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Covid-19 and Technologically Enhanced Trials

Chapter 8

Covid-19 and Technologically Enhanced Trials under the Police, Crime, Sentencing, and Courts  
Act 2022

Have Remote Jury Trials Shifted from Criminal Justice Fiction to Virtual Reality?

Daniel Jasinski

Abstract

This chapter examines the use of technology which has been designed to enhance the criminal trial in England and Wales. It argues that buried deep in the Police, Crime, and Sentencing Act is s.200 which, through the amendment of s.51 of the Criminal Justice Act 2003, seeks to broaden the way in which video and audio connectivity are used in the criminal justice process in England and Wales. Notably, the Act empowers a judge to direct that jurors may participate in a trial remotely, but only where such an order is applied to the entire jury panel. In addition, the Act clearly paves the way for increased remote participation by counsel, witnesses, and defendants. In the midst and wake of Covid-19 such a move is, on its face, sensible. The Courts system all but ground to a halt during 2020 and 2021, adding to the already unacceptable backlog of cases and these changes may reduce the delays caused by the absence of key participants at a criminal trial. This chapter explores the extent to which an increased use of technology in the criminal trial can ensure that cases continue to be dealt with in a fair, just, and safe manner.

**Introduction**

Never has the term ‘legal tech’ been such a prominent consideration for those involved in the provision of legal services. In recent years, many firms have been looking at the ways in which they can use technology to improve efficiency and the standard of the service they provide to their clients.<sup>1</sup> In the context of Alternative Dispute Resolution, decision-making processes have been supported and streamlined by artificial intelligence for some time.<sup>2</sup> However, as noted by

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<sup>1</sup> See, for example Oliver&Co ‘The Oliver & Co Conveyancing App’ <<https://www.oliverandco.co.uk/theoliverandcoconveyancingapp/>> accessed 12 May 2022.

<sup>2</sup> For example, the Financial Ombudsman Service uses a tool called ‘Navigator’ when producing outcomes in relation to complaints pertaining to payment protection insurance (PPI). See further, R. Thomas ‘The impact of PPI mis-selling on the Financial Ombudsman Service’ <[Impact-of-PPI-mis-selling-report.pdf](https://www.financial-ombudsman.org.uk/Impact-of-PPI-mis-selling-report.pdf) (financial-ombudsman.org.uk)? accessed 11 April 2022.

Susskind, the Criminal Justice System<sup>3</sup> has long evaded any substantial overhaul brought about by technological advances,<sup>4</sup> instead being subject to piecemeal changes which have been implemented in only limited circumstances.<sup>5</sup>

The Covid-19 pandemic has clearly changed this. Notions and iterations of remote participation at hearings and the entirely virtual trial have been thrust to the forefront of the minds of those with an interest in the criminal process.<sup>6</sup> Quite understandably, much of the early exploratory work undertaken, particularly in the context of entirely virtual trials, has focussed on whether the virtual trial enjoys practical feasibility, concentrating on the more technological aspects of such a trial, with a view to identifying, remedying, and therefore minimising technical issues which might arise.<sup>7</sup>

Whilst such an idea might seem something akin to criminal justice science fiction, such an opinion could not be further from the truth. Indeed, with the enactment of Police, Crime, Sentencing, and Courts Act 2022<sup>8</sup> which, in part, amends Criminal Justice Act 2003,<sup>9</sup> a judge is clothed with unfettered<sup>10</sup> discretion to direct that a trial be conducted remotely, provided that all jurors are located in the same physical location.<sup>11</sup> This is a clear step in the tech direction for a system whose processes differ little from trials occurring centuries ago. However, the extent to which this step is capable of becoming a ‘giant leap’ towards a CJS embracing the use of ‘technologically enhanced trials,’ whilst delivering fair, just, and safe outcomes for stakeholders, is by no means apparent.

For the purposes of this chapter, technologically enhanced trials are defined as trials which involve the remote attendance of key participants beyond those permitted by way of Special Measures.<sup>12</sup> It is contended that the use of Special Measures falls outside the scope of the

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<sup>3</sup> Hereafter CJS. This is used to describe the Criminal Justice System in England and Wales.

<sup>4</sup> R. Susskind *Online Courts and the Future of Justice* (OUP 2019), 12.

<sup>5</sup> For a concise but comprehensive overview of these provisions, see L. Hoyano ‘Postage stamp justice? Virtual trials in the Crown Courts under the Police, Crime, Sentencing and Courts Bill’ (2021) 12 CLR 1029, 1031–3.

<sup>6</sup> See, for example, JUSTICE ‘JUSTICE Covid-19 response’ <[<sup>7</sup> See, for example, L. Mulcahy, E. Rowden, and W. Teeder ‘Exploring the case for virtual jury trials during the Covid-19 crisis – An evaluation of a pilot study conducted by JUSTICE’ <Exploring the case for Virtual Jury Trials during the COVID-19 crisis \(justice.org.uk\)> accessed 12 April 2022.](https://justice.org.uk/our-work/justice-covid-19-response/#:~:text=JUSTICE%20has%20been%20testing%20the,be%20accessed%20from%20home%20computers.> accessed 12 April 2022.</a></p></div><div data-bbox=)

<sup>8</sup> Police, Crime, Sentencing, and Courts Act 2022 (Hereafter PCSCA 2022) s200.

<sup>9</sup> Criminal Justice Act 2003 (Hereafter CJA 2003) s.51.

<sup>10</sup> Notably, the parties need not ask for nor consent to such a Direction. See: Hoyano (n 5), 1029.

<sup>11</sup> *Ibid.*, 1037, citing s.51(2) CJA 2003 (as amended by s.200 PCSCA 2022).

<sup>12</sup> See for example, the use of recorded interviews as Evidence in Chief, per s21 Youth Justice Criminal Evidence Act 1999. A detailed overview of Special Measures is available in D. Ormerod et al. (eds) *Blackstone’s Criminal Practice* (OUP, 2022), D14.

discussion in this chapter as, whilst not without challenges,<sup>13</sup> such measures have become a recognised element of the traditional adversarial trial. However, the term is carefully defined in order to avoid being so narrow that it excludes trials where at least some participants are located at a single location. This ensures the definition captures the nature of trials which are now possible in England and Wales, following the enactment of the PCSCA 2022.

Whilst the impetus towards a move to criminal courtrooms which are enhanced by technology has ascended as a result of the Covid-19 pandemic, the enactment of the PCSCA 2022 long after the removal of social distancing and self-isolation requirements potentially renders s.200 as the so-called ‘damp squib’ of the Act. Whilst in many cases, underused legislation often draws criticism for its ineffectiveness, the return to non-socially distanced face-to-face trials before any real momentum could gather behind the notion of remote jury trials, might be the saving grace for fairness in the CJS. As this chapter demonstrates, there is a multitude of insurmountable issues which render a fair and just technologically enhanced trial a near practical impossibility.

The next section of this chapter explores the extent of the need for technologically enhanced jury trials in the context of the Covid-19 pandemic, through an exploration of the alternatives to jury trial. The chapter then provides an overview and analysis of the new s.51 CJA 2003, as amended by s.200 PCSCA 2022. In doing so, the author explores analysis provided by academics in the context of technology in court generally, whilst also drawing upon the experience of Scotland, where hundreds of remote jury trials have been held since the start of the pandemic.<sup>14</sup> The chapter closes with conclusions and recommendations.

### **Exploring the Need for the Technologically Enhanced Criminal Trial**

As noted at the outset of this chapter the idea of ‘virtual justice’ and the ‘virtual trial’ is nothing new. However, the acceptance of the technological enhancement of the criminal trial is historically met with strong resistance which is articulated, in particular, by those who consider such enhancement to be detrimental from a justice and human rights perspective.<sup>15</sup> Covid-19 presented circumstances in which such technological enhancement became a necessity, in order to ensure that courts could continue to function and, as far as possible, reduce the extent to

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<sup>13</sup> See, for example: M. Burton, R. Evans, and A. Sanders ‘Implementing special measures for vulnerable and intimidated witnesses: the problem of identification’ [2006] Mar Crim LR. 229–40.

<sup>14</sup> K. O’Sullivan ‘New stats show almost 300 high court trials beamed from remote jury centres’ <<https://futurescot.com/new-stats-show-almost-300-high-court-trials-beamed-from-remote-jury-centres/>> accessed 28 June 2022, citing statistics provided by the Scottish Courts and Tribunals Service.

<sup>15</sup> See, for example: Hoyano (n 5) 1039–41.

which justice is delayed due to the challenges presented by the need to self-isolate, remain socially distant whilst maintaining open, and effective justice.<sup>16</sup>

The reasons for this are clear. Whilst the Crown courtroom is often portrayed as a grand stateroom with ample space in which to conduct the court's business, the contrary is often the case. As noted by Quirk, the pandemic gave rise to the need for jury trials to be heard over three courtrooms, ensuring Covid security,<sup>17</sup> a fact which clearly demonstrates the often-limited space which available to participants in jury trials. This led to a dramatic slowdown in the speed at which indictable<sup>18</sup> offences made their way through the Crown Court system. This highlights that the Crown Court estate is not prepared for the effective delivery of justice in the midst of a pandemic involving a contagious disease. Whilst this might be forgiven, not least due to the scarcity of such a pandemic, the very fact that the Crown Court, as a system of courts, has been fundamentally failing to deliver timely justice for over decade cannot.<sup>19</sup> In essence, the Covid-19 pandemic has merely intensified the effects of an overstretched, under-resourced, and outdated courts system.<sup>20</sup>

By way of catalysis, Covid-19 has brought to the fore the injustices presented by delays in dealing with criminal cases, with practicing lawyers,<sup>21</sup> judges,<sup>22</sup> academics,<sup>23</sup> and politicians<sup>24</sup> uniting in their appraisal of the consequences of the Covid-19 pandemic on the CJS. Notably, HHJ Emma Nott highlights that '[f]or victims of domestic abuse, and their children, delayed justice is often no justice at all.'<sup>25</sup> In addition, McConville and Marsh analyse the problems associated with trials being delayed beyond the maximum permitted timeframe for which an individual can be

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<sup>16</sup> For the juror's perspective see: G. Moore, 'My experience of jury service on a trial in a socially distanced court during the coronavirus pandemic' <<https://inews.co.uk/news/long-reads/jury-service-trial-court-coronavirus-covid-19-pandemic-socially-distanced-676160>> accessed 9 July 2021.

<sup>17</sup> H. Quirk 'Covid-19 and jury-less trials?' [2020] 7 *Crim. LR.* 569–71, 569.

<sup>18</sup> To be taken to mean Indictable Only and Either Way offences.

<sup>19</sup> A. Pinto, S. Davis, 'Joint statement on jury trials, court capacity and dealing with the backlog' <<https://www.lawsociety.org.uk/en/topics/criminal-justice/joint-statement-on-jury-trials-court-capacity-and-dealing-with-the-backlog>> accessed 9 July 2021.

<sup>20</sup> Ibid. See also: D. Shaw 'Clearing the backlogs in the courts: are there enough lawyers, judges and court staff to do it?' <<https://www.crestadvisory.com/post/clearing-backlogs-in-the-courts-are-there-enough-lawyers-judges-and-court-staff-to-do-it>> accessed 25 May 2022.

<sup>21</sup> Pinto and Davis (n 19).

<sup>22</sup> E. Nott 'Addressing domestic abuse before, during and after the Covid-19 pandemic: a perspective from within the criminal justice system of England and Wales' [2022] 77 *Crim. LR.* 525–44.

<sup>23</sup> M. McConville and L. Marsh 'Resuscitating criminal courts after Covid-19: trialling a cure worse than the disease (2022) 26 (2) *E & P* 103–20.

<sup>24</sup> N. Rose 'MPs slate Ministry of Justice over Crown Court backlog and judges' <<https://www.legalfutures.co.uk/latest-news/mps-slate-ministry-of-justice-over-crown-court-backlog-and-judges>> accessed 25 May 2022.

<sup>25</sup> Nott (n 22) 542.

remanded in custody whilst awaiting trial by jury,<sup>26</sup> duly highlighting the dilemma faced by judges when deciding whether to release a defendant whom they had previously considered to be too dangerous to release into society due to the expiry of the custody time limit, a decision which is before them simply because the case has taken such a long time to reach trial.<sup>27</sup>

In effect, whilst Covid-19 might not be the underlying reason for the need for changes in the CJS, its impact on highlighting such a need cannot be ignored. It is, however, pertinent to note that the application of technological enhancements to the criminal trial was not the only possibility explored by those looking to keep the wheels of justice moving throughout the pandemic. One prominent suggestion relates to removal of juries from the process.<sup>28</sup> The principal mechanisms through which this might be achieved will now be explored.

### **The Judge-Only Trial**

Again, this is not a new concept and the use of judge-only trials for the most serious cases, exists in a number of jurisdictions.<sup>29</sup> In the context of the Covid-19 pandemic, the advantages of such trials are clear. First, as noted above, the social distancing requirements were imposed to reduce the spread of the virus effectively rendered a single trial taking over three courtrooms. The removal of 12 participants would, without doubt, reduce the amount of real estate needed to conduct a socially distanced trial. Second, as noted by Quirk, 'Judge-only trials are [both] speedier and cheaper,<sup>30</sup> not least do to time saved through the absence of the time needed for administering the jury (e.g., election and swearing-in) and an arguable reduction in the risk associated with trial delays and failure due to the unavailability of jurors, a risk which was intensified during the pandemic.<sup>31</sup>

That said, the judge-only trial has rarely been seen as a popular option for the CJS.

Notwithstanding this, a fact which is little known outside the circle of criminal lawyers and academics, is that cases for offences tried in the Magistrates' Court can be heard by a District

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<sup>26</sup> McConville and Marsh (n 23).

<sup>27</sup> Ibid.

<sup>28</sup> Quirk (n 17).

<sup>29</sup> Readers may recall that the trial of Oscar Pistorius in South Africa, which abolished trial by jury in 1969: S. Findlay 'The Trailblazing Judge Who Will Decide Oscar Pistorius' Fate' < <https://time.com/87811/pistorius-judge-thokozile-matilda-masipa/>> accessed 25 May 2022. Others include Canada and New Zealand. See S. Doran and J. Jackson 'The case for jury waiver' [1997] *Mar. Crim. LR.* 155–72, 156.

<sup>30</sup> Quirk (n 17) 570.

<sup>31</sup> J. Connell 'Worcester attempted murder trial delayed until next year' < <https://www.worcesternews.co.uk/news/19453278.worcester-attempted-murder-trial-delayed-next-year>> accessed 24 July 2021.

Judge sitting alone, rather than by a bench of lay magistrates.<sup>32</sup> This, in effect, means that there already exists a mechanism through which judges can hear cases alone in England and Wales. However, in the trial context, the jurisdiction of District Judges is limited to the same as that which is enjoyed by magistrates; notably those cases which are less serious than those tried in the Crown Court.<sup>33</sup> The case for the use of judge-only trials in more serious cases has never really gained traction.

Perhaps the most notable example of judge-only trials for serious cases in the United Kingdom are the so-called 'Diplock Courts'.<sup>34</sup> These trials have dealt with more than 10,000 cases pertaining to the conflict in Northern Ireland.<sup>35</sup> However, such trials are not without their critics. Both Quirk<sup>36</sup> and Campbell<sup>37</sup> note the comments of Jackson and Doran,<sup>38</sup> regarding a fundamental shift away from the traditional adversarial norms on which the CJS is based, towards a more inquisitorial method of achieving justice; arguably, depriving defendants of the contextual and, perhaps, creative decision-making brought to cases via the lay jury.<sup>39</sup>

Other examples include the little-used provisions of the Criminal Justice Act 2003, in which a judge tries a case without a jury where, following an application from the Crown, they are satisfied that:

- A real and present danger of jury tampering exists;<sup>40</sup> and
- Notwithstanding steps which might reasonably be taken to prevent jury tampering, it is in the interests of justice to proceed without a jury<sup>41</sup>

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<sup>32</sup> For a fascinating look into the work of District Judges, see P. Darbyshire 'Cameos from the world of district judges' (2006) 7(5) *J Crim L* 443–57.

<sup>33</sup> E.g., cases which relate to 'Summary-Only' offences or less-serious 'Triable Either Way' (TEW) offences where, at a Plea Before Venue Hearing, a District Judge or Bench of Magistrates decide that the Magistrates Court would have the power to sentence the defendant, were the defendant convicted of the offence charged and the defendant elects to be tried summarily. See further in Ormerod (n 12) D6.13.

<sup>34</sup> As introduced by the then Northern Ireland (Emergency Provisions) Act 1973, s2(1).

<sup>35</sup> Quirk (n 17) 569.

<sup>36</sup> Quirk (n 17) 570.

<sup>37</sup> L. Campbell 'The prosecution of organised crime: removing the jury' (2014) 18(2) *E & P* 83–100, 95.

<sup>38</sup> J. Jackson and S. Doran, *Judge without a Jury: Diplock trials in the Adversary System* (Clarendon Press 1995).

<sup>39</sup> For an interesting analysis on this point, see E. Johnston and T. Smith *Criminal Procedure and Punishment* (2nd edn, Hall and Stott Publishing 2020) 176.

<sup>40</sup> Criminal Justice Act 2003, s.44(4).

<sup>41</sup> Criminal Justice Act 2003, s.44(5).

In addition, a provision once featured on the statute books with a view to allowing complex fraud trials to be heard by a judge alone.<sup>42</sup> However, this was repealed without having ever being in force,<sup>43</sup> naturally resulting in no cases being heard in this way.

In essence, the judge-only trial has only ever been deemed a vaguely viable, albeit questionable, alternative to jury trials in extremely limited circumstances. The risk posed to the sacrosanct adversarial norms, due process safeguards and age-old traditions of normative justice in England and Wales, have not been outweighed by the perceived benefits of this move.<sup>44</sup> Not least given the comments of Lord Macdonald regarding the likely permanence of any measures implemented to keep the wheels of justice moving throughout the Covid-19 pandemic,<sup>45</sup> the fact that the scope of judge-only trials has not been increased can only be deemed a positive outcome for those who vehemently defend the sanctity of trial by jury.

### Increasing the Jurisdiction of Magistrates

The reduction of jury trials was recognised as one of the key approaches in which cases could move more swiftly through the courts, minimising the backlog of Crown Court cases caused by the Covid-19 pandemic. One would be forgiven for arriving at the conclusion that the only way in which this can be achieved, is with a move to judge-only trials. However, another way in which jury trials could be limited, or perhaps even eradicated, is through the expansion of the use of the Magistrates' Courts.<sup>46</sup> There are two main ways in which this can be achieved. The first is by increasing the sentencing powers of magistrates.<sup>47</sup> The second, is using magistrates to sit alongside Circuit Judges, in place of juries.<sup>48</sup> Each of these will now be considered in turn.

Increasing the sentencing powers of magistrates has been a contentious subject for some time,<sup>49</sup> but has most recently raised its head as the '[l]atest step to drive down the backlog in the criminal

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<sup>42</sup> Criminal Justice Act 2003, s.43.

<sup>43</sup> Ormerod (n 12) D13.76 citing the Protection of Freedoms Act 2012, s.114 and Schedule 10, Part 10.

<sup>44</sup> As described by Campbell (n 37) 85–6.

<sup>45</sup> D. Gadher and R. Ellis 'The justice system: will courts and juries ever return to normal?' *The Times* (London, 20 July 2020) <<https://www.thetimes.co.uk/article/the-justice-system-will-courts-and-juries-ever-return-to-normal-h7zfzqgl5>> accessed 25 May 2022, citing The Lord Macdonald of River Glaven QC, former Director of Public Prosecutions in England and Wales.

<sup>46</sup> Law Society Gazette Newsdesk 'Limits on jury trials may be needed, says LCJ' <https://www.lawgazette.co.uk/law/limits-on-jury-trials-may-be-needed-says-lcj/5104649.article> accessed 7 June 2022.

<sup>47</sup> A suggestion which is now, in fact, a reality, following the enactment of the Judicial Review and Courts Act 2022 (Hereafter JRCA 2022), s.13.

<sup>48</sup> See the Comments of Burnett LCJ, who indicated this as an option for less-serious indictable offences: Law Society Gazette Newsdesk (n 46).

<sup>49</sup> D. Ormerod 'The Judicial Review and Courts Bill' [2022] 5 Crim LR. 353 - 357, 355–6.

courts which rose during the pandemic.<sup>50</sup> Recently resuscitated in the JRCA 2022,<sup>51</sup> s.3 of JRCA 2022 amends s.224 Sentencing Act 2020, so as to enable magistrates to impose a custodial sentence of up to 12 months upon a defendant convicted of a single ‘Triable Either Way’ (TEW) offence.<sup>52</sup> This should, in theory at least, have a direct impact in terms of reducing the number of cases that are sent to the Crown Court, not least through the reduction of instances in which magistrates refuse jurisdiction on the basis of a lack of sentencing powers.<sup>53</sup> However, these reforms have been met with an appropriate degree of scepticism, particularly when considered in the context of backlog reduction and the CJS’s Covid response and recovery.

Whilst the Ministry of Justice (MoJ) estimate that this will ‘free up around 1,700 extra days of Crown Court time each year,’<sup>54</sup> others are doubtful as to the extent to which such space in the Crown Court calendar will ever truly materialise. Mindful of the fact that, even where a bench of magistrates accepts jurisdiction, a defendant has the right to elect trial by jury in cases involving TEW offences,<sup>55</sup> Ormerod notes that more defendants are likely to elect trial by jury than before;<sup>56</sup> a sensible conclusion at which to arrive given that, when deciding whether to elect to be tried in the Crown Court, lawyers will often advise their clients to weigh the maximum sentencing powers of magistrates against ‘rolling the dice’ with a jury, the latter traditionally giving rise to a better chance of acquittal.<sup>57</sup> In effect, the increased sentencing powers afforded to magistrates renders trial by jury an even more attractive prospect than it was prior to the enactment of s.13 JRCA 2022, which may render this change entirely counterproductive and fruitless when compared with its stated aims.

As noted above, another way to reduce the use of juries whilst making an increased use of magistrates, is to introduce a mode of trial in which a judge sitting in the Crown Court is flanked by two lay magistrates.<sup>58</sup> It is noteworthy that this reflects the usual composition of the Bench

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<sup>50</sup> MoJ, HMCTS, and D. Raab ‘Press release: Magistrates to help tackle backlog as sentencing powers doubled’ <<https://www.gov.uk/government/news/magistrates-to-help-tackle-backlog-as-sentencing-powers-doubled>> accessed 7 June 2022.

<sup>51</sup> Judicial Review and Courts Act 2022 (Hereafter JRCA 2022) s.13.

<sup>52</sup> Currently six months: Sentencing Act 2020, s.224. At the time of writing, s.13 JRCA 2022 is not fully in force.

<sup>53</sup> Interestingly, this would also increase the number of cases heard by a Judge alone. See discussion in relation to District Judges, above.

<sup>54</sup> MoJ, HMCTS, and Raab (n 50).

<sup>55</sup> Magistrates Court Act 1980 s.20.

<sup>56</sup> Ormerod (n 49) 355–6.

<sup>57</sup> In their 2020–21 Annual Report, the CPS data indicates that out of the 16,690 cases that proceeded to trial, 10,491 (63%) resulted in a conviction. This is compared to 2,354 convictions from 3,904 jury trials (60%). See: CPS ‘The Crown Prosecution Service Annual Report and Accounts 2020–21: Casework statistics’ <<https://www.cps.gov.uk/annual-report-accounts-2020-21>> accessed 15 June 2022.

<sup>58</sup> Law Society Gazette Newsdesk (n 46).

for the hearing of appeals from the Magistrates' Court,<sup>59</sup> rendering this proposal a mere extension of the uses for a bench configuration which already exists in the CJS. In support of the idea, Burnett LCJ suggests that this move would, unlike judge-only trials, continue to facilitate lay decision-making whilst eradicating need to socially distance 12 jurors.<sup>60</sup> However, it is respectfully suggested that this viewpoint rather oversimplifies the meaning of 'lay decision-maker.' First, the fact that 87% of the magistracy is white and 82% is over 50<sup>61</sup> renders it clear that such a move would reduce the representative nature of tribunals in the CJS, notably affecting those trying the most serious cases.<sup>62</sup> Moreover, an inevitable increase in workload, at least in the short term, would arguably intensify the risk of casehardening.<sup>63</sup> As such, and conscious of the notion that 'Defendants, and their lawyers, ... think that magistrates' court equals police court,'<sup>64</sup> the increased use of magistrates is not capable of satisfactorily appeasing the need for jury trials, even in the context of the Covid-19 pandemic.

Finally, and perhaps the elephant in the room in terms of the abovementioned proposals, the Magistrates' Court system has a backlog of its own which is, once again, only partly attributable to the pandemic. Whilst Ormerod notes that the Magistrates' Court has reduced its backlog from over 420,000, to just under 365,000,<sup>65</sup> there clearly remains a backlog of immense proportions, a backlog which needs to be addressed with the same urgency as that relating to the Crown Court. Stretching Magistrates' Court resources in the ways suggested above, would act as nothing more than a loosely fitting 'sticking plaster,'<sup>66</sup> which would negatively impact the administration of justice elsewhere in the CJS.<sup>67</sup>

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<sup>59</sup> Senior Courts Act 1981 s.74(1).

<sup>60</sup> Law Society Gazette Newsdesk (n 46).

<sup>61</sup> MoJ 'Official statistics: Diversity of the judiciary: Legal professions, new appointments and current post-holders – 2021 Statistics' <<https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2021-statistics/diversity-of-the-judiciary-2021-statistics-report#:~:text=56%25%20of%20sitting%20magistrates%20were,were%20aged%2050%20and%20above.&text=Across%20all%20non%2Dlegal%20exercises,Asian%20and%20minority%20ethnic%20ethnic%20backgrounds>> accessed 7 June 2022.

<sup>62</sup> Though the fact that juries can be unrepresentative must not go unacknowledged, it has been highlighted that this does not necessarily impact the fairness of decision-making by juries. See: C. Thomas, *Are juries fair?* (Ministry of Justice Research Series 1/10, 2010) 18.

<sup>63</sup> Case-hardening is a criticism often laid at the feet of Magistrates. See, for example: Editorial 'Mr Straw's bricks and the criminal justice system' (1997) 147 (6804) *NLJ* 1177, 1179.

<sup>64</sup> *Ibid.*

<sup>65</sup> Between June 2020 and July 2021. D. Ormerod 'Tackling the Backlog' [2022] *Crim LR*. 1–4, 1

<sup>66</sup> As so described by chairman of the Criminal Bar Association, Jo Sidhu QC. See: E. Colato 'Plans to double magistrates' sentencing powers damned as a "sticking plaster" for a broken justice system' <<https://www.thejusticegap.com/plans-to-double-magistrates-sentencing-powers-damned-as-sticking-plaster-for-broken-justice-system/>> accessed 7 June 2022.

<sup>67</sup> This is notwithstanding the fact that the MoJ announced an intention to recruit 4,000 new magistrates (see MoJ, HMCTS, and Raab (n 50)). The Magistrates Association notes that the number of magistrates halved

## Protecting Trial by Jury

The need to retain trial by jury, even in the midst of a pandemic involving a contagious disease, remains strong. It has been contended that a reduction in the number of jurors required to form a jury panel might be the answer.<sup>68</sup> However, the benefit of removing two or three jurors from a trial from a Covid-safety perspective is arguably negligible, as providing space for seven socially distant jurors in Crown Court rooms is minimally more easily achievable than accommodating 12, meanwhile such a move would ‘fundamentally alter a core element of our criminal justice system.’<sup>69</sup>

It is, therefore, fair to say that the absence of any real appetite for significant changes to the way in which trials on indictment are decided,<sup>70</sup> indicates that, even in the face of a coronavirus pandemic, the so-called ‘wheels of justice’ must continue to be driven by the traditional notions of justice that have pervaded the CJS since Magna Carta. Consideration must, therefore, turn to the ways in which this can be achieved in a safe and sustainable way through Covid-19 and beyond. It is axiomatic that the abovementioned use of three courtrooms to hold a single trial is anything but sustainable, rendering the increased use of technology within the CJS an inevitable outcome of the pandemic.

## Covid-19 and the Need for Remote Jury Trials

It was noted at the outset of this chapter that the Covid-19 pandemic was not the genesis for the use of technology in the criminal courts, whether by virtue of the natural percolation of technological enhancements in wider society into the courtroom, particularly from an evidential perspective,<sup>71</sup> or via concerted efforts to ensure that the ‘best evidence’ is available from vulnerable witnesses and those who are at risk of intimidation.<sup>72</sup> However, the MoJ and legislators at Westminster needed to act speedily in order to ensure that trials continued and the impact of Covid on the delivery of justice by the CJS was minimal.

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between 2009 and 2019. See: J. Bache ‘Recruiting police is pointless without more magistrates’ *The Times* (London, 15 August 2019) < <https://www.thetimes.co.uk/article/recruiting-police-is-pointless-without-more-magistrates-cvsvj3fd> > accessed 7 June 2022.

<sup>68</sup> Law Society Gazette Newsdesk (n 46).

<sup>69</sup> House of Lords Select Committee on the Constitution, Covid-19 and the Courts (HL, 2019–21, 257) para 232.

<sup>70</sup> P. McGarth ‘Coronavirus, the courts and case information’ (2020) LIM 20(3) 126–32, 129.

<sup>71</sup> E.g., Closed circuit television (CCTV). See: T. Murphy ‘The Admissibility of CCTV Evidence in Criminal Proceedings’ (1999) 13(3) IRLCT 383–404.

<sup>72</sup> An analysis of these efforts is beyond the scope of this chapter. However, see: Burton, Evans and Sanders (n 13).

In order to achieve this, provisions for virtual courts were included in the Coronavirus Act 2020,<sup>73</sup> which amended s.51 CJA 2003 in order to facilitate broader use of live links in the criminal courts.<sup>74</sup> This was capable of profound effect, particularly in terms of the ability of the courts to continue operating, particularly in the Magistrates' Court and for case management and sentencing hearings in the Crown Court.<sup>75</sup> However, there was one key restriction in relation to the use of video links in that, by virtue of s.51(1B) CJA 2003 a judge did not possess the power to order that jury members attend remotely.<sup>76</sup> As such, whilst it was possible for the Crown Court to minimise delays, and therefore the backlog, by progressing non-trial-related hearings, the fact that jury trials could not be held remotely significantly undermined the impact of these measures. Notably, this causes the true extent of the backlog of cases in the Crown Court to be underestimated as, unlike other hearings, trials can span multiple days, even weeks, rendering a backlog of 56,000 cases feeling more like 70,000 cases.<sup>77</sup> This evidently undermines the effectiveness of the virtual hearing as a mechanism for both reducing the backlog and ensuring the delivery of efficacious justice both throughout and beyond the Covid-19 pandemic. However, this position has changed, following the indefinite amendment<sup>78</sup> of the s.51 CJA 2003, so as to include the abovementioned powers for a judge to order the remote participation of a jury, provided all jury members are located in the same physical space.<sup>79</sup> This chapter now turns to a discussion of this significant change to the rules pertaining to the use of live links in criminal proceedings.

### **Remote Jury Trials—From Criminal Justice Fiction to Virtual Reality**

Prior to the Covid-19 pandemic the remote participation of barristers, jurors, and judges in trials was an entirely new and untested concept for the CJS.<sup>80</sup> When considering the mechanisms through which cases could continue to move through the courts during the pandemic, lawmakers indicated a clear statement against the erosion of the notion that jury members are key participants in trials in indictment. As noted above, emergency measures introduced in order

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<sup>73</sup> See Criminal Justice Act 2003 s.51 prior to its amendment by s.200.

<sup>74</sup> See Coronavirus Act 2020, s.53(a) and Sch 23, amending s.51 Criminal Justice Act 2003.

<sup>75</sup> The success of the latter in Sheffield has been heralded as a success by Her Majesty's Court and Tribunal Service. See L. Shotton 'The value and purpose of the fully remote court' <<https://insidehmcts.blog.gov.uk/2021/12/29/the-value-and-purpose-of-the-fully-remote-court/>> accessed 7 July 2022.

<sup>76</sup> Criminal Justice Act s.51(1B) as then amended by Coronavirus Act 2020.

<sup>77</sup> House of Lords Select Committee on the Constitution, Covid-19 and the Courts (n 69) paras 131–3.

<sup>78</sup> As opposed to the temporary changes made by Coronavirus Act 2020.

<sup>79</sup> S.51(2) CJA 2003 (as amended by s.200 PCSCA 2022).

<sup>80</sup> Although there have been anomalies. See: M. Fouzder 'Virtual judge hears jury verdict via Skype' <'Virtual' judge hears jury verdict via Skype | News | Law Gazette> accessed 11 May 2022.

to keep courts open during the pandemic expressly excluded jurors from a judge's discretion to order that participants join trials via live link. This seems sensible as, whilst '[j]ury trial is ... of the cornerstones of our criminal justice system,<sup>81</sup> jury decision-making is a concept fraught with fragility, risk, and a threat of inequity, particularly when jurors are required to apply essential but altogether vague concepts of law to the facts of the case before them.<sup>82</sup> As such, there exists a clear need to maintain a degree of status quo, so as to ensure the fragile but fundamental institution that is the jury trial, does not become an unwitting casualty of the pandemic. However, by introducing the possibility of the remote participation of jurors in trials in the Crown Court, legislators have brought about what is arguably the biggest change to trial by jury in the CJS since the introduction of Diplock trials in 1973. The specific rules and implications of this will now be considered in detail.

### **Analysing the Concept of Remote Jury Trials**

Section 200 PCSCA 2022 amends s.51 CJA 2003 to include the following:

s.51

(1) The court may, by a direction, require or permit a person to take part in eligible criminal proceedings through—

(a) a live audio link, or

(b) a live video link.

(2) A direction under this section may be given *in relation to a member of a jury* only if the direction requires *all members of the jury to take part through a live video link while present at the same place.*<sup>83</sup>

It is noteworthy at the outset that, from a technical perspective, a trial can feasibly be operated entirely away from the physical courtroom, with all members of the jury present at a single location. In a study by Mulcahy, Rowden, and Teeder, a mock Crown Court trial was conducted with all members joining from a remote location, with members of the jury located at a mock jury centre.<sup>84</sup> However, the impact of the significant shift in the nature of the communication

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<sup>81</sup> HL Deb 10 January 2022, vol 817, col 920.

<sup>82</sup> See P. Darbyshire 'The lamp that shows that freedom lives – is it worth the candle?' [1991] *Crim LR*. 740–52, for pivotal analysis on the fragility of trial by jury.

<sup>83</sup> Criminal Justice Act 2003 s.51 as amended by Police, Crime, Sentencing, and Courts Act 2022 s.200 (emphasis added).

<sup>84</sup> L. Mulcahy, E. Rowden, and W. Teeder 'Testing the case for a virtual courtroom with a physical jury hub – Second evaluation of a virtual trial pilot study conducted by JUSTICE' <https://files.justice.org.uk/wp->

between members of the jury and other participants in the criminal trial should not be underestimated. The words of Lord Pannick are particularly poignant:

I share the concerns about this proposal that have been expressed by the Bar Council and the Law Society. They say that the success of a jury trial depends in large part on a good working relationship of trust and confidence between judge and jury. The jury needs to be attentive and mindful of its onerous responsibilities; the judge needs to watch the jury to ensure that its interests are protected and it is properly performing its responsibilities. Counsel—both prosecution and defence counsel—need to engage with the jury during the trial. All this is so much harder to achieve through a video screen.<sup>85</sup>

As such, it is arguable that the additional barrier between the jurors and others in the courtroom presents a particularly significant challenge, not least as ‘when courtroom communication is mediated by video link, the courtroom becomes spatially distributed and the relationships between participants are reshaped.’<sup>86</sup> For example, it will be considerably more difficult than is already the case for judges to ensure jurors are following the proceedings in court and that they are not consulting material which has not been presented to them throughout the course of the trial.<sup>87</sup> Furthermore, there is a potential for an increased risk of jurors making decisions based on their appraisal of counsel, specifically the fact that one took the time to be present in court, whereas the other was attending via video link. Whilst this would appear speculative, research by Darbyshire suggests that jurors may make decisions based on how they feel about counsel throughout the trial.<sup>88</sup> A simple way of ensuring this does not occur would be to legislate for the fact that barristers must be present at trial in the same way. For example, if a judge is to order that one barrister attend via live link, this must be the case for all barristers. This would arguably minimise any potential inequity arising as a result of a barrister participating via live link.

It must also be remembered that jurors are not passive bystanders during a trial and that effective communication with members of the jury is tantamount to the performance of a jury advocate when delivering speeches and examining witnesses. The adjustment to carrying out

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content/uploads/2020/06/06165935/Mulcahy-Rowden-second-evaluation-report-JUSTICE-virtual-trial.pdf> accessed 12 April 2022.

<sup>85</sup> HL Deb 10 January 2022, vol 817, col 920.

<sup>86</sup> J. Donoghue ‘The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice’ (2017) 80(6) *MLR* 995–1025 at 1011.

<sup>87</sup> For an indication of the significance of this where all are present in court, see *R v. Benjamin Thompson and otrs* [2010] *EWCA Crim* 1623.

<sup>88</sup> Darbyshire (n 82) 748–9.

these key components of a jury trial is not going to be easy for advocates, who have developed, refined, and polished their craft so as to deliver the best performance they can whilst on their feet, in a physical court space. Furthermore, as is generally the case when sweeping changes are brought to the CJS, lawyers are expected to seamlessly integrate these changes into their practice with little guidance, training,<sup>89</sup> and the accompanying high-risk of harm to their professional standing and reputation, a fact which only adds to the risk these changes pose to the quality of justice delivered by the CJS. Linked to this, is the fact that the quality of video and audio technology might have significant implications on the perceived veracity and credibility of witnesses' testimony.<sup>90</sup> It is asserted that where the question of an individual's guilt rests, even to the smallest extent, on the quality of the internet service provided to witnesses, counsel, courts, and jury centres, the safety and fairness of verdicts are open to question.

Sticking with matters of evidence, Hoyano makes an interesting point in relation to the availability of physical evidence to jurors.<sup>91</sup> In a traditional trial, where all participants are in one courtroom, members of the jury are able to see, in person, the tools used to commit an alleged burglary, the suspected drugs paraphernalia, or the knife used to wound a complainant. In the shift to online trials, no consideration appears to have been made for the drastically restricted ability for jurors to do the same. In effect, one can envisage increased security, transport, and storage costs, in addition to the risk of delays, where jurors request to see items of evidence in person. This can only be regarded as having the potential to undermine any efficiency savings proffered by a move to virtual trials.

Another notable concern that those participating in remote trials will no longer respect the solemnity and significance of the work of the courts. An example of this can be seen in the recent case<sup>92</sup> involving Johnny Depp and Amber Heard, in which a witness gave pre-recorded evidence via video technology, whilst driving their car and using a vape device.<sup>93</sup> In addition, again in the USA, an individual attempted to flatter a judge during an online bail hearing.<sup>94</sup> It is contended that such behaviour would not even be contemplated by those attending a physical

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<sup>89</sup> A point Hoyano duly makes in relation to the Digital Case System: Hoyano (n 5) 1043.

<sup>90</sup> Donoghue (n 86) 1007.

<sup>91</sup> Hoyano (n 5) 1037.

<sup>92</sup> Albeit in the United States of America.

<sup>93</sup> T. Thomas 'Doorman witness vapes and drives during testimony in *Depp v. Heard* trial' *The Guardian* (London, 28 April 2022) < <https://www.theguardian.com/film/2022/apr/28/doorman-witness-vapes-and-drives-during-testimony-in-depp-v-heard-trial> > accessed 15 May 2022.

<sup>94</sup> NBC Miami 'Suspect Flirts with Broward Judge During Virtual Bond Court Hearing' < <https://www.nbcmiami.com/news/local/suspect-flirts-with-broward-judge-during-virtual-bond-court-hearing/2375983/> > accessed 15 May 2022.

courtroom to give evidence or appear before a judge and only goes to exemplify the risks posed to the respect for and veracity of the work of the CJS, through any increased of the use of a judge's powers to order the remote attendance of key participants at hearings, including trials.

### **Lessons from Scotland**

It is noteworthy that the legal rules discussed in this chapter relate specifically to England and Wales. However, the ability for a jury to attend a trial remotely has been a facet of the Scottish Criminal Justice System since early on in the Covid-19 pandemic.<sup>95</sup> Notably for socially distanced juries to be ordered to watch proceedings taking place in the courtroom, via live link at venues such as cinemas, across Scotland.<sup>96</sup> Between the start of the Covid-19 pandemic and August 2021, 278 cases were heard by juries in remote jury centres.<sup>97</sup> This is a stark contrast, when considering the fact that such trials have only just become possible in England and Wales.

Given that such a significant number of remote jury trials have taken place in Scotland, there exists useful data upon which conclusions can be drawn in order to influence the analysis of remote jury trials in the context of the CJS. According to one study, 97% of jurors who provided responses to an 'exit' survey, indicated that they had an overall positive experience with regards to hearing cases remotely.<sup>98</sup> This could, therefore, support the notion that any move towards virtual trials in England and Wales, would be an overwhelmingly positive step in using technology to enhance criminal courts in the context of the CJS. This success, however, is somewhat cooled by the fact that only 53% of jurors surveyed felt that this experience was better than their previous jury service which had been physically undertaken in the courtroom.<sup>99</sup>

The study also captures the viewpoints of professionals and, in doing so, distinguishes between 'Crown Professionals' and 'Defence Professionals.'<sup>100</sup> Alarming, the group of professionals which is the least satisfied with the process is labelled as 'Defence Professionals,' with only 56% indicating a positive response to the study's overall satisfaction question.<sup>101</sup> The reasons for this require further investigation in order to ascertain why remote jury panels were deemed to be quite so unsatisfactory from a defence perspective. It may be the case that defence professionals

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<sup>95</sup> See Anon 'News' [2020] 23 SLT 147–52, 151.

<sup>96</sup> See Anon 'News' [2020] 38 SLT 269, 269–70.

<sup>97</sup> O'Sullivan (n 14).

<sup>98</sup> Wellside Research 'Court User Satisfaction Survey2021/2022: Phase 1: Jury Trials' <<https://www.scotcourts.gov.uk/docs/default-source/coming-to-court/jurors/court-user-satisfaction-survey-2021-phase-1-results-final-report.pdf>> accessed 30 June 2022, 43.

<sup>99</sup> *Ibid.*, 41.

<sup>100</sup> *Ibid.*, 6.

<sup>101</sup> *Ibid.*, 9.

in Scotland feel that the move to remote juries erodes further the rights of the defendant in such trials in favour of speed and procedural prowess.<sup>102</sup>

Perhaps most concerning, however, relate to the ability of jurors to engage with the process. In the abovementioned study, 15 (of 78) professional respondents indicated that a disadvantage of remote jury trials was the '[r]educed impact and levels of engagement of/with the jury.'<sup>103</sup> This adds credence to the theoretical analysis provided above, in relation to the risks posed to the ability of judges to maintain checks and balances on the jury, and the increased challenges presented to counsel in terms of their communicating with the jury, where participants join trials remotely.

Feedback was also provided in relation to the fact that that some jurors had difficulty taking part in deliberations, due to the need to communicate via microphones.<sup>104</sup> Whilst this represents a small proportion of respondents (30 of 1027 respondents),<sup>105</sup> the inability of just a single juror to engage effectively in the decision-making process is enough to question the veracity and credibility of the CJS. Moreover, some respondents indicated that 'the more relaxed atmosphere and being separate from the court and other participants had perhaps resulted in some jurors not taking the case or the responsibilities as seriously as they would ... under court-based conditions.'<sup>106</sup> This clearly adds support to the belief that removing participants from the courtroom might detrimentally impact the extent to which participants respect the solemnity of the occasion.

Finally, In Mulcahy, Rowden, and Teeder's fourth virtual mock trial, which involved a jury housed in a single physical space, it was noted that 'the connection from the jury hub to the virtual courtroom did not fail once during the day.'<sup>107</sup> Whilst this should be commended, the impact of a private company providing high-quality equipment, in addition to an on-site four-person technical support team<sup>108</sup> should not be ignored. Indeed, the experience of Scottish jurors was somewhat different, with a number experiencing technical (audio and/or visual) difficulties

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<sup>102</sup> For interesting insight into how managerialist approaches to justice might be eroding the role of the defence lawyer and subsequently the rights of the defendant, see E. Johnston *The Role of the Defense Lawyer: Perceptions and Conceptions Within a Changing System* (Lexington Books 2021).

<sup>103</sup> Wellside Research (n 98) 39. This is the most frequently cited disadvantage by professionals (Crown and defence) in the survey.

<sup>104</sup> Wellside Research (n 98) 38.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Mulcahy, Rowden, and Teeder (n 84) 4.

<sup>108</sup> Ibid.

in terms of their observing the trial (118/1027 respondents).<sup>109</sup> Noting the importance of jurors being able to both see and hear all the evidence, it is rather concerning that such a significant proportion of jurors had to deal with such challenges. What is perhaps more worrisome, is the fact that 56% of jurors indicated that these technical issues were never resolved.<sup>110</sup> The extent to which jurors being unable to follow proceedings in remote trials might be proper grounds for appeal is unclear. However, what is fundamentally clear at this juncture, is that such a scenario presents a real risk that a witness's evidence might be judged, at least in part, on the quality of the video technology available, a scenario which is frankly unacceptable.<sup>111</sup>

Notwithstanding the apparent overall successes in Scotland, the use of remote juries and remote jury centres is being brought to an end and Scottish jury trials are, by and large, returning to in-person, traditional format.<sup>112</sup> It can therefore be suggested that, even in the face of a mostly successful, albeit Covid-19-induced, real-world pilot of remote jury trials, such a reluctance to maintain them long-term demonstrates that the remote jury trial fails to present an appropriate, long-term, viable alternative to in-person jury trials. In the context of England and Wales, this is significant for two reasons. First, by taking until May 2022 to enact provisions enabling remote jury trials following the eradication of social distancing and self-isolation rules, the Westminster Government is clearly guilty of closing the stable door once the horse has bolted. The second, and perhaps more significant point is that, whilst remote jury trials provide a suitable emergency response to a global pandemic, they do not offer a safe and dependable mechanisms for reducing the catastrophic backlog currently facing the Crown Courts in England and Wales.

## **Conclusion**

This chapter has considered the key challenges facing the CJS when seeking to keep cases moving during the Covid-19 pandemic. However, with a system already plagued funding gaps, ageing real estate, and perpetual delays, it was inevitable that the backlog of cases would grow exponentially during the pandemic. As noted throughout this chapter, delays cause both evidential and procedural issues resulting in significant injustice in the very system which should be delivering safe, fair, and accessible justice to its participants. As such, alternative mechanisms

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<sup>109</sup> Wellside Research (n 98) 37.

<sup>110</sup> Ibid.

<sup>111</sup> Donoghue (n 86) 1011.

<sup>112</sup> Scottish Courts and Tribunals 'Jurors to return to courtroom for the first time in over two years' <<https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2022/05/25/jurors-to-return-to-courtrooms-for-the-first-time-in-over-two-years>> accessed 30 June 2022.

of delivering justice needed to be identified to minimise the impact of Covid-19 upon those touched by the CJS.

As argued throughout this chapter, the preservation of trial by jury is central to ensuring the credibility and perceived fairness of the CJS. Attempts to dilute the role of the jury ensue, with the increase of magistrates' sentencing powers being a key step in this direction. All must be done to prevent the further weakening of the jury's standing in the CJS. It therefore follows that trial by jury cannot be allowed to become collateral damage in the fight to keep society moving, even in the face of a global pandemic. For the reasons outlined earlier in this chapter, the use of judge-only trials or trials involving a judge and two magistrates, are in no way acceptable alternatives to usual trials by jury, even on a temporary basis.

This effectively presents a need to find ways of pressing ahead with jury trials, even during pandemics, such as the one pertaining to Covid-19. In terms of remote juries, the discussion throughout this chapter has indicated the risks posed by their use. Notably, erosion of a judge's ability to monitor and control the jury, the potential for technical issues to lead to jurors missing vital evidential points without resolution and the significant changes to the way in which the jury communicates with other participants in the Crown Court trial, fundamentally undermines the remote jury as a suitable alternative to in-person jury trials. So much so, that even the trailblazing Scottish Courts and Tribunals Service is phasing out the use of remote juries in favour of in-person jury trials. In essence, when deciding whether to exercise their newly established power to order the remote attendance of a jury, or indeed any other participant, that judge is arguably faced with weighing up a delay against the delivery of an inferior quality of justice.

In essence, even in the face of a virus such as Covid-19, in-person jury trials must continue. As discussed, the current Crown Court estate is not capable of delivering socially distanced trials in a safe and sustainable way. It might have been sensible to treat those engaged in jury trials in the same way as police officers, National Health Service staff, and teachers who, for the most part, had to work in close proximity to colleagues and service users in order to ensure they were able to deliver the requirements of their respective roles. That said, this would be nothing more than what is arguably best worst-case scenario in terms of keeping the wheels of justice moving. Had the court estate been preserved, rather than closed,<sup>113</sup> improved rather than neglected to a state of dilapidation, and prioritised rather than demonised over the past decade, the Crown Court estate might have been better placed to deliver justice throughout the Covid-19 pandemic.

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<sup>113</sup> Donoghue (n 86) 1001.