The Michael Farmer Memorial Lecture 2016

Delivered by Lord Justice Davis at the Legal Wales Conference held in Bangor on 7 October 2016

It is a privilege to be giving this talk to this conference in honour of the late Michael Farmer. Many of you will have known him well. I, in fact, first met him when I became a Presiding Judge of the Wales and Chester Circuit in 2006. I was born and brought up in Kent. I went to school in England, I went to university in England, I practised at the bar from chambers in Lincoln's Inn in London. Michael was, of course, a Welshman through and through. But I like to think that, by the end of my time as Presider, he had – just about – forgiven me for my distressingly English origins.

As a judge, Michael was as versatile as he was practical. Family law was latterly his speciality, but civil, crime, public law – with his intellect and energy he could do them all and do them all well. He was a judge we were immensely fortunate to have in Wales. One of his many attributes was not just an ability but an absolute determination to get on with things and to ensure that, whatever the difficulties, lists were moved forward

and cleared. He would have been the last person in the world to have objected to being styled "robust". Linked to that was his dislike of undue or unnecessary technicality which he felt could obfuscate the essence of a case.

This talk is intended to be in that spirit of practicality which Michael upheld so strongly. As I gather, thus far none of these memorial lectures have been on the subject of criminal law or practice. In fact, the last two – delivered by Sir James Munby and Sir Ernest Ryder – have been on the subject of family law and practice, an area in which Michael's barrister daughter Mair specialises. So for his barrister son Sion I hope my present subject will at least contribute to a degree of familial balance.

May I get in some disclaimers at the outset of this talk on the modern criminal trial and sentencing process. First, I will only, in this talk, be discussing Crown Court process, not the Magistrates Court. Second, I am not talking from the position of someone who has spent over 40 years in the criminal law, able to offer insights or perspectives based on an effective professional lifetime as a criminal practitioner. To the contrary. At the bar my own specialisation was in civil law : specialising, in particular, in cases involving corporations, banks, property disputes and insolvency. The very first time I appeared in front of a jury was as an

Assistant Recorder in Isleworth Crown Court in 1995: and a very nerve-wracking occasion *that* was. So in some ways I have come to the criminal law as an outsider; even if in the last 20 years I have spent a great part of my judicial time doing criminal cases, both as a trial judge (in particular in murder cases) and, in the last few years, presiding over criminal appeal cases. And perhaps just because I came to the criminal law late, I have not always been inclined to take some things for granted and have even engaged in heretical thinking along the lines of "Why is this – why *need* this – all be so utterly different from civil law process?"

Well, the proposition I advance, based on my own experience at all events, is that things, so far as the process of the criminal trial is concerned, have changed enormously in this regard over the last 20 years: and, in my own view, have changed, taken overall, very much for the better.

I think that this advance is encapsulated in two maxims which have frequently been deployed in recent years and which, in my view, are none the less true or less meaningful simply because they have become judicial clichés. The first, which in truth has some links to the second, is: "Criminal litigation is not a game". The second is "You can trust the jury". Can I just give some illustrations of how, in my own experience,

these sentiments have underpinned beneficial changes in the approach of the criminal trial process over the period I have had some involvement in the criminal law?

One, statutory, example, is the modification of the so-called "right to silence", whether in police interview or at trial, effected by the provisions of S.34 and S.35 of the Criminal Justice and Public Order Act 1994. Of course the right to silence, as such, was not taken away. It was retained but it was permitted that the jury could be instructed, in appropriate cases, that adverse inferences could be drawn from a failure to answer relevant questions in interview or from a failure to give evidence at trial; something which (subject to a few exceptions) had not previously been permissible.

One can regret the complexity of the statutory provisions in this regard and one can regret the complexity of the directions in a summing-up necessitated in consequence. But my personal view was then and is now: how can that, in modern times, be anything other than a satisfactory development? At the time there were many – particularly among those specializing in criminal defence – who seem to have regarded this as a grave encroachment on a fundamental right, who seem to have thought that such a development grossly favoured the almighty state at the

expense of the little individual, who seemed to have thought that the whole criminal sky was falling down. Well, I think time has shown these Chicken Lickens to be wrong. If there is good reason for not answering questions in interview, for example, then the trial process is well able to accommodate that. If, however, as is often the case, the reason is tactical then the jury should be entitled to draw an inference, as part of the overall assessment of the case while being trusted not to give excessive weight to the point. How, I ask rhetorically, is that unfair? To the contrary, it is a good (statutory) illustration of lending no assistance to those who think litigation is to be treated as some kind of tactical game.

In a similar vein, surely the potentiality for introducing at trial the previous bad character of a defendant – subject always, and crucially, to obtaining the permission of the trial judge – is a positive development. At all events, I personally am in no doubt that is so. And this development too is itself, as I see it, an illustration of Parliament wanting to assist, as well as to trust, a jury. In the old days, anecdotally, juries were said to be rather resentful of only knowing of a defendant's previous convictions after they had pronounced on guilt. Indicative of a reason in itself, said defence practitioners, for them *not* knowing beforehand. Not so, in my view. Juries should in an appropriate case, have this evidence where relevant; and can be trusted not to be prejudiced or to give it

disproportionate weight. Parliament has so proceeded: and a good thing too.

Can I give another example showing a common sense and commendable approach, helping to debunk the notion that criminal litigation is a game and to advance the notion, to put forward another (related) cliché: "Parties should put their cards on the table". When I started as an Assistant Recorder, coming from a civil background, it was always a matter of puzzlement to me how little, subject to whatever was vouchsafed in interview, the prosecution or judge was permitted to know of the defence case (leaving aside alibi and other such instances). This reflected the same mindset, I suspect, as revealed in the belief that there should be an absolute right of a defendant to silence without adverse comment being possible. But such an approach would not have been tolerated in a civil case. The system of civil pleadings, of course, called for the parties – defendants as well as claimants – to particularise their cases in advance of trial: and woe betide the party who sought to advance at trial a case he had not pleaded. In my view, the system and philosophy of the overriding objective and judicial control of case management, enshrined in the Woolf proposals for civil procedure reform, has had a salutary impact on the approach to criminal trials; preceded, in the first instance, by the general requirement under the provisions of the Criminal

Procedure and Investigations Act 1996, for the defence to identify its case by providing a defence statement. Again, I ask: where is the unfairness in that ?

This whole approach has, of course, advanced apace over the last few years: and healthily so. We now have in effect a criminal procedure code, enshrined in the Criminal Procedure Rules and related Practice Directions (and, of course, an endorsement of an overriding objective). We now have an active system of judicial case management: no longer can the parties (prosecution or defence) expect to conduct matters so that the true issues are not identified, let alone deliberately withheld, prior to a trial. Trial by ambush is – or, at all events, should be – a thing of the past. Criminal litigation is not a game. Cards are to be laid on the table.

A striking illustration of the modern approach is to be found in the case of *West* [2014] 2 CAR 28. In that case, at a preliminary hearing, the judge directed defence counsel to consider in conference at court that day with his client potentially highly incriminating interview answers. Counsel refused, saying he did not need to do so, could not be required to do so and was jolly well not going to do so as his firm instructions were that a plea of Not Guilty was to be entered, come what may. He declined to attend court later that day as directed. Counsel went so far beyond the

duty frankly and fearlessly to advance the case of his client as to conduct himself with gross rudeness and, as it was put, "breathtaking arrogance". The judge's dealing with him thereafter for contempt was quashed on appeal for procedural irregularity (what if anything, happened before the Bar Standards Board thereafter I do not know). But the point I would emphasise is that the judge's vigorous and pro-active case management – designed to tease out from the defence at a very early stage just what its stance to the interviews would be and to test whether there really would be a trial – was endorsed. This whole tendency to vigorous and pro-active case management, designed to have the issues identified at an early stage before the time of trial, is, in my view, thoroughly to be welcomed; and now has the further impetus given to it by Sir Brian Leveson's 2015 Review of Efficiency in Criminal Proceedings. But the case of *West* also, I might add, illustrates the need for all advocates to co-operate and to engage in the required process.

So far as "trust the jury" is concerned, in my view the trial process and, indeed, statutory developments in this regard, have made great strides over the last 20 years. In fact in days gone by one sometimes might almost think that judges had proceeded on the footing that you could *not* trust the jury. If so, that mindset is now outmoded: or, at all events, should be.

As someone who, until 1995, had had no practical exposure to the jury system I suppose, in fact, that my initial thoughts were: why do we even have juries? To be honest, I am perhaps a little surprised that the jury system has remained as entrenched as it has in our criminal justice system. In one sense, one principal cause of delay and expense in the criminal justice system - and delay and expense are issues of a kind which legitimately concern politicians – lies in the very fact that we have lay juries in contested Crown Court criminal trials. Yet the position has not much altered. Of course the vast majority of criminal cases are dealt with in the Magistrates Courts. Many of those cases that are sent to the Crown Court, moreover, then result in pleas of guilt. But it is the balance of those cases which take up most of a typical Crown Court's time: and successive Governments have thus far shown little determination, in spite of one or two proposals, to see through, for example, either a significant increase in the jurisdiction of magistrates or a significant increase in offences designated as summary only: let alone showing any interest in abolishing the system of lay jury trials. As to either way offences, I personally consider it quite surprising that a defendant, in an either way case, still has the right to elect for a jury trial. I can see a strong argument for that being a matter of judicial decision and judicial allocation: but whilst allocation of cases is addressed in the Leveson Review there was

no proposal to deprive a defendant of the unilateral right to elect. One can understand the point that used to be made by the late Judge Stephen Tumim: it is a very serious thing for a clergyman to be charged with stealing a box of chocolates from a supermarket. But by that token, and from the purist point of view, it is a very serious thing for anyone to be so charged. Should that confer an unfettered right to elect for a jury trial in such a case?

More fundamentally, why juries at all? This, of course, is an old legal debate. It cannot readily be said to be an affront to a civilised justice system not to have them: many civilised countries do not (or at least not in the way we have them). There are principled objections to criminal cases being decided by lay juries. One, for example, is that the assessment of evidence is, in truth, a skilled task calling not just for "experience of the world" but legal experience of trials and witnesses. Another, cogent, objection is that a convicted defendant should be entitled to know the reasons for his conviction: a factor long since reflected in the requirement for magistrates to give reasons. Yet all that defendants receive in a Crown Court trial, if convicted, is the unilateral pronouncement: Guilty. To equate a traditional summing-up of the judge with jury reasoning seemed, to me at least, something of an uncomfortable intellectual fudge in this regard.

To hardened criminal law practitioners these would be, no doubt, heretical thoughts. But I am not going to traverse this topic of debate: because, as I see it, the jury system in 2016 can be taken as entrenched in this jurisdiction. And for one very, very good reason. It is accepted. It commands, by and large, the respect and support of the public, of advocates, of defendants, of judges. Research by Professor Cheryl Thomas, among others, has spoken of the essential fairness of juries and their ability to cope. In the context of lengthy and complex fraud trials, a recent report of the organisation Justice has endorsed this. Of course there will be "wrong" verdicts: in the sense of guilty people being acquitted, sometimes innocent people being convicted. But that can happen in any system; and overall the jury system *works*. Long may that be acknowledged.

Now, I happen to think that the efficacy of the jury system has if anything been significantly enhanced in the last 20 years. As with witnesses (not least vulnerable witnesses) juries are, quite simply, better treated. And this is essential given the ever increasing complexity and length of many modern criminal trials – be they ones involving multi-count historic sexual abuse cases; terrorism cases; complex frauds; sophisticated drugs conspiracies; and so on. I think that the better treatment and better

instruction of juries goes hand in hand with the appreciation that juries are to be trusted; and if juries are to be trusted they must be properly assisted.

When I was receiving my training as an Assistant Recorder, back in 1995, we were advised normally not to say anything at all to the jury at the start of a criminal trial but proceed, immediately the jury had been empanelled, to inviting prosecuting counsel to open the case. How times have changed! I personally never followed that advice – it seemed to me, then and now, only right to make at least some introductory remarks to a newly empanelled jury; if only as a matter of politeness. But matters have of course long since moved on. For some time now a trial judge has been positively required to make introductory comments to a jury, extending to a number of topics, including (though of course not limited to) instructions about avoiding use of social media during the trial, the need to focus only on the evidence given in court and so on.

This is a clear change for the better: much enhanced by the proposals made in the 2001 Auld Report and advanced in the 2015 Leveson Review, and taken up in the recently amended Criminal Procedure Rules and related Practice Directions. Not only do these changes require a focus at the outset of the trial in front of the jury on the true issues in the

case, rather than permitting counsel at trial to meander slowly and haphazardly through the evidence in case something might turn up, doubtless to the bewilderment of the jury who may be wondering what on earth is going on. Now, under the revised Rules, the issues have to be identified before trial and then openly highlighted at the outset of the trial. Further, appropriate legal directions – for example, on identification – can now be given by the trial judge at an appropriate stage, so that the jury can thereafter assess the evidence already knowing the legal context rather than having to wait – perhaps some days later – for the appropriate guidance in the summing up. Written Routes to Verdict, written chronologies, written legal directions: these are now all standard fare, designed to *assist* the jury and produced in the expectation that juries can be trusted to follow the legal directions and have due regard to this judicial assistance. This change of culture – acknowledging the paramount importance of assisting the jury and requiring active judicial case and trial management – is strongly to be welcomed. It is, it may be recalled, only some 2 years ago, in fact, that a constitution of the Court of Appeal (Criminal Division) in the case of *Bennett* [2015] 1 CAR 16 decided that it was inappropriate for the jury even to be provided by the judge with a written chronology prepared by him as an aid to their deliberations. The revised Rules rightly consign that sort of approach to the past.

The most recent changes to the Criminal Procedural Rules have been described in some quarters as a "sea change". Maybe that overstates it a bit: but they certainly call for an approach different from the traditional approach: and surely the new approach can only help a jury, which after all has a difficult enough task as it is. I think, in particular, that the encouragement to provide juries with a written Route to Verdict and/or a written series of questions they should ask themselves will have two further additional advantages: or any rate potential advantages.

(1) The first is that it will go some way towards confronting the (principled) objection to which I have already referred: that heretofore jury verdicts have been unreasoned. Thus far the lay jury system as operated in England and Wales has escaped being designated as contrary to Article 6: indeed it has been endorsed as compliant. But dare I suggest that it has in some quarters been perceived as a close run thing: as illustrated by a consideration of the twists and turns in the European Court of Human Rights' case of Taxquet v Belgium (2012) 54 EHRR 26. Surely the provision of a written questionnaire or list of issues or Route to Verdict document, set in the context of the summing-up as a whole, at least helps to allay concerns in this respect?

(2) The second is that such an approach really *should* encourage – whether it *will* encourage remains to be seen – shorter trials and shorter summings-up. As to the latter, any appeal judge or criminal advocate has experience of rambling and unduly lengthy summings-up, with the summary – sometime, in truth, more of a recital than a summary - of the evidence which is unrelated to any identified issues. Those too should increasingly become a thing of the past. I have to say, in fact, that I am one of those who have at least some doubts as to the value of a "traditional" summing-up of the evidence at all. It does not, for example, happen in the United States of America. Closer to home, the charge of a Scottish judge to a jury is conventionally brief and directed primarily at identifying relevant points of law. There has been much debate and some research on whether full-form summings-up truly do assist the jury (who, it will be recalled, not only will have heard all the evidence but also will have had speeches from prosecuting and defending counsel). In my own view, at least, it can be said that all recent trends – and not least the recent changes to the Criminal Procedure Rules – should at any rate lead to much tighter and sharper summings-up, focused on reminding the juries of the essential issues and the questions they should be asking themselves, in the context of any necessary legal directions, and

> avoiding detailed exposition of each witness's evidence. Thereafter – well, trust the jury. And let the Court of Appeal endorse and approve the principle of the concise summing-up: the approach of the Court of Appeal in the recent case of *Stark* [2016] EWCA Crim 850 being a good start. And who knows? Perhaps Court of Appeal judgments can become shorter too.

Overall, then, my personal view is that the criminal trial process in the Crown Court is, at the moment, reasonably well positioned. In saying that I am not for one moment suggesting that everything in the garden is lovely. It would be a rare Crown Court or Appeal Court judge or criminal advocate who would say that it is. But the current particular pressures mostly, I suspect, derive from a system which is not really, as has often been pointed out, a system at all, coupled with ever increasing volumes of work and ever restricted resources. So many differing stakeholders are involved – police, prosecutors, advocates, defendants, judges, court service, probation service and so on – that delays and inefficiencies and lack of communication can and do arise. Poor charging decisions are made; disclosure is given late; the prison van is delayed; the video link breaks down – and so on and so on and so on. Improvements to technology and the court estate, and the impact of the Common Platform, are designed to help address that. That is not the subject of

what I have to say today. All I will say is that much is being done in this regard, as you all know. It is still a work in progress. It is crucial work.

I have been concerned today to make some observations on the trial process – not the substantive criminal law. But I should say at least something on that because it does have a bearing on the trial process. It has recently been stated by Dame Mary Arden, in one of the essays contained in her recent book Common Law and Modern Society, that the criminal law "stands at a cross-roads". What she has in mind is the criminal law following a convenient finger-post sign at these cross-roads marked "codification". That is easy to understand. Whilst we now have a code of criminal procedure as set out in the Criminal Procedure Rules we have no code of the substantive principles of criminal law nor a code of criminal evidence. In many areas, the criminal law is complex, diffuse and difficult to ascertain, often with a mish-mash of common law principles and statutory provisions running side by side. It is, for example, surely remarkable that, on the substantive law, we have a Theft Act, we have an Offences Against the Person Act (albeit over 150 years old), we have a Sexual Offences Act. But - notwithstanding past proposals by the Law Commission - we have no Murder Act which defines the offence of murder: murder, just about the most serious crime there is, remains a common law offence: albeit statute provides certain

defences such as loss of control and diminished responsibility, to that common law offence. That cannot, in modern times, really be satisfactory. I rather suspect, in fact, that many jurors still are surprised to be told that murder extends not only to killing with intent to kill: it also extends to killing with intent to cause serious harm without intent to kill. And they might also be surprised to learn that in attempted murder – where the intent, of course, has to be an actual intent to kill – no defences of loss of control or diminished responsibility are available at all.

That a criminal code for England and Wales has long been advocated – indeed was being advocated in Victorian times - is well known. It has had much distinguished support, most recently in a speech given this summer by the Lord Chief Justice at the Mansion House. A draft code, as revised, has in the past been published by the Law Commission in 1989. For whatever reason it has never been introduced into the law of England and Wales. But, all that said, this position has pertained for so long that I would not myself say that the criminal law is at a cross-roads. At all events, if it is then it has remained stuck there at the junction for a very long time. Maybe the time will come when a criminal code is eventually introduced. It will be an enormous task. I am not aware myself of any current plans for a criminal code, other than in regard to sentencing. And maybe, right now, that is not so bad a thing. I

personally would certainly be concerned if there were any major distraction, in terms of time and resources, from the current on-going process of court reform and modernisation which is so important and so major of itself. Subject to that, these current trends and improvements in the criminal trial process and the modernisation of the courts surely ought to provide a further impetus for having a modern criminal code as well.

As to the current position on sentencing I will say only a few words. The proliferation and complexity of the applicable statutory provisions have been heavily criticised in many quarters, not least by the Council of Circuit Judges; and after all they best of all should know. Every year seems to bring further convoluted statutory provisions on sentencing, some brought into effect (not infrequently, piece-meal), some not brought into effect at all – but all potentially requiring extensive and time-consuming judicial training. By way of example, the imprisonment for public protection provisions notoriously spawned immense difficulties, both in their legal application and in their practical application within the prison system: the whole system of imprisonment for public protection ultimately, of course, collapsing and being abandoned. Thereafter: "Custody Plus"? "Intermittent Sentences"? Remember them? And so on. Many of these problems derive, as I see it, from an understandable desire of those formulating sentencing policy to be seen to be tough on crime

coupled with a simultaneous understandable (but potentially conflicting) desire to make savings in the cost of the court and prison services. There are, moreover, periodic conceptual waverings between placing greatest emphasis on the protection of the public; on retribution and the rights of victims; on deterrence; on rehabilitation. A difficult balancing act, I know. But it has to be said that sentencing judges simply have not been given clear or consistent guidance over the last 20 years and on the contrary, as I have mentioned, each year tends to be met with a barrage of complex new provisions.

My own view, nevertheless, is that Crown Court judges have by and large coped extremely well with all the difficult legislation and sentencing regimes with which they have been required to comply – and I think that they have been greatly aided in this in recent years in two particular ways. First, as with trials and so also with sentencing, the training and information offered by the Judicial College (formerly Judicial Studies Board) is of the highest standard – that should be acknowledged. Second, the guidance given in the guidelines issues by the Sentencing Council (formerly Sentencing Guidelines Council) is invaluable. They require a structured and disciplined approach to sentencing in individual categories of cases. Although some judges initially grumbled, fearing a mechanistic uniformity and an unwelcome encroachment on judicial discretion, I

think almost all, even if not all, would now acknowledge the utility of the guidelines and the welcome promotion of a consistent approach and, in consequence, the achievement of more consistent outcomes. And of course we still have to come – hopefully – the new sentencing code being put forward by the Law Commission.

The theme of this conference has been "Convergence or Divergence": and I should perhaps, albeit with some diffidence, finally say something about criminal justice in Wales. As matter stand, the criminal law in England still is, essentially, the same as the criminal law in Wales. If a young man is unwise enough to commit an assault at that end of the high street of Presteigne which is in Wales, the process and outcome for him will be no different had he committed the assault at the other end of the high street of Presteigne which is in England. The Silk recommendations concerning proposed devolution of aspects of criminal justice in Wales (for example relating to aspects of policing and rehabilitation of young offenders) have not been carried through to the current Wales Bill. It will ultimately be for the politicians to decide how best to deal with this whole matter; a matter as delicate as it is important. The Silk proposals recommend a more wholesale review within 10 years. All I can say is that there is of course an opportunity for change: for both England and Wales. But at the same time we must remember that we have a criminal

trial system in the Crown Court in England and Wales which in terms of its process has, in its fundamentals, proved itself over the centuries. Of course it has evolved; of course it will continue to evolve. My hope is that whatever changes are in store, whether in England or in Wales or in both, the very many admirable features of our criminal trial process are retained. So that whatever changes there may be in the future it may not matter too much, and the process and outcome will not differ too much, for the young man whether he commits his assault at one end of Presteigne high street as opposed to the other.

Lord Justice Davis

The views expressed in this paper are entirely personal to the writer.