LORD CHIEF JUSTICE
OF ENGLAND AND WALES

LORD JUDGE

THE CRIMINAL JUSTICE SYSTEM IN ENGLAND AND WALES
TIME FOR CHANGE?

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I hope that this lecture will be seen for what it is intended to be, a tribute to Professor Stockdale, and an expression of gratitude to him for his contribution to the administration of justice over many years, both as advocate, and judge, and now professor.

Perhaps, however, I should begin by offering my congratulations to Daniel Berger and Beverly Cottrell, undergraduates at this university, who have won the Essex Court National Mooting competition. This is indeed a true competition and a much sought after award by undergraduates at every university. They have brought distinction on themselves and reflected glory on this university.

The Criminal Justice System in England and Wales is in a state of change. It always has been and always will be in a state of change. The important mark in the title to my lecture is none of the letters, but the question mark. That, to use an arcane word, is the mystery.

This talk is concerned with the criminal courts, and I am directing my attention only to courts and the court process, not to the police, to investigators, to prosecutors, nor or to those who act for defendants nor to those who keep them in custody or supervise them after conviction. But I want to lay down this important marker. None of us works in isolation. Decisions by the police and prosecuting authorities affect the way in which the courts do their work, just as decisions by the courts affect prison numbers. All are independent of each other, but all operate within the criminal justice system. I shall shortly identify a striking example of the benefits of a joined up approach to criminal justice.

I am concerned with the doing of justice in the courts. Obviously efficiency must be as high as possible, but in the end we must produce a criminal justice process that is fair and a result to the process which in each case as far as possible represents justice. I am not advocating convictions or acquittals. Where the evidence proves guilt the defendant should be convicted: if not, he should not.

If convicted he must be sentenced. I have already given this University a talk on sentencing, and I do not propose to repeat it. But I do want to emphasise that the paramount consideration in every sentencing decision is the safety of the public and the reduction of

crime. When criminal activity is proved the sentence must address the defendant's punishment as well as the public interest in his reform or rehabilitation. It is to the public disadvantage if the importance of deterrence as an ingredient of the sentencing process is underestimated and, as it seems to me, the guilty defendant should always be frightened of the prospect of going to court. The objective of the sentence is to do justice appropriate to the individual who has committed the particular crime or crimes in the light, not only of its impact on the community at large, but also the direct consequences for the victims.

Legal systems everywhere are notorious for their conservatism, but I doubt the critics who say that our system reflects accurately the aphorism written by Lord Falkland in 1641, "When it is not necessary to change it is necessary not to change."

Lord Falkland was the classic appeaser. He was, said Lord Clarendon, "So enamoured on peace that he would have been glad the King should have bought it at any price." There is in this aphorism an essential kernel of truth which is that if the legal system is not broke or breaking, then it does not need fixing, but my philosophy is rather different and is encapsulated by a different aphorism, from Giuseppe Di Lampedusa "If we want things to stay as they are, things will have to change". The process of critical re-examination and re evaluation of our system should be constant, but we should not embrace change merely for the sake of current temporary fashion nor enforce it on the grounds of political correctness.

History shows us the wisdom of this approach. The common law did not fossilise in 1189. Perhaps its greatest strength through the centuries has been its flexibility and capacity for development and change. A fossilised system could not have survived so successfully nor could it have transported across the world as one of this country's greatest gifts, nor indeed have survived when all the other trappings of imperialism were dispensed with. For example, during a recent visit to India I was addressing judges who understood not only the words that I was using to express my meaning, but concepts of the common law of which they were entirely familiar and to the development of which they have made their own contributions.

Change has certainly gone on throughout Professor Stockdale's time in practice, and if I may say so as a younger man, throughout mine. I was called to the Bar in 1963. We knew then about injunctions. Those of us who had even heard the word certiorari, had no idea how to pronounce it. *Mandamus* was a little clearer, because in our youth we all had to learn a little Latin. *Prohibition* we understood, although it was mixed up with our film going days and crime in parts of alcohol-free America. Yet the revival of these medieval remedies by the judges has enriched the ability of citizens to take on and insist on the lawfulness of government action, and indeed actions by all those who would otherwise be in authority. The concept of judicial review and the specialist administrative court, and the way in which both have developed during my professional life are quite remarkable, and give the lie to the idea that the system is unchanged and unwilling to accept change.

Let me highlight some other features.

The criminal justice system included the old Assizes. On my Circuit, the High Court judge would travel from Aylesbury to Bedford then to Northampton, Leicester, with a possible stop off in Oakham, then on to Lincoln, finally back to Nottingham, delivering the jails. We no longer have Assizes, nor, and this is an important consideration, a system in which every case was concluded- that is from the very start to a verdict- in a day or less.

In those days it was entirely acceptable for the defence to be able to ambush the prosecution, by suddenly conjuring together an alibi: gradually the opportunities for defence ambushes were steadily reduced. Indeed nowadays expert reports must be exchanged, so that areas of

difference can be analysed, and more likely, the usually wide area of agreement between reputable experts reduced to agreed facts.

The defendant could make a statement from the dock, instead of giving evidence and being cross-examined. What is more the jury was directed to take account of such a statement. That entitlement has gone. The jury is directed to take account of the fact that he remains silent when he had an opportunity to give evidence on his own behalf.

The defendant was entitled to speak before he was sentenced: that too has gone. Now indeed it is the victim who has a say at that stage, and the judges are informed of the impact of the crime on the victim, not, I emphasise the wishes of the victim about sentence, simply the impact of the crime.

Sentencing discussions with the judge took place, but then in 1975 they were supposed to have been ruled out. Anathema. We now have a much better process in which the defendant is entitled to seek and the judge entitled to give an indication of the sentence he has in mind in the particular case. The Goodyear indication does not represent a "deal" with the prosecution. The process is strictly regulated. The judge if he is willing indicates what is in his mind. We have found that it works. There is now, too, a formalised statutory process for those who turn "Queen's evidence"- and indeed for a review of sentence of those who decide to offer assistance after they have been sentenced.

Our Magistrates, some 30,000 or more, received no training of any kind. That after all was their purpose. They were simply decent citizens, offering their services as volunteers, offering common sense and a healthy dose of reality, but certainly they were not lawyers. My father in law was Chairman of his local Bench. He thought that the training he needed was training in life, and perhaps as one of those who served his country heroically- a word overused, but in his case accurately- he learnt plenty about life, and death too. Nowadays training is regarded as essential.

While emphasising the contribution made by the Magistrates' Courts, let me pause here to reflect on an initiative in those courts, which has already proved successful. The very idea of a Magistrates' Court is that it should administer summary justice locally. The system was becoming bogged down in far too much process, and a tendency for relatively minor cases to be treated as if they were the trial of the century. Magistrates appointed to apply robust common sense were finding that because of interminable adjournments patience was a more valuable qualification for office than robustness. Criminal Justice Simple Speedy Summary- represented a new and more efficient way of working in the Magistrates Court by all those involved in the Criminal Justice System, under the overall leadership of successive Senior Presiding Judges. Among the practical benefits of the scheme already identified are a large increase in the number of cases completed at the first hearing, a significant reduction in adjournments and in adult cases more guilty pleas at the first hearing. The average time from a defendant being charged to the final conclusion of the case is down from 62 days in March 2007 to 45 days. This is a remarkable success. It illustrates the value of a joined up system of justice in which the mutually independent parts, the police, the CPS, and the Magistracy, have all worked together. The former barriers, believed to be in place to preserve the independence of each, have been modified without any diminution in the various independences.

Returning to changes in Professor Stockdale's lifetime, the Judicial Studies Board was regarded with great suspicion when it was first created. Indeed its very title was intended to deflect suspicion. Notice it is not a training board for judges, it involves "studies". For years, and I was part of the Judicial Studies Board in its early years, many many judges thought it was an instrument by which the government of the day would start telling judges what sentences to pass. Naturally enough, they were deeply suspicious. As I would have been.

And as I would be now. There is no sphere of judicial responsibility which can or should be subject to the behest of the executive. None. Ever. In any field. If we countenanced such a possibility then the independence of the judiciary would be undermined, and once undermined would disappear into the sands. However open we should be to proposals for change, that principle is immutable, unchanging, not negotiable.

To repeat words that I have used before, I am not speaking in defence of some minor judicial flummery or privilege. Judicial independence is an entitlement of the community to have its criminal trials and sentences as well as its disputes, particularly those with the government of the day, and the institutions of the community, heard and decided by an independent judge, subject to what Edmund Burke described as "the cold neutrality of the impartial judge." The overwhelming beneficiary of the principle is the community. If the judge is subjected to any pressure, even unconscious pressure, his judgement is flawed, and justice is tarnished. Not least because, among our tasks we have to ensure that the rule of law applies to everyone equally, not only when the consequences of the decision will be greeted with acclaim but also, and not one jot less so, indeed even more so, when the decision will be greeted with intense public hostility.

The JSB has proved spectacularly successful, not least because the training is in the hands of judges and judges realise that the Board is not telling them how to exercise their function, but showing them what the law currently is, and my word, the law is constantly changing, not least in the criminal justice system, both in relation to trials and, most complicated of all, sentencing.

My catalogue is not comprehensive. The list could be endless. What I am driving at is that changes in the criminal justice system are common place, and so they should be.

The Criminal Justice System is a living instrument. It must be relevant and kept relevant to the changing needs of the community it serves. The list demonstrates the validity of my thesis that, contrary to popular misconception, and a perspective encouraged among some elements of the media, that change is a constant and desirable feature of our criminal justice system.

One continuing constant and unchanging feature however is this, and although it is obvious to us as judges, it is not always commonly understood. The guilty defendant knows perfectly well that he is in truth guilty. For this purpose I exclude the rare cases where the law itself may be uncertain or unclear. The ambition of a guilty defendant who insists on fighting the case is for justice to miscarry, for an untrue verdict to be returned. He therefore has much to lose by cooperating in a process designed to achieve justice. The innocent defendant, the truly innocent defendant, is desperate for justice to be done. A miscarriage of justice is a catastrophe for him personally, of course, but for justice too. Whichever category the individual defendant falls into, neither wishes any stone to be left unturned. The judicial system has to cater for both of them. So far as humanly possible it has to avoid the conviction of the innocent, and this means that there will be occasions when the guilty defendant is able to take advantage of processes designed to assist the innocent defendant. There is no physical sign or mark on the defendant which tells us which of these categories he falls into. In the old Northampton Assize court, the ceiling superbly decorated by Robert Adams, had a face with a mouth wide open and a tongue perched over the witness box. The tradition was that when the witness told a lie, the tongue wobbled. I never actually saw it wobble, and that means that in Northampton every witness always told the truth.

That court was built long before the typewriter. There was no electric light, no telephone. All these, when introduced, were "modern technology". We have current modern technology, but a great deal of it has contributed to the increasing length of trials with its endless paper. File after file, folder after folder, this problem is not confined to the legal

system. Ask any businessman: any police officer: any hospital worker: ask anybody about the impact on their professional and working lives of an increased number of processes designed to make use of the advantage of modern technology and you will find that our modern technology is a fantastic servant but a cruel and unrelenting and ultimately wasteful master.

It has contributed to a dramatic change in the role of the trial judge. When I began virtually every judge believed that his role was to act as a referee, fairly keeping the balance between the prosecution and the defence, and occasionally blowing the whistle if one side or the other went offside or infringed the rules. Many judges would not read the papers before they went into court, genuinely believing that this would predispose them to one side or other. The process worked on the basis that there was ample time for the advocates to be able to inform the judge of all the details of the case in the course of their arguments. That is no longer true. There is no time. Judges have a far more proactive role. Well in advance of the trial, it is their responsibility to get a firm grip of the case, seek to identify the issues, and give directions for the conduct of the trial.

In 2003, addressing a meeting of judges I said, and I apologise for quoting my own words, but every word of this still stands good:

"Time is a precious commodity, resources, judges' time, jury time, witness time, police time- these are not infinite. Every case that takes longer than it should delays another case, with its strain on the defendants. And the witnesses. And their victims. And on jurors and magistrates who are, not withstanding the increased time lag since the alleged offence, still expected to reach a true verdict. This extravagant liberality is pointless. It does not serve to increase the prospect of a true verdict."

There is now a Criminal Procedure Rule Committee which is in effect in constant session, producing rules which give courts explicit powers and responsibilities actively to manage cases. We are developing what will effectively be a Criminal Procedure Code, whereas once we had rules in something like fifty separate statutory instruments, and as you hunted for them, and they were not all readily accessible, all impetus was lost. The management of cases is a relatively new feature of the criminal justice system. The court must actively manage each case. So, for example, the parties and the court must each appoint a case progression officer, a named individual who is personally responsible for the handling of the case. The court may give directions which include a timetable, which can include a timetable for the trial itself. The parties may be required to provide a timed batting order of live witnesses, details of any written or other material to be adduced, advanced warning of any point of law. And so on.

As with the best laid plans, what was not immediately anticipated was that these processes would increase the number of preliminary hearings, so as to enable the judge to be sure that his directions were complied with. We have now cut through the process. With the positive and active encouragement of the Bar led by Phillip Mott QC most of those hearings have been done away with. The project was called "Death of the Mention". Using modern technology, and without the need for the parties to come to court and time provided for them, the judge deals with these matters administratively, before he resumes the ongoing trial.

Not everyone agrees with these changes but then, as with every proposal for improvement or reform, not everyone does, and when opposition is expressed on principal grounds, it requires careful attention. These new functions have been described as "all voguish and modern but...subversive of the adversarial process...A system in which the judge runs the show does nothing to encourage good practice." Well, I respectfully disagree. This is an area where modern technology has been hugely beneficial. Many preliminary matters can be

dealt with on paper, with written arguments from both sides, without the need for an oral hearing. Obviously if the judge feels the need for one, he or she can order it.

Let me now turn to the other end of the trial process, the summing up. Let me make my position clear: the summing up is an essential ingredient of our system. The problem is that summings up have become longer and longer and directions of law have become more and more complicated, and have turned in some instances into disquisitions about jurisprudence.

Let me start at the beginning. When I was first in practice a new judge, at whatever level, was provided with no guidance or assistance of any kind. Whatever his practicing background and experience, nothing was provided. Then, the Lord Chief Justice of the day, in response to a newly appointed High Court Judge who asked for assistance, sent out a list of five or six subjects to be addressed in the summing up. It was literally a short list and included, functions-judge/jury: burden of proof: standard of proof: ingredients of the offence. I cannot remember the others. After the Judicial Studies Board was founded we decided that this should be spelled out in a little more detail. And so it was. Thereafter specimen directions were established and from time to time approved by the Court of Appeal. Once a direction was approved, its omission came to be regarded as a major flaw in the summing up, producing the argument that its omission had undermined the safety of the conviction. And so, like Topsy, the summing up has grown.

One approach is that many matters of law currently requiring directions are no more than matters of common sense. But, and it is a very big "but", we have in our summings up to address issues where common sense might produce injustice. Let me give a simple example. We all know about the problems with what appear to be confident visual identifications. Some jurors might perfectly well believe, as a matter of common of sense, that nothing could be safer than an identification by someone who knows you. Yet we know, and they know when it is pointed out to them, that mistakes in these circumstances are not uncommon. If that is not dealt with by way of a direction- how should it be dealt with?

At the same time our knowledge is steadily increasing. Let me offer you a very recent example. We know that victims of serious sexual assault do not always, and necessarily, make an immediate complaint. Until recently the absence of an immediate complaint was said to indicate that the complainant's evidence might lack credibility: if she was in truth a victim, why the delay? Perhaps it represented second thoughts after consensual sexual activity. We know better now. Last week the Court of Appeal made clear that the judge could point out to the jury when summing up that the absence of an immediate complaint, although a factor to be born in mind, may have a number of different explanations, -one of them, just plain sad simple trauma- and could not be limited to the facile view that no immediate complaint meant that there had been no sexual offence. This is a prime example of change based on careful expert research and the experience of and developing understanding of the courts. This is not fad or political correctness: it is practical reality, recognised by the courts.

I want to address four particular features of the system, two Ds and Ss, which are more administrative. The Ds are the defence statement and disclosure. The Ss are special measures and sanctions.

Once the prosecution papers have been served, the defendant is required by statute to provide a defence statement. The process was introduced by statute in 1996, and amended in 2003. As we shall see it has been re-amended.

Essentially the defendant has required to set out what his defence – alibi, wrongful identification, no dishonesty, lack of criminal intent or as the case may be, as well as the

areas of evidence where issue is taken with the prosecution. The proposal was opposed on the basis that it meant that the defendant could be required to incriminate himself, and that is wrong in principle. If the defendant were so required, it would, but he is not. He has pleaded not guilty. He knows what the truth of the case is. He knows what the prosecution case is and he knows what his defence is. He knows the elements of the prosecution evidence against him which are disputed, and why. He is being asked to provide that information. The innocent defendant should normally welcome the provision of such information, because, when checked, it may exonerate him. It may demonstrate a gaping weakness in the prosecution case, sufficient to bring it to a halt. But the process of checking, and possibly exploding a false defence, is not self incrimination at all. What is at stake here is whether, in complicated cases, the defendant should be able to postpone his detailed answer to the prosecution case in order to give himself time to fabricate a defence which fits in with the facts relied on by the prosecution, or indeed the evidence disclosed by the prosecution under its duty of disclosure.

A stark example arose in the case tried by Fulford J of the 21st July bombers, that is the bombs in London which detonated but, by absolute sheer good fortune, did not explode. The judge was sure that some of the defendants had "tried to mould their defences to the scientific evidence...rather than providing information that would enable useful tests to be undertaken at the outset". He could of course only have said that after a conviction. If the defendants had been acquitted, whatever his suspicions, he would have sat silently mulling over to himself the menace of the moulded defence.

As a result of his observations the law has been amended. At some later stage I may have to decide what the implications of the most recent amendment will be, so I shall be reticent. It came into force yesterday. "The particulars of the matter of fact on which he intends to rely for the purposes of his defence". That is what must be set out. It followed in consequence of Fulford J's observations. The new defence case statement regime should be immeasurably superior to the old.

Disclosure is a fraught problem. In Eric Stockdale's day, and my own, the statements taken by the prosecution were few. As prosecuting counsel I would show my opponent any statements which undermined my case or reinforced his, and he reciprocated when our roles were reversed. However investigations have grown and grown. Thousands, literally thousands of pages of material are sometimes gathered. The immediate reaction of the prosecution was simple. Very well, let the defence have access to every document except those specifically exempted for public interest immunity purposes. We will show these to the judge, and ask him to rule. Beyond that, give the defence lawyers the key to the room full of papers. We call it "the key to the warehouse". No one could then complain of concealed evidence, or failure by the prosecution to disclose material of potential value to the defence.

That however won't do either. The defence do not always have the resources to examine 5, 10 or 20,000 pages of evidence, nor the resources to put the research into the hands of a sufficiently experienced employee. The answer has to be found in leaving the responsibility to the prosecution to disclose material of any possible relevance in the light of the detailed defence statement. What cannot be right is for the prosecution to do its best without such a statement, or for the defendant thereafter to seek to cobble together some defence, and years later say there was material which would have supported it which was not disclosed.

In short, the pre-trial defence statement is a critical ingredient of the process, with particular importance to disclosure. There are those, again, who express principled reservations to any system for defence disclosure. Thus, in the Supreme Court in the United States, where a majority held that a notice of alibi provision was constitutional, Justice Black dissented on the basis that this represented "a radical and dangerous departure from historical and constitutionally guaranteed right of a defendant in a criminal case to remain completely

silent, requiring the state to prove its case without any assistance of any kind from the defendant himself."

However, with respect, self-incrimination is not on the agenda. Nor is the defendant required to assist the prosecution. It is arguable, and I do argue that a system which refuses to accept that the prosecution may be ambushed, or which rejects the idea that the defendant may manufacture a spurious defence, and seeks to address these problems, is not offending the rule against self incrimination, nor damaging the interests of justice. Surely there is no problem with the principle that the defence and the prosecution must contribute to an efficient trial process designed so far as possible to get at the truth. If the truth hurts one side or the other, so it should. If the truth benefits one side or the other, so, equally, it should. As far as possible we should ensure that the verdict is indeed a true one.

Special measures

Children, and not only children, but vulnerable adults too, are sometimes assaulted and sexually abused, neglected and starved. These are very difficult case for judges and juries, but our problems are as nothing faced by the victims of such ill-treatment. And, of course, as ever, the harsh reality is that not every complaint is a true one. Apart from child witnesses – and I shall use the phrase to cover all vulnerable witnesses – as victims, child witnesses can witness crimes committed by adults and indeed other children. We also know that children can perpetrate the most dreadful crimes. They too are entitled to a fair trial, fair in the particular context of their vulnerability as children.

I am indebted to Professor John Spencer of Cambridge University for these two illustrations of our ancestors' examination into the competency of a 13 year old child. The date is 1684. The judge is Judge Jeffreys, but in this at any rate he was reflecting the understanding of his age.

Judge: *Suppose you should tell a lie, do you know who is the father of liars?*

Boy: *Yes*

Judge: Who is it?

Boy: *The devil.*

Judge: *If you should tell a lie, do you know what will become of you?*

Boy: *Yes.*

Judge: *What if you should swear to a lie? If you should call God to witness to a lie what would become of you then?*

Boy: *I should go to hell fire.*

The witness passed the test. He believed that if he lied his soul should be damned forever into hell fire. Good Christians preached this doctrine. John Wesley himself did. By the middle of the nineteenth century eternal damnation was less in vogue. This exchange took place before Mr Justice Maule.

Judge: *And if you do always tell the truth, where will you go when you die?*

Little Girl: *Up to heaven sir.*

Judge: And what will become of you if you tell lies?

Little Girl: I shall go down to the naughty place, sir.

Judge: Are you quite sure of that?

Little Girl: Yes sir.

Judge: Let her be sworn, it is quite clear she knows more than I do.

When you all laugh, or gasp in horror, can we remember, with some humility, that each generation believes it knows better than the one before. What is more important, perhaps, than the arrogance of certainty that our current system is the best for dealing with these problems, is that we should all in the best of faith embrace what we honestly believe to be the best practice, conscious that the last words on this topic have not been written, and that certainly in 50 years time, and probably in 25 years, our successors will at best be mildly amused at our best efforts, and at worst horrified by them.

Our current statutory arrangements are found in the Youth Justice and Criminal Evidence Act 1999, which came into effect rather later. Special measures are available for eligible witnesses. Witnesses are eligible on the grounds of age or incapacity. Incapacity includes mental disorder, or significant impairment of intelligence or social functioning, and may extend to physical disability or disorder. When considering whether to make an order, the views of the witness should be taken into account. The court must be satisfied that the quality of his or her evidence is likely to be "diminished by reason of fear or distress" in connection with the process of testifying. Where appropriate, the court may give a special measures direction. That is binding until further order. The object is that the vulnerable witness will know precisely what system for giving evidence will apply to his or her case, in advance of the hearing.

The process is designed to protect. Thus, taking it very briefly, the evidence of a child witness may be given on the basis of a video recording of the child telling his or her story. The child is never exposed to the sight or view of the defendant. The technology usually works well, but not always. Judges are perfectly familiar with the relatively modest requirements of technological skills.

The controversial question here is whether the use of the television screen in front of the jury reduces the impact of the child's evidence: a number of experienced judges hold very strongly that it can. Others disagree and they also point to the fact that there will be many guilty pleas just because the evidence can be given by the child in this form, and the defendant knows it, and cannot therefore wait, as he might have done in the old days, to see whether the child would in the end come up to proof. The reality is that something of a compromise is going on here. On the one hand there is the aspiration that those who are guilty of crimes against children should be convicted of them: on the other hand there is a countervailing concern that the condition and development of children who have been victimised should not be aggravated by the court process.

This leads me on to a further consideration, again which must be common to all of us. Which should come first, the trial of the defendant, or necessary psychiatric treatment of the victim? If the trial is postponed for too long, and treatment postponed, how much worse will the victim's condition be as a result of the delay? On the other hand once the victim is treated, then there is an inevitable supervening of the involvement of the psychiatrist with the victim, which may impact on the evidence given by the victim and possibly create concerns with the jury about that evidence. Cases of this kind are given a proper sense of urgency, and listed as

early as practicable, but there is a serious public question here- in a case like this is it better to go for a conviction of the defendant or treatment and care for the victim? You might want to think about the problem.

In the context of some vulnerable witnesses, with supervening problems of, say, articulation, we now allow the evidence of the witness to be given through an intermediary, with such aides to communication as the witness may need. One way of considering the intermediary's role is that he or she is the equivalent of an interpreter. There is, however, much more to it than that. An interpreter simply translates exactly what the witness using a foreign language has said. An intermediary may have to communicate with the witness, outside the immediate words used by the advocate or the judge in order to ascertain precisely what the witness wishes to say. And this process involves rather more than simple or direct interpretation. To some extent therefore the intermediary is interposed between the witness and the questioner. And the reality has to be faced that the fact finding tribunal has no real way of drawing any conclusions whatever from the apparent demeanour of the witness. Thus, for example, the witness who may appear stroppy or difficult or incapable of answering a direct question with a direct answer, may suffer from a condition which makes it difficult for him or her to answer in any other way. This new process has produced a number of convictions for serious offences which a few years ago would not have been prosecuted at all.

As I speak, in the Court of Appeal Criminal Division, we are examining the impact on the administration of justice of the new Criminal Evidence (Witness Anonymity) Act which came into force in July 2008 on the problem of anonymity for witnesses. Anonymity is itself a special measure. As with all special measures, the interests of justice and a fair trial must supervene.

Sanctions

To date this has proved an intractable problem. The one order which cannot be made against a defendant in a criminal trial, but which can be made in a civil action, is the strikeout. Where the prosecution does not comply with an order, it is possible to refuse to exercise the court's discretion to allow the prosecution to adduce evidence when it has failed to comply with conditions and orders relating to its admissibility, for example, in relation to a notice that use will be made of bad character evidence. But if the evidence is relevant, and certainly if the alleged crime is serious, and it helps to prove the truth of the prosecution's case, refusing to allow the evidence to be used may discipline the prosecution, and improve its longer term performance, but will not do justice to the victim in the individual case. That makes for a very difficult judgement. But even more problematic is the availability of sanctions against the defendant.

Non-compliance with the obligations, however gross, cannot lead to an order by the court that the defendant must be deemed to be guilty, or have his "not guilty" plea struck out, or that he should be denied the opportunity to give evidence at his trial if he so wishes, or to call evidence in support of the defence. The provisions relating to alibi notices were introduced in 1967. Absent an alibi notice, in law the court was entitled to prohibit the defendant from calling alibi evidence. There have been precious few cases where such a sanction was ordered. When preparing myself for this lecture, I could not, off hand at any rate, think of any. Equally, non-compliance does not put a defendant in contempt of court, or expose him to any penalty, or to the risk of any penalty. The only effective proper sanction is to enable the prosecution, or co-accused if there are any, or the judge, to make adverse comment, and for the judge to be empowered to direct the jury about the possibility of drawing adverse inferences against the defendant. That is then evaluated by the jury. If that is the extent of the sanction for non-compliance, the proposal is not disproportionate. If the available sanctions included a power in the court to exclude the defence case altogether objections in principle might be better founded. But some may begin to ask- why not such a power? One

last word here, in relation to costs orders. This is always problematic. Often the defendant is impecunious anyway. There are considerable difficulties, and rightly so, with crossing the confidentiality of the relationship between client and lawyer, and on the whole the investigation into the issues can become a form of protracted satellite litigation of its own, wasteful of time and resources.

Future Problems

Let us be realistic and address the access jurors have to the internet. Nowadays, judges at the outset of the trial among other directions to the jury direct them not to look at the internet in connection with the trial. We assume that the direction is accepted and obeyed, although inevitably, from time to time an individual juror will disregard the direction and make his own private enquiries. In one case, there was evidence of consultation of the internet in a rape trial, and the conviction was quashed. On the other hand, we are hardly likely to welcome a suggestion that the technological equipment belonging to an individual juror should somehow be vetted or overseen or checked after the trial, to make sure that the judge's directions have not been ignored. Such an intrusion would be entirely unacceptable.

The problem has implications for the way in which our media have to address the problem of pre-trial publicity. It is legitimate for it to be pointed out that however measured our own media may be, the basis for requiring media reticence is undermined if and when the citizen, not yet called to serve on the jury and seeking further information than that already published, can access it through the internet. That too is another problem.

To my mind, however, there is a further connected, but longer term problem, which I have mentioned in the past, but which we have not yet addressed, but should anticipate having to face. Our system of jury trials depends on twelve good men and women and true coming to court and listening to the case. Orality is the crucial ingredient of the adversarial system. Witness speak and answer questions. Counsel speak and address the jury. Judges speak and give directions.

Look, now, at our young. Most are technologically proficient. Many get much information from the internet. They consult and refer to it. They are not listening. They are reading. One potential problem is whether, learning as they do in this way, they will be accustomed, as we were, to listening for prolonged periods. Even if they have the ability to endure hours and days of sitting listening, how long would it be before some ask for the information on which they have to make their decision to be provided in forms which adapt to modern technology? By modern technology I do not mean technology as we understand it, but the technology which will be available to our successors in, say, 2020 or 2025? I cannot begin to imagine the extent of the changes which lie ahead. Think back to 1990 or 1995, and where technology has gone since then. In our current process, in major trials involving fraud and terrorism, much material is made available to jurors on screens. But not without difficulty and with great expense. However what about the defendant's oral testimony and child witness complaining of an indecent assault which the defendant adamantly denies? What process aimed at finding the truth between them, and enabling a jury to decide where the truth lies, will be in place in twenty-five years time? What will happen to our oral tradition? Should it, will it, be forced to change?

These are all separate potential areas of difficulty and problem. I do not have solutions. Nor, for that matter, would I think it right for any individual to be able to dictate how these issues should be addressed. But I do hope that we shall think about them. How much better if we gave them detailed thought while we have time to do so, rather than, as so often happens in the legislative process, wait until it has already become a problem, rather than anticipate it before it has. Better that than to legislate at haste, and repent at leisure.

Time, that limited resource, inevitably brings change. We must, as a society, as a community, ensure that if we wish to preserve the best of our system – a system in which I have the most profound personal belief – we must continue to make it capable of development and adaptable for the future as it has demonstrated that it has been in the past. In other words, it is always time for change.
