Fairness in the courts: the best we can do

Address to the Criminal Justice Alliance

Lord Neuberger

10 April 2015

1. On 18 March 1957, Dr John Bodkin Adams, a medical practitioner in Eastbourne, was charged at the Old Bailey with murdering one of his patients, an 81-year old widow called Edith Morrell. She had originally named him in her will, although she had subsequently revoked the gift. The clear implication of the prosecution's case was that Bodkin Adams had in fact murdered over 150 of his elderly patients, many of whom had named him as a beneficiary in their wills. After what was a sensational, and at the time the longest ever, murder trial Dr Bodkin Adams was acquitted by the jury on 9 April 1957. He lived on in struck-off disgrace but great comfort in his seventeen-room house for another quarter of a century.

2. The Bodkin Adams case has, of course, a certain resonance in the light of the activities of Dr Harold Shipman, some forty years later, but that is not the reason for raising it. Nor am I raising it because, most unusually and rather controversially, the Bodkin Adams trial was the subject of a book[1] written some thirty years later by the trial judge himself, Mr Justice Devlin, later a Law Lord. I mention it because the Bodkin Adams trial was covered by a fine novelist and journalist, Sybille Bedford. She attended every day of the trial and later wrote an excellent book about it with the title, "The Best We Can Do"[2]. Like all the best titles, it is capable of conveying different things to different people. (This is one of the ways in which good journalists and good fiction-writers differ from good legal draftsmen; journalism and fiction often thrive on ambiguity and uncertainty, but clarity of meaning is the number one requirement of legal drafting). The message which I have always taken from the title "The Best We Can Do" is that it was intended to be a comment on the way in which criminal trials are conducted, or at least how they were conducted over fifty years ago.

[1] Patrick Devlin, *Easing the Passing: The Trial of Dr John Bodkin Adam*s, Bodley Head 1985

[2] Sybille Bedford, *The Best We Can Do : An Account of the Trial of John Bodkin Adams* Collins 1958, Penguin 1961 and 1989 (with a new introduction by the author)

3. And it is a very well judged message. It reminds us that it is "we" humans, mostly judges developing the common law and legislators laying down statutory principles, who have made and developed the rules and principles by which trials are conducted. And it is "we" humans who manage and run the trials themselves - judges, barristers, solicitors, jurors, parties and witnesses. The human input at both stages, making the rules and conducting the trial, is fundamental and wide-ranging. And, because humans are fallible the trial process cannot be perfect: it will inevitably have its defects.

4. The description "the Best We Can Do" therefore reminds us that determining guilt or innocence in a criminal case, or, equally, in deciding who is in the right in a civil or family case, is a human endeavour, and that it is therefore never going to be perfect. It is important that everyone who is responsible for making the rules or for conducting trials bears this in mind, because, if we are properly aware of our frailties and the problems they can lead to, we can watch out for them and correct or compensate for their consequences.

5. But, at least equally importantly, the title of Sybille Bedford's book also reminds us that we, whether judges, lawyers or non-lawyers, involved in a criminal, family or civil trial, owe a duty to society to ensure that the justice system, and in particular the trial process, is as effective, as fair, and as compliant with the rule of law as it possibly can be – it must be the best we can do.

6. And it is not merely a case of making our justice system as effective and fair as it can be: it is equally important that the citizens of this country perceive that our justice system is as effective and fair as it can be. That is, in the broad perspective, what we mean when we say that justice must not only be done, it must be seen to be done. In other words, in summary terms, the trial system in all our courts must be as fair as we can make it and it must be seen to be as fair as we can make it.

7. At first sight, at any rate, all this sounds pretty anodyne – at least to judges and practising lawyers: we take it for granted that we have to be fair and to be seen to be fair, and we

strongly believe that we do our very best to be fair and to be seen to be fair. But, of course, one is always in dangerous territory once one takes things for granted. Complacency is a very dangerous state of mind. I do not intend to be too critical: in this country we have a remarkably dedicated, able and impartial judiciary, and we have a legal profession which is in the first rank. But society is changing very quickly in terms of perceptions, social mix, cultural values and communications; and, by contrast, the law is not noted for the speed with which it moves. Again, that is not a criticism of the law-making system or the legal system: it is to their credit that the people who make laws and the people who administer justice do not rush to adapt to every passing fad, but take their time to absorb developments and arguments, and assess trends, before making changes. But this inevitably means that there is a risk of the law being left behind in the very fast changing world of the early 21st century. While that is a general point about law, which does not just apply to our trial system, it is our trial system on which I am focussing today. And in that connection, we judges, lawyers and others must not use the bewilderingly fast changes in society as an excuse for not doing our best to ensure that the courts are as fair as they can be and are seen to be as fair as they can be.

8. And, as with any profession or other organisation, there is a danger of what might be termed group inwardness, epitomised by the notion that, for instance, politicians really only talk and listen to each other and not to the public, or that medicine is treated by doctors as existing for its own sake or only for their benefit, and that patients are just an incidental aspect. And the same is true of law and lawyers. And there is of course some truth in that. Most lawyers are interested in the law, and in practising law, because they enjoy it, because they are interested in it. But we lawyers, whether in practice or judges, should never forget that we are performing a public service, and a unique public service at that, because without lawyers, judges and courts, there is no access to justice and therefore no rule of law, and without the rule of law, society collapses. The public service aspect is fundamental: if we are a public service, we must, self-evidently, serve the public, above all those who use our services and our courts.

9. When one turns to consider how things might be improved, let me start by making a very basic point. I suspect that the most difficult message for judges and litigation lawyers to get is how artificial and intimidating the trial process seems to most non-lawyers. In particular to lay people who get involved with trials, the parties, their families,

the victims, the witnesses and the jurors. Judges and litigation lawyers are so familiar with the court procedures and practices that we implicitly assume that there is nothing strange, unfamiliar or frightening about them. This is of course, perfectly natural: we all take for granted the world we have become used to and familiar with, and it requires a constant and conscious effort to remind ourselves how very different our world must appear to visitors and strangers.

10. Whether we are judges or trial lawyers, we would do well always to have in the forefront of our minds the recollection of our first professional outings in court as advocates on our feet. We should recall how artificial and unfamiliar the whole thing felt, how terrifying and intimidating the whole court set-up seemed. Those memories will help give us some inkling as to how court proceedings must appear to lay people, particularly if they have to give evidence. In fact, it must be significantly worse for them. Advocates are trained and prepared before they go into court; they understand the rules, they will have been involved in mock trials and they will have been pupils or trainees working with experienced trial lawyers and seeing them in court. In footballing terms, the lawyer standing up and speaking for the first time in court is very much like a professional footballer playing at home on familiar turf where he has been trained, whereas witnesses and jury members are not merely like footballers playing away – they are playing football for the first time.

11. Indeed, I sometimes wonder whether our trial procedures really are the best way of getting at the truth. It is hard enough for a witness to remember what happened – often years after the event, after talking to many other people, and after reconstructing in his mind what must have happened. But, more to the point, would you feel that you had given of your best if you had been forced to give evidence in unfamiliar surroundings, with lots of strangers watching, in an intimidating court, with lawyers in funny clothes asking questions, often aggressively and trying to catch you out, and with no ability to tell the story as you remember it? But I am far from suggesting wholesale change. Sweeping reforms almost always leads to uncertainty and unanticipated problems. And there is much to be said for a system which has been developed over centuries, and which is understood and adopted by judges and lawyers. Further, it is always easy to criticise the status quo – and the grass is always greener on the other side of the fence. But, if we are to make the present system work as well and fairly as it can, we must bear in mind the

intimidating and artificial nature of our procedures, and we must work to minimise the potential for consequential unfairnesses, misunderstandings and injustices.

12. This means that judges, lawyers, and indeed court staff, have to go out of their way to ensure that the non-lawyers who appear in court, or are in other ways involved in the trial process, are not alienated or frightened. Witnesses and jurors, and of course the accused in criminal proceedings and the parties in civil and family proceedings, should be able to understand what is going on, and what is required of them. They should be able to give of their best, to do themselves justice, and that means that they must feel as unintimidated and as natural as possible. And non-lawyers who are otherwise involved, including visiting members of the public, should be able to understand what is going on and why it is going on: otherwise confidence in the rule of law risks being undermined.

13. The requirement that people understand what is going on, how the justice system works, is particularly important now that legal aid is being cut, in some areas very substantially: people are having to choose between representing themselves or not getting justice at all. I am not today here to discuss the rights and wrongs of that. The point I am making is that it is therefore even more important than it ever was, that the workings and requirements of the court system are properly accessible and understandable to non-lawyers from the beginning to the end. From the time that a person is first told that she is to be prosecuted in a criminal case or, in a civil or family case, when she first wishes to start proceedings as a claimant or is first informed that she is being sued as a defendant. Until the time when sentence is pronounced in a criminal case or a court order is made in a civil or family case. People need to understand what is required of them in the lead-up to the trial, what paperwork is required and what has to be done with it and when it has to be done, what preliminary hearings have to be attended and when and where they have to be attended and what they are for. And, after the trial, people need to understand what the court has decided and what it involves them doing and when they have to do it.

14. Otherwise, justice is either denied, in that people do not get access to the courts or they do get access but the court gets the wrong answer; or justice is severely delayed, in that things go wrong, hearings are aborted and unnecessary costs are incurred which is almost as bad. And, as Emily Gold Lagratta and Phil Bowen say in their excellent report for the

Criminal Justice Alliance[3], it is in the interest of the court system itself that all parties to proceedings really understand what is required of them before, during and after the trial: otherwise a lot of court time (and indeed lawyer time) is wasted, and that means an inefficient justice system which undermines the rule of law and increases the demands on the public purse.

15. It is relatively easy to say that we must make all aspects of the courts and trial systems more accessible, more understandable, more user-friendly, and why we should do so. It is much more challenging to identify precisely what should be done. In that connection Lagratta and Bowen suggest that research has established that there are four essential ingredients to public confidence in the courts[4]. First, that decisions are seen to be taken in a genuinely unbiased and neutral way; secondly, that everyone involved in the trial is treated with genuine respect; thirdly, that non-lawyers can understand how decisions are made, and understand what is required of them – whether as a defendant, a victim, a party, a witness or a juror; fourthly, that anyone with a legitimate wish to do so has had the opportunity to be heard. All these factors are important, and together they go make up the ingredients of court system which will command respect because it will be seen to be administering justice in a way which enjoys the confidence of citizens, of the British public.

16. This requires the documentation which tells people what they have to do, whether before or after a trial, to be as clear, as simple, and as untechnically expressed as possible. It requires the court staff, who will inevitably be heavily relied on for assistance, such as people manning the desks ahead of the trial, or the associates, clerks and ushers at the trial, to be pleasant, helpful, informed, informative and patient (although they cannot of course be expected to give legal advice). And it requires the lawyers acting for the parties to help people by explaining things clearly and informatively. And, of course, it requires the judges to play their part too – and a very important part it is. So, as a judge, let me turn to the role of judges.

[3] Emily Gold Lagratta and Phil Bowen *To be fair: procedural fairness in the courts.* Criminal Justice Alliance, 2014, page 4
[4] Lagratta and Bowen *op cit*, page 2. I have slightly paraphrased the summary

17. Here, I must be careful not to be too prescriptive. That is for two reasons. The first reason is that it I have not been a trial judge for eleven years. Since 2004, I have only been hearing appeals, not listening to any oral evidence, just legal argument. So that means that my antennae are probably not as sensitive as they were to the concern of witnesses or other lay people involved in trials such as juries or victims, let alone magistrates, and I may be somewhat out of date with the latest thinking. Indeed, even when I was a trial judge, I only tried a limited number of criminal cases. But provided that you bear that caveat in mind when considering what I have to say, I may have something to offer – although I doubt that it is very original. The second reason for caution is that it is dangerous to be too prescriptive: what is appropriate in one case may not be appropriate in another, not least because we are talking about how to deal with particular people in particular circumstances.

18. I think half the battle is won once a judge genuinely and fully appreciates the problems faced by non-lawyers when they have a part to play in court. Once genuine awareness of the need to explain, to show respect, to listen, and to appear fair is part of the conscious judicial tool-kit, most judges should be intelligent and savvy enough to make things a lot better than they otherwise would be. The big problem, as it is everywhere, is with unconscious bias. I dare say that we all suffer from a degree of unconscious bias, and it can occur in all sorts of manifestations. It is almost by definition an unknown unknown, and therefore extraordinarily difficult to get rid of, or even to allow for. But we must, as I have said, do our best in that connection as in every other.

19. In that connection, for some thirty years, England and Wales have had an impressive institution which prepares people to be judges, and provides continuing judicial education[5]. It used to be called the Judicial Studies Board and it is now the Judicial College, currently and ably chaired by Lady Justice Rafferty, a very experienced criminal judge. In my view, at least, the most important educational function of the College is to teach what many people call judgecraft – i.e. educating judges and would-be judges not so much about substantive law or procedural law, but about the multifarious techniques which help make someone a good judge, and appear to be a good judge. The courses are

[5] Its website is https://www.judiciary.gov.uk/about-the-judiciary/training-support/judicial-college/

targeted so as to focus on different areas of judging, and the criminal courses[6], which are run by another very experienced criminal judge, Mr Justice Openshaw, include topics which are very much within the scope of the concerns covered by the Lagratta and Bowen briefing.

20. More specifically, what should judges be doing? To answer that I shall revert to the four categories identified by Lagratta and Bowen. First, perceived neutrality. When it comes to issues which they have to decide, some judges do appear to have made up their minds early on – even at the beginning of the case. But in almost all (I would like to say all) cases, they have not done so: they are simply testing arguments put before them. And it is inevitable that, once a judge understands the issue, he or she will often have a preliminary view, but any judge worthy of the post who has formed a view can still be persuaded to change his or her mind. But judges should remember how it looks if they appear to have made up their minds and don't change.

21. More broadly, judges may not appear to be neutral because they will almost always be seen, normally rightly, to come from a more privileged sector of society, in both economic and educational terms, compared with the many of the parties, witnesses, jurors in court. It would be absurd to suggest that judges should be poorly educated or should pretend to be not what they are, but they should be sensitive about this aspect. And that is also true when it comes to gender and ethnic differences. Thus, a white male public school judge presiding in a trial of an unemployed traveller from Eastern Europe accused of assaulting or robbing a white female public school woman will, I hope, always been unbiased. However, he should always think to himself what his subconscious may be thinking or how it may be causing him to act; and he should always remember how things may look to the defendant, and indeed to the jury and to the public generally.

22. This is where neutrality shades into the second requirement, respect. Judges have to show, and have to be seen to show, respect to everybody equally, and that requires an understanding of different cultural and social habits. It is necessary to have some understanding as to how people from different cultural, social, religious or other backgrounds think and behave and how they expect others to behave. Well known

[6] See for instance https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/judicial-college-prospectus-2014-15-v8.pdf

examples include how some religions consider it inappropriate to take the oath, how some people consider it rude to look other people in the eye, how some women find it inappropriate to appear in public with their face uncovered, and how some people deem it inappropriate to confront others or to be confronted – for instance with an outright denial. More broadly, judges should be courteous and, generally, good-humoured; and, while they should be firm, they should never, however great the temptation, lose their temper.

23. Respect extends to ensuring that those with what in law is an indirect interest in the proceedings, most notably victims of crime, are properly recognised. And that, of course, is where respect extends to ensuring that those who wish to be heard are indeed heard. It is important that victims are not simply treated as witnesses, or members of the public, who just happen to be victims. It is essential that their plight and their concerns are understood.
24. And it is here that respect and the right to be heard shade into understanding. Because, more generally, a judge must ensure, as far as can be done, that those involved in a trial understand what is going on and why, and, perhaps even more, what is expected of them and why. It may be difficult for a judge to help a witness, whether a party or not, to understand why she is going to give evidence and how the system works: that is the job of the lawyers. But, at least ideally, the judge should make sure not merely that a witness is treated fairly and respectfully by the judge and others in court. This can be very difficult, as an advocate cross-examining a witness whose evidence is harmful to his client's case is bound to be challenging to that witness, and the judge has to be wary of unfairly interfering with the conduct of the advocate's case. Particularly in the heat of the moment, it is hard to assess whether a witness is being attacked unfairly or disrespectfully, rather than simply toughly. However, it is sometimes appropriate and fair for a judge to help a witness who does not appear to have understood her role or is (often unintentionally) being unfairly treated in cross-examination – or sometimes even in chief. A judge may often be well advised, particularly in such a case, to check that a witness understands or to ask her whether there are any questions or uncertainties.
25. And where the judge clearly has a very important role when it comes to understanding is when sentencing a defendant in a criminal case or when making an order whether in a criminal, civil or family case. It is essential that a person against whom a sentence or order is made has the sentence or order fully explained in plain and accessible language.

It is highly desirable that it is spelled out by the Judge in open court, so that all involved, including the public, understand what has been decided. Before leaving the court, the person against whom an order or sentence is made has to know precisely what is to be done to them, precisely what they have to do, and when and why. This can be very difficult when the order or sentence is complex.

26. All this, of course, applies to magistrates, although their position is less ticklish during the trial as there is no jury. The relationship between judge and jury can be tricky because (i) the judge is addressing a group of twelve people, normally from disparate backgrounds, and (ii) the jury does not reply to the judge (save in an occasional written note), whereas it is of course perfectly acceptable and sometimes plainly sensible for the judge to have a dialogue with a witness.

27. Reference to juries and lay magistrates is a fitting topic on which to draw to a close, because what underlies the issues discussed in this little talk is the vital importance of the justice system, and in particular the criminal justice system, being understood and trusted by the public. There are two good ways of achieving this. The first is to ensure that the system is openly and fairly run and properly explained to the public, which has been the focus of this talk. The second is to ensure that the public actually take part in the administration of justice, which is an overriding benefit of the lay magistracy and the jury systems. And, before I sit down, I should like to say that the Criminal Justice Alliance with its commitment to promoting and assisting in the promotion of the sound administration of the criminal justice system[7] deserves public recognition and public gratitude for the work it does to improve the running of the criminal justice system and public confidence in it.

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[7] Criminal Justice Alliance, *Report and Financial statements, Year ended 31 August 2014*, page 10. The excellent work is summarised in the following five pages