre-trial hearings which he suggested were mostly unnecessary and misused. The parties should be responsible for preparing the case properly. Pre-trial hearings should be reserved for matters that cannot be resolved informally between the parties. His strictures were mainly directed at the automatic Plea and Directions Hearings (PDH) in the Crown Court.

Contrary to Sir Robin, I incline to the view that on balance the automatic PDH is worth preserving.

The purpose of the PDH is for the pleas to be taken and, in contested cases, for the prosecution and defence to assist the judge in identifying the key issues and to provide other information required for the proper listing of the case. The Lord Chancellor's Department (LCD) has issued a standard check-list of questions (the Judge's Questionnaire) for consideration at the hearing. In large centres as many as 30-40 a day may be listed, "taking the form of a report on progress, good or bad, and the fixing of a trial date or the judge chivvying the parties into getting on with basic matters of preparation and to resolving issues that they may or may not have discussed before then".[26] In more complex cases there may be more substance in such hearings.

Auld L.J.'s proposal was based on the belief that PDHs are usually not necessary because the parties should be expected to do what needs to be done to move the case on.

> In courts at all levels the main players–the police, prosecutors and defence lawyers–should take the primary responsibility for moving the case on. They should concentrate on improving the quality of the preparation for

[26] Auld, *Review of the Criminal Courts*, p. 483, para. 209.

> trial rather than trying to compensate for its poor quality by indulging in a cumbrous and expensive system of, often unnecessary and counterproductive court hearings.[27]

The way to do that, he said, was "by adequate organising and resourcing of the police, prosecutors, defence practitioners and the courts, including the provision of a common information system of information technology for all of them and the Prison and Probation Services".[28]

Provision of a common IT system for all the criminal justice agencies would, in the best case, take years to establish. That cannot be used to justify any alteration in the system until it is in place.

As to "adequate resourcing" of the criminal justice agencies, I have no confidence that significantly greater resourcing will become available. But even in the unlikely event that the Treasury agreed to release significant extra funds, say, for generous remuneration of pre-trial work by legally aided lawyers, I do not think it would make much impact on the problem here under consideration, namely the identification of the key issues for trial.

I believe that, for a variety of reasons, the matters dealt with at the PDH will not be dealt either as efficiently or as quickly if they are left to the parties to handle without the stimulus (what Auld L.J. calls the "wake-up call") of a court hearing. The fact that the relevant interests are all there at the same time makes it possible to sort out matters that would otherwise not be sorted out at all–or that would take much more effort and delay to get sorted out. In my Dissent to the Royal Commission's Report I spelled this out. I believe that what I wrote in 1993 is equally applicable today:

> Having an automatic Plea and Directions Hearing (PDH) for every case seems to me to have the following actual or potential advantages:

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[27] Auld, *Review of the Criminal Courts*, p. 487, para. 220.

[28] Auld, *Review of the Criminal Courts*, p. 487, para. 220.

> (1) All parties (prosecuting and defence counsel, defence solicitors, CPS and defendant) are required to come to court on a fixed date. This seems to work satisfactorily. It requires very little chasing. They come.
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> (2) The defendant has an early opportunity to discuss his plea in person with a barrister. Often it is not the barrister who would ultimately conduct his trial if there were one, but it is a barrister. This is a considerable advantage–especially if, as will commonly be the case, he has previously only discussed his case with a solicitor's clerk.
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> (3) The PDH is a convenient opportunity for the two opposing counsel to confer to see whether there is any basis for a plea (or charge) bargain where the prosecution drops more serious charges and the defendant thereupon pleads guilty. At present this opportunity does not usually present itself before the day of trial. The effect of bringing it forward should be to reduce the number of last minute guilty pleas on the day of trial (cracked trials). The experiment with [the pilot study on PDHs known as] Recommendation 92 suggests that this is happening.[29] ...
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> (5) If it appears that the case is to go forward as a contest, the barrister would normally have an opportunity at the PDH to consider what further steps need to be taken by his instructing solicitors to get the case ready for trial. Sometimes he would communicate such views informally and orally to the representative of the solicitors' firm present at the PDH. Sometimes he would write them

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[29] [The *Interim Report of the National Steering Group*, March 1993, stated that cracked trials were reduced from 31% to 19%.]

> down there and then by 'endorsing' them on his brief. Sometimes he would send the solicitors a more formal and extended 'advice on evidence' from chambers.
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> Any of these forms of assistance should have the effect of improving the quality of preparation of cases. The Interim Report on the pilot experiment states: "The indications are that [Plea and Directions Hearings are] improving the preparation and disposal of Crown Court cases. The extent of this will not be clear until completion of the pilot... It is however already clear that the key to any improvement is early and adequate preparation by both prosecution and defence…"
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> This is extremely important–considerably more important than 'clarifying the issues for the jury' or 'streamlining the trial' or 'saving costs'. It is central to whether justice is done because it directly concerns the question whether the defendant's case is properly put to the court by his lawyers. Critical to that is whether the case has been properly prepared by the solicitors... One of the most serious defects in the existing system is inadequate preparation of routine cases by defence lawyers.[30] Among the many reasons for this is that the work in most solicitors' firms is done by clerks with insufficient guidance from solicitors in their own firms and, too often, with no guidance from a barrister. The early opportunity of a face-to-face consultation with a barrister for both the defendant and the representative of the solicitors' firm is therefore one of the potentially most valuable

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[30] See for instance McConville, Hodgson, Bridges and Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain*.

> aspects of the automatic Plea and Directions Hearing for cases that end as trials...
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> (6) [The PDH pilot scheme] includes provision for a detailed questionnaire, the answers to which are checked through at the PDH in court by the judge himself on the basis of responses given by counsel... The fact that the questions are put by a judge is critical. Counsel having to attend and answer a judge is more likely to produce answers than merely having to exchange forms. Knowledge that counsel has to answer the judge is also apt to have the effect of concentrating the mind of instructing solicitors on all the matters in issue.
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> (7) The involvement of a judge in a hearing in every case may at first sight seem to be a waste of resources. But it is probably, on balance, both cost and benefit effective in that it should achieve various important objectives which either would not otherwise be achieved at all, or if at all, to a lesser extent or with even greater costs:
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> - The PDH is usually brief–typically between 5 and 30 minutes
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> - It serves multiple purposes, including actual disposal of as many as half of all cases and, potentially, better preparation of a considerable number that end as contests.
>
> - It provides a prospect that pre-trial information about the case, important to permit accurate listing, will actually be forthcoming–and at a very early stage.[31]

The Court Service's *Review of the Effectiveness of Plea and Directions Hearings in the Crown Court*, 1998

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[31] *The Royal Commission on Criminal Justice, 1993*, pp. 229-232.

found that since the introduction of PDHs there had been "a significant reduction in the broad "cracked trial"[32] rate (the number of cases cracking as a percentage of all disposals) from around 23% to 18%".[33] Also, "[s]ince full implementation of the PDH scheme, average waiting times [had] fallen from around 16 weeks to slightly over 12 weeks." The Review continued, "[i]n part, this is due to the success of PDHs in encouraging guilty pleas at an earlier stage of the trial process, with the number of guilty plea cases dealt with before trial rising from 38% to 46%."[34]

Auld L.J. says that what was needed was a "pre-trial assessment" of the case and of the state of readiness. Under the proposal, in most cases the assessment would be a paper exercise–"the parties signifying in writing to each other and the court their readiness or otherwise for trial and the court responding in writing as appropriate".[35]

This is reminiscent of what existed before which did not work. The Runciman Commission said that in 1982 a Working Party under the chairmanship of Lord Justice Watkins recommended a system of pre-trial discussion between the parties based on the exchange of forms giving information about the likely length of the case, the witnesses to be called, pleas and so on.[36] But an experiment set up to try out the scheme had produced disappointing results. The use of the forms was patchy. Equally, in the Crown Court Study, court clerks said that just under half (47%) of the listing information forms that were supposed to be sent in by the lawyers had not been received and of those that were sent in, many were returned late.[37] If such systems did not work

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[32] As has been seen, a "cracked trial" is one where a case listed as a contest collapses at the door of the court usually as a result of a negotiated change of plea in return for reduced charges.

[33] *Review of the Effectiveness of Plea and Directions Hearings in the Crown Court*, Executive Summary, para. 3.

[34] *Review of the Effectiveness of Plea and Directions Hearings in the Crown Court*, Executive Summary, para. 3.

[35] Auld, *Review of the Criminal Courts*, p. 489, para. 224.

[36] *The Royal Commission on Criminal Justice, 1993*, p. 103, para. 10.

[37] Royal Commission on Criminal Justice, Research Report No. 19,

before, what reason is there to think that they would work now?

A paper PDH may sometimes be sufficient to achieve the various objectives of the PDH–but I believe that in a significant proportion of cases it will not. The reason for my scepticism is the many things that will go wrong (sometimes through someone's fault, often not) if the matter is left for the parties to handle in their offices and chambers–as opposed to being physically in the same place at the same time in the presence of the judge. I believe that–despite all the shortcomings of the way it works in practice–this physical presence will often be better than what would be achieved without it.

It may be that in the long run video conferences will take the place of court room PDHs. (An experiment with 'virtual PDHs' has just started in Manchester.) But until that happens I would keep what we now have.

Other relevant findings of the 1998 Effectiveness Review,[38] included the following:

- Committal papers were served late on the defence in half of all cases in the sample (in 41% of cases less than 7 days before committal instead of 14 days as required and in 6% on the day of committal).[39]
- The prosecution brief for the PDH was returned in just over two-fifths of cases (42%) according to the CPS and in just under two-fifths (37%) according to prosecution counsel.[40] By comparison, defence solicitors reported that the brief had been returned in a fifth of cases (21%) and defence barristers in slightly less (18%).[41]

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section 2.2.8.

[38] These data were based on 50 cases each from three Crown Court centres–Ipswich, Manchester Minshull Street and Newcastle. Interviews were conducted with the judge, CPS, defence solicitors, both counsel and the Listing Officer.

[39] *Review of the Effectiveness of Plea and Directions Hearings in the Crown Court*, para. 4.3.

[40] *Review*, table on p. 20.

[41] *Review*, para. 5.11.

- The brief was usually returned on the day before the PDH or on the day itself (87% according to the CPS, 82% according to counsel).[42]
- The CPS said they met with counsel before the day of the PDH in only 3 cases out of 144.[43] Defence solicitors met with their clients before the PDH more often (37%), but two-thirds had not done so.[44]
- In the majority of cases (58%) defence counsel had not met with the defendant prior to the PDH.[45]
- In almost all cases (96%) there had been no contact between prosecution and defence counsel prior to the PDH.[46] Usually the reason was that they did not know each other's identity. Prosecution counsel said they learnt the name of their opponent on the day of the PDH in 96 per cent of cases. The equivalent figure for defence was 92 per cent.[47]
- According to Listing Officers, the defence failed to comply with the obligation to supply the court and the prosecution 14 days before the PDH with a full list of the prosecution witnesses they wanted to attend at trial in over three-quarters of the cases (77%). (Defence solicitors reported compliance in 47 per cent of cases).[48]

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[42] *Review*, para. 5.11.

[43] *Review*, para. 5.6.

[44] *Review*, para. 5.12.

[45] *Review*, para. 5.18.

[46] *Review*, para. 5.30.

[47] *Review*, para. 5.31. The report said the graduated fee scheme introduced in January 1997 had attempted to deal with these problems by offering defence counsel an incentive for early preparation in the form of an advance fee of £100 for juniors, £250 for QCs. This was payable if the advocate certified that he had liaised with the prosecution, had read the case papers, held a conference with the client and advised on plea at least 5 days before the PDH. ("There is no evidence, however, that this incentive has encouraged any earlier preparation and there have been no claims received to date"–para. 5.32–though this might be due to inertia by counsel's clerk.)

[48] *Review*, para. 5.38.

- Counsel at the PDH and at the trial was not the same person in three-quarters of the cases (74%) for the prosecution and in two-fifths (41%) for the defence.[49]

D. Disclosure

My understanding is that there is no equivalent in Ireland of our elaborate disclosure regime. Instead, there is simply a common law rule that documents or other evidence should be disclosed basically if that is required "by the interests of justice". (The case of *DPP v. The Special Criminal Court and Paul Ward* established what I gather are called the *Ward* principles, namely an obligation "to disclose any document which could be of assistance to the defence in establishing a defence, in damaging the prosecution case or in providing a lead on evidence that goes to either of these two things".[50])

Until recently the basic rule in England was that the prosecution must disclose all the evidence it intends to call–whereas the defence was under no similar obligation. In 1967, statute required the defence to disclose the details of any alibi defence and in 1980, this was extended to any defence based on expert evidence.

So far as concerns evidence the prosecution do not intend to use ('unused material'), there were various stages:

- *The common law rules 1946-81*–the prosecution had to inform the defence of the name and address (but, probably, not the evidence) of a witness who could help the defence
- *Attorney General's Guidelines* (1981)–unused material should be disclosed "if it has some bearing on the offence(s) charged and the surrounding circumstances of the case"–subject to a discretion not to do so if, for instance, an informer would be

[49] *Review*, para. 6.31. A differential fee had been introduced to encourage first briefed defence counsel to attend PDHs, but only 13 per cent of barristers in the study felt that the graduated fees had had any impact on their attendance at PDHs. Court managers agreed. *Review*, para. 6.34.

[50] [1999] 1 I.R. 60 at 71.

compromised. (Further Guidelines were issued by the Attorney in November 2000.)

- *The common law (1989-1995)*–In *Saunders* (1989) Henry J. ruled that unused material included all preparatory notes and memoranda which led to the making of witness statements. In *R. v. Ward*,[51] the Court of Appeal said the defence should have the same opportunity of reviewing all the available material as the prosecution.
- *The Runciman Royal Commission on Criminal Justice (1991-93)* was persuaded that the requirements of prosecution disclosure had become too burdensome. It recommended unanimously that instead there should be a two-stage process. The prosecution should at first be under a limited duty of primary disclosure (which would cover "all material relevant to the offence or the offender or to the surrounding circumstances of the case"). The Commission was also unanimous in recommending that if the defence wanted fuller disclosure, it should be required to present the case for such a request to a judge.[52]
- The Commission, by a majority of 11-1, further recommended that the defence should be under an obligation to notify the prosecution of the broad outlines of their defence. I was the dissenter–on grounds both of principle and practical considerations.[53]
- *The two-stage process implemented in a restricted form by the Criminal Procedure and Investigations Act, 1996 ("CPIA") and Code of Practice.* Primary disclosure limited to what "in [the prosecutor's] opinion might undermine the case for the prosecution".[54] The defence are then required to put

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[51] [1993] 1 W.L.R. 619; [1993] 2 All E.R.577; 96 Cr. App. R. 1.

[52] *The Royal Commission on Criminal Justice, 1993*, ch. 6, paras. 33-55.

[53] *The Royal Commission on Criminal Justice, 1993*, pp. 221-223.

[54] Criminal Procedure and Investigations Act, 1996, s. 9(2)(a).

in a statement of 1) the nature of the defence,[55] 2) in what respect the defendant takes issue with the prosecution[56] and 3) the reasons.[57]

There is general agreement that the new regime does not work well–in the sense that it is heavily bureaucratic and costly and that too often both the prosecution and the defence fail to comply with their disclosure obligations.[58] Research has shown moreover that in regard to defence disclosure neither the prosecution nor the judges have been active in trying to enforce the defence obligations. In my view these problems are probably insoluble.[59]

The Government's White Paper (*Justice for All*, July 2002) proposed that the obligation on the defence to disclose should be extended to include names and addresses of proposed defence witnesses[60] and the reports of experts that the defence does not intend to use.[61] (In the Criminal Justice Bill introduced in November 2002, Part 5, changes to the rules included a requirement to disclose the names and addresses of defence witness and the names, but not the reports, of all defence expoerts consulted.)

It is arguable that the Runciman recommendations regarding disclosure were misconceived. (Plotnikoff and

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[55] Criminal Procedure and Investigations Act, 1996, s. 5(5).

[56] Criminal Procedure and Investigations Act, 1996, s. 5(6)(b).

[57] Criminal Procedure and Investigations Act, 1996, s. 5(6)(c).

[58] See Plotnikoff and Woolfson, *A Fair Balance? Evaluation of the Operation of Disclosure Law*, Home Office 2001.

[59] I set out my views in my Response to Lord Justice Auld's *Review of the Criminal Courts*, November 2001, pp. 47-54–accessible at http://www.lse.ac.uk/collections/law/auld_response_web.pdf (The memo, *inter alia*, summarises, at pp. 50-51, the discouraging findings of the Plotnikoff and Woolfson research.)

[60] This was specifically considered and unanimously rejected by the Runciman Commission–*The Royal Commission on Criminal Justice, 1993*, p. 99, para.69.

[61] For critical comment, see Zander, "Advance disclosure", *Solicitors' Journal*, 20 September 2002, p. 824, based on a 17-page response to the Home Office consultation–accessible on the LSE website at http://www.lse.ac.uk/collections/law/pdf/adv.discl..pdf.

Woolfson quote an unnamed senior police officer: "There is a big irony regarding costs. Excess defence demands were the reason for the CPIA but this was based on a tiny number of cases. Now we have more work on every contested case.")

Maybe the Republic would do well to leave this issue to the gradual development of the common law–possibly with the help of Attorney General's Guidelines.

E. An Agreed Case Statement

Lord Justice Auld proposed that in Crown Court cases the parties should be required to produce an agreed case and issues summary which would be approved by the judge.[62]

Plainly jurors would benefit from such a summary. But in my view the effort to get such a document would be greatly disproportionate to the likely benefits.

The problems relating to getting the parties to produce an agreed statement of fact include the following:

- As has been seen, it is common in Crown Court cases for both prosecution and defence barristers to receive the brief for the trial at the very last minute–the day before the trial or the morning of the trial.[63] In that situation how could there be an agreed case statement?
- Very often, counsel at trial is different from counsel who dealt with the matter before. Again, this is true for both the prosecution and the defence.[64] It could not be assumed that a statement drafted by the (usually more junior) counsel who acted earlier would be thought adequate by the trial advocate.

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[62] "I am not proposing routine exchange and provision to the court of skeleton arguments or pleadings, simply a neutral and summary document derived from the sort of analyses that competent advocates on both sides would, in any event, need as part of their own preparation for trials of substance which, under my proposals, would in future be the sole or main candidates for trial by judge and jury*"* (*Review of the Criminal Courts*, p. 522, para. 24).

[63] See n. 19 above.

[64] See n. 20 above.

- Typically counsel in the case do not know the identity of the opposing counsel ahead of time. How can they agree a document if they do not know each other's identity?
- Even if counsel does know the name of the then opposing counsel, since it is normal for counsel to change during the pre-trial stage, there would be no way of knowing whether that counsel will still be acting when the matter comes to trial.
- If, as would often happen, the appreciation of the facts changes as the case preparation moves along, the case and issues summary would have to be up-dated–with further resulting problems of getting agreement.
- Presumably the case and issues statement would have to be settled by counsel. But what would be the role of the defence solicitors and the CPS? Auld L.J. says nothing about this. Many solicitors would find it very unsatisfactory to be excluded from the process but having them involved would obviously add significantly to the complication and delay involved.
- Would the lawyers in practice get instructions from the defendant? There are, notoriously, serious difficulties in criminal cases in getting instructions from the defendant. If he is on bail, he frequently does not manage to get himself to his solicitors' office; if he is in custody, his solicitors and barristers commonly do not manage to get to the prison.
- Since there would be no advantage to the defendant in agreeing a statement such as Auld has in mind, defendants and their lawyers will drag their feet and will not be co-operative. Why should they be? We already know that this is the case with defence disclosure, despite the fact that failure to produce a defence disclosure statement may result in adverse comment by the judge.[65] Plotnikoff and Woolfson's

[65] Criminal Procedure and Investigations Act, 1996, s. 11(3).

> research establishes that this is virtually a dead letter. The defence statement is generally either framed in a way that reveals little, or it is not entered at all. Yet, prosecutors generally do not ask the court to direct that further particulars be given nor do they generally ask the judge to comment adversely on the absence or inadequacy of the defence statement. One reason is that judges seem to be as unenthusiastic about enforcing the statutory obligation as prosecutors. If that is true of defence statements which are supposed to be helpful to the prosecution, how much more would it be true of Auld's proposed case statements which would mainly be intended to be helpful only to the jury?

If these are the facts, it seems clear that any attempt to make the idea work would create extra delay, extra costs and a great deal of general aggravation.

F. Securing Guilty Pleas

The English system has various ways of encouraging guilty pleas and more recently early guilty pleas:

1. The Sentence Discount

For many decades it has been officially acknowledged by the Court of Appeal that a defendant who pleads guilty is normally entitled to expect some reduction in sentence. In *Turner* Lord Parker CJ said that counsel for the defence was entitled to advise his client ("if need be ... in strong terms") that a guilty plea "showing an element of remorse is a mitigating factor which may well enable the court to give a lesser sentence than would otherwise be the case".[66]

The usual range of discount is 25-33%. This applies both in the Crown Court and in the magistrates' courts. (The Magistrates' Association's Sentencing Guidelines as long ago as 1993 stated that sentencing starting points indicated in the Guidelines should be reduced by approximately one third where there had been "a timely guilty plea".)

Despite the fact that the sentence discount might tempt an innocent defendant to plead guilty, this concept

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[66] [1970] 2 Q.B. 321 at 326.

seems to be universally accepted. (In the hundreds of memoranda received by the Runciman Royal Commission there was none that recommended its abolition.)

Section 49 of the Criminal Justice and Public Order Act, 1994 provides that when determining what sentence to pass on a defendant who has pleaded guilty, the court shall take into account the stage of the proceedings at which the plea was indicated. Sub-section (2) states that if the court gives the defendant a lesser sentence than it otherwise would have done "it shall state in open court that it has done so".

2. The Judge's Involvement in Plea Discussions

The Court of Appeal has for decades been concerned about the nature of judicial involvement in discussion of plea–see *Turner*.[67] But it still happens. The Bar would like there to be such a possibility.[68]

3. Runciman's Proposal for "Sentence Canvass"

The Runciman Royal Commission proposed that the defence should be able to ask the judge for an indication of what sentence he would give on a guilty plea. There would be a hearing in chambers with both prosecution and defence represented and a short-hand writer. If the defendant accepted the sentence, the case would be adjourned into open court and the parties would go through it again in public. If the defendant did not accept it, he would be free to contest the case in the normal way and the judge would not be bound by the indication of sentence given.

The proposal was not implemented at the time largely because of the opposition of the then Lord Chief Justice, Lord Taylor. However, it reappeared in Lord Justice Auld's report,[69] was adopted by the Government's July 2002 White

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[67] [1970] 2 Q.B. 321.

[68] In the *Crown Court Study* (Royal Commission on Criminal Justice, Research Report No. 19, 1993), barristers were asked "Do you think that *Turner* should be reformed to permit full and realistic discussion between counsel and the judge about plea and especially sentence?" 86% of prosecution barristers and 88% of defence barristers said yes. Two thirds of the judges (67%) agreed. See section 4.13.1.

[69] *Review of the Criminal Courts*, pp. 434-444

Paper[70] and a form of the proposal to be applied in magistrates' courts was included in the Criminal Justice Bill currently before Parliament.[71]

4. Taking the Plea before Mode of Trial Decision

In a Consultation Paper in 1995 the Government put forward the idea that the defendant should be required to plead before the court decides whether he is to be tried in the Magistrates' Court or the Crown Court. Under the then existing law the defendant could not enter a plea when the magistrates committed the case for trial.

This was implemented in the Criminal Procedure and Investigations Act, 1996, section 49–subject to an important modification, namely that it is now an option not a requirement. If the defendant declines to indicate his plea at that stage and later pleads guilty his sentence discount will be lower.[72]

G. Does the Jury Need More Help?

On this whole matter, the Auld report follows in a long line of pronouncements over many years to the general effect that the system should do more to help the jury. What is striking about these statements is that there is no evidence for the proposition that the jury needs more help–for the obvious reason that one is not allowed to conduct research in the jury room. What is also striking is that such evidence as does exist, far from supporting the proposition, suggests that it may be essentially mistaken.

The best evidence is that from the Crown Court Study based on questionnaires returned by barristers, judges and jurors in over 800 contested cases. (There were responses from over 8,000 jurors.)

Half the jurors (50%) said that it was "Not at all difficult" for them to understand the evidence and another two-fifths (41%) that it was "Not very difficult". Under ten

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[70] Cm 5563, *Justice for All*, para. 4.42.

[71] New s. 20 of the Magistrates' Courts Act, 1980 introduced by Schedule 3 of the Bill.

[72] *Rafferty* [1998] Crim. L.R. 433.

per cent thought it was "Fairly difficult" (8%) or "Very difficult" (1%).[73]

When asked about fellow-jurors, over half (56%) of the jurors said that all members of the jury understood the evidence and another two-fifths (41%) said that most did. The foremen said the same.[74]

The results for remembering the evidence were almost the same.[75]

Some 9 out of 10 barristers thought the jury would have had no trouble in understanding the evidence in the case.[76]

Where there was scientific evidence, more than 90 per cent (94%) of judges thought that all the evidence was understandable by the jury.[77]

Belief in the jury's capacity to manage tolerably well seems plausible given that most cases are not long[78] and juries usually do not take much time to reach a verdict. The Crown Court Study showed that in a third of cases (33%) the jury was out to consider its verdict for under one hour; in

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[73] Royal Commission on Criminal Justice, Research Report No. 19, 1993, table 8.3, section 8.2.1.

[74] Royal Commission on Criminal Justice, Research Report No. 19, 1993, table 8.6, section 8.2.3.

[75] Royal Commission on Criminal Justice, Research Report No. 19, 1993, tables 8.7 and 8.9, sections 8.2.4 and 8.2.6.

[76] 94% of prosecution barristers; 90% of defence barristers–Royal Commission on Criminal Justice, Research Report No. 19, 1993, table 6.15, section 6.2.7.

[77] Royal Commission on Criminal Justice, Research Report No. 19, 1993, section 3.2.14.

[78] Figures supplied to me by the LCD based on payments to lawyers in 9,949 trials show that two-fifths (41%) of all Crown Court trials currently last one or two days; nearly a quarter (23%) last three days; nearly two-fifths (19%) last four to five days; just over a tenth (11%) last 6-10 days; 3% last 11-15 days; 1% last 16-20 days; 1% last 21-25 days and 1% last over 25 days. The figures are for April-September 2001. Guilty pleas and cracked trials are not included. The figures somewhat inflate the length of cases since if a trial starts at 2 p.m. and continues for two hours on the next day the lawyer will have been paid for attendance on two days even though the trial only lasted four hours.

nearly two-thirds of cases (62%), it was out for under two hours and in nearly ninety per cent (87%) it took under four hours.[79] Unsurprisingly, the longer the case, the longer on average, the jury's deliberation.[80]

None of this is conclusive evidence, but it is suggestive and, even one might say, encouraging. It certainly does not provide support for the often stated view that the jury needs more help.

H. The Role of Sanctions

Sir Robin accepts that sanctions are mainly useless or inappropriate in promoting good standards in pre-trial work in criminal cases.

> Throughout the Review I have anxiously searched here and abroad for just and efficient sanctions and incentives to encourage better preparation for trial. A study of a number of recent and current reviews in other Commonwealth countries and in the USA shows that we are not alone in this search and that, as to sanctions at any rate it is largely in vain. In a recent report, the Standing Committee of Attorneys General in Australia commented: "… the primary aim is to encourage co-operation with pre-trial procedures. There are inherent practical and philosophical difficulties associated with sanctions for non-co-operation".[81]

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[79] Royal Commission on Criminal Justice, Research Report No. 19, 1993, table 8.23, section 8.10.1.

[80] Thus, where the case lasted under half a day, the jury was out for under two hours in 96% of cases. When it lasted 3-4 days, the jurors were back in under two hours in 41% of cases; when it lasted for two weeks or more it was out for under two hours in 7% of cases. In cases lasting between a week and two weeks, the jury was out for less than four hours in 53% of cases and between four and eight hours in another 44% of cases. When the case lasted over two weeks the comparable percentages were 31% and 40%. (Royal Commission on Criminal Justice, Research Report No. 19, 1993, table 8.24.)

[81] *Review of the Criminal Courts*, p. 491, para. 231.

This conclusion stands in marked contrast to the views expressed in the Court Service's Consultation Paper *Transforming the Crown Court* issued under the imprimatur of the Lord Chancellor in September 1999 and in the Report of the National Audit Office, *Criminal Justice: Working Together* published in December 1999. The Court Service's Consultation Paper repeatedly stated that compliance with protocols and other case management performance standards must be enforced by sanctions. These it suggested should include on-the-spot fines or fixed financial penalties imposed by judges or by court staff under judicial direction. Financial penalties would apply to the police and other agencies. Consistent failure to comply could lead to agencies' budgets being capped. The National Audit Office Report equally urged that sanctions should play a central part in court management. It recommended that "[i]n taking forward its proposals to change Crown Court procedures, the Court Service should ensure that appropriate forms of sanctions are introduced to help manage robustly".[82] It identified the sanctions available to the courts as costs orders against the lawyers, reprimand in open court, reprimand in the judge's chambers, a report to the head of chambers or, as the case may be, to the senior partner of the firm of solicitors, and reference to the practitioner's professional body. The same view was taken by my fellow Commissioners on the Runciman Royal Commission. Sanctions, they thought, should include docking fees, wasted costs orders, or a report to the head of chambers or to the leader of the circuit.

There is, in other words, a powerful contemporary disposition to imagine that sanctions are an answer to the fact that pre-trial process does not function according to the rules. (The same philosophy informed Lord Woolf's Report on *Access to Justice*.) Not that they are frequently used. The National Audit Office, which was so enthusiastic about their use, said:

> For sanctions to be effective they need to be workable and appropriate. Magistrates and court staff we spoke to criticised costs orders,

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[82] National Audit Office, *Criminal Justice: Working Together*, p. 110.

> which they considered to be overly cumbersome since a lawyer's right to make representations against an order can prove time consuming and expensive. They are also felt to be inappropriately severe, since a single costs order can damage the reputation of an advocate, leading to hostility rather than co-operation between local defence solicitors and Crown Prosecution Service staff. Additional hearings may entail expenditure greater than the award itself.[83]

In my paper entitled "What on Earth is Lord Justice Auld Supposed to Do?", I urged Sir Robin to reject this fashionable current philosophy:

> [I]t is time that the belief in the value of sanctions in securing compliance with performance targets in the context of the justice system is challenged. People on the whole do their work as best they can according to their abilities, so far as circumstances permit. If in the mass of cases the system is not working as it is supposed to do, it is probably not the fault of those doing the work. Sometimes, the fault lies in the design of the system, but often there is no fault.[84]

I expressed the hope that, if Sir Robin was persuaded of this, "it would [be] very helpful if he said so in plain terms". He did precisely that and he set out the reasons.[85] These may be summarised as follows:

- An order for costs against the defendant is usually not an option because of his lack of means and because he cannot be blamed for the faults of his lawyers.

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[83] National Audit Office, *Criminal Justice: Working Together*, p. 90.

[84] [2000] Crim. L. R. 419, 429.

[85] *Review of the Criminal Courts*, p. 491, para. 230.

- The fairness of the trial is threatened if the defendant is under threat of sanctions if he or his lawyers misjudge the extent of their obligations to co-operate with pre-trial procedures.
- Judges are reluctant to make costs orders against the prosecution involving a transfer of funds from one public body to another.
- In attempting to make wasted costs orders it is difficult to identify who was at fault–on the prosecution side, counsel, those instructing him or the police; on the defence side, counsel, his solicitor or the defendant. Wasted costs proceedings, Auld L.J. said, are "an impracticable and expensive way of achieving efficient preparation for trial".
- There are considerations of public interest, including the fairness of the trial, in extending the court's power to draw adverse inferences against a defaulting party or in seeking to import from civil process the notion of "strike out", for example by depriving the defendant from advancing part of his case or by too ready a use of the court's power to stay a prosecution for abuse of process.

Despite his conclusion that "there is little scope for improving on existing sanctions against the parties or their representatives for failure to prepare efficiently for trial",[86] Sir Robin suggested two exceptions. In regard to his proposal (noted above) that the parties shoulder primary responsibility for the task, having recourse to a pre-trial hearing only when there are matters they cannot reasonably resolve between them, he suggests that they should be penalised if they unnecessarily ask for a pre-trial hearing. The penalty would be loss of the fee for the unnecessary hearing. In my view that would be open to all the same objections that Sir Robin levelled against wasted costs orders. The penalty would be used very rarely–and when used, would result in lengthy and costly debate and successful appeals. It would also be likely to have the effect of discouraging lawyers from asking for a pre-trial hearing in cases where one was actually needed.

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[86] *Review of the Criminal Courts*, p. 492, para. 232.

Secondly, he suggested, the Bar Council and the Law Society should "incorporate more stringent and detailed rules in their codes of conduct about preparation for trial" and should issue clear guidance "as to the seriousness with which the court will view professional failures in this respect".[87] Again, in my view this would be either useless or actually counter-productive. The more stringent and detailed the rules, the more they will not be complied with. And to say that the courts will regard failure to comply with the stringent and detailed rules with "seriousness"–having just acknowledged that there are no workable sanctions–is to invite cynicism.

The Government's July 2002 White Paper showed that it had not absorbed the message in the Auld Report:

> The Government also intends to review existing court powers to order defendants to pay prosecution costs where they have failed to give legal representatives instructions or to meet defence disclosure obligations. As well as the power to penalise lawyers by making them pay costs wasted as a result of their errors or omissions, we will also consider whether other forms of penalties, including financial, could be applied.[88]

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[87] *Review of the Criminal Courts*, p. 492, para. 234.

[88] CM 5563, *Justice for All,* para. 3.62.