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New Developments in Criminal Justice: The Approach to Summary Justice both in and out of Court

Centre for Crime and Justice Studies

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Introduction

I am delighted to be able to deliver this lecture, not least because of the central role that the Centre of Crime and Justice Studies has in informing public debate about crime and its causes and the importance of engaging the wider public, beyond those directly involved, in the issues that have to be addressed.

The topic I have chosen for the seminar as part of the series of developments in criminal justice deals with the lower end of the spectrum in crime and, more particularly, as you have been told, "The Approach to Summary Justice both in and out of Court."

Summary Justice both in the form of out of court disposals called cautions and proceedings in what used to be called the police court, now the magistrates court, exercised by justices of the peace acting alone and in concert has, of course, been with us since early modern times. Why do I think that it is a topic worthy of attention now? It is because, over many years, a system born out of simplicity and intended to be straightforward has been modified, always with the best intention, time after time, until it changed out of all recognition. Using the analogy of an animal, in my dreams, the criminal justice system is lean, sleek, swift and effective, the equivalent of a jaguar; unfortunately, the reality is rather different and I am afraid that a more accurate animal analogy would be that of a tortoise, arthritic and probably only partially sighted.

The answer, for proceedings in the magistrates' court, intended to move away from the tortoise and towards the jaguar is the approach known as CJSSS: the triple S stands for Simple, Speedy and Summary. It was devised jointly by my predecessor as Senior Presiding Judge and the Crime Director of Her Majesty's Courts Service and has been piloted, adopted and, in the jargon, rolled out, with the active support of the Lord Chancellor, initially Lord Falconer and now Jack Straw. For the last year, I have been encouraging all those in the criminal justice system to embrace the ideas and I am very pleased to share it with this wider audience.

CJSSS

Before I start, let me give you an example of the problem. Bear in mind that we are is supposed to be considering summary justice but this example could more properly be described as a horror story. It involves a simple case of driving whilst over the legal limit. When it eventually came to trial, an application was made to stay the case on the basis that to pursue it was an abuse of process. Why? Because of the lapse of time. The driver had been stopped in August 2000 and the trial was due to be heard in October 2004. Why had there been such a lapse of time? There had been no fewer than 44 court hearings over the intervening 4 years and the case had been bogged down by procedural requests for evidence, for disclosure, for scientific evidence, for material about the operation of the particular intoximeter. The list was endless.

The magistrates were having none of this. They proceeded to trial, convicted the motorist and the case eventually found its way to the Divisional Court where his complaints received short shrift. Mitting J, giving the first judgment, said1:

> "The history of the case, which can properly be described as scandalous, illustrates what happens when the process of the court is used not to achieve a fair trial of the real issues within a reasonable time but in the hope that something will turn up, and if not, the proceedings may be so delayed that no trial can occur. The response of the prosecution and of the justices on the facts which I have recited can, even if perhaps harshly, be described as lame. It is to be hoped that if such tactics are adopted by the defence in future cases, a more robust response will occur."

> Maurice Kay LJ added2:
> "Now that the Criminal Procedure Rules are in force, it is to be hoped that Magistrates Courts will never again countenance the conduct of criminal litigation in the indulgent manner which prevailed in this case between 2000 and April 2004."

The consequence was that all that had been achieved (besides the vast costs incurred all to the public purse) was a delay for the motorist of that period of 4 years, a very substantial period of time to worry about whether he would in fact be disqualified for this breathalyser offence. That sort of approach is simply not acceptable.

That is but one example albeit I accept a very extreme one. I am afraid that I could provide many more. The average number of adjournments between 4 and 5 and trials were being fixed ever further into the future in order to cope with the never ending time taken up by pre-trial issues. Adjournments were sought and granted readily and not very much ever seemed to have been achieved. Thus, to try to rescue a system that was bogged down by delay and, in short, seizing up, there had to be a change of culture. You will now understand why my tortoise was described as arthritic.

[1] [2006] EWHC 1753 paragraph 42

[2] Ibid para 47

CJSSS was brought in as an initiative to improve the speed and effectiveness of the magistrate's court. The process of summary trials would be speeded up so that cases could be dealt with from beginning to end within a maximum of 6 weeks. All parties would be involved – the courts, police, CPS, defence solicitors and the work would be done in a proportionate fashion. I shall return to this concept later.

This scheme was initially piloted in 4 sites and its key aspects are as follows:

1. The first hearing in the magistrates' court should be effective.
2. In order for the first hearing to be effective, the prosecution should have served on the defendant and the court all necessary papers: the important

word in that sentence is the word necessary and the important concept was to include the court in the recipients of the material, so as to allow a meaningful discussion of the case at that first hearing.

3. Where there is to be a trial, the date for trial should be set at first hearing, not more than 6 weeks away.
4. Directions for pre trial issues should be given at the same time, the first hearing, where at all possible so that a trial within that period of 6 weeks could be achieved.

Findings from the pilot sites show that there has been a significant impact with increased guilty pleas at first hearing and increased timeliness. It has therefore been initiated throughout the country.

The position was described by the Lord Chief Justice at the speech he delivered to the East Sussex Magistrates on 14 November 2007, in these terms:

> "39 Local Criminal Justice Areas have at least one court that is applying CJSSS, and the remaining three (all in the West Country) will have a 'live site' by the end of the year. 18 areas – that is 43% of the whole – have fully implemented CJSSS. It is too early to have statistics on the effect that this is having on the time taken to bring on contested trials. What we do have is statistics relating to the first hearing, and these show that the vast majority of areas have managed to dispose of more than half the guilty pleas in the day of the first hearing."

I provide those figures to compare them with more up to date ones which are even more impressive. Just over a month after the Lord Chief Justice spoke, 31 of the 42 areas have fully implemented CJSSS and a further 9 are live in at least one site. To my mind, what is just as impressive, and just as important – if not more so – is that over 900 local defence solicitors have been involved in CJSSS local awareness events or local implementation teams. It is important because although the police, the CPS, the courts and NOMS are all centrally managed organisations, defence solicitors are not and have entirely legitimate, but different, interests to serve. They must also be satisfied that the system will work fairly for them and for their clients.

It would be unrealistic to say that all is plain sailing. The introduction of means testing for defendants in the Magistrates' court undeniably threatened the effectiveness of CJSSS; defendants who live chaotic lifestyles at the best of times would not make applications for legal aid or would not accurately provide their national insurance number or other details necessary to identify them through the DWP computer and confirm that they were in receipt of benefits. Adjournments resulted while the application was being processed. A lot of effort has been put into trying to solve that problem with some real success.

The next problem has been the extent of the information that ought to be provided for the first hearing. There is absolutely no point at all in requiring the police to provide the CPS and thus the defendant and the court with a trial ready file for that hearing for the only effect of such a requirement would be to extend the time from arrest to first hearing as that information was collected and the police were understandably concerned that this would cause a very real increase in the work required of them and would do nothing for ultimate incidents to court disposal times. It is all very well saying how quickly the court process has been concluded but if the police have had to bail a defendant for weeks and weeks while the evidence is collected before first appearance, no real benefit has accrued, especially when the defendant was prepared to plead guilty from the outset in any event. Indeed, the paperwork being prepared by the police no doubt in an effort to

deal with the never ending demands of some lawyers such as evidenced by the horror story I mentioned at the start of this address, was as equally cumbersome for a short, simple, summary case as for a much more complex investigation.

To deal with that problem, a pilot or trial was commenced known by the unfortunate acronym DGQP: Director's Guidance Quick Process, the Director being the Director of Public Prosecutions. The idea was that in those straightforward simple cases identified as likely guilty pleas, the only material that would be provided would be a summary of the case and that only if the matter was contested and went off for trial would a full file be prepared. The summary had to be sufficient for the CPS to prosecute, for the defence to take instructions and for the court to sentence; in other words, the idea was that the preparation should be proportionate to the issues. DGQP has now been refined to DGSP – Director's Guidance, Streamled Process but the emphasis remains upon preparing for trial only those cases that need to be prepared for trial and summarising evidence rather than taking statements save, of course, where eye witnesses might be lost unless their evidence is captured.

I explained that the summary trial file will be served in good time on the defendant and the court. In that way, at the first hearing, the defendant will have had the chance to provide instructions and the court will know sufficient of the facts to be able to challenge the parties to identify the real issues in the case and to clear away the peripheral. If the issue is identification, it is the identifying witness or witnesses who are required and none of the other witnesses who prove the other ingredients, such as the owner of the broken window who establishes the approximate value of the damage but did not witness the incident nor provide any other meaningful evidence.

By involving all parties in this process, concerns can and have been taken into account. Unnecessary preparation of cases likely to be guilty pleas is just as much a waste of police resource as unnecessary adjournments are for the Crown Prosecution Service and court resource. But, from first to last, it remains essential to bear in mind that at the end of the process is a defendant whose liberty is at stake and whose interests must be protected.

It will take time to see the full effects of CJSSS. I do not want to speak too soon, but early signs are very positive indeed. The latest Time Interval Survey data indicates that the number of adjournments fell in September 2007. Indeed, for all magistrates' court cases, adjournments were at the lowest level since 1994.

Local areas have also been reporting on their CJSSS performance and the vast majority are reporting significant improvements in the number of early guilty pleas entered at first hearing and the number of cases disposed of at that hearing. Many are reporting that 80-90% of cases are disposed of at first hearing - which is a considerable step forward.

As I have said, the police, the Crown Prosecution Service, the defence and the court have been engaged. We have also carried it forward to the next stage. After guilty plea or conviction, do we really need a full case pre-sentence report, which costs something like £600 to produce? Or would it be sufficient to arrange some lesser form of report, whether fast delivery (relying essentially on past records) or oral only. If a defendant is well known to the probation service, when was the last report prepared and can it be updated either in the course of the morning at court or by the defence lawyer without the need for an adjournment? If the advance information is also provided to the probation officer as well as to the court, he or she can also be prepared. This, also, is equally fertile territory for a sensible approach to proportionality and the proper prevention of unnecessary wastage of the scarce resource of NOMS.

I commend another thought to you, as I have to magistrates and the judiciary generally. It has always been traditional to adjourn for a pre-sentence report to assess suitability for unpaid work. 95% of people who are so assessed are assessed as suitable. Sometimes that has been done on the day; often it led to an adjournment. In appropriate cases, where there is no obvious and apparent reason for concluding that a defendant is not fit for unpaid work, why should the court not consider making the order, emphasising that if, on investigation, the offender is not suitable, the case can be brought back. The necessary assessment will still have to take place but a second hearing would then only be necessary in those rare cases where it is not appropriate. I see nothing offensive in law in doing so.

Every way we can, we should be looking to try our best to make our response to everything we deal with proportionate. This would of course take into account the gravity of the crime alleged, the complexity of what is at issue, the severity of the consequences for the defendant and others, the interests of victims and witnesses unnecessarily brought to court and then allowed to go either because the case is not reached or their evidence is identified as uncontroversial and, finally, the needs of other cases. That is what we are doing, and, as far as I am concerned, should continue to do. The prize is obtaining the maximum benefit out of the resources available for the criminal justice system and, at a time of increasing financial stringency, it is a prize worth seeking.

Dissatisfaction with delays in the court system not only led to a critical view being taken of procedures. It was one of the matters referred to by those who advocated diversion away from the court process entirely and this is a convenient moment for me now to turn to this issue.

Diversion

I underline my respect for the right of parliament to legislate as it believes appropriate and, further, let me start by saying that I have no objections in principle to the use of certain types of diversion from the court system. Cautioning has a long and distinguished record as a tool available to the police to deal with certain types of criminal behaviour committed in circumstances that it was not necessary or indeed proportionate, to take an offender to court.

But we have moved far beyond cautioning, a formal warning, noted by the police, but not part of any criminal record. Now, things become more difficult. What is critical about any other form of diversion is that there must be transparency in its operation, proper reporting of its use and a real measure of public accountability for what the police and the Crown Prosecution Service are doing in our name. It may be that the Office for Criminal Justice Reform (OCJR) can provide more detailed information to the courts and the public concerning the level of use of Penalty Notice Disorders (PNDs) and Conditional Cautions but, in my view, that is not sufficient to provide the accountability to which I refer.

I repeat that certain diversionary measures, conducted properly, can provide the opportunity to deal with crime and regulatory offending appropriately and proportionately. We all understand a police caution for low level first time offending, and fixed penalties for road traffic offences such as parking violations and even perhaps speeding. In addition, there are also pilot schemes where diversion involves participation by the victim, which is a form of restorative justice. I understand that this has resulted in victims being satisfied that justice has been done. I am a supporter of restorative justice and so, in principle, I am favourably disposed to this scheme.

However, the extension of these well recognised forms of diversion into concepts such as Penalty Notices for Disorder and Conditional Cautioning is fairly new and, because of my concerns, I would like to examine them in a little more detail.

First of all, let me look at Penalty Notices for Disorder. These were introduced by the Government to provide the police with a quick and effective means of dealing with low level, anti social and nuisance offending; it is often alcohol related and typically occurs at night and at the week ends in busy city centres. This is applicable to persons aged 18 and over and notices may be issued on the spot or at the police station by an authorised officer.

A PND is provided for by sections 1 – 11 of the Criminal Justice and Police Act 2001. Section 2(1) provides that a constable may issue a penalty notice where he or she has reason to believe that a person has committed one of the penalty offences in the schedule. Notices may attract an upper tier £80 (e.g. disorderly behaviour) or lower tier £50 penalty notice (e.g. drunk in highway) and recipients may elect to pay or to request a court hearing.

On the face of it, such a notice could be a useful and potentially proportionate disposal. At this time of the year, there are many celebrations at the end of the day and revellers might go beyond the boundaries of propriety and cause a nuisance or disturbance. A fixed penalty could be wholly appropriate. But there has been some concern that their use is extending far beyond those cases and, far from underlining the importance of complying with the law, risks bringing it into disrepute. This can relate to the type of offence for which it is being issued, the means of the offender (which must be taken into account before a court imposes a fine) or the background and antecedents of an offender. One example concerned the use of multiple PNDs: an offender had amassed no fewer than eight such notices for theft, presumably shoplifting, and one for drunk and disorderly. Thus, he had amassed a total liability of £960 all unpaid with no real prospect of ever being able to pay a single one of them.

Further, without satisfactory confirmation of identity, again, a PND becomes a farce. I have heard of one case in which an offender provided his name as that of a very distinguished war hero and gave an address which turned out to be the square in which the hero's statue was to be found. That method of disposal surely cannot generate any improved confidence in the criminal justice system, even if it does contribute to offences brought to justice.

Conditional cautioning is very different from the simple form of caution to which I have already referred. The concept was introduced by sections 22-27 of the Criminal Justice Act 2003 and is governed by Code of Practice which has since been incorporated into the Director of Public Prosecutions' Guidance on Charging. It is a statutory disposal which may be cited in subsequent court proceedings and is the first pre-court disposal authorised by the CPS. Essentially, an offender must comply with certain conditions to receive the caution and to avoid prosecution for the offence he has committed.

The elements for administering a conditional caution are:

i) that the offender is 18 or over
ii) that the offender admits the offence
iii) that there is in the opinion of the relevant prosecutor, sufficient evidence to charge the offender with the offence.

The conditions should be appropriate and achievable and, up to the present date, have been entirely rehabilitative and restorative. Thus, they might include writing a

letter of apology, attendance on a course or payment of compensation.

The legislation, however, goes further. Punitive measures, that is to say conditions which punish or penalise the offender (including payment of a financial penalty, unpaid work not exceeding 20 hours and attendance at a specified place for a period not exceeding 20 hours) are contained within the *Police and Justice Act 2006 (*amending the *Criminal Justice Act 2003*); these provisions are due to be brought in at a later date and not yet in force.

I do not believe that I am alone in expressing concern about these powers. It is not a question of not trusting the police or the CPS, or challenging the will of parliament. It goes back to the origins of our system of summary justice, carried out in public by members of the public, appointed as magistrates, whose decisions can be scrutinised by the public, can be the subject of public debate and, if appropriate, appeal to the court in public. A drunken 18 year old of prior good character ends up in the cells. He is not entirely sure what he did but does not want his parents to know that he has been in trouble. What would he admit and accept rather than risk going to court, whether or not he could truly be proved to have committed an offence? And what impact would such a conditional caution, part of a record, have upon him which an absolute or conditional discharge, which could be appropriate depending on the circumstances, would not? Where is the mechanism for accountability for these important decisions, taken behind closed doors? It is perhaps appropriate that I merely ask the questions and allow others to consider the answers.

Conclusion

The question posed at the beginning of my address was why is the approach to summary justice a new development in the Criminal Justice system? In summary, I believe that it is because our willingness to re-examine our approach and modify practices that have become encrusted with procedural doglegs of every kind enables us to continue to drive the system forward into the 21st Century. In doing so, however, we must be very wary of ensuring that we retain the essential elements not only of fairness to all, in a particular those accused of crime, but also of public accountability for all that is done in the name of the public.

CJSSS represents a substantial change in culture and this, alongside alternative methods of disposal, properly considered and administered, can only assist in ensuring that the criminal justice system justifies a high reputation in the minds of the public while at the same time being administered swiftly and effectively – moving like the jaguar that I dreamt about. I hope that the time has come or is quickly coming when the dream is no longer, but is indeed a reality.

Thank you very much.

End.
