

JURY TRIALS DURING “LOCKDOWN”: AN OVERVIEW

Introduction

The 23rd March 2020 saw the UK enter “lockdown” following the outbreak of Covid 19. The subsequent imposition of the Coronavirus Act 2020 and the decision to halt jury trials has led to a national discussion regarding the use of Diplock Courts and alternative methods during the “lockdown” period. This article outlines the current position in respect of jury trials, the history of Diplock Courts and addresses the competing views as to their application during this period. The article also considers alternative solutions for the commencement of jury trials in those courts currently deemed ‘unsuitable’.

Current Position

On 11th May 2020, the Lord Chief Justice¹ and the Lord Chancellor² issued statements regarding the resumption of jury trials. The statements confirmed that a limited number of jury trials would resume in certain courts. The two courts identified were the Old Bailey in London and Cardiff Crown Court. It was stated that trials would be conducted safely whilst observing social distancing rules. Since the announcement, several other courts have been identified as venues in which limited jury trials can re-commence. I understand that those courts are Bristol, Reading, Warwick, Winchester and Manchester Minshull Street.

Despite the Old Bailey being deemed suitable for trials, on 13th May 2020 Mrs Justice Cheema-Grubb ruled that the trial of a couple accused of murdering a man with "devil's breath" poison, would be too long and complex and would not be compatible with the strict Covid-19 guidelines³. Those guidelines are due to come into effect in courtrooms on 18th May 2020. The impact of this decision on those trials which are also scheduled to take place is currently unknown.

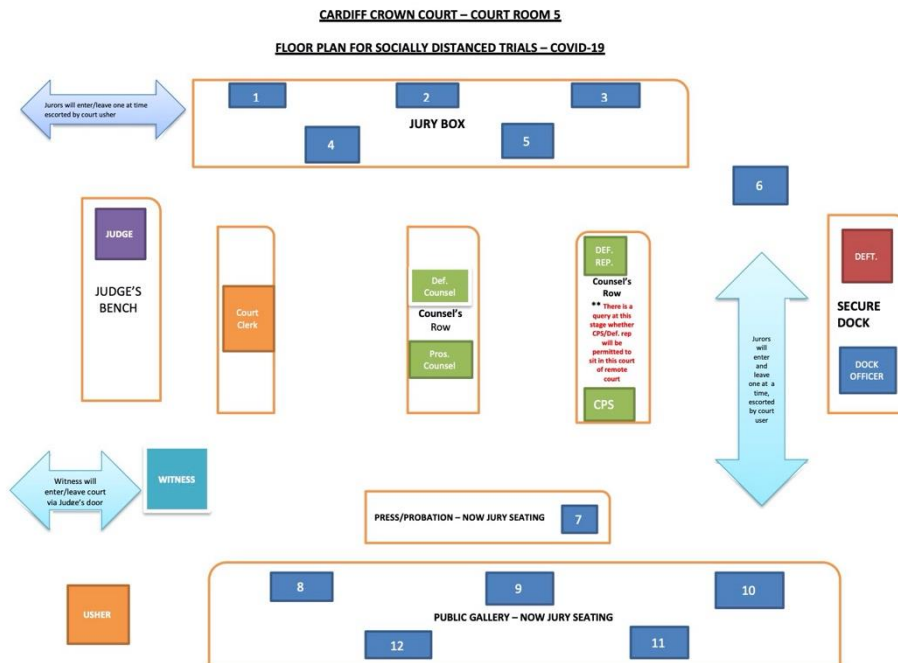
In respect of Cardiff Crown Court, a diagram of the proposed layout was posted to Twitter on 12th May 2020 by Richard Hearnden⁴, a barrister at Furnival Chambers in London. The diagram had been emailed to him in connection with the trial due to commence the following week, though the original source of the diagram is unknown. The diagram depicts the following:

¹ <https://www.judiciary.uk/announcements/jury-trials-to-resume-this-month/>

² <https://www.gov.uk/government/news/statement-from-the-lord-chancellor-on-the-resumption-of-jury-trials>

³ <https://news.sky.com/story/coronavirus-devils-breath-murder-trial-too-complex-to-go-ahead-with-social-distancing-11987448>

⁴ <https://twitter.com/BarristerHove/status/1260211032045359107>



Comments made, as a result of the diagram, have identified the following practical considerations:

- The dispersal of jurors would undoubtedly affect the impact of a closing speech. The effectiveness of a closing speech is attributable both to what is said and the manner in which it is said. In this scenario, Counsel would be forced to rotate to address the jury unless they delivered their speech from the witness box.
- The decision to allow witnesses to enter via the judge's door has the potential to sway a juror's perception as to the independence of such witness.
- This proposed set up would be ineffective in trials involving multiple defendants.
- How effective is 2 metre distancing when confined to a space for hours at a time?

Regardless of the views as to the intricacies of such a set up, it is important to acknowledge the efforts being made by all to facilitate the return of jury trials. This is an important first step towards normality. It is, however, widely recognised that this is not a long-term solution. For example, the trial due to commence at Manchester Minshull Street next week will require three courtrooms in order to achieve the requisite level of safety for the participants. The rest of this article provides an overview of the alternative solutions that have been pondered.

Trials before a judge, sitting without a jury

One suggestion is to allow defendants the opportunity to elect trial by a single judge. Such courts are still in operation in Northern Ireland.

“Diplock Courts” in Northern Ireland

Diplock Courts were first established in Northern Ireland in 1973 following the Report of the Commission, chaired by Lord Diplock. The report considered the legal procedures in Northern Ireland, in the context of “The Troubles”, and found that the jury system, as a means of trying terrorist related crime, was compromised due to the danger of perverse

acquittals and juror intimidation. The report recommended that trials were before a single judge without a jury. The automatic use of Diplock Courts, for scheduled offences⁵, was abolished by The Justice and Secretary (Northern Ireland) Act 2007⁶.

Whilst the use of Diplock Courts in Northern Ireland has been relatively limited since the passing of the 2007 Act, the case of Dennis Hutchings⁷ has confirmed the stance on the continued use of Diplock Courts in Northern Ireland.

In April 2016, the Northern Ireland Director of Public Prosecutions (DPP) issued a certificate under the 2007 Act preventing Mr Hutchings from being tried by a jury. The DPP suspected that the offences had been committed 'in connection with or in response to the political hostility of members (or suspected members) of the Provisional IRA towards those who believe Northern Ireland should remain a part of the United Kingdom'. Mr Hutchings appealed unsuccessfully to a Divisional Court and in 2019⁸, the Supreme Court ruled that Mr Hutchings would face trial without a jury. In the view of the Supreme Court, if Mr Hutchings and another soldier fired on Mr Cunningham believing him to be an IRA gunman, then that would satisfy the conditions required for the use of a Diplock Court.

Trials without a jury outside Northern Ireland

Part 7⁹ of the Criminal Justice Act 2003 contains provision for trial on indictment without a jury. The provision was designed to deal with issues of jury tampering and is an example of parliament recognising that the right to a jury trial is not absolute. It is, however, right to acknowledge that the rationale behind the law, namely that the defendant has behaved in such a way as to deprive himself of the right to a jury, is obviously very different to our current circumstances. Sections 44 – 46 outline the power, procedure and principles to be considered when determining whether a trial should be conducted without a jury.

One example of an English case, that proceeded without a jury, is R v Twomey [2009] EWCA Crim 1035. Three trials were heard, between 2005 and 2008, in relation to an armed raid that occurred in 2004. The second trial ended after a juror complained of being "stressed"; refusing to return to court after a bank holiday. The jury were discharged in the third trial due to jury tampering.

Following decisions made by the trial judge, HHJ Roberts QC, and the Presiding Judge of the Circuit, Calvert-Smith J as to the impact and consequences of jury tampering, it was initially

⁵ Definition of scheduled offences.

⁶ Whilst no longer automatic, sections 1 – 9 of the 2007 Act contained provision for trial on indictment without a jury. The 2007 Act also allowed the DPP to issue a certificate requiring a defendant to be tried without a jury if satisfied that the administration of justice might be impaired by a jury trial and one of four specified conditions was met. Three of the conditions involve proscribed organisations. The fourth condition requires the offence to have been 'committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another'.

⁷ Mr Hutchings faces prosecution in relation to the 1974 fatal shooting of John Cunningham, a vulnerable adult who was running away from a patrol in County Tyrone.

⁸ <https://www.supremecourt.uk/cases/docs/uksc-2018-0040-judgment.pdf>

⁹ <http://www.legislation.gov.uk/ukpga/2003/44/part/7>

decided that a 'package' of measures would be sufficient to reduce the risk of jury tampering to an acceptable level.

Upon appeal by the Prosecution, the Court of Appeal¹⁰ considered that the protective measures identified did not sufficiently address the extent of the risk of jury interference. The trial was allowed to take place without a jury and in 2010, Mr Twomey and his co-accused were convicted. Mr Twomey was sentenced to over 20 years' imprisonment.

Mr Twomey and his co-defendants unsuccessfully appealed in 2011¹¹, with one ground of appeal referring to the refusal of the trial judge to order a trial by jury. The following comments made by the Court of Appeal are useful in considering the use of Diplock Courts:

'Trial by jury is described as a "right" in order to emphasise the importance that is attached to it, but it is a right which can be and from time to time is circumscribed by statute'.

'The right to trial by jury may be created, extended, amended, reduced or abolished by statute. It is not a right protected by the European Convention of Human Rights, nor does its removal involve interference with the rights to liberty or property or fair process protected both at common law or by the Convention.'

It is also worth noting that the right of defendants to elect trial by judge alone is available in Canada, Australia and New Zealand.

Judge only trials and Covid 19

Numerous articles have been written by Ministers and senior judges in which they contemplate how to re-commence jury trials during "lockdown".

Writing in The Times¹², Sir Richard Henriques advocated the use of judge only trials as a "simple and economical solution that would allow crown courts to get back to work". In his view, "there is nothing to fear from judge-alone trials. Judges recognise a bad officer when they see one, can assess credibility, reject unreliable identification evidence, avoid bias and accurately apply the burden and standard of proof. They are obliged to give very full reasons for any verdict, including any bias for accepting or rejecting any evidence".

Sir Richard Henriques pointed to escalating domestic violence, overcrowded prisons, exploitation of the Covid-19 opportunities and the increase in the pre-existing backlog of cases. He advocated that proposals to reduce the number of jurors would not work and pondered the difficulties posed when jurors consider their verdicts. In affirming his support for judge only trials, Sir Richard Henriques was clear that this proposal was "not an attempt to undermine trial by jury but a short-term measure to counter a situation which threatens to permanently erode confidence in our criminal justice system".

¹⁰ <https://www.bailii.org/ew/cases/EWCA/Crim/2009/1035.html>

¹¹ <https://www.bailii.org/ew/cases/EWCA/Crim/2011/8.html>

¹² <https://www.thetimes.co.uk/article/judge-only-trials-would-let-courts-get-back-to-work-j2fjp9pxw>

Various comments have been made in response to this article. Focus has been placed on the fundamental role of juries¹³ in the Criminal Justice System and the need to retain the jury system to ensure a fair trial.

Chris Philp, Minister for Immigration Compliance and the Courts, told MPs that there was “categorically no question at all under any circumstances of the right to jury trial being removed”¹⁴.

The Lord Chancellor, Robert Buckland QC, gave evidence to the Joint Committee on Human Rights on the government’s Covid-19 response. He said that judge-only courts were a disproportionate step which would have wider consequences that ‘we would all regret’¹⁵.

In addition to the above views, the following are other points for consideration:

- All are agreed that the halting of jury trials will have an impact on the already strained criminal justice system;
- Alternative suggestions, such as those outlined in this article, may run the risk of eroding good practice rather than becoming an interim measure, particularly due to the uncertainty regarding the duration of the current situation. Careful consideration must be given to the fairness of any practice adopted, even for a short period of time. The danger of inferior temporary measures becoming permanent must be resisted;
- Trial by jury is fundamental to the Criminal Justice System. Should that fundamental right be eroded because of a temporary, albeit serious, crisis? Of course, most civil trials are conducted successfully without juries, though the liberty of the individual is rarely at stake;
- During the Second World War, jury trials continued with a reduced number of jurors (except in cases of murder or treason). It has been suggested that the current crisis is comparable because there is no clear end point. It is, however, by no means clear that reducing the numbers of jurors will allow social distancing to be maintained and enable trials to resume in meaningful numbers;

Alternative Suggestions

Changes to venue/layout

A judicial working group¹⁶ has been established to consider ways to re-start some jury trials, “once it is safe to do so”. Chaired by Mr Justice Edis, the group includes representatives from the Law Society, Bar Council, Criminal Bar Association, HMCTS, CPS, PECS, MoJ, HMPPS, NPS, NPCC, and Legal Aid Agency. “The plans will place the judge, jury, advocates and defendant in one large court, the public, press and others in another court, with a live feed, and enable the jury to have a large room for its deliberations,” a spokesman for the

¹³ https://www.linkedin.com/posts/chris-daw-qc-54b46542_top-lawyer-says-trials-should-be-held-without-activity-6662043791584710656-Sbh9

¹⁴ <https://www.parliamentlive.tv/Event/Index/af4d1d9e-2ba3-4bc8-b363-fe757e69df64>

¹⁵ <https://www.lawgazette.co.uk/news/buckland-rules-out-judge-only-trials-as-solution-to-virus-backlog/5103945.article>

¹⁶ <https://www.judiciary.uk/announcements/jury-trials/>

judiciary told The Times¹⁷. This stance appears to accord with the diagram outlined above. Whether sufficient venues of the requisite size are available for a significant number of trials to commence is unclear but even if such a step would allow only for a limited resumption of jury trials it must be welcomed.

In an article posted on Crime Line¹⁸, Richard Wright, QC, the Leader of the North Eastern circuit considered the prospect of re-opening the courts and looked at the state of the Criminal Justice system pre-lockdown. He wrote 'we entered lockdown with a Justice system that had been cut to its core and in which significant trial backlogs had been allowed to develop, hidden behind meaningless and misleading statistics'. He commented on the 'terrible state of cleanliness and repair' within the Court Estate and suggested that social distancing within the court and hearing rooms would be impossible. He considered the 'understandably high rates of absenteeism amongst HMCTS staff, many of whom are older people who face greater risks from this disease. Then factor in the movement of prisoners, the attendance of witnesses, litigants, experts, probation officers, interpreters, intermediaries, witness support staff, and the scale of the problem of operating a system whilst observing social distancing becomes clearer'.

Richard Wright QC advocated the use of alternative venues for trials, including empty buildings, which could be built in the same way as 'Nightingale' hospitals. In respect of judge-only trials, he did not suggest one particular solution but stated, 'if the reality is that for a limited period juries of 12 cannot be accommodated then let us have as a nation a sensible, non-partisan debate with regard to that period, considering adjustments to the size of juries, or allowing defendants to elect trial by a panel of Judges, or a Judge sitting with lay assessors'.

The sentiment of utilising alternative buildings is shared by David Lammy, the Shadow Justice Secretary. He said 'many large courtrooms, university lecture halls, schools and leisure centres are currently sitting empty. The Ministry of Justice should co-opt these buildings if necessary, to carry out socially distanced trials according to public health advice. Justice delayed must not be allowed to become justice denied.'¹⁹. Lord Burnett has also said that 'the use of "very large courtrooms" or other "big venues", such as university lecture halls, was also being considered'.²⁰

The question arises as to whether the solemnity of the occasion befits only a courtroom. Can justice be delivered in any venue? I am of the view that the venue is subsidiary to the trial process and that the current climate dictates the use of alternative settings.

In respect of cleanliness, Leader of the Northern Circuit, Lisa Roberts QC, has undertaken visits to three courts on Circuit: Liverpool, Manchester Crown Square and Manchester

¹⁷ <https://www.thetimes.co.uk/article/7693e618-8f99-11ea-866d-11e3826964c3?shareToken=a1265867344c429da4f197c494dc324e>

¹⁸ <https://crimeline.co.uk/nightingale-courts/>

¹⁹ <https://www.theguardian.com/law/2020/may/01/labour-livestream-court-cases-during-and-after-covid-19-crisis-justice>

²⁰ <https://www.independent.co.uk/news/uk/home-news/coronavirus-juries-court-trials-change-case-backlog-remote-video-a9492166.html>

Minshull Street. She spoke highly of the level of cleanliness in those courts and the compliance with PHE guidance.

Changes to the composition of the Bench

Taking to Twitter, Lord David Anderson QC proposed a 'better solution'²¹. His suggestion was a bench comprising of a judge and two magistrates. He stated 'I used to sit on such appeals as a Recorder. The magistrates were always on best behaviour, and their insights as lay people who had seen a bit of crime definitely added value to mine'.

A reduced number of jurors

The Lord Chief Justice told BBC Radio 4's Today programme, 'I would support a move in those circumstances to reduce the number of jurors needed for a trial... Plainly it would be easier to ensure a safe trial for everybody with social distancing and other precautions if the number of people involved in a trial was reduced by a few'²².

Virtual Trials

Campaign group JUSTICE have hosted three, mock, virtual jury trials to test whether they could be used as a fair alternative to face-to-face hearings. The first virtual trial received largely positive feedback, with Professor Linda Mulcahy of Oxford University and Dr Emma Rowden from Oxford Brookes University describing it as 'a success for open justice'²³. They found that the defendant 'was treated with much more dignity than when they are placed in an enclosed dock'. In respect of negative feedback, numerous technical problems arose including jurors disappearing from the screen. The researchers noted that the virtual trial placed 'a huge amount of trust' in the jurors, who were instructed to locate themselves alone in private rooms, to comply with their legal responsibilities during the trial²⁴.

The third virtual trial took place on 6th May 2020²⁵. As above, the trial received both positive and negative feedback. Patricia Hitchcock QC, Recorder of the Crown Court, stated 'I was impressed with how much better my view of all the participants was than it usually would be for a juror in court, and by my ability to hear everybody involved'. James Chalmers, Professor of law at the University of Glasgow, said, 'having been very sceptical of the possibility of a jury deliberating electronically, I found myself converted by the set-up trialled by JUSTICE – the software worked very effectively and enabled jurors properly to evaluate the evidence and deliberate on it'. Technical issues were again present, with the live thread of tweets by Tristan Kirk²⁶, the Courts Correspondence for the London Evening Standard, outlining the multiple glitches and their impact on the trial process.

²¹ <https://twitter.com/bricksilk/status/1256105926974738434>

²² <https://www.independent.co.uk/news/uk/home-news/coronavirus-juries-court-trials-change-case-backlog-remote-video-a9492166.html>

²³ <https://www.lawgazette.co.uk/news/fully-remote-jury-test-a-success-for-open-justice/5103927.article>

²⁴ Ibid

²⁵ <https://justice.org.uk/justice-pilots-first-ever-worldwide-virtual-mock-jury-trial/>

²⁶ <https://twitter.com/kirkkorner/status/1257975727456227328>

A press release from HMCTS²⁷, dated 30th April 2020, introduced a new video platform that would 'enable all parties in a criminal hearing to take part remotely – allowing all magistrate and Crown Courts in England and Wales to hold secure hearings, making it easier to make sure justice continues to be served'. The Cloud Video Platform 'CVP', whilst promising, will not be utilised for jury trials.

Conclusion

The steps taken thus far to resume jury trials is commendable. There is no one way to solve the issues raised and it is important to acknowledge the progress made since the start of "lockdown". In respect of trials without a jury, it is clear that the need for such courts has arose due to need to avoid jury tampering. Can it be said that Covid-19 has also generated a need for judge-only courts? I do not believe that is has. Instead, I would promote the use of larger venues, with stringent cleaning requirements, to facilitate the return of jury trials.

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May 2020

²⁷ <https://www.gov.uk/government/news/new-tech-will-help-keep-the-criminal-justice-system-moving-during-covid-19-pandemic>