

All Rise for the Interventionist: The Judiciary in the 21st Century

Ed Johnston*

This paper will examine the evolving role of the judiciary from the early adversarial trial up until the advent of the Criminal Procedure Rules 2013 [hereafter, CPR]. The paper will chart the role played in early criminal proceedings, starting with the lawyer-free ‘altercation’ trial of the sixteenth century. Here, the judiciary assumed an early form of case management powers; they actively manage cases and acted as counsel for the defendant. The prohibition on defence counsel was lifted in the eighteenth century, this was the genesis of adversarial trial. The role of active judicial participation rapidly diminished and an era of judicial passivity commenced. The paper will investigate whether a cultural shift has occurred in the contemporary criminal trial. At the heart of this pendulum swing is a question: is the judiciary reverting to its pre-adversarial approach by departing from its position of passivity to become a more active participant in the arena of the criminal trial? The paper will discuss the potential ramifications this culture shift has for the future of the adversarial criminal justice process of England and Wales.

1. The Lawyer Free ‘Accused Speak’ Trial to the Adversarial Trial

The lawyer-free trial was an altercation between citizen accusers and the accused. Throughout the trial process the roles of the accused as both defendant and witness were inextricably linked.¹ Following the conclusion of the altercation the judge left the jury to decide upon the guilt or innocence of the accused; often with little judicial intervention. Langbein suggests that there is very little written about the early altercation trial and Sir Thomas Smith’s *De Republica Anglorum* is the earliest account of the trials of the time. According to Smith, at the conclusion of the altercation, the judge merely told the jury ‘ye have heard what these men say against the prisoner, you have also heard what the prisoner can say for himself.’² In the altercation trial the judge acted as both the examiner and cross-examiner; the duty of the judge was to present the evidence to the defendant and he would have the opportunity to counter to maintain his innocence.³ No form of pre-trial disclosure existed and the accused would hear the evidence against him for the first time at trial. This was a pivotal part of the proceedings as it was thought the unrehearsed responses would give the best indication of the guilt or innocence of the accused.⁴ Occasionally,

* Senior Lecturer in Law, Bristol Law School, University of the West of England. The author would like to thank Richard Edwards and Daniel Jasinski for their perceptive comments on an earlier draft.

¹ J.H. Langbein, *The Origins of the Adversary Criminal Trial*, 2003, (Oxford: Oxford University Press) p.13.

² T. Smith, *De Republica Anglorum* (Mary Dewar ed) (1982) (1st Edition 1583, written c.1565) as cited in *ibid* p.14.

³ J.M. Beattie, ‘Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries’, 9 *Law & Hist. Rev.* 221 (1991) at p.222.

⁴ *ibid* p.222.

the judge would intervene to ensure what was being said remained relevant to proceedings. During the trial, the accused was seen to be an ‘informational resource’ to the court. The oral discussion by the accused of the events was the key component to the trials rapid speed; it was believed that the most efficient way to adduce evidence is to have the accused speak about the alleged offence(s).⁵ The length of altercation trials, including jury deliberations, was between fifteen and twenty minutes,⁶ so justice was both rapid and swift.

Very little is known about the trial process during this period outside of the Smith’s account. However, a great deal more is written about treason trials. Langbein suggests these accounts were collected retrospectively and the collection was known as the *State Trials*.⁷ These trials differed from the altercation trial, as prosecution counsel were permitted in the courtroom. In the treason trial of Sir Nicholas Throckmorton,⁸ the defendant responded to questions from both the prosecution and the bench. Furthermore, the trials gave rise to a very early form of judicial case management. It would be the responsibility of the judge to direct proceedings; including the admission and presentation of evidence and the judge would comment on witness testimony as it was being heard in court.⁹ The prohibition on defence counsel applied to matters of fact rather than law. The accused was permitted to engage counsel to make submissions of law.¹⁰ However, the vast majority of defendants raised no issues of law, save for entering a plea of not guilty. Beattie¹¹ illustrates that from 1740 until 1780 cases with prosecution counsel did not exceed eight per cent per annum. Whereas defence representation was seen in even fewer instances and did not exceed six per cent.¹² As so few defendants engaged counsel, this left the judiciary to assume the mantle of counsel and the task was discharged in the most basic of fashion. This did not mean the court assisted in the formulation of a defence or act as advocates; they merely observed their responsibility to ensure the defendant was protected from illegal procedure or faulty indictments.¹³

It was the Treason Act 1696 that first permitted defendants to be represented at trial. However, the lifting of the prohibition only applied in treason trials and defence counsel were still not permitted to represent defendants in ordinary cases of felony.¹⁴ There were four overarching reasons that ensured treason trials were demarcated as a procedural world of their own and permitted defence counsel:¹⁵

- I. Prosecutorial Imbalance: There was an imbalance between the prosecuting lawyer and the unrepresented accused. This notion of imbalance stemmed from potential prosecutorial misconduct, examples of this misconduct includes reliance on perjured testimony and the inequality of the procedure to convict the defendant. The prosecution were permitted to hire as

⁵ *supra* n.1 at p.21.

⁶ *ibid* p.16.

⁷ *ibid* p.14.

⁸ *R v Nicholas Throckmorton*, 1 St. Tr 869 (1554).

⁹ *Supra* n.1 at p.15.

¹⁰ *ibid* at p.26.

¹¹ *supra* n.3 (1991) at p.222.

¹² *ibid* at p.227.

¹³ *Ibid* at p.222.

¹⁴ A felony was a deemed a serious crime that could be punishable by death.

¹⁵ *supra* n.3 at p.98.

lawyers as required; whereas the defendant was left unrepresented. In an ordinary felony case, the victim or kin of the victim acted as the prosecutor and he was not the beneficiary of vast state resources funding the search for witnesses who supports the prosecution's story.

- II. Judicial Bias: As indicated by the Stuart treason trials, the subservience of the court to the King was a problem perceived to be specific to treason trials. Most of these trials took place in London under the watchful gaze of the Crown and the judges were hand picked for the trials. The King had an acute interest in the outcome of a treason trial; he had no direct interest in whether a defendant was found guilty of stealing sheep and therefore these lesser offences did not require assistance from defence counsel.¹⁶
- III. The Complexity: Ordinary crimes were thought to involve more reliable proofs; Burglary, stealing sheep or murder are examples of crimes that would potentially leave witnesses or other evidence whereas the evidence in treason trials may be evidence of a person overhearing a plot to kill the King. The case of Popish Plot¹⁷ underlined the inherent dangers of false testimony being admitted and therefore a greater propensity of evidential probing by counsel was required. It would be impossible to think an unrepresented defendant, who has no knowledge of the charge would be able to comprehend and probe the evidence the prosecution have advanced.
- IV. Evening Up: By permitting the defendant to be represented by defence counsel the Treason Act was evened the playing field because the Crown was represented by the prosecution.

However, there was a fundamental reason for lifting of the prohibition but limiting its application to purely treason trials. This was an attempt by the judiciary to preserve the 'Accused Speaks' trial. Trials for treason were relatively rare there was no threat the permitting the defence lawyer into the court would diminish the traditional 'accused speaks' trial.¹⁸ As such the defendant would not lose his voice in the courtroom and his status as an informational resource of the court would be preserved. However, the impact of permitting defence counsel in the court room had an impact on the role of the trial judge. Ultimately, the evolving prominence of the defence lawyer diluted the role of the judiciary; it diminished the role that judges played in proceedings. The changing trial process prompted criticism from James Fitzjames Stephen who thought the law manifestly unfair as certain offences were allowed defence representation but others were not afforded such a right, solely due to the crime the accused committed. He said '[I]t was a matter of direct personal interest to many members of parliament that trials for political offences should not be grossly unfair but they were indifferent as to the fate [of those] accused of sheep-stealing,

¹⁶ *supra* n.1 at p.99.

¹⁷ The Popish Plot rested on the testimony of Titus Oates. He alleged an extensive Catholic conspiracy existed to assassinate King Charles II. His accusations led the execution of twenty two men. Oates' web of lies eventually fell apart and he was arrested and convicted of perjury.

¹⁸ *Supra* n.1 at p.36.

burglary and murder.¹⁹ By 1730 Stephen's criticism had been alleviated and defence representation was now permitted in ordinary felony trials. Prosecution lawyers had become increasingly involved in such cases and the judges of 1730s allowed defendants the assistance of counsel to probe evidence advanced by prosecution lawyers.²⁰ With the 1730s ushering in the era of the early adversarial trial, the role of the judiciary had been drastically altered. In the sixteenth and early seventeenth centuries, both the admission and presentation of the evidence was the responsibility of the judge.²¹ Prior to the introduction of the adversarial trial the judiciary were highly proactive and would take witnesses through their testimony, often line-by-line, acting as both the prosecutor and cross-examiner.²² However, with the proficiency of the lawyers at adducing evidence, the judiciary began to adopt an increasingly passive role in proceedings. Charles Cottu remarked that the early adversarial English trial judge 'remains almost a stranger to what is going on'²³ during the process of cross-examination. Throughout the period of altercation trials, the judiciary led fact-finding because nobody else could.²⁴ In the more lawyer-dominated proceedings the judiciary compared poorly when compared to the skills of the lawyers. The adversarial setting allowed counsel to be better prepared to adduce evidence as they had the vast benefit of pre-trial preparation. As such, this left the judge at a stark disadvantage and he slipped quietly into the background. The once prominent participant had been relegated to the role of passive observer in the new era of the adversarial criminal trial.

2. The Lawyer Dominated Trial

With the advent of the adversarial criminal trial, the defence lawyer assumed a more dominant role in proceedings. Initially, defendants were only permitted to instruct counsel in trials of treason, and the defendant was not afforded a full defence; lawyers were merely permitted to examine and cross-examine witnesses but were unable to address the jury. Over the course of the mid eighteenth century and the early nineteenth century, this stance would change. In 1836, the *Second Report of the Criminal Law Commissioners*²⁵ was published. This report fully supported a full right to defence counsel. The commissioners ridiculed the traditional stance that the truth of the offence would manifest from the prisoner's unprepared testimony as both 'strange and unreasonable.'²⁶ The Prisoner's Counsel Act²⁷ brought about an immediate and far-reaching transformation of criminal procedure. The Act replaced 'the rough and ready procedure of the eighteenth and early nineteenth centuries into the scrupulous

¹⁹ J. F. Stephen, *A History of the Criminal Law of England, Volume 1*, (Cambridge: Cambridge University Press) 2014 (1st ed first published 1883) at p.226.

²⁰ *supra* n.1 at p.172.

²¹ J.S Cockburn, *Introduction, Calendar of Assize Records: Home Circuit Indictments Elizabeth I and James I*, (1985), HMSO.

²² J.M Beattie, *Crime and the Courts in England*, 1986 (Oxford: Oxford University Press) p.342.

²³ *supra* n.1 at p.6.

²⁴ *ibid* at p.312.

²⁵ *Second Report of the His Majesty's Commission on Criminal Law* (1836) Parl. Papers XXXVI 183 as cited in D.J. A Cairns *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (Clarendon Press, Oxford, 1998). Cairns states that the use of Royal Commissions to facilitate legislative reform were a characteristic of the nineteenth century law reform and the *second report* is a classic example of this process in action.

²⁶ *ibid*

²⁷ 6 & 7 Will. 4, ch. 14 (1836).

adversarial trial of today.’²⁸ The Act permitted all persons who were tried for a felony to be granted permission to a full defence by counsel learned in the law or by an Attorney in courts where an Attorney practices as counsel.²⁹ The Act also permitted a person bailed or committed to prison to be entitled, on demand, to copies of the examination of witnesses on who’s deposition they have been held, for the sum of three and a half pence for each folio of ninety words.³⁰

The introduction of defence counsel to the criminal trial disentangled two activities that were previously the sole responsibility of the unrepresented defendant; it was the duty of the defence lawyer to probe whether the prosecution had a tenable case against the defendant. If so, the lawyer would offer evidence of a defensive nature to rebut the prosecution’s allegations. The defence lawyer was able to insist on asking on the judge if the prosecution have discharged their burden of adducing sufficient evidence to support a verdict in their favour. The defence lawyer would typically move for a verdict of an acquittal at the conclusion of the prosecution’s evidence. If a judge overruled this, the defence would then present its evidence.³¹ The inclusion of the defence lawyer altered the very fabric of the trial; he broke up the dual roles of speaking and defending that had previously been the responsibility of the accused. He assumed the role of defender; he insisted on prosecutorial burdens of proof and largely shut down the role of the accused.³² Prior to the involvement of the defence lawyer, the trial was the forum in which the accused could reply to the charge and evidence against him. The evolution of the adversarial trial changed this concept; the new ‘lawyer-dominated’ trials were no longer the place the accused merely aired his response to the charge, but became the forum in which the accused’s defence counsel tested the prosecution’s case.³³ With the lawyer now a fully-fledged participant in proceedings the previous functions of the judiciary were stripped from him. Gone were his responsibilities of organising and presenting the evidence as well as examining and cross-examining witnesses. Effectively, the judiciary was relegated to the role of a passive observer and it is easy to see how Cottu made two central observations to the English criminal trial. Firstly, the judge is ‘almost a stranger to what is going on’ and secondly, ‘[the accused] does so little in his own defence that his hat stuck on a pole might, without inconvenience, be his substitute at trial.’³⁴ It was clear that the lawyers are now dominating proceedings.³⁵ The era of the judicial led accused speaks trial was ended and an era of judicial passivity was commenced.

²⁸ D.J. A Cairns *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (Clarendon Press: Oxford, 1998) at 176.

²⁹ Part I – The Prisoners Counsel Act 1836 (6 & 7 Will.4, c.114).

³⁰ S.3 The Prisoners Counsel Act 1836 (6 & 7 Will.4, c.114).

³¹ *supra* n.1 at p.258.

³² *supra* n.1 at p.307.

³³ For an analytic discussion on the origins of the defence lawyer, please see J. H. Langbein, *The Origins of the Adversary Criminal Trial*, (Oxford University Press: Oxford), 2005 Chapter 3 and 5(D).

³⁴ C. Cottu, *On the Administration of Criminal Justice in England* (London 1822) as cited in *ibid* n.1 at p.6.

³⁵ This growth continued into the early twentieth century with the advent of the Poor Prisoners Act 1903 that provided an early form of legal aid, although the judiciary were encouraged not to advertise this fact. However, this altered dramatically with the creation of the Legal Aid and Advice Act 1949 and the importance defence lawyers role was recognised in The Convention for the Protection of Human Rights and Fundamental Freedoms.

2.1 The Mid Twentieth Century

The notion of judicial passivity continued into the middle of the twentieth century. In 1944, Lord Greene MR stated if a judge conducted cross-examination, he ‘descends into the arena and is liable to have his vision clouded by the dust of conflict’.³⁶ By reverting to his former role as an engaged participant, it was thought that the judge would lose his position as an observer as a result of his clouded vision ‘he unconsciously deprives himself of the advantage of calm and dispassionate observation’.³⁷ The trial judge should refrain from entering the arena of the adversarial battle, save for clearing up a point. Lord Greene was not alone in stressing the importance of the judiciary to remaining passive and unengaged throughout the trial proceedings. In 1957, Lord Justice Denning gave the quintessential description of the modern day adversarial judge. The Court of Appeal case *Jones v National Coal Board*³⁸ centered on the fact the judge intervened too frequently during cross-examination. It was held that the judge should intervene as infrequently as possible as the heart of cross-examination lies in the unbroken sequence of question and answer.³⁹ Excessive judicial interruption weakens the effectiveness of cross-examination and in this instance the defence were unduly hampered by the interventions. The judge frequently initiated discussions with counsel and often interrupted witnesses during their answers to a question; he effectively had taken the task of examination out of the hands of the advocate. This behavior was deemed to fall outside the realm of their role. Denning LJ said the role of the judge is to ‘hearken’ to the evidence, he can ask questions to clear up a point and keep the advocates in good order and ensure they follow procedure and avoid repetition. If he goes beyond these tasks he ‘drops the mantle of a judge and assumes the role of an advocate; the change does not become him well.’⁴⁰ Furthermore, Denning reiterated the position of the Lord Chancellor stating that ‘patience and gravity of hearing is an essential part of justice; and an over speaking judge is no well-tuned cymbal’.⁴¹

In *Clewer*⁴² the defendant appealed on the basis of undue interruption by the judge. The judge was of the opinion that the defence advanced was improbable. Goodard LJC stated that if ‘counsel was interrupted ... his task becomes impossible’.⁴³ The judge went as far as suggesting to the jury that the defence is raising ‘false issues.’⁴⁴ The court quashed the conviction. The Court of Appeal took a very dim view of the illegitimate conduct from the judiciary of the judge. In *Barnes*⁴⁵ the judge informed the defence that he takes ‘a serious view of hopeless cases ... contested at public expense’. The Court of Appeal quashed the conviction because of the ‘wholly improper’ conduct of the judge in exerting pressure to enter a guilty plea.⁴⁶

³⁶ Per Green MR, in *Yuill v Yuill* [1945] 1 All ER 183 at 189.

³⁷ Per Green MR, in *Yuill v Yuill* [1945] 1 All ER 183 at 189.

³⁸ *Jones v National Coal Board* [1957] 2 Q.B. 55

³⁹ *ibid* per Denning LJ at p.65

⁴⁰ *Ibid* Per Denning LJ at 64.

⁴¹ F. Bacon, *Essays, Civil and Moral*. Vol. III, Part 1. The Harvard Classics. (New York: P.F. Collier & Son, 1909–14), Chapter 56 Of Judicature as cited by Denning LJ *ibid*.

⁴² (1953) 37 Cr.App.R 37

⁴³ Per Goddard LJC in *R v Clewer* (1953) 37 Cr.App.R 37 at 40.

⁴⁴ *Ibid* at 41.

⁴⁵ *R v Barnes* [1971] Cr.App.R 100

⁴⁶ *ibid* Per Parker LCJ at 106.

If the judiciary resumes the role of an active participant in proceedings he clearly runs the risk of jeopardising the right to a fair trial of the accused. In the Irish case of *Phelim McGuinness*⁴⁷ the accused was granted leave to appeal, as the interventions of the trial judge rendered the trial unsatisfactory and the verdict potentially unsafe. The Appeal Court held that the active participation by a judge in examination-in-chief is undesirable as it may purport to the accused that the judiciary are lacking impartiality.⁴⁸ During the examination of a defence witness the judge interjected with twenty consecutive questions. As a result, the Appeal Court ordered a retrial.

The aforementioned case examples illustrate the boundaries the judiciary faced in the twentieth century. No longer is the judge an active participant who is requested of actively engaging with the witnesses and evidence. However, it is clear that he should not be viewed as the stranger advanced by Cottu in the formative years of the adversarial trial. Both Greene MR and Denning LJ state the role of the judge is more than merely a cricket umpire asking ‘how’s that? His object, above all is to find the truth’.⁴⁹ It is clear that the judge is more than a mere umpire in proceedings but issues exist in delineating the boundaries. Silverman suggests the judge can be a pilot who guides the trial along orderly lines but is confined within the rules of evidence and procedure. This steering role means that he can be considered less than a participant, as he refrains from entering the fray of combat but is more than a sporting umpire.⁵⁰

3. The Twenty-First Century: A ‘Sea Change’ and a Shifting Pendulum

With the advent of the adversarial criminal trial the role of the judge was demoted from active participant to that of a pilot who was responsible for guiding the trial to completion. This remained the quintessential approach until the early part of the new millennium where tension arose between the judiciary’s approach to case management and judicial demeanor. Lord Justice Auld’s *Review of the Criminal Courts of England and Wales*⁵¹ (hereafter, the Auld Review) provided the catalyst for a change in judicial demeanor. Auld LJ suggested that the ‘criminal trial is not a game under which a guilty to defendant should be provided with a sporting chance. It is a search for the truth ...’⁵² In the wake of the Auld Review the judiciary began to embrace their changing role. In *Chabaan*⁵³ the judge refused the application on the basis that he expected the case to be dealt with expeditiously and it should not conclude beyond a pre-defined date. The defendant was convicted and he appealed on the basis, *inter alia*, that the judge should not have refused the expert application. The appeal was dismissed and Judge LJ stated that ‘a judge has always been responsible for managing the trial ... that is one of his most important functions’.⁵⁴ Judge LJ highlighted the importance of dealing with cases expeditiously. He said that ‘time is not unlimited ... the entitlement of a fair trial is not inconsistent with proper judicial control over the use of time ... every trial that takes longer than necessary is wasteful

⁴⁷ *The People (at the Suit of the Director of Public Prosecutions v Phelim McGuinness)* [1978] IR 189.

⁴⁸ *ibid* at 193.

⁴⁹ *Supra* n.37 Per Denning LJ at 63.

⁵⁰ H.W. Silverman, ‘The Trial Judge: Pilot, Participant or Umpire?’ 11. *Alta L Rev* 40 1973 at 63.

⁵¹ Auld LJ, *Review of the Criminal Courts of England and Wales* (HMSO: 2001).

⁵² *ibid* at 154.

⁵³ [2003] EWCA 1012.

⁵⁴ *ibid* per Judge LJ at para 35.

of limited resources.’⁵⁵ The importance of dealing with cases efficiently and effectively is clear. Furthermore adjournments to instruct experts to make speculative investigations will no longer be tolerated. Judge LJ took the opportunity to reinforce the notion that the era of active case management had dawned. In *Jisl*⁵⁶ Judge LJ reiterated this point and explicitly outlined that the starting point of a criminal case is simple:

‘Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited ... [I]t follows that the sensible use of time requires judicial management and control’.⁵⁷

With the goal to eroding the ‘sporting chance’ Auld LJ suggested creating a single corpus of rules for a unified criminal court.⁵⁸ The recommendations led to the creation of the Criminal Procedure Rules 2005.⁵⁹ The Rules are underpinned by an Overriding Objective to deal with cases justly,⁶⁰ dealing with a case justly includes the Acquitting the innocent and convicting the guilty,⁶¹ dealing with both sides fairly,⁶² recognizing the ECHR rights of the defendant,⁶³ respecting the interests of witness, jurors and victims,⁶⁴ dealing with cases in an efficient and expeditious manner,⁶⁵ ensuring that the court has appropriate information when considering bail and sentencing⁶⁶ and dealing with case that takes into account the gravity of the offence, its complexity, the severity of the consequences for the defendant and the needs of other cases.⁶⁷ At face value, the overriding objective appears to employ a common sense approach to criminal trials that previously might be viewed as an inefficient and ineffective system benefits nobody. However, by unpicking the individual sections of the objective it is clear a paradigm shift in judicial culture underpins the rules and the emphasis of not wasting resources. It is apparent that the semi-passive, piloting approach to the role of a judge in criminal cases is to be replaced by that of a more active, hands on, case-manager. Lord Justice Thomas suggested the advent of the CPR effected a ‘sea change’⁶⁸ in how criminal cases should conducted and Part III of the rules outlines explicitly exactly what constitutes good case management.

⁵⁵ *ibid* per Judge LJ at para 36.

⁵⁶ [2004] EWCA Crim 696.

⁵⁷ *ibid* per Auld LJ at para 114.

⁵⁸ *ibid* at para 277.

⁵⁹ The rules were created by Part 7 of the Courts Act 2003 s.69-73.

⁶⁰ Rule 1.1(1) Criminal Procedure Rules 2013.

⁶¹ Rule 1.1(2)(a).

⁶² Rule 1.1(2)(b).

⁶³ Rule 1.1(2)(c).

⁶⁴ Rule 1.1(2)(d).

⁶⁵ Rule 1.1(2)(e).

⁶⁶ Rule 1.1(2)(f).

⁶⁷ Rule 1.1(2)(g)(i)-(iv).

⁶⁸ *R (on the application of the DPP) v Chorley Justices & Anor* [2006] EWHC 1795 per Thom as LJ at para 24.

3.1 Active Case Management

In order to satisfy the overriding objective, a duty is placed on the court to actively manage the case and rule 3.2(1) outlines eight component parts to active case management.⁶⁹ A key driver behind the active case management provision is saving resources. Time is a resource that should not be wasted. In *D and Others*⁷⁰ it was held that to deal with a case ‘justly’ requires efficiency and expedition.⁷¹ The trial lasted for 235 days but court only sat for 132 of those days. Moses LJ went on to say the main cause of delay lay in the failure of the Judge to ensure that a sufficient number of hours were sat in order to read and hear the evidence. Despite this failure, counsel did not escape criticism. The court was dismayed by the fact counsel declined to tell the Judge how long cross-examination of certain witnesses would take.⁷² To satisfy the implicit time-saving goals, the judiciary is permitted to curtail oral argument and have counsel produce their submissions in writing.⁷³

As well as refusal applications, active case management allows the judiciary to curtail any cross-examination that is deemed unnecessary or repetitious. In *Butt*⁷⁴ defence counsel spent a great deal of time asking questions to establish background information. Counsel then went on to conduct a detailed repetitious cross-examination as to the events of the material time and the allegation of rape. The judge said counsel was concentrating on unimportant issues and cross-examination was to be finished in ten minutes. The defendant was convicted and appealed on the basis the judge prevented his counsel from cross-examining the complainant adequately and this resulted in an unfair trial. The appeal was dismissed and the Court stated that the cross-examination wasted time and was repetitious. Counsel spent too much time reaching the ‘real issue’ of whether the complainant consented to sexual intercourse. Dyson LJ stated the ‘management of a trial involves the exercise of judgment and discretion and the court will not interfere with a decision made when the judge is exercising this function.’⁷⁵

3.2 Over Zealous Case Management: The overactive judiciary

There are limits to the case management powers possessed by the judiciary and at times they are guilty of overstepping the boundary of acceptable conduct. In *Cordingley*⁷⁶ the trial judge was deemed to act in an oppressive manner toward the defendant. In the interests of efficiency the judge in the first instance disagreed with counsel’s assertion that the estimated length of the trial should be three days. The judge intimated this should be reduced. Bail was also withdrawn, despite the

⁶⁹ Including, *inter alia*, (a) the early identification of the real issues (c) achieving certainty as to what must be done, and by whom, and when, in particular the early setting of a timetable for the progress, (e) ensuring that evidence is presented in the shortest and clearest way (f) discouraging delay and (g) encouraging participants to co-operate in the progression of the case

⁷⁰ [2007] EWCA Crim 2485

⁷¹ *ibid* per Moses LJ at 31.

⁷² *ibid* paras 37-41.

⁷³ *Kay* [2006] EWCA Crim 835.

⁷⁴ [2005] EWCA Crim 805.

⁷⁵ *ibid* per Dyson LJ at para 16.

⁷⁶ *R v Cordingley* [2007] EWCA Crim 2174.

defendant being released on bail for the previous eight months. The Court of Appeal endorse robust case management and ensuring the time of the court is used sensibly, however in this instance the conduct of the trial judge betrays an element of rudeness on which he should have been ashamed.⁷⁷ The safety of a conviction does not merely depend upon the strength of evidence that the jury hears but also the observance of due process. It was clear to the Court of Appeal that the effect of the judge's conduct was to inhibit the defendant in the course of his defence. To the court this point was inescapable and would have severe consequences for the credibility of the defendant before a jury.⁷⁸

Robust case management is a pivotal part of the modern day criminal trial. However, discourteous bad manners will not be tolerated by the courts. Furthermore, excessive judicial intervention is also not permitted. In *Copsey*⁷⁹ the judge asked 60 questions in the first defendant's evidence-in-chief and 50 during cross-examination. The co-accused was asked 57 throughout his evidence-in-chief and 36 during cross-examination. Many of the questions took the form of cross-examination and ended with the question 'did you?' The judge made disparaging and potentially prejudicial remarks about the defence evidence; he referred to part the evidence as 'bizarre' and was dismissive of defence witnesses. Both defendants were convicted and appealed on the basis that *inter alia* there was excessive judicial intervention that would lead the jury to perceive that the judge did not believe their case. The nature of frequency of the questioning concerned the Court of Appeal, especially his contention that an important part of the defence case was labelled 'bizarre'. Ultimately, the conduct of the judge rendered the trial unfair and ultimately, the conviction unsafe.⁸⁰

Interestingly, not all 'excessive' interventions render the trial unfair. In *Zarezadeh*⁸¹ the trial judge made a number of interventions during his cross-examination for the prosecution. The judge effectively appeared to the jury as a 'second prosecutor' and the impression potentially given to the jury is one that the judge does not accept what the defendant was saying.⁸² However, despite this impression being given to the jury, the Court of Appeal held this did not infringe the Appellant's right to a fair trial. The court decided the judge did not go beyond the point of elucidating exactly what Appellant was saying. The court noted it was unfortunate that the judge intervened in the manner that he did, and that he did not allow the prosecutor to perform his task. However, the conduct of the judge was not deemed to characterise an unfair trial.⁸³ In *Meall*⁸⁴ it was also held that the questioning by the judge did not fall into the trap of improper judicial discretion. On appeal the defence submitted that the judge should have discharged the jury after making a number inappropriate comments that intimated two witnesses must have made a mistake and the defendant did indeed kick the victim. In his summing up the judge directed the jury to only consider the evidence they have heard before them and not the questioning or comments made by himself. The Defendant was convicted by a majority of eleven to one. The Court of

⁷⁷ *ibid* per Laws LJ at para 12.

⁷⁸ *Ibid* para 15.

⁷⁹ [2008] EWCA Crim 2043.

⁸⁰ *ibid* per Silber J at para 24.

⁸¹ [2011] EWCA Crim 271.

⁸² *Ibid* per Wilkie J at para 27.

⁸³ *Ibid* at para 29.

⁸⁴ [2011] EWCA Crim 2526.

Appeal held that the judge waited to the appropriate point to question the Defendant and that the questions were limited in scope. The court was satisfied that the judge did not invite the jury to disbelieve the evidence and he offered a robust direction to the jury, thus the conviction was considered safe.

Whilst case management has always made up a component part of the role of the judge, until the dawn of the new millennium he was often still viewed as the passive pilot. The advent of the CrimPR has allowed the judge to shed his coat of passivity in favour of a more interventionist role. A just and fair hearing should undoubtedly underpin a criminal process. However, the members of the judiciary that act in an interventionist manner potentially undermine the classic notion of adversarialism. Furthermore, the managerial aims of an expeditious and efficient criminal trial shake the adversarial foundation to its very core.

4. The Death of the Adversarialism: The Pursuit of the Overriding Objective.

Undoubtedly, the criminal trial has always evolved through time. The development of the adversarial criminal trial occurred whilst the court was still trying to preserve the 'accused speaks' trial. By retaining this form of trial would allow the court to benefit from treating the court as an 'informational resource' and have him openly talking at trial and control of the proceedings remained with the judiciary. Adversarial theory heralds that the trial is a dispute between two competing sides, which are in a position of equality. The argument takes place before a passive and neutral adjudicator. The evidence is predominately oral and it is the responsibility of the adjudicator to ensure the parties stay within the rules.⁸⁵ Each side is responsible for the presentation of their individual case, the trial being the forum in which the guilt or innocence of the Defendant is resolved.⁸⁶ Arguably, the trial in the new millennium has departed from this traditional stance of adversarialism; what has gone relatively unreported is the potential impact this change holds for justice.

The accused speaks trial reflected the notion that the trial was designed to establish the truth of a particular accusation. William Hawkins in *Treatise of the Pleas of the Crown* illustrated the importance of using the accused as an informational resource to be investigated by the court. He said '[the] guilty, when they speak for themselves, may often help disclose the truth, which probably would not so well be discovered from the artificial defence of others speaking for them.'⁸⁷ The Prisoners' Counsel Act 1836 provided full rights for defence counsel to address juries as well as examine and cross-examine witnesses and thus ending the judicial involvement in the presentation of evidence and examining witness. Langbein suggests that the truth became a by-product of the criminal trial⁸⁸ as each partisan party is concerned with winning rather than establishing the truth.⁸⁹

⁸⁵ For a critical evaluation of adversarial theory see M.R. Damaška *Evidence Law Adrift* (New Haven: Yale University Press, 1997).

⁸⁶ J. McEwan 'From Adversarialism to Managerialism: Criminal Justice in Transition' *Legal Studies*, Vol. 31 No 4 at 520.

⁸⁷ W. Hawkins, *A Treatise of the Pleas of the Crown*, Vol II, (London 1721) cited in. J. H. Langbein, *The Origins of the Adversary Criminal Trial*, 2003, (Oxford: Oxford University Press) p.171.

⁸⁸ *supra* n.1 at p.331.

⁸⁹ *ibid* at p.332.

Arguably, the implementation of the CPR alongside the judiciary assuming a more interventionist role might suggest that the pendulum is moving toward re-establishing the importance of the truth in criminal trials opposed to proof. This can be illustrated in the post-Auld review criminal trials. In *Gleeson*⁹⁰ the court ruled that the defence tactic of an ambush defence will no longer be tolerated. At the close of the prosecution case, the defence submitted no case to answer. The court allowed the prosecution to amend the indictment. The defence objected; they anticipated their submission would be successful. As such, counsel deliberately did not cross examine witnesses. The prosecution application was successful and the defendant was convicted. His appeal was dismissed by the Court of Appeal, Auld LJ stated that a prosecution ‘should not be frustrated errors of the prosecutor ... for defence advocates to take advantage of such errors by deliberately delaying identification of an issue of fact or law in the case until the last possible moment is, in our view no longer acceptable ...’⁹¹ This is a clear example of the court emphasizing the discovery of the truth over proving the allegation; as in the first instance, the prosecution could not prove the offence was committed by the defendant. It could only be proven once the indictment had been amended. This is an erosion of the penalty shoot-out theory of criminal procedure. The Crown had one shot at goal, and if the striker missed, however unlucky, he did not get another chance.⁹²

The truth seeking nature of the trial is also exemplified by the case management provisions of the CrimPR; the power conferred on the judiciary and magistracy to ensure the provisions are followed. The case management form ensures that the ‘real issues’ have to be identified in advance of trial.⁹³ This is nothing new to Crown Court proceedings as the Criminal Investigations and Procedure Act 1996⁹⁴ compelled the accused to complete a defence case statement in advance of trial. However, for magistrates’ court cases this provision was merely voluntary.⁹⁵ Rule 3.2 CPR 2013 indicates that the court furthers the overriding objective by actively managing the case.⁹⁶ Never before has the judiciary or magistracy had such explicit directions as to what constitutes their role of active case management. Some of the component parts present great danger to the notion of adversarialism in England and Wales. Arguably, the case management forms are akin to completing a defence case statement under the CPIA⁹⁷; effectively the case management forms circumvent the voluntary nature of the statutory legislation. Whilst defence disclosure is not an entirely novel proposition, never before has the defendant had to disclose so much information.⁹⁸ It might be argued that dual goals of active case management by the judiciary and

⁹⁰ [2003] EWCA Crim 3357

⁹¹ *ibid* per Auld LJ at para 35.

⁹² J. Chalmers, F. Leverick and L. Farmer, *Essays in Criminal law in Honour of Sir Gerald Gordon*, 2010 (Edinburgh: Edinburgh University Press) p.323.

⁹³ Rule 3.2(1)(a) Criminal Procedure Rules 2013.

⁹⁴ Section 5.

⁹⁵ S.6 Criminal Procedure and Investigations Act 1996.

⁹⁶ Active case management includes is defined in Rule 3.2(1)(2)(a)-(h) see n.71.

⁹⁷ Andrew Keogh argues the case management form is analogous to the defence statement in the Crown Court. See A. Keogh ‘Criminal Case Management – Is the Game Over?’, Eldon Lecture Series, (2011) Northumbria University School of Law.

⁹⁸ Previously, defence alibi witnesses had to be disclosed by virtue of S.11 Criminal Justice Act 1967 and in fraud trials the defendant had to outline his defence in general terms. However, if the defence to the fraud charge was based on alibi or expert evidence then fuller disclosure was required.

magistracy combined with the desire for expeditious and efficient trials have the effect of returning the trial to the ‘accused speaks’ format. However, the modern day ‘accused speaks’ trial has a notable difference from its earlier counterpart; the accused is now speaking through written case management disclosures, as opposed to orally disclosing information. It has been claimed that defence disclosure does weaken a fundamental adversarial foundation, namely that the burden of proof rests solely on the prosecution. However, The Roskill committee reporting in 1987 suggested that this issue might be circumvented:

‘The prosecution would still have to prepare their case fully ... including making early disclosure of their evidence ... we recognize that the burden of proof would be affected if the prosecution were allowed to alter the nature of their case once the defence had been disclosed. To avoid this possibility, any proposal would there have to involve the prosecution’s case being “fixed” before the defence could show his hand. If the prosecution sought to change their ground ... or, if it were not too late, to ensure the that the prosecution adhered to the original case’.⁹⁹

The approach offered by the Roskill committee is admirable; it sets out that the burden of proof would be significantly diluted if the prosecution were permitted to amend their case once the defence has been disclosed. However, the ‘sea change’ which started with the Auld Review and permeated through the judiciary and magistracy to enact a change in culture almost ignores the due process safeguard highlighted by the committee. The modern judge will permit the prosecution to alter an indictment to ensure cases are not frustrated by prosecutorial error.¹⁰⁰ Whilst this satisfies the goal of an efficient and expeditious criminal process the decision is one that is certainly non-adversarial. The court in *Chabaan*¹⁰¹ was entirely correct, time is not unlimited but the dual goals of efficiency and case management should not be fulfilled by the potential prejudice to the defendant. The changing role has further distorted the role of the judge; it appears there is some difficulty in ascertaining the boundaries in which they operate. In *Cordingley*¹⁰² the judge was discourteous and rude and in *Copsey*¹⁰³ the Court of Appeal deemed his interventions all too frequent. However, in more recent times the judge has been permitted to act as a second prosecutor.¹⁰⁴ He asked many questions during the trial, rendering the boundaries of the role are rather opaque. What is clear is that the modern day judiciary and magistracy are no longer passive umpires, but active case managers who pilot the case along the correct flight path to ensure nobody veers off course.

5. Conclusion

The evolution of the interventionist judge comes at a time where the nature of the criminal trial is shifting from its traditional adversarial roots. This shift is occurring with a dilution of due process ideals and is being replaced with a managerial approach

⁹⁹ The Fraud Trials Committee, Chairman: The Right Honorable Lord Roskill, P.C, (HMSO: 1986) p104 at para 6.75.

¹⁰⁰ See *Gleeson* n.87.

¹⁰¹ above n.49

¹⁰² *Supra* n 69.

¹⁰³ *Supra* n73

¹⁰⁴ *Supra* n.79.

that is underpinned by a crime control agenda. The implementation of these ideas sits rather awkwardly in the adversarial process. The managerial model dislikes party control and this control is now taken away from the State and defence lawyers and transferred to the court.¹⁰⁵ The judiciary in the twenty-first century plays a far more prominent role than his twentieth century predecessor. The judge is no longer described as passive and is the undoubted key figure throughout the trial process. He is more than a pilot, more than an umpire. He is the manager, with the goal of concluding the trial in the most expedited manner possible. Should either side not comply with the directions given by the ‘manager’, they may face a number of sanctions. The Court can fix, postpone, bring forward, cancel or adjourn a hearing. It can make a costs order and finally, it can impose any other sanction as may be appropriate.¹⁰⁶ In reality, the judiciary can issue any sanction they deem suitable.¹⁰⁷

The interventionist judge has his goals underpinned by the CPR. The traditional adversarial trial has diminished in importance and it is no longer the forum in which the prosecution and defence zealously represent their clients. With the death of the ambush defence, the creation of both the defence case statement under the s.5 CPIA 1996 and the analogous requirement under the CPR 2013 the adversarial battle has been replaced with each party knowing the ‘real issues’ of the opposition’s case. This is in stark contrast to the development of disclosure regime. Historically, disclosure was the antidote to the potential unfairness caused by the inequality of resources between the prosecution and defence.¹⁰⁸ In the modern criminal trial a notion of co-operation permeates through the trial process; illustrated by the creation of timetables and each side informing the judiciary of any significant failures by themselves or their opponent. The sea change is clear and the evolving role of the judiciary should be viewed through the same lens. It is judiciary who allows the sea change by performing the pivotal role of case manager. The very idea that trials should become more efficient and resources should be saved is admirable and one that should be embraced. The need for heavy-handed judiciary appears sensible considering each side should be adversaries. The overriding objective is to deal with cases justly¹⁰⁹ and the judiciary has a number of tools available to ensure that goal is met. However, in meeting this goal, the judiciary has to act in a manner that is distinctly non-adversarial. Having non-adversarial traits in a due process adversarial system appears to sit rather awkwardly, the meeting of the overriding objective by active case management with an interventionist judiciary is distinctly non-adversarial. Professor McEwan suggests that a new ethical code is needed if the criminal justice system is no longer adversarial.¹¹⁰ There has been no explicit statement to suggest that adversarialism is abandoned. Although perhaps this has been suggested implicitly; piecemeal changes to the criminal justice process and increasing significance of

¹⁰⁵ J. McEwan ‘From Adversarialism to Managerialism: Criminal Justice in Transition’ *Legal Studies*, Vol. 31 No 4 at 544.

¹⁰⁶ Rule 3.5(6)(a)-(c).

¹⁰⁷ Although historically, there has been great difficulty in finding a suitable sanction for procedural failures. For an in-depth discussion of this issue please see H.S. Quirk ‘The Significance of Culture in Criminal Procedure Reform: Why the revised disclosure scheme cannot work’ *The International Journal of Evidence and Proof*, 10(1), (2006) 42-59.

¹⁰⁸ D. Corker and S. Parkinson, *Disclosure in Criminal Proceedings*, (Oxford: Oxford University Press) 2009 at p.6.

¹⁰⁹ Rule 1.1 Criminal Procedure Rules 2013.

¹¹⁰ F. Garland and J. McEwan, Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate, (2012) *The International Journal of Evidence and Proof*, 16 (233-262) at 262.

judicial intervention since the turn of the century suggest a new form of process is being created. A cornerstone of this change is the return to the ‘accused speaks’ trial. The importance of having the accused speak was best highlighted by the earlier Hawkins quote for ‘[the] guilty, when they speak for themselves, may often help disclose the truth, which probably would not so well be discovered from the artificial defence of others speaking for them.’¹¹¹ The interventionist judiciary and the disclosure regime are forcing the accused to talk by having them ‘identify the real issues’ at an early stage. The culture does not represent a shift in process toward inquisitorialism. Instead the shift is toward managerialism and at the heart of this shift is the interventionist judiciary who is not merely a pilot, the pendulum has swung and the former pilot has been promoted to a General.

Total Word Count (excluding footnotes): 6,704

Total Word Count (including footnotes): 8,016

Keywords: *Criminal Procedure Rules, Adversarialism, Managerialism, Judiciary*

¹¹¹ W. Hawkins, *A Treatise of the Pleas of the Crown*, Vol II, (London 1721) cited in n.1 at p.171.