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Adversarialism goes West: Case Management in Criminal Courts

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Abstract

This article examines the approach of criminal courts in England and Wales to case management alongside the contradictory pressures placed upon the pre-trial role of the defence advocate, when advising on plea, which have led to the erosion of the adversary ideal. It focuses on the overarching procedural code that ‘governs’ the relationship between defence lawyers and the judiciary in the conduct of criminal cases (the Criminal Procedure Rules) and draws upon a recent important decision which extends the antipathy of the courts towards adversarial advocacy. The conclusion drawn is that traditional understandings of the adversarial advocate have expired together with the duty of defence lawyers to ‘promote fearlessly and by all proper and lawful means the *client’s* best interests’.

Key Words: Leveson Review (2015); Adversarial advocacy; Criminal Procedure Rules; Case management; Defence duties; Guilty pleas.

Introduction

It is a critical test of the freedom inherent in our democratic society that those accused (usually by the State) of committing criminal offences can and should be represented by capable criminal advocates, independent in spirit who, subject to the rules of law and procedure which operate in our courts and to the dictates of professional propriety, are prepared to put the interests of their clients at the forefront and irrespective of personal disadvantage.¹

It is a decade since the Criminal Procedure Rules (CrimPR) came into effect. The CrimPR sought to simplify the procedures of criminal courts in England and Wales and to make them ‘accessible, fair and efficient.’² Despite the ‘sea change’ heralded at the time³, criminal practitioners still do not fully appreciate the fundamental change that the Rules Committee (Chaired by the Lord Chief Justice and heavy with other judges including Leveson, P.) has implemented under the broad powers conferred by the Courts Act, 2003. Practitioners have misread the extent to which their duty to their clients has been overridden in the cause of ‘efficient’ court administration and have not appreciated that the ‘fair’ provision has been left trailing. As the President of the Queen’s Bench Division, in his 2015 *Review of Efficiency in Criminal Proceedings* (Leveson Review),⁴ strikingly explained: there has been ‘a failure properly to disseminate the good work of the Committee and embed it in the consciousness of criminal practitioners’. To resolve

¹ Lumsdon & Ors, R (On the Application Of) v Legal Services Board [2014] EWHC 28 (Admin) (20 January 2014)), [1], per Leveson LJ.

² Courts Act, 2003, section 69 (4) (a).

³ Thomas LJ in R (on the application of the DPP) v Chorley Justices [2006] EWHC 1795 [24], [25].

⁴ Final Report, January 2015, para 193, p.52.

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this, the Leveson Review sets out, bluntly, to make ‘alterations to the culture which surrounds practices in the criminal courts’.⁵

Prior to the publication of the Leveson Review, a stark indication of the impact of the CrimPR had already come to the forefront in *Re West* (West),⁶ a decision on case management powers which exemplifies a developing official culture (governmental and judicial) towards defence services with important implications for the wider legal profession. As will be argued, *West* is symbolic of the tension faced by trial judges under the CrimPR when ‘managing’ defence counsel who seek to assert their ‘right’ to adversarial protections.

This article examines the approach of the criminal courts in *West* to the contradictory pressures placed upon the pre-trial role of the defence advocate, when advising on plea, which have led to the erosion of the adversary ideal. This article therefore adds to the growing body of literature that makes a central claim:⁷ the adversary system has been significantly weakened by a shift in judicial approach, one aligned to governmental interests, its most visible manifestation being the disintegration of defence counsel’s ‘proper’ role.

The conclusion drawn is that traditional understandings of the adversarial advocate have expired and traditional limitations on the role of judges have been abrogated by judicial

⁵ Leveson Review, para.322, p.84. Emphasis added.

⁶ *West*, Re [2014] EWCA Crim 1480 (CA (Crim Div)).

⁷ See e.g. Hodgson J. *The Future of Adversarial Criminal Justice in 21st Century Britain*. *North Carolina J. of International Law and Commercial Regulation* 2010; 35: 319; McEwan J. *From adversarialism to managerialism: criminal justice in transition*. *Legal Studies* 2011; 31(3): 519.

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aggrandisement. The duty of defence lawyers to ‘promote fearlessly and by all proper and lawful means the *client’s* best interests’⁸ is out of alignment with the recent judicial overreach into the conduct of the defence case under the CrimPR – a regime which now openly prioritises ‘savings to the State’ in the once sensitive balance of counsel’s duties and which accords judges powers unimaginable under adversary principles.⁹

An Historical Antipasto

In 1784, William Shipley was charged with criminal libel for the re-publication of a pamphlet calling for democratic governance. In line with bitterly contentious precedent,¹⁰ Mr. Justice Buller sought to restrict the jury to determining whether the words had been published and that it was for him to decide whether the words were a libel. Following the brilliant defence of Thomas Erskine, one of the greatest ever advocates to appear in English courts, the jury said Shipley *was guilty of publishing only*. Although the Judge tried to confine the jury to ‘guilty of publishing’ without the word ‘only,’ a juror said that ‘only’ was part of their verdict. The argument continued:

Erskine: ‘Then I insist that it shall be recorded.’

⁸ Rule rC15.1 of the Code of Conduct, Bar Standards Board Handbook, January 2014 at p.33, available at https://www.barstandardsboard.org.uk/media/1553795/bsb_handbook_jan_2014.pdf

⁹ As Lord Reid in *Rondel v Worsley* [1969] 1 AC 191 famously observed: ‘Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case’. Lord Reid qualified his ‘fearless advocate’ through the advocate’s position as an officer of the court: ‘Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession . . .’.

¹⁰ The precedent having been established by Coke LCJ (who effectively invented criminal libel as a means of suppressing criticism of State officials) and Lord Mansfield in the notorious trials of Woodfall and Almon (1770-1772, *State Trials*, xx, 803, 895) whose direction to the jury was described by Junius as one which ‘contradicts the highest authorities as well as the plainest dictates of reason’.

Justice: ‘Then the verdict must be misunderstood. Let me understand the jury.’

Erskine: ‘The jury do understand their verdict.’

‘Sir,’ thundered Justice Buller, ‘I will not be interrupted.’

Erskine: ‘I stand here as an advocate for a brother citizen! I desire the word “only” to be recorded!’

‘Sit down, sir!’ roared the judge. ‘Remember your duty, or I shall be obliged to proceed in another manner.’

Undeterred by the thinly-veiled threat of contempt of court, Erskine continued:

Erskine: ‘Your Lordship may proceed in what manner you think fit; I know my duty as well as your Lordship knows yours. I shall not alter my conduct.’

Nor did Erskine alter his conduct in this or indeed in other cases. He remained the champion of press freedom, freedom of peaceable protest, freedom to agitate by lawful means for political and other causes, and the independence of the Bar. Although soon after Fox’s Libel Act, 1792¹¹ confirmed the right of the jury to return a general verdict (thereafter extended to all criminal cases), Erskine’s argument is of profound relevance today as we will seek to show.

¹¹ 32 Geo. III c.60.

The Problem of the Adversarial Advocate

The celebratory rhetoric traditionally surrounding the defence advocate had two chief dimensions. First, advocates were ‘fearless, vigorous and effective’ actors independent of the judge and prosecutor.¹² Second, they operated to secure ‘the best outcome *for* the client’.¹³ Independence and professional standards allowed barristers, as ‘gladiator of the accused’¹⁴ to robustly protect defendants who might acquiesce (as many have¹⁵) to pressure coming from the authoritative standpoint of a judge. Nowhere has this pressure been more acute than with the timing of plea.¹⁶

In this regard, under the current regime, the CrimPR dictates that at every hearing the court must, where relevant ‘... take the defendant’s plea (unless already done) or if no plea can be taken then find out whether the defendant is likely to plead guilty or not guilty’¹⁷. This presents a substantial difficulty for the defence where no prosecution evidence (or only a summary of it) has been served.

¹² Lord Chancellor’s Department, Code of Conduct for Employees of the Legal Services Commission who Provide Services as Part of the Criminal Defence Service. London: TSO, 2001, p.4.

¹³ Ibid.

¹⁴ Du Cann R. The Art of the Advocate. London: Penguin, 1964, p.46.

¹⁵ A wealth of empirical research supports this picture of defendants being ‘pressured’ into pleading. See e.g. Bottoms A and McClean J. Defendants in the Criminal Process. Routledge, 1976; Baldwin J. and McConville M. Negotiated Justice. London: Martin Robertson, 1977. More recent empirical research confirms that financial incentive structures in place for defence lawyers heightens this risk: Newman D. Legal Aid Lawyers and the Quest for Justice. Oxford: Hart, 2013; Alge D. The effectiveness of incentives to reduce the risk of moral hazard in the defence barrister’s role in plea bargaining. Legal Ethics 2013; 16(1): 162.

¹⁶ As the court in *Goodyear* (2005) EWCA Crim 888 put it: ‘The starting point is fundamental. The defendant is personally and exclusively responsible for his plea. When he enters it, it must be entered voluntarily, without improper pressure’ [at 30].

¹⁷ Rule 3.9(2)(b).

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Traditionally, defendants could, without penalty, elect to remain silent and instead see whether the prosecutor produced a case to answer. In addition to being a corollary of the burden of proof, silence in such circumstances, far from indicating guilt, was a prudent decision given that the prosecution case may have been misstated, defective or misplaced. Indeed, there are a host of genuine circumstances where the accused is not in a position to provide an early account.

In turn, criminal courts were historically supportive in this regard, explaining ‘the accused is not bound to give evidence... he can sit back and see if the prosecution have proved their case’.¹⁸ This was a corollary of the classical distinction between factual and legal guilt namely ‘...that the issue in a criminal trial is always whether the accused is guilty of the offence charged, *never whether he is innocent*’.¹⁹ Understood in this way, the advocate’s duty to the client was emphatic:

Counsel has the same privilege as his client, of asserting and defending the client’s rights and protecting his liberty or life by the *free and unfettered statement of every fact* and the use of every argument and observation that can legitimately, according to the principles and practice of law conduce to this end, and any attempt to restrict this privilege should be jealously watched.²⁰

¹⁸ R v Bathurst [1968] 1 All ER 1175.

¹⁹ Boulton WW. A Guide to Conduct and Etiquette at the Bar of England and Wales. London: Butterworths 1953, p.56 (emphasis added).

²⁰ Ibid, emphasis added.

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Allied to this, the lawyer's duty to the court was expressed in negative terms: primarily that counsel must not actively mislead the court or permit the client to give perjured evidence.²¹

However, criminal courts have become increasingly frustrated when defendants do not assist (as they see it) in the process.²² Defence counsel venerating adversarial protections create particular difficulties when criminal benches seek to express case progression obligations against 'the defence', which are plainly not in its best interests.

In this regard, criminal courts have adopted two positive strategies to render this lineage as inconsequential, induce co-operation from defendants, and weaken protections previously the domain of their legal representative. Firstly, an overt strategy of inducement has come in the form of sentence 'discounts' for an early indication of a guilty plea (calculated to reward most those defendants who buckle with the least prosecution 'disclosure'). A second (more covert) strategy of inducement has been to distance the relationship between defendants and their legal representatives. Criminal courts have enabled this shift in loyalty from defence lawyers away from the client towards the court by legitimating fundamental changes to their role-performance as 'culture change'.²³

²¹ Lord Denning in *Tombling v Universal Bulb Co. Ltd* [1951] 2 TLR 289: 'He must not, of course, knowingly mislead the court, either on the facts or on the law, but short of that, he may put such matters in evidence or omit such others as in his discretion he thinks will be most to the advantage of his client....'

²² Exemplified by the dictum 'a criminal trial is not a game' oft-repeated since Auld introduced it.

²³ Indeed, Lord Woolf explained in 2005, that the stated intention behind the CrimPR, was to 'promote a culture change in the management of criminal cases': <https://www.justice.gov.uk/courts/procedure-rules/criminal/notes>. The language of 'culture change' continues to this day, featuring throughout the Leveson Review.

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Under the legitimating canopy of ‘culture change’ the administration of justice now seeks to impose its supremacy over what many understood to be justice itself. In particular, the demands upon prosecutors to first prove their case have been diluted²⁴ and defendants (or counsel) sanctioned for invoking adversarial protections at early stages of trial proceedings.

The source of ‘cultural change’ in regard to the ability of courts being able to expect more from the defence at a stage when, concomitantly, less is expected from the prosecution, has its basis in the assertion of Sir Robin Auld’s 2001 *Review of the Criminal Courts in England and Wales* that the defendant’s right to silence does not justify a refusal to provide necessary information for the management of the case.²⁵

Auld’s strategy to legitimate this ‘cultural change’ was to denigrate the image of the advocate, captured in his formulation as a core ‘problem’ of the system, with its artful employment of ‘and/or,’ namely ‘the uncooperative or defendant and/or his defence advocate who considers that the burden of proof and his client’s right to silence justifies frustration of the orderly preparation of both sides’ case for trial.’²⁶

Despite Auld’s empirically-unsupported claim sitting badly with the respect rhetorically accorded by judges to the defence lawyer,²⁷ his Review went further in seeking to

²⁴ See e.g. Pitchford LJ in *R (on the application of Payne) v South Lakeland Magistrates’ Court* [2011] EWHC 1802 [at 40].

²⁵ Auld Review, ch 10, para 154.

²⁶ Auld Review, ch 10, para 8.

²⁷ As Lord Justice Moses put it, ‘[t]he accused must believe his brief will tell the judge to go to the devil if that is what his case demands’: *The Ebsworth Lecture - Looking the Other Way*. Middle Temple, 13th February, 2012, p.14.

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undermine the armour afforded to the defence, reporting that ‘the “adversarial dialectic” and the “principle of orality” have been elevated to ends in themselves rather than means to get at the truth and also, as a result, discourage modern and more efficient ways of putting evidence before the courts’.²⁸

Auld’s answer was to propose restructuring the role-performance of defence lawyers so that they would become partners to the prosecution and judge in the ‘cost-efficient’ administration of justice. His recommendation that the rules of criminal procedure be codified was taken up by Parliament who enacted part 7 of the Courts Act which created a single judge-dominated Criminal Procedure Rules Committee. The powers of the Committee were, under section 69(4), to be exercised with a view to securing that:

- (a) the criminal justice system is accessible, fair and efficient, and
- (b) the rules are both simple and simply expressed.

As we shall argue, these powers are being exercised with a view to securing ‘cost-effectiveness’ rather than ‘efficiency’ and with ‘fairness’ no longer a consideration at all.

Case Management under the CrimPR

The CrimPR do more than merely consolidate and simplify rules of procedure. The code fundamentally alters criminal proceedings with the imposition of a framework for duties

²⁸ Auld Review, ch 11, para 9. This view was largely informed by the Association of Chief Police Officers. Indeed, by any defence lawyers’ understanding the CrimPR now engages counsel in ‘truth’ seeking rather than the shibboleth of testing the Prosecution’s case, despite the structural realities of criminal procedure which make this an all but impossible task. Indeed, truth-seeking (itself undefined) in this usage is simply a cover for the displacement of adversary justice. For further explanation, see McConville M and Marsh L. *Criminal Judges*. Cheltenham: Edward Elgar, 2014, 171-172.

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imposed on courts, prosecutors and defence lawyers, to further the ‘Overriding Objective’²⁹. The concept of an ‘Overriding Objective’ (that cases be dealt with ‘justly’³⁰) fed directly from the civil justice Woolf reforms³¹ transposing the civil law doctrine of proportionality into the context of the criminal process³² and is pivotal in two ways. Firstly, we have witnessed the increased role of the defence in the prosecution enterprise. Since each ‘participant’ (and that includes the defendant and the defendant’s legal team) is required to prepare and conduct the case in accordance with the ‘Overriding Objective’, defence lawyers and their clients bear not only the task of ‘acquitting the innocent’ but, remarkably, the duty of ‘convicting the guilty’. This can only mean that defence lawyers representing defendants who accept that they are factually guilty but wish to put the prosecution to the proof, a right they have traditionally enjoyed, now find themselves in procedural conflict as their duty to help convict their client overrides their duty to the client. Secondly, the shifting role of judges has been formalised by a rule which imposes upon the court a duty to further that Overriding Objective by ‘actively’ managing cases.³³ Every case under the CrimPR regime is now labelled a ‘managed case’³⁴ and to this end, the Rules Committee has given trial judges extensive case management powers.³⁵

²⁹ Rule 1.2.

³⁰ At the top of the list of what this means in concrete terms is ‘acquitting the innocent and convicting the guilty’ (Rule 1.1(2)(a)).

³¹ The Government explicitly credited Auld in announcing the implementation of the CrimPR: see <<https://www.justice.gov.uk/courts/procedure-rules/criminal/notes>>.

³² Rule 1.1.

³³ Rule 3.2.

³⁴ Moss N. Every Case, A Managed Case: Using The Criminal Procedure Rules. Speech to London CPS, 5th March 2013, available at <[http://www.judiciary.gov.uk / Resources / JCO / Documents/Speeches/nicholas-moss-speech-cps-london-050313.pdf](http://www.judiciary.gov.uk/ Resources / JCO / Documents/Speeches/nicholas-moss-speech-cps-london-050313.pdf)>.

³⁵ Rule 3.5.

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The upshot: the ‘autonomy’ of the advocate has been subject to a variety of qualifications prescribed through the CrimPR since its inauguration in 2005.³⁶ Nevertheless, earlier decisions such as *Chaaban* [2003]³⁷ and *Gleeson* [2003]³⁸, show that much of the shift in defence duties had been anticipated by judges prior to its arrival.³⁹ For example, the rationale for ‘active’ case management in criminal cases was underlined by Lord Justice Judge in *Jisl* [2004]⁴⁰:

...Resources are limited. The funding for courts and judges, for prosecuting and the vast majority of defence lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial; and, no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody, and the witnesses in trials which are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control.

³⁶ For fuller discussion see McConville M and Marsh L, fn.28 above, ch 6.

³⁷ EWCA Crim 1012.

³⁸ EWCA Crim 3357.

³⁹ In fact, the overwhelming majority of the first version of the Rules simply adopted procedures from the old rules.

⁴⁰ EWCA Crim 696, [2004] All ER (D) 31 (Apr) [at 114].

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The CrimPR therefore represents the formalisation of a judicial ‘ideology’ located in cost-effectiveness through a regime of ‘active’ management. The net effect has been the legitimisation of a defence role-reversal. Whereas historically, the duty of defence counsel was ‘to get an acquittal if he can, *whatever the merits* of the case may be’⁴¹ under the CrimPR, the defence is now under a duty to remedy flaws in the prosecution case⁴². Similarly, the right of the defence putting the prosecution to proof in its entirety before closing its case is excoriated as antiquated⁴³; onerous requirements of defence disclosure now ensure lines of ‘unexpected’ attack in cross-examination can be relabelled ‘ambush’ and disallowed;⁴⁴ and even at the earliest stages of proceedings, the level of prosecution disclosure made available before judicial pressure is applied and a plea ‘expected’ is ever diminishing. The ability of the defence to consider the prosecution case properly has therefore been impaired and important decisions are increasingly expected to have been made without the ability to properly evaluate the Crown’s evidence as opposed to its claims. Nowhere is this exemplified more powerfully than in the case of *West*.

West: The Adversarial Advocate under the CrimPR

The decision of *West* warrants reflection because it raises pressing questions regarding the direction that the relationship between defence lawyers and the judiciary in the

⁴¹ Poland H.B. Sir. Short History of the Criminal Evidence Act. Mr. Baugh Allen’s edition of the Act, 1898, at p.21, originally cited in Rogers S. The ethics of advocacy. Law Quarterly Review 1899; 15: 259.

⁴² Under Rule 1.3, the defence are expected, under fear of sanction, to notify the court and all parties ‘at once . . . of any significant failure’ of compliance. It is worthy of note that criminal courts have been far more accommodating where prosecution failures occur. See for example, *R. v. Marchese* [2009] 1 W.L.R. 992, C.A., *R. v. Smith (Joseph Alexander)* [2013] 2 Cr.App.R. 49(5), C.A., *R. v. Gul (Hamesh)* [2013] 1 W.L.R. 1136, C.A., and *R. v. White (Anthony)* [2014] 2 Cr.App.R. 194(14), C.A.

⁴³ *Malcolm v DPP* [2007] EWHC 363 (Admin) [at 31].

⁴⁴ This was foreshadowed in *Gleeson* [2003] EWCA Crim 3357 [at 35].

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conduct of criminal cases continues to head. Indeed, the questions arise out of the earliest stage of court proceedings – the Preliminary Hearing.

The Preliminary Hearing

On 14th April, 2014, a defence barrister (West) appeared before a Crown Court Judge (His Honour Judge Kelson) in a Preliminary Hearing while representing a man accused of theft and perverting the course of justice. While in pre-trial custody, the defendant was interviewed by a defence solicitor for approximately one hour. Following a twenty minute conference with his client and instructing solicitor, West went before the Judge in a hearing designed to ensure that a full set of prosecution papers was served at a future date, that a date for the Plea and Case Management Hearing (PCMH) was agreed between the prosecution and defence and, finally, to set a trial date. At the Preliminary Hearing there is no obligation to enter a plea (this being dealt with at the PCMH), although defendants may do so and a defendant who enters a ‘guilty’ plea may be awarded ‘maximum credit’ (sentence ‘discount’) for doing so at the ‘earliest opportunity’. Defence barristers have a duty to explain this reward/punishment system to their clients, even where disclosure obligations of the prosecution have not yet been discharged. While defendants are systemically encouraged to enter a guilty plea in the absence of full disclosure, an important function of defence lawyers remains to ensure that their client is not pressured into entering an inappropriate guilty plea. This feature of defence representation is one of the matters at the heart of the problems experienced by West.

It is important to go back to the initial interaction at the Preliminary Hearing. Here, both prosecution and defence were working cooperatively and in agreement as to case progression. Prosecuting counsel explained to the Judge there was no plea to be entered, and proposed a trial timetable. This proposal (on which West had been consulted) included fixing a date by which the prosecution would serve full disclosure (giving them approximately five weeks' grace), and a PCMH held (approximately two further months from that point). Issues of admissibility could be raised and the defence would then be required to serve a defence statement. At the Preliminary Hearing, West had been served with interview summaries prepared by the prosecution but had not received disclosure of the evidence. Both parties had complied fully with their case management duties under the CrimPR and in this regard there was an 'effective' hearing.

In spite of conspicuous cooperation between prosecution and defence, the Judge steered the Preliminary Hearing in a direction which resulted in the defence barrister being professionally undermined alongside his instructing solicitor, held in contempt of court, fined, reported to the Bar Standards Board (BSB), and forced to haul himself before the Court of Appeal where (despite his 'win') found his professional integrity called into question by being brandished a 'systemic threat'.

Following discussion of suitable dates for trial, the Judge continued:

JUDGE KELSON: It would be at a risk that week but then again, having read the

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interviews in the case, I wonder how much of a risk. He had *something of a difficulty* dealing with the wrap around the £1,000 didn't he?⁴⁵

This stance from the Judge – as evidenced by the italicized phrases – is suggestive that the prosecution summary of evidence was against the defendant.⁴⁶ This type of intervention from the bench might fairly be described as ‘poking’ into the defence case and although a Judge is tasked with ‘managing’ a case, he must do so sensitively and avoid ‘judicial musculature’⁴⁷. In reply, West explained that his client would be pleading ‘not guilty’ (‘He says he is not guilty so we will have to work on the basis that that is right’) and indicated his acceptance of the suggested court date. From here, the tone of the Judge markedly changed:

JUDGE KELSON: Mr West, *of course he has pleaded not guilty, not your most helpful observation*. To case manage the case properly, some clue as to the likely issues, even at this early stage, would be useful. I have deliberately made reference to the interviews because to the outside observer they appear to present him with a very substantial problem evidentially, so what I want from you, *a little more helpfully*, is is there an issue over the admissibility of the interviews?

MR WEST: The answer is until I see them I do not know.⁴⁸

⁴⁵ West, Re [2014] [at 7] (emphasis added).

⁴⁶ If this was ever in doubt, the Judge, when imposing a reporting restriction during the contempt proceedings, stated he would impose such a restriction on his ‘comments as to the state of the evidence’ as it would be ‘obvious from some of the [Judge’s] observations... that it would be unwise for those to be published’: Transcript of Contempt Proceedings (on file with authors), p.10, lines 27-31.

⁴⁷ Chartwell Estate Agents v Fergies Properties SA & Hyam Lehrer [2014] EWCA Civ 506 [at 62] cited by Judge Kelson himself: Transcript of Contempt Proceedings, p.17-18.

⁴⁸ Transcript of Preliminary Hearing in R v Paul Ingham (14th and 15th April, 2014) (on file with authors), p.2, lines 1-8 (emphasis added).

This intervention – again evidenced by the italicized phrases – was unprovoked by anything West had said (except his indication that the plea would be Not Guilty) and set in train an exchange that became heated. The barrister explained that he had seen only brief summaries of the interviews and that he had not gone through them with his client. The Judge persisted:

JUDGE KELSON: I think perhaps you should really, to make it a useful hearing.

What is the point of this hearing if you have not taken instructions?

MR WEST: I have taken instructions that he is not guilty...

The interpretation placed upon the exchanges up to this point by the Court of Appeal demonstrates the importance both of the *construction* of ‘facts’⁴⁹ and of the *characterization* of ‘facts’. In our view, the Judge had set a confrontational tone (indicated by the manner of his questioning as to whether the barrister was being ‘helpful’ and his assumption that West had ‘not taken instructions’). Yet the Court of Appeal, in a judgment delivered by Sir Brian Leveson (President of the Queen’s Bench Division), constructed a narrative which saw no flaw in the conduct of the judge:

Leveson P: Pausing at this point, the judge had proceeded with *perfect* propriety...⁵⁰

⁴⁹ See, Spector M and Kitsuse J. *Constructing Social Problems*. Menlo Park, CA: Cummings, 1977; McConville M, Sanders A and Leng R. *The Case for the Prosecution*, Routledge, 1991.

⁵⁰ Emphasis added.

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It is difficult to agree. To have arrived at a position in which a judge - who upset the cordial atmosphere which had characterized the proceedings prior to his interventions and presumed (wrongly) that West had failed to take any instructions - had 'proceeded with *perfect propriety*' mischaracterizes the situation and signals the growing resistance to adversarial advocacy.

Returning to the Preliminary Hearing, having been advised by West that he had 'taken instructions that he is not guilty....', the Judge interrupted:

JUDGE KELSON: *Everybody is assumed to be not guilty*, but most people are then confronted ... by their interviews *by any helpful advocate*.⁵¹

To the outside observer, these remarks might be considered disparaging and gratuitous, a point made emphatic when we contextualize this as an exchange with a member of the independent Bar with courtroom experience approaching some thirty years. West cemented his stated position by underlining that it was not based on any such assumption:

MR WEST: I have had all the time I need. I know that it is going to be a not guilty trial. I do not need to go through the short summaries of the interviews with him to change that position. He tells me he is not guilty. We need to fix a trial date. I do not need any more time, thank you.

⁵¹ Transcript of Preliminary Hearing, p.2, lines 24-25 (emphasis added).

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This was to trigger a further intervention from the Judge who wished to focus upon West not having gone through the prosecution summary with the defendant:

JUDGE KELSON: Do you not think it is an important part of preparation for this hearing to go through at least some of the evidence with a defendant rather than just take his bare assertion?....

Remembering that prior to the Judge's remarks, West had informed the court that he was sufficiently instructed ('I have had all the time I need... I do not need any more time, thank you') and bearing in mind full instructions would not be possible until full disclosure was made available, from that point onwards, their discussions took a turn for the worse:

MR WEST: Who is saying I took his bare assertion?

JUDGE KELSON: At what stage were you proposing going through the evidence with him?

MR WEST: When I have got it.

JUDGE KELSON: I will put this case out till later today when you have conducted *a proper conference* with your client and we will revisit the case.

MR WEST: I will decide how long I spend in conference with him.

JUDGE KELSON: Mr. West, we will come back to this case after two o'clock.⁵²

West objected to the need to adjourn the matter (which would involve a wait of at least

⁵² Emphasis added.

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several hours and possible disruption to other commitments)⁵³ on the basis that his instructing solicitor would not be able to stay longer and, importantly, he was not willing to discuss the summary of evidence further with his client in the absence of the solicitor.

It can be noted at this point that once instructed, a barrister may, in appropriate situations, conduct a conference without a solicitor. Where a solicitor has had a conference with a defendant who has indicated that he is not guilty, however, it would be legitimate for a barrister to show reluctance at the prospect of seeing the defendant without the solicitor being present. This is especially the case if the purpose of the exercise was to advise him that he should plead guilty. A barrister who does so lays himself open to later complaint that he has applied improper pressure, or, more immediately, may be ‘sacked’ by the client. Hence West’s reluctance to have such a conference.

In fact, as earlier indicated, the solicitor had already met with the accused to discuss the case in a conference which West had some input in preparing. In reply, the Judge sharpened his attitude calling him ‘an impertinent barrister’ and ordered him to ‘sit’ (seven times):

JUDGE KELSON: Mr. West, you will be here at 2.15. Now, mind your manners and sit down. Sit down.

MR WEST: Excuse me.

JUDGE KELSON: Sit down, Mr. West, or I will take this further. Sit down.

⁵³ From the full transcript it appears that, following the adjournment, it was not until approximately 3pm that West’s case would have been brought back into court, the clerk having to remind the judge that he had not dealt with it.

MR WEST: In what ...

JUDGE KELSON: Sit down, Mr. West.

MR WEST: I am not used to be spoken to ...

JUDGE KELSON: You are an impertinent barrister.

MR WEST: I am ...

JUDGE KELSON: Do as you are told or sit down.

MR WEST: I am apparently ...

JUDGE KELSON: Sit down. Very good ... we will come back to this case.

West did not return at 2.15pm. The Judge contacted his chambers, requiring him to attend the following day to conclude matters relating to the hearing and to explain his failure to return.

While the Court of Appeal recognized that such a judicial practice of adjourning preliminary hearings to allow further time focusing on the state of the evidence ‘might, in fact, result in an admission’⁵⁴ it added a comment not arising from the facts: ‘It is to be said it might also cause there to be *some other sensible resolution of the case*’.⁵⁵

This construction, we argue, slants the judgment in one way and deflects attention away from the facts. What Judge Kelson *actually* intended, as he explained at the proceedings for contempt,⁵⁶ was ‘[m]y practice therefore is often to adjourn such preliminary hearings if it is felt that further time focusing on the state of the evidence might in fact *result in a*

⁵⁴ West, Re [2014] at [5].

⁵⁵ West, Re [2014] [at 5] emphasis added.

⁵⁶ Transcript of Contempt Proceedings, p. 12, lines 5-7.

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guilty plea.' Judge Kelson continued: 'It might not, but my experience is that it often does. If this sort of active case management results in *teasing out guilty pleas* at an earlier stage in even 10% of cases coming to the Crown Court, the savings to the State would be enormous'.⁵⁷

Set against 'active case management' legitimated in terms of 'financial savings'⁵⁸, a number of important points follow. First, this means that judicial pressure *is* employed, under the aegis of 'active' case management, in circumstances where a view has been taken by a Judge on the 'strength' of the 'evidence', namely that the accused *is* guilty and irrespective of case-load pressure.⁵⁹ The chief difficulty with this 'practice' is that this view is based upon a prosecution-minded 'summary'; one constructed to ensure that a *prima facie* case is readily apparent on the papers. Importantly, evidence favourable to the defence may be excluded, having not been considered properly or disregarded improperly or simply unknown to the prosecution. Furthermore, a 'summary' of evidence has the potential to de-contextualize the facts of the (prosecution) case, rendering any fair assessment of its weight subject to the need to take into account *all* the evidence in its complete form that the Crown relies on.⁶⁰ Ultimately then, a Judge *cannot know* the strengths of the defence case at the Preliminary Hearing stage and any barrister, helpful

⁵⁷ Transcript of Contempt Proceedings, p.12, lines 5-9.

⁵⁸ For arguments as to why this rationalisation is problematic, see McConville M and Marsh L, fn.28 above, especially chps 4 and 7.

⁵⁹ Judge Kelson stated that the case had come before him 'in a moderately busy plea list': Transcript of Contempt Proceedings, p. 10, line 33.

⁶⁰ See, for example, research conducted on behalf of the Royal Commission on Criminal Justice by Professor John Baldwin which examined efforts in force areas selected because they were likely (by reason of their training, traditions or special efforts in this regard) to produce better quality summaries of police taped-recorded interviews concluded that there was 'about a fifty per cent chance that any record of interview will be faulty or misleading – a proportion that increases with the length of interviews': Baldwin J. Preparing records of police interviews. Research Study No.2, Royal Commission on Criminal Justice. London: HMSO, 1992, p.21. See to the same effect; Baldwin J and Bedward J. Summarising tape recordings of police interviews. Criminal Law Review 1991: 671-679.

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or otherwise, would have good reason to avoid placing reliance upon ‘prosecution summaries’.⁶¹

Equally, the defendant’s legal adviser must reach an independent view on the available evidence. At a Preliminary Hearing it is not possible to appreciate the strength of the prosecution evidence in the face of denials by the client and instructions from the solicitor that it is to be a trial, because, as was the case here, disclosure will be incomplete. In spite of this unassailable reality, the Judge ordered that the matter be adjourned until after the lunch recess, by which time, West was required to return to court, whereas prosecution counsel was released from attending.

This encounter raises a number of questions, not least, the extent to which a judge can commandeer a client conference? Moreover, how should a client’s legal representative act when a judge is applying pressure on them to spend what they deem unnecessary ‘further time focusing on the state of the evidence’ especially when the clear but *unstated* motive of the Judge is that it ‘might in fact result in a guilty plea’? And how can what happened be characterised as ‘case management’ with a view to case progression when a

⁶¹ See the salutary advice of Sedley LJ in *Secretary of State for the Home Department v AF* [2008] EWCA Civ 1148, at para. 113: ‘...it is in my respectful view seductively easy to conclude that there can be no answer to a case of which you have only heard one side. There can be few practising lawyers who have not had the experience of resuming their seat in a state of hubristic satisfaction, having called a respectable witness to give apparently cast-iron evidence, only to see it reduced to wreckage by ten minutes of well-informed cross-examination or convincingly explained away by the other side’s testimony. Some have appeared in cases in which everybody was sure of the defendant’s guilt, only for fresh evidence to emerge which makes it clear that they were wrong. As Mark Twain said, the difference between reality and fiction is that fiction has to be credible. In a system which recruits its judges from practitioners, judges need to carry this kind of sobering experience to the bench. It reminds them that you cannot be sure of anything until all the evidence has been heard, and that even then you may be wrong’.

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court hearing is mandated in the absence of both the instructing solicitor and prosecution counsel?

Remembering that West's client had insisted in pleading 'not guilty', it is submitted that – in light of the Code of Conduct under which all barristers must operate⁶² - West had two options open to him but only one appropriate course of action. The first option would be to accept his client's instructions, subject to conflicting evidence which West considered necessary (at that stage) to discuss with his client. This approach would be correct.

The second option would be to reengage his client in light of the Judge's directions, specifically focusing on prosecution-summarized 'evidence' that the Judge, by raising admissibility issues, had highlighted as problematic for the accused. In the event that a 'not guilty' indication continued to be maintained, court time would have been wasted, falling foul of the CrimPR. In the event the accused swiftly changes his indication of plea to 'guilty', the barrister ought to remain under a duty to advise his client to enter no plea (at that stage), as he is entitled, until further disclosure is made available by the prosecution⁶³. This is for two reasons. Firstly, no barrister can properly advise on the evidence until they have had an opportunity to gauge it collectively, rather than

⁶² Part 2 of the Bar Standards Board Handbook (see above) which contains the Code of Conduct must be read in the round, but 'independence' prevails: [Barristers] owe a duty to the Court to act with independence in the interests of justice. This duty overrides any inconsistent obligations which [barristers] may have (other than obligations under the criminal law)', p.23.

⁶³ A defence statement, setting out his defence in detail, would have to be served but not at the preliminary hearing stage. The barrister would, of course, be required to explain the impact of timing of plea upon any sentence discount.

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subjectively skewed in summary form.⁶⁴ This premise, now openly sinking, is founded on the bedrock principle that the State can *only* convict on legal guilt, not merely factual guilt. Thus, a barrister who advised the court that there were no issues of admissibility of evidence (when they had not had full sight of it) would be acting against the interests of their client, and in turn, misleading the court. Even if he decided to submit to the Judge's request to probe further on the available evidence, West's hands were ultimately tied by the procedural stage at which he found himself advising.

Similarly valid is the concern that the Judge, having highlighted a specific area of the evidence requiring further discussion, might be seen to be signaling a pro-prosecution disposition.⁶⁵ Under such circumstances, it would be proper for (and indeed incumbent upon) the barrister to protect the accused from judicial pressures, actual or believed. A *volte-face* on plea from a client in such circumstances might easily raise alarm bells from the barrister's perspective that their client *may* have buckled under the weight of the Judge's intervention. It requires little sensitivity to see how advice that proper disclosure is needed before a decision can properly be taken, ought to be given by the barrister in those circumstances. Nor conversely, did the Judge appear to consider the risk of pressure coming from the defendant's own counsel, who, evidently reluctant not to suffer the lengthy delay of an unnecessary adjournment, may have been placed in a position where his conduct, inadvertently, 'results in an admission' by the accused. Despite these

⁶⁴ As Sir Bill Jeffrey has explained: 'Inadequate preparation is the enemy of good advocacy.' Jeffrey B. *Independent criminal advocacy in England and Wales*. UK: Ministry of Justice, 2014.

⁶⁵ Counsel for West in his appeal told the Court of Appeal the appellant (West) believed the judge was making a 'coded assertion' [at 11] as to the merits of the case. To argue that a barrister need not mention the judge's singling out of evidence misses the point. A barrister is under a duty to act in the best interests of their client – to conceal such discussions is anathema to this duty.

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professional and ethical conflicts, the Judge held the case back with the result that West, following a further conference with his client to explain developments, left court.

On 15th April, West was told by the Judge to return to court (along with his client and prosecution counsel – this time represented by a different barrister) to explain his absence following the adjournment the previous day. West's justification was two-fold: (1) his professional judgment was improperly curtailed by the Judge; (2) the Judge was punishing him by adjourning the matter. As to the issue of professional judgment, not only was West's position – whether a further client conference was needed was a matter to be decided by himself, his solicitor and the client themselves and not by the judge – a legitimate one, but the discussion above on professional ethical conflicts that arose or could have arisen, demonstrates why West could only be *guided* by the Judge but not *compelled*, on pain of sanction.

While it is a matter for the bench whether it wants to invite counsel to consider taking further instructions, it remains a matter for counsel as to whether he or she accepts the invitation. Indeed, the Judge will have known that there may have been a host of reasons for West declining this invitation: the extent of instructions already taken (West's solicitor had previously obtained full instructions); the inadvisability of counsel seeing a client without the presence of his solicitor; that the point raised by the Judge may have been preemptively dealt with; or, more sensitively, whether his client could sustain the potential pressure further (judge-ordered) enquiries posed. West ultimately justified his

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conduct to leave court on the basis that instructions had been furnished and advice given, after due consideration.⁶⁶

The supplementary argument that West was being asked to return to court as a ‘punitive measure only,’ though carrying some force was rejected by Judge Kelson as ‘deluded’.⁶⁷

It appears, however, that not only was the defence solicitor’s presence not really given due weight but if the Judge’s genuine intention was to ‘case manage the case properly’ and have an effective hearing it is unclear why prosecution counsel was excused from further attendance.

Contempt Proceedings

On 25th April, summary contempt proceedings against West were brought during which the Judge decided that the barrister was in contempt of court, and fined him £500 for ‘conscious defiance’ of his ‘firm order’.⁶⁸ Hearing the contempt case, the Judge said West’s behaviour was ‘far over-stepping the mark in courageously representing’ the defendant.⁶⁹ West’s ‘deeply unpleasant style of advocacy’ was ‘highly impertinent and somewhat confrontational, if not pugnacious’.⁷⁰ He continued: ‘Case management was *deliberately thwarted* by Mr West and the dignity and authority of the court were undermined by his conscious and deliberate act of defiance in failing to attend court in

⁶⁶ See Transcript of Preliminary Hearing, p.8, lines 22-26. This was an account not referred to by the Court of Appeal in its judgment.

⁶⁷ Transcript of Contempt Proceedings, p.24, line 13.

⁶⁸ Transcript of Contempt Proceedings, p. 23, line 8.

⁶⁹ Transcript of Contempt Proceedings, p. 17, lines 11-12.

⁷⁰ Transcript of Contempt Proceedings, p. 23, lines 27-28.

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the afternoon.’⁷¹ The Judge further referred West to the BSB, which has the power to suspend or disbar him. West appealed the Judge’s finding and the matter went before the Court of Appeal.⁷²

The Appeal

On 12th June, Sir Brian Leveson P., sitting with Mrs Justice Patterson and Sir Richard Henriques allowed West’s appeal. West, represented *pro bono* by Bryan Cox QC, contended that: (i) the Judge had erred in failing to recuse himself, as the exchanges on the 14th and 15th of April, had given the appearance of partiality; (ii) the fairness of the contempt hearing had been jeopardised by the Judge’s reference to authorities and materials about which he had not given notice or invited submissions, in particular, the case management and contempt provisions of the CrimPR; and (iii) the Judge had not adhered to the contempt provisions of the CrimPR.

The Court of Appeal, in allowing the appeal, summarily dismissed the first contention. Despite the fact that, as Judge Kelson conceded, it would not have been ‘too difficult’ to put the contempt case over to another full-time judge and that Judge Kelson offered no reason for not doing so except to state (perhaps remarkably in a case involving alleged contempt by a barrister) ‘...this is simply not required in this case,’ and given the clear evidence of displeasure that the Judge developed towards West, the Court of Appeal concluded that the Judge’s finding that West had been ‘impertinent’ had not

⁷¹ Emphasis added.

⁷² Pursuant to s.13 of the Administration of Justice Act 1960.

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demonstrated an inability impartially to determine whether the conduct constituted a contempt of court. The Court rationalized its stance by the determination that ‘it is not merely the words uttered (which can be read on the transcript) but also the way in which this exchange occurred that is relevant: only the judge was in a position to assess that feature.’⁷³ This is nonsense because otherwise it would preclude any other judge from hearing the contempt charge. Indeed, it is falsified by the fact that Judge Kelson himself accepted that he could have put the contempt hearing over to another judge.

If the Judge’s posture was not manifest to the Court of Appeal at the Preliminary Hearing (doubts about which would be removed by the transcript), any acquaintance with the contempt proceedings in which West’s conduct was characterized, *inter alia*, as ‘conscious defiance’, ‘deeply unpleasant’, ‘highly impertinent’, ‘somewhat confrontational, if not pugnacious’, would surely have been of the utmost relevance.⁷⁴ The Court of Appeal, however, dismissed this, proceeding to depict his conduct in even more damning language than that used by the Judge (‘more than merely impertinent’, ‘breathtaking arrogance’, ‘serious misconduct of a type that is wholly inimical to the proper discharge of his professional duties’, ‘worthy of serious sanction’).⁷⁵

To the extent that it was argued that the Judge could not range beyond the authorities cited, the defendant’s submission, the Court of Appeal rightly said, went too far. It was

⁷³ West, Re [2014] [at 28].

⁷⁴ James Richardson QC further argues, ‘[u]pholding this argument would, however, be bad for judicial comity, so the court resorted to an old forensic trick, viz. finding a ground of appeal that the appellant had not raised, thereby awarding the appellant the result that he deserved but depriving him of any satisfaction in getting it’: see C.L.W. commentary, 14/38/4.

⁷⁵ Emphasis added.

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not an unusual occurrence that judicial research revealed additional relevant authority and it was a matter of judgment whether, in a particular case, the parties should be given notice and allowed to address further argument. In the circumstances, as everyone had appreciated, case management had been at the core of the Judge's complaint and it was remarkable to suggest that reference to the contempt provisions of the CrimPR could or should have taken anyone by surprise.

However, the email informing the defendant of the contempt hearing had clearly fallen short of the procedural requirements set out in the CrimPR.⁷⁶ In cases of alleged contempt, strict observance of the provisions was essential.⁷⁷ Accordingly, the failure of process invalidated the conclusion the Judge had reached.

In allowing the appeal on a technicality regarding notice in Rule 62 (which West expressly did not raise through his counsel)⁷⁸, yet proceeding to condemn his conduct, the Court was able to undermine the barrister while preventing a dismissal of his case and, concomitantly, further exploration in the event of a further appeal to the Supreme Court of an important issue underlying West's refusal to attend the adjourned hearing: whether the case management powers vouchsafed to a judge of the Crown Court by the CrimPR give him or her the power to order (as opposed to request) a legal representative to personally attend a hearing. We submit there is a clear distinction between making orders

⁷⁶ Rule 62.7 of the CrimPR provides that where the court postpones a contempt inquiry, it 'must arrange for the preparation of a written statement containing such particulars of the conduct in question as to make clear what the respondent appears to have done', and requires such statement to be served on the respondent together with notice of the date on which the inquiry would be resumed.

⁷⁷ In the normal course, compliance with the strict provisions of the CrimPR could be waived by the parties or the court.

⁷⁸ West, Re [2014] [at 30].

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about the case, and making *in personam* orders about the barrister. In our view, as West argued, the power to make orders about case management are directed at the *parties*, not their representatives. As a creature of statute, the Crown Court's powers are derived entirely from statute or from subordinate legislation: s. 1(1), 45(2) and (4), Senior Courts Act 1981. As argued by Bryan Cox QC at the contempt hearing, the Court has no 'inherent jurisdiction' as such. Moreover, it is further submitted, the obligation imposed on legal representatives by CrimPR 3.3(a) to assist the court in the exercise of its case management powers under Rule 3.2, does not carry with it the sanction of liability for contempt of court, unless there is an intention to obstruct justice. Despite the Judge wrongly asserting West had 'abandoned his own lay client'⁷⁹, the barrister had in fact sought and obtained his client's consent to be absent from the adjourned hearing. This interpretation was dismissed by the Court of Appeal, which in turn, has now imputed powers to the CrimPR which constrain the liberty of all barristers via contempt proceedings, despite their actual status as case management powers granted by rules made under subordinate legislation.⁸⁰ This is all the more alarming when we recall Part 3 of the Rules indicates that the court's case management powers enable a judge to give *any* direction and take *any* step actively to manage a case.⁸¹

Despite West's appeal succeeding, success came at the cost of public condemnation of his behaviour, the Court adding to the reproachful tone of the trial judge: 'impertinent', 'appalling', 'monstrous'. West was deemed an affront to the profession, Leveson LJ depicting his actions as:

⁷⁹ Transcript of Contempt Proceedings, p.23, line 9.

⁸⁰ cf. Rochford [2010] EWCA Crim. 1928.

⁸¹ Emphasis added.

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...serious misconduct of a type that is wholly inimical to the proper discharge of his professional duties and, furthermore, in total disregard of his duty to the court.

We have no doubt that the temperature of the exchange increased as it proceeded: that was *entirely the responsibility of the appellant* and, on the following day, to require an apology of the judge was more than merely impertinent.

To hammer home that such conduct would not be tolerated, the Court of Appeal directed that a copy of the Court's judgment be sent to the BSB (thereby potentially influencing the direction the disciplinary body might take). Judge Kelson, it was said, had operated with 'perfect propriety' alongside a prosecution the Court congratulated as 'truly exemplary' (which to others might appear excessive in light of the non-requirement to attend the adjourned hearing on the 14th April and the unprepared state of the prosecution the following day)⁸².

Rather than analyse the scope of 'independent' legal advice in the particular context of representation the barrister found himself in, the Court of Appeal in its final words chose to portray West as a systemic threat:⁸³

...[his conduct], if it was to become the norm, will cause our present system to collapse for want of sufficient funding with the risk causing enormous damage

⁸² Mr Dryden, acting for the Crown on the 15th April, was, in the words of Judge Kelson, 'uninstructed' and unable to deal with the substantive issue of bail. When asked if he could help as to why the defendant was in custody prosecution counsel replied: '...the short answer is I cannot... I was only informed a short time ago that this case was being mentioned... I do not have any papers. I do not think the Crown has any papers in the building today' (Transcript of Preliminary Hearing, p.7 lines 7-10).

⁸³ Notwithstanding that the court allowed the appeal on a procedural irregularity.

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*and replacement by a process that imperils many of the hard gained
improvements designed with the interests of justice in mind.*⁸⁴

This conclusion raises questions as to how the application of the CrimPR risks attenuating the rights of defence lawyers in criminal cases. West's high level of advocacy experience was held in such low regard as to be subverted to a risk, not, it should be noted, to the adversarial system, but to the guilty plea process that has in large measure replaced it. And to re-characterize this process as having been designed with the 'interests of justice' in mind is surely contradicted by the history of plea bargaining and the justifications advanced by judges on its behalf.⁸⁵ The 'example' made of West, itself an overbearing threat to less-experienced barristers, is at risk of being further exploited as ammunition in the continued attack against defence lawyers.

Conclusion

The traditional role of criminal defence lawyers has been to stand between the State and their defendant clients. But the modern practices of criminal courts, combined with the CrimPR, now dictate a change to that position. The interpretation of the CrimPR in *West* is confirmation that criminal advocates must re-assess where they stand in relationship to the accused as their natural sense of purpose fades.

⁸⁴ West, Re [2014] [at 55] (emphasis added).

⁸⁵ Although the link between defence advocacy and system failure is apparently not lost on members of the Criminal Court of Appeal: 'The criminal justice system in this country requires the highest quality advocates... The better the advocates, the easier it is to concentrate on the real issues in the case, the more expeditious the hearing and the better the prospect of true verdicts according to the evidence. Poor quality advocates fail to take points of potential significance, or take them badly, leading to confusion and, in turn, appeals and, even more serious, leading to potential miscarriages of justice', R v Crawley [2014] EWCA Crim 1028 [at 57], repeated by Leveson at para 11, p.4-5 of his Review.

West underscores the extent to which ‘fearless’ advocacy in an adversarial criminal justice system has been steadily disintegrated under the CrimPR by ‘active case management’. The professional judgment of a highly experienced criminal barrister, that no further benefit from discussion with his client could be achieved until ‘evidence [was] served in its full and proper form’⁸⁶ was repackaged as ‘treating the pretrial procedure as some sort of game’.⁸⁷ Whilst unswerving support from the Court of Appeal to a judge executing his case management powers is perhaps unremarkable in this ‘age of retrenchment’⁸⁸, criticism of an experienced barrister, without addressing the merits of his initial action to decline the ‘suggestion’ of a Judge on how to conduct his case, warrants our attention.

As the Court of Appeal rightly identified, there were two dimensions to *West*’s conduct. First, the degree of assistance that could be expected from the barrister in the management of the case; second, whether the barrister should have attended the adjourned preliminary hearing in the afternoon as requested. It is submitted that the Court’s condemnation for the latter issue (itself contentious, as we have argued) has overshadowed exploration of the former – arguably, a more fundamental issue which underpins the functioning of criminal cases: the scope and limits of a barrister’s independence in protecting the best interests of the accused.

⁸⁶ Transcript of Preliminary Hearing, p.9, line 3.

⁸⁷ *West*, Re [2014] [at 22] (emphasis added).

⁸⁸ Thomas LJ. Reshaping Justice. 3rd March, 2014, at p.3 available at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-speech-reshaping-justice.pdf>

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Unfortunately, West's decision to not attend court following the adjournment, gave both trial judge and Appeal judges a mandate to obscure his 'best point' and skirt any meaningful enquiry into what some (including West) might consider to have been a principled response to the Crown's obligation to present its case, or at the very least, not to apply pressure upon the defence until it was sufficiently cognizant of the case against it.

However, without West's rebuff, such an episode may never have come into the light. Far from atypical, such hearings under the CrimPR are replicated in courts up and down the country, with barristers less seasoned and less willing to incur the ire of judges managing the 'progress' of their cases (and possibly their future career progression).⁸⁹ The strikingly unadversarial dynamic of the criminal process on display in *West*, has resulted from momentum created by the CrimPR in which trial judges are able to exploit the now near inevitable setting of a Preliminary Hearing to extract pleas by 'exploring' what the 'real issues' are likely to be. While system efficiency (including cost-savings) is laudable, the case of *West* has shown that 'savings' may come at the 'cost' of a defendant's right to a fair trial. In condoning the trial judge's approach, the Court of Appeal's affirmation of the CrimPR confirms that defendants are at real risk of entering a plea involuntarily, faced with a coercive sliding scale of reward in the form of sentence 'discounts' at a stage in the proceedings when all their legal representative can do is 'second guess' the

⁸⁹ This risk has been heightened by the controversial Quality Assurance Scheme for Advocates (QASA). This scheme which places the regulation of the quality of all advocates appearing in the criminal courts in England and Wales in the hands of judges has incurred the ire of the independent Bar who argue such judicial assessment further exposes advocates to inappropriate pressure. Leveson ruled that the scheme was lawful (see *Lumsdon & Ors, R (On the Application Of) v Legal Services Board* [2014] EWHC 28 (Admin) (20 January 2014)), a judgment upheld on appeal when it went to the Supreme Court (see *Lumsdon & Ors, R (on the application of) v Legal Services Board & Ors, Court of Appeal - Civil Division, October 07, 2014, [2014] EWCA Civ 1276*). For further background to opposition to this scheme, see Rozenberg J. *The trouble with QASA*. C.L. & J. 2013;177(29): 489.

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prosecution evidence.⁹⁰ When the obligation to serve a defence statement has not yet arisen, what is the basis for such enquiries?

The extent to which a judge can intrude into the sensitive exercise of client representation remains unknown. The starkest warning sign in this regard, and the provision upon which the Court of Appeal relied, is Rule 3.5 (1) of the CrimPR which provides: ‘...the court may give *any* direction and take *any* step actively to manage a case unless that direction or step would be inconsistent with legislation, including these Rules’.⁹¹ As is clear from this, defence lawyers are constrained by a dominant power, itself subject only to an express statutory measure (already thin on the ground) and qualifications whose ambit is as yet under-specified.⁹² Rule 3.5 led the Court in *West* to determine the issue through a singular lens. In doing so it was inevitable that it would skew the way in which the Court would view that fateful Preliminary Hearing so that, for example, the Judge’s own admission that he (regularly) seeks to ‘tease out guilty pleas’ was re-labelled neutrally as an ‘admission’ *or* ‘other sensible resolution of the case’.

Underlying the CrimPR therefore lie important constitutional questions. Under the cloak of a statute which authorized the making of rules with a view to securing that ‘the criminal justice system is accessible, fair and efficient’,⁹³ the judge-led and judge-laden Rules Committee has vested extraordinary powers in trial judges that have not been

⁹⁰ Indeed, Judge Kelson confirms that, on his circuit, ‘...Judges frequently make the same enquiries at the same point of the proceedings’: Transcript of Contempt Proceedings, p.7, line 13.

⁹¹ Emphasis added.

⁹² The Court of Appeal explained that although ‘the rules do not refer explicitly to a power to require the attendance of appropriate legal representation’ it was nonetheless ‘implied by the broader case management powers’ [at 39]. The Court also set out some exceptions as to when a barrister might properly refuse an order to attend including ‘...other professional commitments, ill-health, [and] personal tragedy’ [at 40].

⁹³ Courts Act, 2003, section 69(4)(a).

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evident since the Star Chamber and which few institutions possess in a democratic society. What other body or institution is able to ‘give *any* direction and take *any* step’ in pursuance of its self-selected goal⁹⁴, the more so when the source of the power is an unelected judiciary?

The application of the CrimPR and its anti-adversarial ideology is accordingly a matter of public concern. This is particularly so as the degradation of counsel’s role is only likely to exacerbate following the publication of the Leveson Review, its terms of reference being to ‘to identify ways to streamline and modernise the process of criminal justice’ the remit of which includes strengthening further the CrimPR so that ‘maximum efficiency... from every participant within the system’ is achieved and that ‘*any* changes proposed are fully supported by the Rules’⁹⁵.

Indeed the Leveson Review is explicit as to its aim to ‘encourage a *reduced tolerance* for failure to comply with Court directions along with a recognition of the role and responsibilities of the Judge in matters of case management’ with the recommendation that sanctions for failures to comply with the CrimPR are bolstered,⁹⁶ going so far as to furnish the *West* case itself as the exemplar of bad practice⁹⁷ in the ‘new landscape in which we operate’⁹⁸. There is more than a whiff of hypocrisy in this. While in essence critical of *West* for *complying* with his instructions, in conducting his own Review where

⁹⁴ The pursuit of system ‘efficiency’ (i.e., cost-effectiveness) being one goal that judges have prioritised over ‘fairness’ and ‘accessibility’ and over the foregone ‘traditional and vital role of acting as a bulwark for the individual against arbitrary action by the state’: Rt Hon Lady Justice Arden, *Magna Carta and the Judges – Realising the Vision*. Speech given at Royal Holloway, University of London, June 2011.

⁹⁵ Emphasis added. Leveson Review, p.2.

⁹⁶ Leveson Review, section 7.4.

⁹⁷ Leveson Review, fn 94.

⁹⁸ Leveson Review, para 21, p.8.

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he was specifically restricted to reviewing the Criminal Procedure Rules and the practice of the criminal courts not requiring legislative change, Leveson LJ expressly *violated* his own terms of reference by devoting a whole chapter⁹⁹ to matters (essentially, trial by jury) actually necessitating legislative change.

The direction plotted by the Leveson Review has further relevance because of the ‘first overarching principle’ it propounds in order to modernise criminal justice (without, it seems, any trace of irony): ‘*Getting it Right First Time*’.¹⁰⁰ The underlying premise is that actors in the criminal justice system can place their faith in both the police and Crown Prosecution Service (CPS), whom Leveson holds up as ‘the gatekeepers of the entry into the criminal justice process’ to ‘make appropriate charging decisions, based on fair appraisal of sufficient evidence, with proportionate disclosure of material to the defence’¹⁰¹. It is from this basis, the Review explains, that ‘defence lawyers can take proper instructions and *progress expeditiously*: furthermore, it will be *incumbent upon*

⁹⁹ The shallow discussion therein, however, simply adds to the concern that senior judges have little love of jury trial. Such data as were available to the Review bearing on the issue of cost-effectiveness (the experiences of trial judges at Southwark Crown Court), for example, are brushed aside by Leveson on the extraordinary ground that it is ‘not implausible’ to reach an opposite conclusion (para. 357). Of course, it is not implausible to reach an opposite conclusion on almost any issue but that is not a justification in and of itself for any opposite conclusion reached. See also the discussion of the right of election for jury trial at paras. 336-342 which is not rescued by the superficial disclaimer at para.3 that the issues are raised only to suggest that they be revisited and that how far any are taken forward ‘depends on policy decisions upon which, at least in part, it is not appropriate for a serving Judge who has not specifically been asked to review legislation to express a concluded view’.

¹⁰⁰ Leveson Review, section 2.1, p.9.

¹⁰¹ Leveson Review, para 25, p.9. Although Leveson’s overarching principle is written in the conditional (‘*If they [the gatekeepers] make appropriate charging decisions, based on fair appraisal of sufficient evidence, with proportionate disclosure of material to the defence, considerable delay can be eradicated*’ (emphasis added)), he is advancing this principle on the basis that the relevant groups make the ‘right’ decisions. The weakness is not the principle but the failure to recognise the reasons (institutional corruption, flawed assessment mechanisms, technical competence, etc) why the parties do not get ‘it’ (whatever that is) right. For evidence of institutional failures, see generally McConville M and Marsh L, fn.28 above.

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them to do so.’¹⁰² This rationale appears to have underpinned the Court’s failure in *West* (which Leveson presided over) to examine properly the barrister’s professional stance not to take further instructions from his client *on plea* while disclosure was lacking. And yet West’s conduct – ensuring that his client was not bullied into an inappropriate plea whilst unsure whether he was guilty or not as a matter of law - surely conforms to the Overriding Objective of working with all parties cooperatively in ‘acquitting the innocent and convicting the guilty’. In the absence of full prosecution disclosure, how is such an assessment to be made? Indeed, this problematic circularity of function caused where disclosure is limited, delayed or incomplete, is revealed by the Review itself as commonplace: ‘[o]ne of the major issues [is] the present failure of the police and the CPS to meet deadlines for disclosure.’¹⁰³

Without recourse to principle and lacking evidence,¹⁰⁴ the Leveson Review cements the role-reversal of the defence, earlier paved by the Review of LJ Auld¹⁰⁵, turning counsel’s protective function over the accused on its head, and stressing instead the importance of ‘the *critical role* that the defence can play whether in relation to advising clients as to *discount* and the benefits of entering an *early guilty plea* or obtaining instructions to *identify the true issues* in dispute...’;¹⁰⁶ a State-serving menu of functions that will be delivered more expeditiously only with the Review’s recommendation that ‘a fee mechanism’ for defence lawyers be developed that ‘rewards early significant engagement

¹⁰² Leveson Review, para 25, p.9.

¹⁰³ Leveson Review, para 178, p.49.

¹⁰⁴ The admission by Leveson that there was “no time or little opportunity for evidence gathering” (para. 9) is less a justification for a rushed review and more an insight into why it is so flawed.

¹⁰⁵ Uncritically praised by the Leveson Review. For an explanation of this, see McConville M and Marsh L, fn.28 above, ch 4.

¹⁰⁶ Leveson Review, para 99, p.30.

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with the prosecution that results in the more effective and efficient early disposal of cases.¹⁰⁷

The CrimPR regime, as applied in *West*, with further reinforcement from Leveson's Review, can only cause alarm amongst the ranks of an already disempowered criminal defence profession; the expectation being that cases such as this will fade with time as 'case management' becomes more entrenched¹⁰⁸ and 'disobedience' more punishable. Today the balance between court duties and acting in the 'best interests' of a client now pivots on the 'best interests' of the State. The scales are, however, weighted by a procedural code giving currency to an ideology critical of an assertive but principled defence, such as that mounted by Thomas Erskine in *Shipley's Case*, and leaving once lauded adversarial protections up in the air.

The case of *West* demonstrates that the powers recently annexed by the senior judiciary (and delegated to trial judges who will now be styled as 'case managers') owe their continuance primarily to the dangers involved in attacking them by lawyers standing up for the accused and also that they violate the fundamental principle set out by Thomas Erskine in the eighteenth century: 'The Constitution never intended to invest judges with

¹⁰⁷ It is submitted that this is not remedied by the Review's simplistic disclaimer: 'It is important that nothing should be done which can be seen as a financial incentive to persuade a client to plead guilty', para.186; page 187. If the purpose of a 'fee incentive' is not to encourage earlier and greater pressure on defendants ('more effective and efficient early disposal of cases'), what is it meant to do? In this setting, where the interests of individuals are eagerly trivialized, it is easy to see how cases become treated as waste that must be disposed of as quickly as possible.

¹⁰⁸ As Leveson puts it in his Review: 'Although independence is a valuable, indeed essential, characteristic in our judiciary, that 'independence' does not extend to a choice as to whether or not to apply the rules, rules that have been introduced after careful deliberation by an expert committee and which are authorised by primary legislation', para 191.

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a discretion which cannot be tried and measured by the plain and palpable standard of
law....’