Notes and Observations to the questions relating to Criminal Legal Aid

Question 24: Do you agree with the proposals to:
· pay a single fixed fee of £565 for a guilty plea in an either way case which the magistrates' court has determined is suitable for summary trial;
· enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases; and
· remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee?

Please give reasons.

In principal there is some force in the suggestion relating to either way offences where a defendant elects and pleads guilty at the first opportunity. That being said, the litigators have no control over a client's right to elect and some do so for tactical reasons even though intending to plead guilty. This may occur where a defendant believes that he may be committed to the Crown Court for sentence in any event and wishes to preserve his bail position or un-convicted status if on remand.

As far as cracked trials are concerned please see the comments below relating to the circumstances in which a trial may crack. Where a case has been properly prepared for trial (including those matters dealt with in readiness for a PCMH hearing) the proposed fee goes nowhere near providing reasonable remuneration if the case cracks for reasons outside the advocates control.

Question 25: Do you agree with the proposal to harmonise the fee for a cracked trial in indictable only cases, and either way cases committed by magistrates, and in particular that:
· the proposal to enhance the fees for a guilty plea in the Litigators' Graduated Fees Scheme and the Advocates' Graduated Fees Scheme by 25% provides reasonable remuneration when averaged across the full range of cases; and
· access to special preparation provides reasonable enhancement for the most complex cases?
Please give reasons.

Cracked Trials

This proposal appears to be based upon a fundamental misunderstanding of how criminal litigation is conducted. It appears to rely upon a belief that defence lawyers are in a position to dictate when and if a case pleads. On paper the cracked trial system may appear open to manipulation by the legal profession, however, there are many factors involved in criminal litigation over which a defence lawyer has absolutely no control. From my experience, the majority of cracked trials involve cases in which defence lawyers have carried out considerable pre-trial preparation and which crack at a late stage through no fault of theirs. The Carter review that led to the AGFS recognized that lawyers should be properly compensated for the work they carry out and for loss of work opportunity should a case crack at a late stage. The "third" system took this into account by reflecting the greater amount of work likely to have been carried out closer to the trial date. To do away with a proper payment for cracked trials unfairly penalizes lawyers who have carried out work and fulfilled their obligations to both client and the court properly and faithfully.

Where a not guilty plea is entered, defence advocates are usually obliged to:

- Draft a defence case statement
- Provide details of witness requirements
- Provide editing proposals for defendant's interviews and/or witness DVD interviews
- Respond to bad character or hearsay applications
- Provide details of any points of law
- Produce skeleton arguments relating to the above
- Advise upon defence evidence

All of the above generally involves adherence to tight time limits and a thorough reading of the papers. None of the above arises in the case of a straightforward guilty plea.

Defendants

Defence advocates can only act upon the instructions of their client. A client cannot be forced to accept proper advice. However unrealistic and illogical it may appear, many clients, particularly in criminal proceedings, take a short-term view. Whilst some will take on board the principal of credit for plea numerous defendants bury their heads in the sand and seek to put off the inevitable. The very fact that they have committed criminal offences often demonstrates a lack of thinking skills.

This can manifest itself as a desire to postpone punishment or a hope to avoid conviction.

A defendant pleading guilty will normally expect to be sentenced within about three weeks of entering the plea. Defendants on bail frequently take the view that, whilst bail continues, they would prefer to put off their potential punishment despite the risk of loss of credit. Defendants in custody often wish to preserve their un-convicted status. A sentence commencing in three or four months is preferable to one starting in two or three weeks.

Other defendants will put matters off for trial in the hope that something might turn up (or witnesses not turn up) to avoid conviction. Every defence lawyer is familiar with the client whose first question on the day of trial is "Are the witnesses here?" Despite previous protestations of innocence, confirmation from the prosecution brings a sudden change of heart. It is not unusual for a defendant to inform his representatives in advance that he has "heard" that the witnesses will not attend. This stance is maintained together with a resolute refusal to plead until finally confronted with the inevitable.

Evidential difficulties

Some cases crack on the day of trial because the evidence changes. There are occasions when a witness may refuse to attend or is otherwise reluctant and,

under their continuing duty of review, the prosecution has to reassess the chances of securing a conviction.

When a prosecution witness attends court to give evidence they are normally given the opportunity to refresh their memory from their witness statement. This is usually the first time they have seen the statement since it was made. It is not infrequent that witnesses report that there are mistakes in their statements. This results in a change in the evidence that may again alter the prosecution's stance.

Actions of co-defendants

In multi-handed cases, a late plea by a co-defendant may often result in a previously unacceptable plea becoming acceptable or, more importantly, a case being dropped against a defendant. Where a not guilty plea would have been maintained and a trial inevitable, the plea of a co-defendant, accepting full responsibility for the offence, results in the prosecution accepting the innocence of the co-defendant.

A recent example. D1 and D2 were charged with robbery of a mobile telephone from another boy. D1 vociferously denied taking the telephone. It was a weak case particularly against D1. On the day of trial D2 (who had spent a few weeks on remand) offered a plea to theft. This plea was accepted by the prosecution who then offered no evidence against D1. D1 would have maintained his innocence had a trial ensued.

Actions of the prosecution

Frequently cracked trials arise as a result of unrealistic charging decisions or inadequate early preparation by the prosecution. The defence may offer realistic pleas at an early stage in the proceedings but the prosecution rejects such.

The classic situation is where an incident is overcharged such as a section 18 OAPA and a plea to section 20 is eventually accepted.

To give another example of a case in which I was recently involved.

D (a prostitute and heroin user) was one of several defendants charged with conspiracy to supply class A drugs. The case arose out of an undercover police test purchase operation. The evidence against D was that on one day during the operation the test purchase officer (TPO) was unable to contact the dealer he was targeting. He went to an area of Norwich where he knew drug dealing took place. He approached D and asked her if she knew where he might be able to purchase heroin. D was returning from having purchased three wraps of heroin from her own dealer for herself and believing the TPO to be a fellow addict in need offered to sell one to him.

At the section 51 preliminary hearing D indicated a not guilty plea to conspiracy but offered a substantive supply. The prosecution rejected this. At the PCMH the offer was repeated in open court and on the PCMH form and again rejected. Some of the co-defendants pleaded guilty to conspiracy some not guilty and the case was adjourned for trial.

A full defence statement was served setting out the defence case that the defendant was not part of a conspiracy with any of her co-defendants but acted entirely independently and set out an analysis of the evidence against her. The defence statement repeated D's willingness to plead to a substantive.

At a PTR the offer of substantives was made once more in open court but the prosecution again rejected it and indicated that telephone evidence was to be served and this "proved" the case against D. A two-week trial was fixed for D and four other defendants.

By this point around 1,000 pages of evidence had been served. The prosecution then served a further 800+ pages of telephone evidence. In the light of the previous assertion from the Crown this was gone through by defence counsel in some detail. It did not strengthen the case against D – if anything it supported her assertion that she was a mere customer of the main defendants. Further

representations were made to the prosecution and we were informed that a plea to conspiracy was still required.

Less than a week before the trial date I received a telephone call from prosecuting counsel who informed me that a conference had taken place with the police and as a result of a review of the evidence the plea to the substantive was now acceptable. It was duly entered and no evidence offered on the conspiracy.

This was a case in which every effort had been made to enter an early meaningful plea. It was consistently rejected. Every effort had been made to appraise the prosecution of the nature of D's defence. The case involved a large number of papers and had been fully prepared for trial. I had a two-week trial booked in my diary. The late notice of the prosecution's acceptance of the plea had resulted in me previously returning other work, as a trial appeared inevitable.

The current proposals would result in me being paid the same as if the plea had been accepted at the s51 hearing. However, as it had not been accepted I had attended three further hearings (PCMH, PTR and plea), had spent a large number of hours preparing the case and was left with a significant gap in my diary, all despite my best efforts and through absolutely no fault of mine or the defence solicitors or the defendant.

In the past it has been well recognized that a cracked trial saves money in the long term because of the freeing up of court time and witnesses. If there is a genuine belief that lawyers are manipulating the system then there will be perverse incentive for those same lawyers to run trials rather than seek a compromise with an inevitable clogging of the court system and limited, if any, saving of the overall budget. There are currently occasions when defence lawyers will make representations to the prosecution and even disclose aspects

of their defence that need not be disclosed in order to resolve matters without the need for a trial. There will be no incentive to do this in the future.

Again an example. Four defendants were charged with affray. All pleaded not guilty. The matter was listed for trial with a ten-day trial estimate. A major plank of the prosecution case was a poor quality video of the incident. Once not guilty pleas had been entered the prosecution announced that it intended to obtain enhanced CCTV and possibly further witness statements. It was quite apparent from the defendants' instructions that they had been misidentified by a police officer who had viewed the video and purported to point out those involved. The defendant's instructions accorded with an independent witness who was abandoned by the prosecution because they believed she was mistaken.

The defence had the option of sitting down with prosecuting counsel and the CPS reviewing lawyer, viewing the video and explaining the defence, pointing out the likely mistakes and cross-referencing the witness statements with what was on the screen or simply waiting until trial and cross-examining the material in.

We took the former course. However, the prosecution was not prepared to accept our representations until it had received and had fully examined the enhanced CCTV. There was no guarantee thereafter that the case would be dropped but the discussions eventually resulted in the prosecution offering no evidence. Ten days of court and jury time were saved. In order to have the discussions the case was effectively prepared for trial. Under the proposed system there would be a disincentive to make any attempt to save court time and a positive incentive to run the trial in the pretty certain knowledge that the defendants would be found not guilty.

Question 26: Do you agree with the Government's proposal to align fees paid for cases of murder and manslaughter with those paid for cases of rape and other serious sexual offences? Please give reasons.

The offence of Murder has and should have a unique position within the criminal catalogue involving as it does loss of life following a deliberate act and bereavement to victims and their families. For the defendant there is the imposition of a mandatory life sentence with significant minimum periods of detention before consideration for release. These factors place a particular heavy burden and responsibility upon counsel involved in such cases.

As far as victims and their families are concerned, the seriousness of the loss of a life should not be diminished and, in the eyes of the public, to equate the seriousness of murder with that of an offence even as serious as rape (or with say the sexual touching of a 15 year old) risks bringing the criminal justice system into disrepute.

To equate rape, as it carries a discretionary life sentence, with manslaughter ignores the fact that other offences (such as those involving some class A drugs or a section 18) also carry discretionary life sentences but are remunerated at still lower levels.

If there is a justification for reducing the fees paid in category A cases there should still be a differential between murder/manslaughter and other serious offences to reflect the matters above.

Question 27: Do you agree with the Government's proposal to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000? Please give reasons