Changes and influences on jury advocacy in England and Wales during the second half of the Twentieth Century

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Changes and influences on jury advocacy in England and Wales during the second part of the Twentieth Century.

Abstract.

Alterations in advocacy during the second half of the 20th Century before juries in English and Welsh courts, are considered. Reasons for them included: falling away in the use of Aristotle's ancient order of closing speeches, an enormous expansion in eligibility to serve on juries, following the Juries Act 1974, resulting in major adjustment to the way jurors were addressed and to different allusions and references used by advocates; reduction, and eventual abolition, by the Criminal Justice Act, 1988, of peremptory challenge of jurors; prosecutions conducted in greater measured tones and more methodical and less aggressive defences ; reduced weight given to police evidence by jurors; less heavy drinking by some barristers and the positive effects of this on their performance in court; a rise of plea bargaining and the need to mitigate effectively after guilty pleas; introduction of Social Enquiry Reports and their effect on pleas in mitigation; the need to make, and respond to, submissions arising out of key changes in evidence and procedure.

Keywords: English, Advocacy, Alterations.

Introduction.

An earlier article *The Silent Revolution in Methods of Advocacy in English Courts* [1] sought to explain profound changes that occurred, broadly in the five decades before early 1940s, in advocacy heard before the courts in England and Wales. In this article an attempt is made to describe alterations that affected jury advocacy during the rest of the 20th Century. Explanations for them included: falling away in the use of Aristotle's ancient order of closing speeches, which usually ended with an emotive peroration ; a huge expansion in

[1]Journal on European History of Law, Vol 7/2016 No2, pp 36-47 .

eligibility to serve on juries, amounting to a *democratisation* , following the Juries Act 1974, resulting in considerable adjustment to ways jurors were addressed and use by advocates of different allusions and references; reduction, and eventual abolition, by the Criminal Justice Act, 1988, of peremptory challenge of jurors; prosecutions conducted in greater measured tones and more methodical and less aggressive defences, although the latter was not always being seen in sexual offences cases; decline in weight attached by juries to police evidence; less heavy drinking by some barristers and the positive effects of this on their performance in court; a rise of plea bargaining and the need to mitigate effectively after guilty pleas; introduction of Social Enquiry Reports and their effect on pleas in mitigation; the need to make, and respond to, submissions arising out of key changes in evidence and procedure concerning the exclusion of confessions, when adverse inferences can be drawn from silence to questions put to the accused and from admission of a defendant's bad character. Each of these matters listed is looked at in turn before advocacy in defamation cases during this period , at first sight a remnant of an earlier less restrained and more exuberant age, is briefly considered.

Closing speeches and perorations.

Traditionally, the structure of a speech to a jury had followed Aristotle's ancient order of: Exordium (introduction); Statement (of the issues before the court); Proof (argument supporting one's case and the refutation of one's opponent); and the Peroration, an emotional appeal, which stood quite apart from the rest of the speech [2] . Richard Du Cann QC, writing in 1964, commented on how many modern advocates had appeared to abandon that conventional structure *and followed no order at all to avoid an obvious display of these divisions, which might interrupt the sequence of thought the advocate was trying to induce on his or her listeners* [3]. He also speculated that a reason for doing this was to avoid deciding whether the most important point in the speech should be put first

[2] From observation of surviving counsel's notes, it seems it was common for Victorian and Edwardian advocates to write out perorations in long hand before delivering them. In *Forensic Fables*, first published between 1926 and 1932, based on observations made during his career, Theo Mathew, tells a fable, the moral of which was that barristers for the defence should *perorate* (*The Brilliant Orator Who Won Fame As A Defender* pp. 321). It may well have been based on Marshall – Hall. He does, however, seem to advise, depending on the audience, that peroration,and the traditional division of a closing speech, may not always be effective (See *The Blushing Beginner and The Bearded Juryman*, pp. 57-58 and *The Brilliant Person, The Vulgar Individual With A Cockney Accent And The Two Malefactors* pp. 305- 306). *Forensic Fables*, Reprinted by Wildy and Sons, London, 1999 .

[3] *The Art of the Advocate*, Pelican, Pelican, First Edition, 1964, page 180.

or last. On the diminished use of the peroration, Du Cann wrote: *"...until quite recently it was possible to see counsel winding themselves up into the majestic spontaneity of their carefully prepared final onslaughts on the emotions of the jury"*. Perorations in capital punishment cases were often long and highly emotional. The abolition of the death penalty (effectively in 1965), according to one senior barrister, author and part –time Crown Court Recorder interviewed[4], was important in the overall reduction of blatant appeals to the emotions and theatricality in jury advocacy. Another factor he mentioned was the closure of many Victorian built courts in the 1960s and 1970s. Acting in small modern rooms, well illuminated by electric strip lighting, rather than poorly lit cavernous rooms built in the gothic revival, which were almost stages for melodrama, seemed incongruous and dated [5].

A junior barrister interviewed [6], working in criminal work and mainly instructed to defend, explained that, in her experience, barristers, both for the prosecution or the defence, now order their closing speeches similar to the way judges do in their summing up to juries. The divisions followed are : informing the jury of the role of the judge and the jury; an explanation of the burden and standard of proof; setting out the law and what it is necessary for the prosecution to prove; addressing legal points of evidence , if necessary; and dealing with the evidence. The barrister explained that, when defending, she would conclude by re-iterating the standard and burden of proof. She stated that the approach taken throughout was one of the facts, interpreted and commented upon, sometimes liberally, by barristers, speaking for themselves, rather than relying on theatrical and emotional perorations [7] . In her view, overt appeals to emotion in perorations, and else where in closing speeches, rather than engaging their powers of reasoning , would be badly received by jurors who increasingly see themselves as possessors of facts through very easy access to computer data bases such as *Google*, if not by books. The possibility of somebody involved in the administration of justice sitting on the jury ,who would very rapidly see through what was going on, was also mentioned as

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[4] Geoffrey Robertson QC interviewed 18th April, 2000. Some of the courts closed in the 1960s and 1970s were appreciably older than the 19th Century, for example the Grand Hall at Winchester, built in the Thirteen Hundreds.

[5] On the effect of courtroom design on proceedings in court see Linda Mulcahy, *Architects of Justice: the Politics of Courtroom Design*, School of Law, Birkbeck College. A paper delivered at the W G Hart Legal Workshop 2006 at the Institute of Advanced Legal Studies, University of London.

[6] Interviewed on 7th September, 2007. She had eight years of experience in criminal work.

[7] The description of modern closing speeches given corresponded with observation of cases made at Blackfriars Crown Court, London between 3rd and 5th July, 2007.

a reason not to employ what could be seen as theatricality [8] . A leading barrister, specialising in criminal defence work and who has practiced since 1962, explained that open appeals to emotion and blatant histrionics had disappeared. Advocacy had come to require the much more subtle accomplishment of being able to appeal to widely held stereo typical opinions which might not correspond with the letter of the law. It was often necessary to do so almost subliminally and always essential not to go beyond propriety. Ability to assess what the jury would take was vital. A number of examples of broadly held social attitudes ,to which messages could be directed by stealth, were given. *Buttons which could be pressed*, included women who drink excessively and dress immodestly invite attention and persons assaulting others have only themselves to blame when the response they get from their victims may be more than the violence they used, provided it not entirely out of proportion. Mention was made of a number of prosecutions that had taken place some years ago under the Obscene Publications Act 1959 for producing pornographic films. Most of these failed before the courts, except where children were involved. As a result, proceedings brought by the police are now very rare. Barristers for defendants had successfully appealed to the broadly held view amongst jurors that, whilst they would not want to view such films themselves, what adults wanted to watch in private was their business [9] .

Democratization of juries .

After 1919 both men and women [10] could serve as jurors but it was necessary to meet a property qualification [11]. Consequently, as one judge, Lord Devlin, recognized, juries were

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[8] In April, 2004, lawyers judges and police officers became eligible to serve as jurors as a result of Schedule 33 of the Criminal Justice Act, 2003 coming into force.

[9] Interview with Anthony Arlidge QC on 30th October, 2007. Mr Arlidge also stated even before judges sitting in appellate cases, without a jury, it was sometimes possible to subliminally appeal to concerns going beyond the limits of the immediate case.

[10] Probably expressing the then conventional wisdom of counsel and judges on the effect of female jurors, A J Ashton, then the Recorder of Manchester wrote in 1924: *Cases seem to take longer when women are on the jury. There is a class of case, which lasts an hour or two, which men dispose of promptly. But women seem to want to talk it over and hear other views, so that they often go out to consider their verdict. The men never object to this ,as they can smoke in the jury room. But we are often well into the next case before they come back with an obvious verdict. Women are less willing than men to find a man guilty, and inclined to be hard on a woman, especially if she is good-looking. They seem to have a curious difficulty in accepting the evidence of a constable. Perhaps it seems too good to be true……. I have noticed that the unmarried woman is often too nervous to do more than agree with the majority; and this is often useful* . (*As I went on my way*, Nisbet and Co, London, 1924, pp. 254 – 5).

[11] A juror from the City of London had to be a householder, or the occupier of premises, or the owner of land or personal estate valued at £60 per year. Jurors in the County of London had to reside in

predominantly male, middle aged, middle minded and middle-class. Following the 1965 Morris Report [12], which concluded that a jury should as far as possible be a genuine cross-section of the adult community, the Juries Act of 1974 swept away the property condition for jury service. The only general qualification for inclusion on the jury panel became registration on the parliamentary or local government lists of voters. This led to a huge change in the make up of juries. The average age of jurors fell and persons became eligible to sit on a jury at 18 years of age. The proportion of women increased, as did that of the working classes. It is estimated that the Act increased the number of potential jurors from eight million to thirty million [13] . Faced with juries of a wider social composition, some of the barristers interviewed said they had intentionally altered their approach in addressing jurors and were careful to use plain words wherever possible. In the opinion of one barrister, who recalled the reform, this had enhanced the clarity and effectiveness of advocacy, rather than reduced it [14] . A former House of Lords Judge interviewed [15] ,said that many, though not all , barristers who changed their style in the 1970's were anxious to avoid appearing patronizing to jurors or under-estimating their intelligence.

Following what might be described as the democratization of the jury, more barristers began speaking in ways less resembling Received English Pronunciation ("RP"). The aim, as one put it, was to appeal more to the common man and woman. The trend continued. That RP is used less today, although still perhaps the most frequent pronunciation heard, reflects both a widening of the Bar's social base, which began to grow in the 1970's together with the number of barristers, and a general decline in that form. This accelerated in the 1990s particularly amongst younger people, many of whom, especially

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premises of net annual value above £30. Elsewhere they had to live in premises with a £20 net annual value.

[12] Lord Morris Committee on Jury Service. (1965) Cmnd. 2627

[13] John Hostettler, *The criminal jury old and new: jury power from early times to the present day*. Waterside Press, 2004, page 125.

[14] Richard DuCann, *The Art of the Advocate*, Penguin, Revised Edition, 1993, page 29, assessing the consequences of the abolition of the property qualification, wrote that juries became much less susceptible to advocates *"whose weapons, words, and the use they make of them, have not changed at all"*. A Queen's Counsel who was interviewed on 19th May, 2007, said that it had certainly consigned to history the approach taken by the prosecution during the trial, in 1960, of the publishers of D. H. Lawrence's *Lady Chatterley's Lover*, who were charged under the Obscene Publications Act 1959. In a closing speech, which was considerably criticized at the time for being out of touch, leading prosecution counsel, Mervyn Griffith – Jones, asked the jury if this was the sort of book *you would wish your wife or servants to read?* . Not only did he count the number of times sexual intercourse had taken place in the novel but translated Phallus *"for those who had forgotten your Greek"*.

[15] Lord Woolf 27th June, 2007.

in the South East of England, prefer “estuary English”, the use of which makes it more difficult to identify the class and geographical origin of the speaker [16] . The great increase in ethnic diversity in Britain, especially in London and the other large cities, has led to more accents being heard in court advocacy. A solicitor interviewed [17] reported that certain barristers, who recognize jurors from similar minority backgrounds to their own, occasionally use words and phrases , speech patterns and rhythms in their closing speeches to strengthen their appeal to them. She also spoke of a decline in use of RP by advocates in the magistrates’ court and a rise in accents originating overseas.

Barristers of senior call, said that they deliberately used briefer sentences than earlier in their careers when addressing juries and, whenever possible, avoided subordinate clauses and parenthesis. They explained this was because short sentences are by far the most used in newspapers, magazines, contemporary novels and, above all, in television and films. Perhaps exaggerating somewhat, one barrister spoke of the imminent arrival of almost "sound-bite advocacy". There was general agreement that the average person's concentration span had fallen, mainly because of the effect of television[18]. Some commented that this was an important reason why final speeches had shortened and why more emphasis is now placed on cross-examination in jury trials. A recently retired Circuit Judge [19] said that juries, like judges, prefer it *clear and concise* . Jurors wanted to go home. He hazarded that, in many cases, an advocate who took twenty minutes for a closing speech would succeed over an opponent whose lasted an hour .

The movement towards conversational, rather than declamatory, advocacy in closing speeches continued. Over the last two decades the practice of reading a prepared speech to a jury has been abandoned almost entirely: Spontaneity, or the appearance of it, and *chattiness* , though necessarily one way, become popularly equated with sincerity [20].

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[16] On the fall in RP generally, see Kirsten Sellars, *We wanna talk like common people,* Daily Telegraph, 21st June, 1997 ; *Where are the gels who can talk proper?* The Times, July, 23rd 2007 and also the Leading Article of that date; and Melvyn Bragg, *RP RIP*, BBC Radio 4, 6th August, 2011,which observed the decline of R P alongside an increasing pride in regional accents. One barrister interviewed said of a younger recent opponent in a criminal jury trial that *her voice slid from Home Counties English down to the lower reaches of the Thames estuary and back in the course of a single sentence.*

[17]. Interviewed on 12th March, 2006. She appeared in magistrates’ courts in central London and instructed counsel to appear in the Crown Court

[18] Mr. John Cooper, a criminal barrister and a member of the Bar Council, in an interview in the *Times*, October 21st,2009, said: *There is no doubt that the ability of the public to appreciate lengthy speeches and oratory has declined over the years. As a society we no longer listen to sermons and speeches at public meetings in the way that we would 100 years ago, before the advent of multimedia. As a result, advocates had to alter their style and the fashion for florid and colourful advocacy of even two decades ago had diminished.*

[19] Interviewed 25th July, 2007

[20] Interview with Anthony Arlidge QC held on 30th October, 2007.

In an episode of the BBC series *Brief Encounters* [21] , the broadcaster and legal commentator, Marcel Berlins, emphasized how much the modern jury differed from that of earlier times. In his view people were more educated about events because of television. They are also less deferential. It is said that society in general is now less respectful of status and office than formerly. Some identify this change as originating in the 1960s [22] . Ann Rafferty QC, a distinguished criminal barrister who contributed to the BBC programme, said jurors were drawn from the *I know what I am entitled to culture*; metaphorically they no longer look up to barristers but peer across at them. This appears to be widely appreciated by modern advocates who consciously avoid any appearance of looking down at and patronising juries.

References and quotations.

References to, and quotations from, Shakespeare [23], the Greek and Roman myths and classics, poetry, Dickens, Sir Walter Scott and other famous authors of English literature seem to have been quite prevalent as late as the 1960s, as was mention of historical events by advocates. In an interview, one retired barrister said that Shakespearean quotes and references would have been comprehended by *40 per cent* of those serving on a pre 1974 jury, whilst the others would pretend that they understood. Greco-Roman classics and myths on the other hand would in his estimation have only reached about *10 per cent* of jurors.

A short article in the *Criminal Law Review* in 1967 cited press reports in which judges and counsel had variously likened defendants and other parties to Macbeth, Lady Macbeth, Iago, from "*Othello*", and John Ridd, from R D Blackmore's historical novel "*Lorna Doone*" . Observations had also been made that certain parties had not been

[21] Repeated on Radio 4, shortly after the death of George Carman QC in 2001.
[22] Anthony Arlidge QC considered that satirical television programmes, which gripped Britain in the 1960's, such as the hugely popular *That was the week that was*, much eroded almost automatic respect and deference for politicians. This spread to other figures in the establishment including judges, seen before as wise but terrifying figures, and barristers, previously held in awe. Mr Arlidge was of the view that this had been replaced by public fascination in barristers and an expectation they would be good with words. Interview on 30th October, 2007. On the decline of deference and increased questioning of authority in Britain see Samuel H. Beer, *Britain Against Itself : The Political Contradictions of Collectivism*, Norton, New York, 1982, Chapter 3. The phenomenon, though the causes may have differed somewhat, was not restricted to Britain.
[23] On lawyers' allusions to Shakespeare, see O.Hood Phillips, *Shakespeare and the Lawyers*, Methuen and Co, 1972, chapter 11.

brought up in accordance with the principles of Dr Arnold of Rugby School and their standards were not those defined by the 19th Century public school headmaster and writer Dean Farrar in *"Eric", or "Little by Little"*. As it appeared that the average juryman required a fair measure of literary erudition, the article, perhaps a little humorously, asked whether in addition to being predominantly "male, middle-aged, middle-minded and middle class jurors" ought also to be well read [24].

If Richard DuCann can be seen as representative, even before the composition of juries was reformed, barristers seem to have been aware that references and quotations could be overdone, as could other oral seasonings. In the first edition of his book, *The Art of the Advocate*, published in 1964, Du Cann wrote : *the use of hyperbole, metaphor , simile , inversions of language , parallels , and allegories should be carefully controlled. Arguments should seem to rely more on force of logic than extravagancies of language* [25].

Socially inclusive juries, where the educational backgrounds and literary interests of many members were not at all similar to those of counsel and the judges, and changes in the curriculum of schools, which gained momentum from the 1960's [26] , even in private

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[24] 496 [1967] Crim.L.R. In a concession to contemporary times, it was reported that a reference to James Bond had also been made. Judges dealing with pleas in mitigation, especially if advocates knew they had an interest in literature and Shakespeare, occasionally might encounter quotes or allusions to Portia's speech from the Merchant of Venice (Act IV Scene 1) with its appeal to mercy and praise for who shows it. A QC, interviewed on the 4th February, 2010, said that, in his opinion, many pre- 1974 Juries Act jurors, who were often more socially deferential, and received less formal education than barristers, expected to be entertained by a display of literary erudition from an educated person, presumed to be from a superior social class, and would have been disappointed if they did not.

A 1940 survey of reading in non academic high schools, where pupils would have left at 14 showed that 62% of boys and 84% of girls had read some poetry: their favourites included Kipling, Longfellow, Masefield, Blake, Browning, Tennyson and Wordsworth. 67% of girls and 31% of boys had read something by Shakespeare. (See Jonathan Rose, *The Classics in the Slums*, City Journal, August, 2004.)

The survey suggests the suitability of literary allusions made by barristers to middle aged jurors, as reported in the Criminal Law Review article of 1967. Many jurors, because they were usually middle class and remained at school longer, would have had greater knowledge of English literature than those in the 1940 survey. On the importance at elementary school between 1870 and 1940, of reciting poetry, as part of English instruction, see Catherine Robson, *Everyday Life and the Memorized Poem*, Princeton University Press, 2011.

[25] Richard DuCann, *The Art of the Advocate*, Penguin, 1964 , pp. 179 – 180.

[26] Robert Graves in the Introduction to his *The Greek Myths*, first published in 1955, wrote *….the Classics have lately lost so much ground in schools and universities that an educated person is now no longer expected to know (for instance) who Deucalion, Pelops, Daedulus, Oenone, Laaocoon, or Antigone may have been*. (*The Greek Myths*, Combined Edition, Penguin, 1992, page 11.) The National Curriculum, introduced in England and Wales in 1988, made no reference to classics, once at the heart of British high culture. Jeremy Paxman, author and television interviewer, reviewing *University Challenge*, a quiz programme screened since 1962 and for which he has been question master for the last 16 years, considered that today's students know less about classics : *It's interesting to see how, as years go by, they know less and less about classics and the Bible and more and more about science and computing*. (Daily Telegraph, 11th August, 2010, *Students have lost touch with classics, says Paxman*.)

and public schools attended by many advocates, led to a decline in allusions to and quotations from literature, references to historical events and other garnishments. A retired barrister interviewed said the last thing he wanted to do was to appear elitist or remote in front of the jury. Whereas before the reform of the jury their use may have helped jurors identify with him, afterwards they became a barrier. To a limited extent, he recalled, that they could still be used for some years before juries in more middle class London suburban areas such as Kingston.[27]

Whilst verbal condiments offered by lawyers to juries became rarer, they continued to be served for years to certain stipendiary magistrates, who appreciated them, in London, and possibly other large cities. Thirty years ago most stipendiary magistrates were barristers, who had often attended public school and many at Oxford and Cambridge Universities. Occasionally it was said that some owed their appointments to being well connected, rather for outstanding talent at the bar. Some would make quotations in Latin; Greek was not unknown but was highly exceptional. References to literature, poetry and sport were also made. Why they did this can possibly be explained by their backgrounds, boredom after a few years on the bench, and, as was suggested by a Lord Justice of Appeal ,[28] in an attempt to differentiate themselves from defendants in their courts.

The legal historian and writer, James Morton [29], who as a criminal solicitor regularly appeared before the Magistrates' Courts in inner London, described how one stipendiary had a great regard for Horace and Virgil. As a result, lawyers might have excerpts from their works snapped at them. Extravagant mitigation, for example, could be met with "*Vitae summa brevis spem nos vetat incohare longam"* (life's short span forbids us entering on far-reaching hopes). Another spoke, in English, of the "*sword of Damocles"* [30] , when dealing with a suspended prison sentence, of the "*labour of Sisyphus"*[31] in the context of court orders, such as probation and community service, that

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[27] Interviewed 2nd April, 2007. Five years after the Juries Act 1974, Brian Gibbens QC advised young advocates against *straining to introduce literary allusions*. Brian Gibbens. *Elements of Modern Advocacy,* New Law Cassettes, Butterworths, London, 1979. Very unusually these days, Anthony Arlidge QC, a noted scholar and author on Shakespeare, said that he occasionally used quotes from Shakespeare and Oscar Wilde but would go to great lengths to make sure jurors comprehended them and why he was doing so. Interview on 30th October, 2007. Gilbert Gray QC (1929-2011), an eminent and eloquent advocate before juries, who sometimes appeared in the same cases as him, never shrank from theatrical courtroom gestures and would often quote poetry or Shakespeare.

[28] Interviewed on 18th July, 2007.

[29] Interviewed on 16th July, 2007.

[30] See Cicero: *Tusculan Disputations V,* XXI [61].

[31] Robert Graves, *The Greek Myths,* Combined Edition, Penguin, 1992, pp. 216-220.

had failed and of a frustration rivaling that of "*Tantalus*" [32]. One stipendiary had a deep interest in poetry and often quoted John Betjeman. Allusions to horse racing, and even hunting, were made by an Irish stipendiary, whilst another, fluent in the language, used Italian whenever any opportunity arose. In order to be as persuasive as possible, solicitors and barristers would try to adopt the language, quotes and allusions made by stipendiary magistrates. James Morton described how some would go beyond that by learning replies in Latin or Italian that could possibly be made and suitable references to the classics and poetry, ancient and modern. Their efforts were very often welcomed and in some instances, he was sure, affected decisions made and sentences passed, even to the extent of whether someone went to prison. Mr. Morton recounted how a new generation of stipendiaries (now referred to as District Judges) appointed in the 1980's had no interest in ornate advocacy from lawyers , preferring plain words throughout. The last of the *old school* retired at the beginning of the 1990s. With them went what remained of the flamboyant advocacy employed by solicitors and barristers in the London Magistrates courts [33] .

Allusions are still made in court but before juries are mostly likely to be from up-to-date culture such as television, films and newspaper stories. This is hardly surprising when the power of the mass media in everyday life is considered. As it was put in an American article on the subject:

"Mass media has brought its stories into our homes and into our hearts. Contemporary mass media provides the central frame of our cultural reference for our conversations and our fantasies. When we tell our own stories, they often involve encounters with media celebrities. When we recount our fantasies, they often involve fictional characters from our favorite films or television shows. When we start to speak with our friends catch

[32] Robert Graves, *The Greek Myths*, Combined Edition, Penguin, 1992, pp. 387-393.

[33] It was reported, by a solicitor interviewed, on 12th March, 2007, that advocates now, as in the past, adopt somewhat different approaches to magistrates who are District Judges (Stipendiaries, professional judges) and the great majority who are not. Most often, District Judges do not require opening speeches from the prosecution in trials. Closing speeches by advocates for the defence (prosecutors are not normally allowed one in summary trials) concentrate on the facts in dispute rather than the law, which it is assumed is more than understood by the District Judge. In front of lay magistrates, the pace of examining witnesses is slower and closing speeches concentrate on the law and the evidence. They may also be somewhat more susceptible to restrained appeals to emotion. Many advocates structure their closing speeches in the order that magistrates deliver their judgements: the offence; areas of evidence not in dispute; areas in dispute and findings upon them.

phrases from contemporary sitcoms and commercials roll off our tongues, much as Shakespeare and the Bible fell easily to the lips of an earlier generation Let's face it— media culture is our culture……" [34].

A retired Circuit Judge[35] said, from what he had observed, advocates needed to be very careful, when going beyond the common denominator of contemporary mass culture, in making allusions to and quoting from literature. This was particularly so because of the diverse ethnic mix of many juries in London and other large cities. Danger lay in some jurors, because of their different back grounds and education, (they may well have been educated abroad and in languages other than English) being completely bewildered, distracted and left feeling apart. Thought had also to be given to references to history which might not be understood [36] , or even found offensive.

Peremptory Challenges.

For most of the 20th Century barristers on behalf of defendants could challenge potential jurors without giving any reason in an attempt to obtain a sympathetic jury. In 1925, the number of such challenges, known as peremptory challenges, was reduced from 25 to 12. The number was limited in 1949 to seven (or seven for each defendant where two or more were tried together) and in 1977 , by the Criminal Law Act of that year, fixed at three. The long standing right of peremptory challenge was abolished altogether by the Criminal Justice Act, 1988 [37], on the grounds that it ran against the important principle of random selection of juries [38]. Senior barristers interviewed [39] explained that being able to assess potential jurors, which could have a great bearing on the verdict, was considered an important part of being an

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[34] Unidentified author, published on Massachussets Institution of Technology website: http//web.mit.edu

[35] Interviewed 25th July, 2007.

[36] One the conclusions reached by Sir David Cannadine, who led a two year research project at the Institute of Historical Research, London University on the teaching of history in English state secondary schools during the past century, is that since changes in history teaching in the 1960s and 1970s away from the subject as a national narrative, and because history is no longer compulsory from the age of 14, many adults today would struggle to recognise characters from British history.(*The Red Bits Are British*, October, 15th 2011, BBC Radio 4, Archive on 4.) This may well help to explain why they are no longer usually referred to by advocates in speeches to jurors.

[37] Section 118.

[38] The prosecution still has the right to 'stand by' a juror without showing cause and with no upper limit, subject to guidelines issued by the Attorney General in 1988.

[39] On June 21st, 2006 and on 2nd April, 2007.

advocate. Up until 1991, when the provision in the 1988 Act came into effect, if there were four defendants, in a 'multi-hander' it was possible to change the entire composition of the jury. Full exercise of the right by both counsel where two defendants were concerned could alter it by half. In many cases the object of using peremptory challenge appears to have been to remove people thought of as middle class in the stereotypical belief they might be more prosecution minded. The way people dressed was important in making decisions, as were any newspapers or books they were carrying. Some barristers looked as closely as they could at a potential male juror's hands . If they were smooth this was an indication that he was not in manual employment. One senior barrister interviewed remembered one of the first cases he defended before a jury in the 1960s . A co-defendant was represented by another somewhat more experienced counsel who, when he saw a smartly dressed man with a copy of *The Times*, said, very firmly, *" at all costs we have got to get rid of him. He looks far too intelligent!"*[40]. Proposals to abolish peremptory challenge were resisted by many barristers at the criminal bar and it was missed when the right was taken away in 1991

Less ferocity.

Senior barristers and a Lord Justice of Appeal interviewed agreed that prosecutors had become less ferocious. Even in the 1970's they recalled that it was not unusual for defendants to receive a savage onslaught from counsel. In the opinion of a Lord Justice of Appeal [41], counsel acting for defendants were now generally less aggressive and more methodical [42] .However a distinction was drawn with rape cases where some barristers still humiliate alleged victims and witnesses. He spoke of having to reprimand a barrister six times during one trial for such behaviour. In his opinion, a sub-culture persists in which local solicitors will brief known aggressive counsel. This contrasted with the practice of the Crown

[40] Interviewed on June 21st,2006.
[41] Interviewed on the 11th July, 2007 (Lord Justice Sedley).
[42] Judge Case, a Circuit Judge and Treasurer of the United Kingdom Women Judges' Association, who had begun her career as a barrister in the early 1970's, interviewed on the 15th May, 2009 at the College of Law Bloomsbury, expressed a similar view. When asked if he had observed a like change in Scottish criminal advocacy, Lord Mackay (Lord Advocate of Scotland 1979 – 1984 and Lord Chancellor of England 1987 – 1997), who began appearing in courts from the mid – 1950's, said it was his impression that advocacy had always been less aggressive, hectoring and blustery than south of the border and in this respect had not changed greatly. He said advocates and solicitors preferred to show a witness was untruthful by their line of questioning rather than calling him or her a liar (Interview at House of Lords, 10th December, 2008).

Prosecution Service who frequently instructed sympathetic barristers, principally for the sake of the alleged victims.

Decline in weight given to Police Evidence.

There was agreement amongst senior lawyers and judges interviewed that juries, and also many magistrates, examine evidence given by police witnesses much more thoroughly than they did some decades previously, when there was much confidence in the police. Police officers were seen as public servants who gave evidence dispassionately and neutrally in court. Decline in weight attached to police evidence was said to be principally caused by police mal-practice and fabrication of evidence revealed in successful appeals arising from a number of high profile cases. Defendants convicted in the 1970's, but not acquitted on appeal until many years later, included the "*Guildford Four"* [43] and the "*Birmingham Six"* [44]. In preparing and running cases on behalf of defendants advocates would once try to depart from police evidence as little as was absolutely necessary, mindful of the credibility given to it. Because jurors and magistrates are now often much more likely to approach testimony of police officers with caution, their evidence is challenged more frequently in trials. Contrary to the past, advocates for the Crown are now less confident of securing convictions on police evidence alone and where there is evidence in addition to that from the police they will seek to emphasise it, especially in closing speeches [45].

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[43] See Robert Kee, *Trial and Error, the Guildford pub bombings and British Justice*, Hamish Hamilton Ltd, 1986.

[44] See Louis Blom – Cooper, *The Birmingham Six and other cases*, Gerald Duckworth and Co Ltd, 1977. Pressure on suspects to confess, and other illegal activities carried out by the West Midland Serious Crime Squad, were also much reported in the 1980's . Geoffrey Robinson QC recalled another source of skepticism about police evidence : The popular television series Rumpole of the Bailey, written by John Mortimer QC and first shown in the 1970's. Alerted in many episodes to the possibility of it occurring in interviews that were then neither tape recorded or videoed, Old Bailey juries began to throw cases out where they suspected police forensic trickery. *The buzz in the Old Bailey robbing room was that Rumpole was the reason*. Geoffrey Robertson, *Rumpole of the Bailey: the very incarnation of English liberty.* The Times, January 17th, 2009.

[45] Lord MacKay described increased skepticism towards police evidence, a feature he saw as common to both Scotland and England, as a very major change during his career and one which has had major effects on the way advocates conduct trials. Lord Justice Goldring, interviewed at the Royal Courts of Justice on the 30th April, 2009, considered an important reason why juries now often retire for longer periods before announcing their verdicts than they did when he began his career as a barrister in the late 1960's was that jurors became less trusting not only of police officers but of the Crown Prosecution Service, barristers acting for the Crown and judges as well. Reflecting society more generally, he saw jurors as less willing to make judgements on the conduct of others.

Plea Bargaining.

Senior barristers interviewed recalled that it became necessary for counsel to become proficient in plea bargaining, a practise hardly acknowledged to exist in English and Welsh courts until an important and controversial study at the Crown Court in Birmingham during the 1970s [46]. In England and Wales, plea bargaining has three meanings: an agreement between the judge and the accused that if a defendant pleads guilty to some or all of the offences charged against him the sentence will or will not take a certain form; the prosecution agreeing with the defence that if the accused pleads guilty to a lesser offence they will accept the plea; and the prosecution agreeing not to proceed on one or more counts in the indictment against the accused if he or she will plead guilty to the remainder [47] . Plea bargaining in the last two meanings became a frequent occurrence, approved by the courts. The bargain is usually struck by prosecution counsel and defence counsel outside court before the start of the trial. In practical terms plea bargaining led to fewer trials for advocates and more emphasis on delivering persuasive pleas in mitigation.

Social Enquiry Reports and Pleas in Mitigation.

The introduction of Social Enquiry Reports in the late 1960s [48] had an effect on pleas in mitigation. Produced by the Probation Service (or social services departments if a juvenile was involved) , they were intended to assist judges and magistrates, who had power to order them, in deciding how to deal with an offender. They contained much about a person's home life, work history, previous offending, attitude to present offences and often included a recommendation for sentence. Judges usually read the reports before coming into court or, if they had not, would do so before counsel started to mitigate.

Reports gave barristers and solicitors additional information. Sometimes this led to clients being asked to clarify certain areas and to give their views about recommendations made in

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[46] John Baldwin and Michael McConville, *Plea Bargaining and Plea Negotiation in England*. Law and Society Review, Vol. 13, No2 Winter 1979, pp.287-307.

[47] John Sprack, *A Practical Approach to Criminal Procedure*, 11th Edition, Oxford University Press, 2006, pp. 284 – 287.

[48] Under Section 57 of the Criminal Justice Act 1967- see David Haxby, *Probation a changing service,* Constable, London, 1978, Chapter 6. About this time the entitlement of a defendant to speak before he or she was sentenced was abolished. Following extensive reforms of court sentencing brought into being by the Criminal Justice Act 1991, Social Enquiry Reports became known as Pre-Sentence Reports. Their content and format became more prescribed, as did the circumstances when they were ordered.

them. Consideration of reports often suggested lines to follow in making pleas. Information presented in a report could result in pleas being shortened. When judges agreed with recommendations contained in a report they would indicate to counsel that their pleas could be brief. Counsel and solicitors interviewed said that some judges and magistrates would become irritable if they felt lawyers were merely reading out what was in the report and would say things like, "*I have read that"* or , even, "*I can read too!"*. Too avoid this, it came seen as wise to refer judge to the relevant paragraphs rather than quote from them, unless there was a very good reason to do so. A senior counsel interviewed [49] spoke of problems that arose when a Social Enquiry Report made an unrealistic recommendation, usually for a non-custodial sentence. In these circumstances counsel had to use what was useful in the report whilst carefully keeping away from that which, if pressed, could well have been harmful [50] .

On pleas in mitigation, the junior barrister interviewed , who specialised in defence work [51], said that the scope for creativity - suggesting certain courses of action and asking for credit for aspects of a person's history - had been reduced when dealing with some offences where minimum sentences have been introduced in recent years.

Accommodating key changes in law and procedure.

When asked about other major influences on advocacy in the closing decades of the last and the beginning of this century , a number of barristers mentioned the need to accommodate three key changes in the law of evidence and procedure.

Under the Police and Criminal Evidence Act 1984 a criminal court must exclude from evidence a confession by an accused if it has been obtained by oppression , or as a result of something said or done which is likely to render it unreliable [52]. Also under the Act evidence generally, including confessions, may be excluded , in the court's discretion, to ensure a fair

[49] Interviewed on 10th April, 2007.
[50] As advocacy in the criminal courts adjusted to Social Enquiry Reports, from the 1960's practitioners in the courts dealing with family matters had to have regard to reports written by social workers on the welfare and custody of children.

[51] On the 7th September, 2007.
[52] Section 76.

trial [53]. The ability to make submissions on these sections became crucial in advocacy before the magistrates and Crown Court.

Secondly, submissions under the Criminal Justice and Public Order Act (CJPO) 1994 also became essential. Before the CPJO 1994, the silence of an accused in an interview could not be used as evidence against him at trial. The Act weakened the right to silence by providing that adverse inferences may be drawn against the accused in certain circumstances from his or her failure to mention certain facts, to account for possession of certain objects, substances or marks, or to account for his or her presence at certain places [54].

The third change cited as greatly affecting criminal advocacy was the Criminal Justice Act 2003. Prior to this legislation coming into force, a defendant could be cross-examined on his or her previous convictions only if he or she attacked the character of the prosecutor or his or her witnesses. The circumstances in which an accused's bad character may be admissible were expanded under the Act [55] . Given the generally accepted negative consequences of revealing a defendant's bad character, especially to a jury, submissions on admissibility are of great importance in trials. If admitted, advocates for the defendant now have to consider calling evidence about previous convictions that would reduce their relevance to offences presently alleged and also how to minimise their impact by comment in closing speeches [56]. These, and other changes, led to more preliminary applications to judges on points of law, before a jury was empanelled[57].

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[53] Section 78.
[54] Sections 34, 36 and 37. See Peter Murphy, *Murphy on Evidence*, Ninth Edition, 2005, Chapter 10.
[55] Section 101. See Murphy, *ibid*, Chapter 6.
[56] Anne- Marie Critchley, 7th September, 2007.
[57] In the opinion of Lord Bingham of Cornhill, then Senior Law Lord, the increase in preliminary applications on points of law, including abuse of process, was a notable development in advocacy during the closing decades of the 20th Century. Interview on 23rd October, 2007. Lord Justice Goldring, interviewed on the 30th April, 2009, explained that applications concerning admission into evidence of bad character have risen while the number of application to exclude confessions have fallen because of audio taping or videoing interviews in police stations.

Heavy drinking and boredom.

The impression of a number of interviewees was that heavy drinking by barristers, an aspect of the Bar for generations, but seldom discussed, had declined over the last two decades. Excessive consumption of alcohol had, in their view, impaired the quality of some advocacy, especially after lunch , and reduced time for effective preparation of cases, particularly those received the night before.

It was said in an interview with a solicitor [58] , who frequently instructs counsel in the Crown Court, that sometimes barristers, to relieve boredom felt in some cases, will decide on a theme for the day, for example golf, and compete with each other as to who can make the most references to it in proceedings. It is impossible to say how widespread this practice is.

More Hastings than Birkett?

Some years ago a former Attorney General, said that much forensic oratory was now delivered like a chartered accountant reading a Sunday church lesson. Whilst many would regard this as an exaggeration, it is beyond doubt that advocacy to persuade juries, for a number of reasons, chief amongst them being the need for advocates to speak in the language of time, was shorter, plainer and more direct at the start of this century than it was at the beginning of the last. Very broadly speaking, and usually without the bullying sometimes associated with him, the direct and forcible style favoured by Sir Patrick Hastings during the first half of the 20th Century has eclipsed that of Lord Birkett, with its greater concern for the graces and literary heritage of English. This does not mean, however, that some histrionic ability amongst advocates is considered unnecessary. Speaking about modern jury advocacy, a retired High Court judge [59] said that in his experience jurors expected a bit of style, not dreariness, and wanted to be charmed, without being patronized. In his view, as much care as an actor should be taken in pitch, speed of delivery and pauses to accentuate points, convey and invite interest. According to him, constant movement of the eyes to scan the jury to make each member feel important was vital. His views echoed those of Sir James Stirling, then a judge in the High Court, written thirty years before in *Verdict*, the Journal of the Oxford University Law Society:

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[58] Interviewed 20th August, 2007.
[59] Interviewed 24th July, 2004 .

"To some extent the same technical equipment is necessary to both professions. Voice, diction, variation of pace, stress, the effective pause,are necessary weapons in both armouries. The actor studies these things deliberately; the advocate is largely let to make use of them by instinct and acquired experience. A too conscious artifice on the part of counsel would probably distract him from the main task, which is to marshall his material: but even good material can be reduced to excruciating dullness by poor delivery or a complete lack of dramatic instinct. Even a wholly juristic argument must be given some " bite " if it going to be listened to easily" [60] .

Later in the article Sir James Stirling advanced the thesis that changes in advocacy curiously corresponded with those in styles of acting. This view was put to Anthony Arlidge QC who said that parallels could certainly be drawn with the stage over the last three decades which had seen the falling away of *Lawrence Olivier* Shakespearian acting, with its unevenly paced and highly stylised delivery, involving hard emphasis on selected words, and the rise of a more naturalistic and conversational form[61].

Advocacy in defamation cases – a remnant of an earlier age?

Trials of civil defamation actions before a jury number very few each year but they often attract much publicity. It is probably correct to say that more vivid and entertaining advocacy, frequently with heaps of sarcasm and ridicule, is employed in these matters than anywhere else [62]. These trials, in some respects, appear as survivors from an earlier, more unrestrained and exuberant period. However, beneath the forensic extravaganza usually lies much greater preparation in cross-examination and closing speeches than in earlier times. George Carman QC, who died in early 2001, was recognized as the outstanding advocate in defamation trails [63]. When asked, he stressed that real spontaneity in addressing juries was a thing of the past. To him, painstaking effort beforehand to coin phrases and choose words carrying

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[60] *Verdict*, Oxford University Law Society, Hilary, 1966, VOL 2. NO 1. page 8. On ability through voice to convey and invite the interest of jurors, it was said of the late Richard Ferguson QC "*that he had the kind of voice that could read the jury the telephone book and they would listen"*. Obituary, Times, 30th July, 2009.

[61] Interviewed on 30th October, 2007.

[62] Judges, to the delight the press, are sometimes said to go along with these spectacles by asking barristers to explain things, sometimes of an embarrassing nature, that they already know. Interview with retired Circuit judge , 25th July, 2007.

[63] See Dominic Carman, *No Ordinary Man: A Life Of George Carman Q. C.,* Coronet Books, Hodder and Stoughton, 2002.

emotional over-tones and great attention to detail was crucial. In this, his admirers compared him with Cicero and Quintillian He also had theatrical ability. Like the playwright Harold Pinter, George Carman in court, according to Marcel Berlins "*was a master of the pause, allowing a witness's dubious answer in cross examination to remain in the air for a while, giving the jury a chance to savour it, before pouncing on it and exposing its shortcomings"* [64].

Conclusion.

This article has endeavoured to outline changes to advocacy in jury trials in England and Wales during the last half of the 20th Century. In the first two decades of this century such advocacy faces accommodating increased employment of expert witnesses in trials; the use of special measures for vulnerable and intimidated witnesses and of witness protection orders in trials of serious and violent offences; submission of written skeleton arguments to judges on complex questions of law; victim impact statements; the prospect of trials without juries in complex frauds and where there is a risk of jury tampering; and the danger of jurors unlawfully conducting research on the internet on matters in trials.

[64] Marcel Berlins, *Writ large,* The Guardian, January 8th, 2001. Commenting on the style of George Carman, Anthony Arlidge QC said it was surprisingly declamatory in an age of conversational advocacy. Interview on 30th October, 2007. When interviewed at his chambers, on 30th July, 2009, Michael Beloff QC, spoke of cases in which he had appeared in defamation trials against George Carman. He said it was noticeable that when matters of law arose George Carmen would hurriedly turn to his juniors for advice. At first Michael Beloff was mystified by this, knowing that his opponent had obtained a first class degree in law and generally shone brightly at Oxford University, but then concluded he had *deliberately purged himself of his knowledge of law in order to find the same wavelength as his audience of jurors.*