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# Moving Up the Day of Reckoning: strategies for attacking the "cracked trials" problem

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**Summary:** *What should be done about the practical problem of trials "cracking" at the last minute? An analysis of the problem is offered, and some solutions suggested.*

**The problem of "cracked" trials**

In attempting to plan and prepare for implementation of the Criminal Justice Act 1991, with particular reference to the new provisions making preparation of "pre-sentence reports" mandatory in most Crown Court cases, it is impossible to ignore a broader problem afflicting the pre-trial phase of the criminal justice process in England and Wales. In the vocabulary of practitioners, the label for this problem is "cracked trials." The term "cracked trial" refers to the following phenomenon: in a criminal case committed to the Crown Court, a defendant may indicate at committal stage or shortly thereafter that he is pleading "not guilty." He may persist in this plea until the day scheduled for trial when, suddenly, he changes his mind and pleads guilty. At different times the Lord Chancellor's Department and others have catalogued the many difficulties that this practice causes for the criminal justice system. Set out below are some ideas as to how this problem might be attacked and to some extent solved.

It is first necessary to describe how this problem has been encountered in work relating to the new pre-sentence reports, as this will provide some context for the subsequent proposals. The Criminal Justice Act 1991, to be implemented in October 1992, provides that courts must call for and consider written "pre-sentence reports" before imposing sentence in all "summary" and "either way" cases in which they are considering imposition of a custodial sentence or a significant community-based penalty. In pilot trials in five Crown Courts (Birmingham, Bristol, Lincoln, Newcastle-upon-Tyne, and Southwark), judges, recorders and all other participants in the criminal court process (the Bar, Solicitors, the Lord Chancellor's Department, the Crown Prosecution Service, the Probation Service, the Police and the Prison Service) have recently operated as

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though the new mandatory provisions on pre-sentence reports are already in effect. Judges and recorders called for reports in every such instance as will be required from October 1992. The purpose of the pilots was to assess the organisational and resource implications of the new provisions on pre-sentence reports. The pilots were successful in uncovering problem areas and in serving as laboratories for innovations and experimental procedures. The final report on the pilots (to be issued by the Home Office) will discuss the findings in detail.

The central complaint heard during the pilot trials, mainly from the judiciary and the Bar, was that the new provisions making preparation of pre-sentence reports mandatory in such a wide range of cases lead to a significant increase in the number of adjournments for sentencing, particularly in cases where the defendant changed his plea to guilty late in the process or on the actual day of trial (*i.e.* when the case "cracked"). The adjournments, of course, were necessary to allow the probation service to prepare pre-sentence reports in those cases where they were unable to do so on a pre-trial basis because the defendant, pre-trial, was contending that he was not guilty and therefore not of a mind to consider tackling underlying issues. It is significant to note that in the past (and currently, outside of the pilot courts), sentencers usually dispensed with a report altogether when a case "cracked" on the day of trial, or when a defendant was convicted after a contested trial, and sentencing proceedings were not frequently adjourned to allow preparation of a report. The new law generally does not permit courts to dispense with a report, even if adjournment is consequently necessary, reflecting a legislative objective that sentencers be consistently well-informed about offenders and the circumstances of offences, in all cases and not only in those where it is convenient to have a pre-sentence report prepared.

Early in the operation of the above pilot projects it became clear that in order to reduce the number of cases in which an adjournment for preparation of a report was necessary, the system would need to find a means of persuading those defendants who were ultimately going to plead guilty to do so well before the day of trial. If it was known even seven or ten days before trial that the defendant was going to change his plea to guilty, then there would be sufficient time in most cases for the probation service to prepare a good pre-sentence report before the court date, and thus both plea and sentencing could occur in one proceeding. Outside of the narrow pre-sentence report context, the benefits to the wider criminal justice process of such a change in practice by "late pleading" defendants would be enormous (*e.g.* great reduction in wasted court and other government resources which now must be expended in preparation for trials that never occur).

Having thus come face to face with this larger problem of "cracked trials" which is generally bedeviling the pre-trial process, one inevitably reflects on how the larger problem might be solved. Analysis of the problem begins with this axiom: undecided (and sometimes agonising) defendants considering what plea to enter in their cases *all*, eventually, come to the final "day of reckoning" on which they must make up their minds. To solve or reduce the "cracked trials"

individual capacity and as a representative of the Vera Institute. He does not write as a government representative and no departments of Her Majesty's government necessarily agree with or endorse his views.



problem, one must find a means of moving up that final day of reckoning from the day of trial to a point at least seven or ten days before trial.

### Advancing the final day of reckoning

Many barristers say that, under current rules and procedures, it is impossible to move up the final day of reckoning—that a large portion of defendants simply will not decide how to plead until the trial day. It is said that some defendants refuse to make the decision until then because they want to see if the witnesses against them will actually come to court, or because they want to know which judge will preside in their case, or simply because they refuse to focus on the difficult questions facing them until they are absolutely forced to do so, and they do not feel "forced to do so" until they see that jurors have been assembled, that a judge is on the bench, and that the show is truly ready to begin. This, of course, happens only on the day of trial, and not before. Barristers say that then, and only then, will many clients face reality and make an appropriate decision about whether to go forward to a contested trial, or to plead guilty. It is also said that many defendants wait until the last minute to decide how they will plead because under current procedures there is no good reason to make the decision any earlier. They reason: "Things can only get better—I'll wait until the morning I go to court to decide."

In order successfully and appropriately to affect the timing of changes of plea, with the intention of moving up the final day of reckoning, one must first study the process by which cases "crack." Much time spent with barristers, solicitors and their clients, watching the process by which defendants take the decision to plead guilty at the last minute, on the day scheduled for trial, provides the necessary education. This is a drama that usually unfolds in the corridors outside of court, in the barristers' robing rooms, and in the court cells. What generally happens is that prosecuting and defending counsel compare views on the strengths and weaknesses of their respective cases, and, in an indirect way, discuss what it would take from each side to get the case to "crack." Counsel come to a unified view about what would be an appropriate settlement of the matter, and generally that involves dismissal of one or more charges outstanding against the defendant, and guilty pleas to all of the remaining charges, or to amended charges. Prosecuting counsel then communicates this view to a CPS law clerk or lawyer, cautiously advising in favour of the proposal. Defending counsel discusses the option with his client and instructing solicitors, with an eye toward gaining acceptance. CPS law clerks, often in consultation with CPS lawyers over the telephone, seem to be the critical decision-makers: *i.e.* once they "bless" the arrangement, the trial quickly "cracks." (The process of persuading the CPS is sometimes gently assisted by the judge who, through counsel, discreetly signals his view that the proposed agreement for disposition of the case seems appropriate, given all the facts and circumstances, and the applicable law.)

If what is set out above is a mostly correct model of the typical "cracking" process, and to the extent that what is described is considered an acceptable practice, then the challenge is to develop procedural mechanisms by which the above discussions are forced to occur earlier in the life of a case, at least seven or ten days prior to the scheduled trial date.

Described below are two related but distinct strategies, either of which if adopted would have the desired effect of moving up the "day of reckoning" in a good percentage of cases. During the ten days before trial the proposed measures would prevent the parties from making the sorts of concessions to each other that cause cases to "crack," thus forcing the negotiation and settlement to occur earlier.

(1) Adopt a rule whereby charges pending against a defendant may not be altered within 10 days of trial. No proposed amendments and no requests for dismissal of counts will be heard by criminal courts after the date falling 10 days before the date scheduled for trial. If counsel do not request that the case be listed for plea ten days before the scheduled trial date, then *without exception* the case shall proceed to trial 10 days hence, on the precise charges of record ten days before trial. Even if the defendant elects to plead guilty to all of the charges on the day of trial, he should be denied the sentencing discount normally afforded to those who plead guilty; or,

(2) Adopt a national Crown Prosecution Service policy or rule whereby CPS lawyers and law clerks are not permitted, within 10 days of the scheduled trial date, to participate in the sort of discussion and negotiation described above, and certainly are not permitted, within 10 days of the trial date, to agree to altered charges, altered charging language, or the dismissal of charges. Again, there should be an accompanying court rule forbidding the award of sentence discounts to defendants pleading guilty to all charges on the day of trial.

Together with adoption of one of these approaches, a national policy whereby all cases are set for a plea review conference, ten days before the scheduled trial date, should be adopted. This conference should occur at court or by conference telephone call, with a court clerk and usually not a judge or recorder convening and overseeing the meeting. This should be a narrowly focused proceeding where the objective is to sort out the defendant's plea, finally and irrevocably. At the same time that the case is listed for the plea review conference, it should be listed for a definite trial date ten days hence, to demonstrate to the parties that the plea deadline is a real one and that, absent notification of a guilty plea at the plea review conference, the case genuinely is going to proceed to trial on a date certain in the immediate future. This listing procedure must have credibility over time and in many cases before it should be expected to have the desired impact on decision-making by the parties.

**Practical considerations**

Many courts currently conduct some sort of plea review proceeding in advance of trial. But court clerks say that these are seldom meaningful or helpful proceedings, as counsel who appear have not really studied their respective briefs, and because the other pressures which cause cases to "crack" on the day of trial are, now, absent at plea review. Announcement of an intention to plead "not guilty" at the conclusion of current plea review proceedings does not preclude submission to the court on the day of trial of some disposition wherein the defendant pleads guilty to altered charges. If the rules proposed above were



made effective, it would be a poor tactic indeed to wait until the day of trial to offer to plead guilty, as the defendant's only option then would be to plead guilty to all charges, without amendment or alteration, and without the possibility of receiving a sentence discount. Consequently counsel would advise their clients that the decision had to be taken before the 10-day deadline to gain any possible benefit. To the extent that courts consistently enforced the new rules, defendants would come to understand that deferring decision on plea until the day of trial did them no good, and that they maximised their chances for a better result by deciding their plea 10 days before trial.

These proposals for moving up the "final day of reckoning" raise their own set of controversial issues. Some say that counsel will never prepare thoroughly for plea review proceedings such that these proceedings will achieve the stated objectives, and that it is thus a mistake to try to breathe more life into the plea review hearings. Many barristers say that it is not worth it for them to thoroughly prepare for plea review proceedings, because:

(1) The Bar are not paid a sufficient fee for plea review proceedings. Counsel are far better compensated under the legal aid scheme if the case "cracks" on the day of trial, which generally results in their receiving a trial fee. This is not to say that counsel admit to actively preventing cases from "cracking" at the plea review proceeding, but they do indicate that their attention naturally is more focused on their cases which are at the trial (and thus more remunerative) stage, knowing that their cases which are at the earlier, plea review stage will ripen with time.

(2) Counsel handling a matter at the plea review stage may well have to pass the case to another barrister before the day of trial, because of how the profession generally operates. Knowing that he will probably not be the advocate with the defendant "on the day," most counsel do not plan to give strong advice on plea at such an early stage, and thus do not substantially prepare for plea review proceedings. (Some say that ethical principles restrict counsel from entering into negotiations on behalf of defendants for whom they will not later appear in court.) Significantly, barristers also note that the plea may be changed to guilty *later* if trial counsel so advise, so nothing is lost under current procedures by failing to settle the matter at the plea review stage.

(3) Clients pleading "not guilty" are not ready to decide to change their minds several days or weeks before trial:
   (a) because they want to see if the witnesses against them will really show up to trial, and/or,
   (b) because they refuse to deal with the situation when the trial is not immediately before them, and/or,
   (c) because they want to know who the sentencing judge will be before committing themselves, and/or,
   (d) because the client simply does not show up for the plea review conference or proceeding.

Many of these factors currently undercutting the practical usefulness of plea review proceedings will disappear upon the adoption of one of the two strategies outlined above, (which end the possibility of benefitting from guilty pleas as of

ten days before trial), *coupled with an increase in fees to be paid to counsel for attendance at such proceedings*. Maybe trial fees should be reduced slightly to offset this increase and to reflect the system's interest in achieving an early "change of plea" if indeed the plea is going to change. Altering the fee structure is a delicate business, not least because one would not want to create economic incentive for counsel to dissuade their clients from selecting the contested trial option when that option is otherwise appropriate. But the problem now may be that the fee structure provides economic incentive for counsel to delay even the consideration of a change of plea to guilty until the last possible moment, and this imposes large financial and planning burdens on others in the court process.

There remains the question of impact on defendants. On two grounds it might be argued that forcing the "day of reckoning" to occur ten days before trial truly would be adverse to defendants' interests:

(1) As noted above, some defendants, with and without the advice of counsel, delay taking a decision on plea until the day of trial so that they might first learn the identity of the judge or recorder who will preside in their case. They will then take their decision on whether to plead guilty or proceed to trial only after having first determined whether they are before, by reputation, a lenient or harsh sentencer. Barristers say that if it is the former, the defendant is more likely to then plead guilty, and that if it is the latter, they are more likely to take their chances and contest the trial. (Also, when in the latter situation, they sometimes think that if they stay with their "not guilty" plea right up to and on the day of trial, their case may be delayed until another day when possibly a different, more lenient judge will be assigned to their case.) Proposals which would move up the "day of reckoning" would push defendants to make their decision on plea early and irrevocably, and while deprived of the knowledge of which judge would sentence them.

(2) Defendants in a dilemma about how to plead will be forced to decide 10 days before trial without knowing or seeing for themselves whether the witnesses against them will really appear. Thus, it can be argued that defendants as a group are not well served by the procedure as it pressures them finally to decide their plea before they can know all of the facts relevant to the question of whether the Crown can really obtain their conviction.

These are very real factors in defendant decision making. With respect to the first issue, if defendants and their lawyers could know with certainty 10 days before trial the identity of the sentencer in the case, more pleas could be established with certainty at that point. To clear up the present uncertainty on this issue, and in parallel with the adoption of one of the "day of reckoning" advancement strategies outlined above, a rule could issue requiring irrevocable assignment of particular cases to particular judges 10 days before trial. Listing officers would not be permitted to switch cases among judges after that point. Critics will say that this will play havoc with listing, and that it is wrong to acknowledge the reality that any two judges may not see a case in exactly the same way. They say that to function, the system must indulge the fiction that judges are fungible, and that the "identity of the sentencer" is not a factor in



defendant decision-making that should be officially recognised. But those who take this view must accept that depriving defendants and their advisers of this information substantially inhibits the early plea determination process. Moreover, if fewer cases "crack" because of these reforms, listing officers will have less need to shift cases among judges at the last minute. Listing generally should be easier and more predictable.

The latter issue also has force. In the pre-trial, "discussion" phase of a case defendants need to be protected against overly optimistic CPS and police predictions about the availability of evidence and consequent probability of conviction. There will need to be a requirement that at the plea review proceeding the CPS, (and not the less credible police) demonstrate the probability of key witnesses appearing to give testimony on the day of trial. For the requirement to achieve its intended effect of informing the participants as to what is truly going to happen at trial, there will need to be an enforcement provision mandating dismissal of affected counts if, on the day of trial, witnesses certified available ten days prior do not in fact appear to give the key testimony. Without this last element, there is the danger that at the proceeding 10 days before trial the CPS will consciously or subconsciously inflate and overstate what they can actually deliver at trial in order to compel guilty pleas to more charges, or more serious charges. The enforcement provision will force the CPS to be conservative and realistic in the pretrial portrayal of their case.

### The quality of justice

The above proposals would enhance the quality of British justice because they would advance in time the process by which plea decisions are taken, making that process more efficient and less burdensome for the courts and the public. Witnesses and jurors would benefit in that they would not be called to court needlessly, to attend trials that never occur. Police officers would spend more time patrolling the streets and less time idly sitting at court. Defendants would benefit in that their cases would proceed through the system on a much more certain timescale. Currently defendants do not know with precision when and in which courtroom their case will be heard, because there is much last-minute lurching about as listing officers juggle cases to fill courtrooms suddenly available due to other cases having "cracked." Finally, the public would benefit as the system would require less resources to operate, there being greater utilisation of court and police time and less need to pay unneeded witnesses and jurors.