

Chapter 5

Remote justice: undermining trial by jury? Exploring the reasons for keeping the jury in the room

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Abstract

The Coronavirus pandemic acted as a catalyst for the use of live link in criminal proceedings. Temporary measures were adopted which empowered judges to order that almost any participant attend court remotely, via live link.¹ However, these temporary measures, quite properly, did not include members of the jury. Some four months following the removal of Coronavirus restrictions in England and Wales, the Police, Crime, Sentencing and Courts Act 2022² went beyond rendering these temporary measures permanent. Indeed, the current iteration of s.51 Criminal Justice Act 2003 clothes trial judges with the power to provide a direction which permits a jury to attend a trial remotely, provided all jurors are located in the same physical space.³ This notion of ‘trial by remote jury’ gives rise to significant concerns and presents an increased risk of miscarriages of justice and, following the removal of Coronavirus restrictions, constitutes an unnecessary addition to the statute books.

5.1 Introduction and context

The Coronavirus pandemic triggered several issues for the Criminal Justice System in England and Wales.⁴ Notably, the Crown Court estate struggled to provide sufficient accommodation for socially distanced jury trials, to the extent necessary to prevent a significant increase in an already unacceptable backlog of cases. In order to minimise the impact of Covid-19 on trial delays, the Scottish Courts and Tribunals Service were very quickly provided with the ability to order remote jury trials.⁵ By contrast, judges in England and Wales were not afforded the power to direct that a jury attends a trial remotely until 28 June 2022,⁶ some six months after Coronavirus restrictions were lifted in England and Wales.⁷

In order to effect this change, s.200 Police, Crime, Sentencing and Courts Act 2022⁸ amended s.51 Criminal Justice Act 2003⁹ to include the following:

- (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*.¹⁰

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¹ See: Coronavirus Act 2020 s.53(a) and Sch 23, amending Criminal Justice Act 2003 s.51.

² Police, Crime, Sentencing and Courts Act 2022 s.200 which amended Criminal Justice Act 2003 s.51(2).

³ Criminal Justice Act 2003 s.51.

⁴ Hereafter referred to as ‘the criminal justice system’.

⁵ Anon ‘News’ [2020] 23 SLT 147 – 152.

⁶ By virtue of the coming into force of the Police, Crime, Sentencing and Courts Act 2022 (see below).

⁷ BBC News ‘Covid: Restrictions end in England and NHS staff challenges in Scotland’ <

<https://www.bbc.co.uk/news/uk-60499042>> accessed 27 June 2023.

⁸ Hereafter PCSCA22.

⁹ Hereafter CJA03.

¹⁰ Criminal Justice Act 2003 s.51 as amended by Police, Crime, Sentencing and Courts Act 2022 s.200 (emphasis added).

The legitimacy, reliability, and essentiality of trial by jury has endured considerable debate.¹¹ The introduction of remote jury trials in England and Wales adds a new nuance to that debate. Professor Laura Hoyano notes:

[T]he conventional adversarial trial in common law jurisdictions is grounded upon the principles of a single hearing at which all evidence is received before the trier of fact in a courtroom, with the trial judge and all parties and witnesses physically present, whilst enabling public scrutiny of the proceedings.¹²

This chapter argues that the power for judges to direct that juries attend a trial remotely poses a risk the safety of verdicts from such juries. Moreover, given that Coronavirus is no longer considered as a world emergency, s.51(2) CJA03 is superfluous to requirements. In order to do so, the discussion first turns to a discussion of the need to protect trial by jury. The extent to which remote attendance by jurors poses a risk to justice is appraised, along with the impact on trial advocates' ability to communicate effectively with jurors via live link.

5.2 Trial by jury – a cornerstone of justice?

It is now perhaps trite, that the origins of trial by jury can be traced back to Magna Carta. However, this has long been refuted,¹³ it was during the Renaissance that trial by jury became a core facet of legal decision-making in England and Wales.¹⁴ For almost five centuries trial by jury in England and Wales has remained a constant reminder of its origins; a jury is still comprised of 12 members, these members are lay people drawn from the local community and the jury remains the arbiter of fact only. There have been some changes, particularly in relation to vast expansion those who 'qualify' to be called for jury service¹⁵ and there has been a concerted effort to reduce the use of juries across the justice system in England and Wales. Notably, the use of juries for civil cases has been significantly curtailed,¹⁶ and there have been various attempts to erode trial by jury in complex fraud cases,¹⁷ in addition to cases in which there exists no reasonable prospect of a fair jury trial.¹⁸ The most recent, albeit unsuccessful, example of a step intended to reduce the number of jury trials pertains to the increasing of the jurisdiction of the Magistrates' Court, whereby magistrates were clothed with the power to pass sentences of up to one year imprisonment for a single either-way offence.¹⁹ This has since been reversed, as the apparent impact is that of harsher prison sentences being passed by magistrates, as opposed to reducing the number of

¹¹ Notably, Penny Darbyshire wrote a number of articles criticising trial by jury. See: P. Darbyshire 'The lamp that shows that freedom lives – is it worth the candle?' [1991] Crim LR. 740–5.

¹² See: L. Hoyano 'Postage stamp justice? Virtual trials in the Crown Courts under the Police, Crime, Sentencing and Courts Bill' (2021) 12 Crim LR 1029 at 1030.

¹³ See the comments of R. Auld LJ in *A Review of the Criminal Courts in England and Wales* 137 – 138. Auld notes that, unlike in other jurisdictions, there is no constitutional basis for jury trial in England and Wales. It might be suggested that the current Government sought to change this, in the now discarded draft Bill of Rights: Bill of Rights HC Bill (2022–23) 117 [9].

¹⁴ T. S. Purwal 'Fit for purpose? A critique of the jury system within the English and Welsh Jurisdiction' (2022) 9(1) LJ 47 – 77 at 48.

¹⁵ For an overview of the changes to juror qualification and eligibility see: P. Thornton 'Trial by Jury: 50 years of change' [2004] Crim LR. 119-137.

¹⁶ See: Senior Courts Act 1981 s.69 and County Courts Act 1984 s.66, which stipulate a presumption of trial by jury only in cases where the court is satisfied that a matter in issue involves malicious prosecution, false imprisonment and/or fraud.

¹⁷ The now defunct Criminal Justice Act s.43 which was repealed by Protection of Freedoms Act 2012 s.113 prior to the provision coming into force.

¹⁸ E.g. Diplock Courts and cases where there is a significant risk of jury tampering. For an overview of these provisions, see: D. Jasinski '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?' in E. Johnston (Ed.) *Covid-19 and Criminal Justice Impact and Legacy in England and Wales* (Routledge 2023).

¹⁹ Judicial Review and Courts Act 2022, s.13 which amended the Sentencing Act 2000 s.224.

defendants electing trial by jury;²⁰ an entirely predictable consequence, not least as the ability for magistrates to pass harsher sentences increases the desirability of taking one's chances with a jury trial.²¹ In essence, the existence of trial by jury remains an enduring element of the criminal justice system which has weathered many attempts to erode its significance.

It is, of course, pertinent to note that trial by jury is not by any means infallible²² and trial by jury has long-suffered criticism, largely following particularly newsworthy decisions which are considered to be 'perverse' or 'bizarre'.²³ Perhaps the greatest indicator of a jury's legitimate ability to fly in the face of both the law, evidence and judicial direction, is evident in *Bushell's Case*,²⁴ which occurred following the imprisonment of a juror for failing to succumb judicial direction as to a defendant's guilt. The then Chief Justice, Sir John Vaughan, made clear the existence of a right for jurors to decide cases as they see fit, notwithstanding the opinion of all others as to the law and evidence before them including, notably, the trial judge.²⁵ As highlighted by Crosby,²⁶ whilst somewhat unpopular, this independence is central to the notion of an impartial jury which decides a justly, in a manner which is free from undue influence.²⁷

One such case which demonstrates this, is the *R v Ponting*.²⁸ In this case, Clive Ponting was acquitted of wrongful communication²⁹ after sending to then Member of Parliament, Thomas Dalyell, information pertaining to the sinking of a ship during the Falklands' conflict. This occurred notwithstanding the fact that Ponting admitted sending the papers. Whilst the reason(s) for the verdict of a jury must never be known, it has been suggested that the reason for Ponting's acquittal arose out of so-called jury equity,³⁰ which occurs when a jury acquits a defendant in circumstances where 'they' think it is the 'right' thing to do'.³¹ Some would suggest that this constitutes re-writing the law and that a jury's ability to deliver such verdicts is, in itself, perverse.³² To the contrary; the only perversion in this context, is to refer to any verdicts delivered by a sworn jury as perverse.³³

What is evident is that, whilst trial by jury is undoubtedly a cornerstone of the criminal justice system, it is one which is fraught with fragility. Judges seek, as far as possible, to ensure that juries return verdicts which are arrived at in accordance with the relevant legal and procedural rules.³⁴ In this regard, writing the forward to the latest update to the Crown Court Compendium (June 2022), Lord Justice Fulford reflects on the increasingly complex nature of criminal cases faced by jurors, and 'some of the 'labyrinthine' directions that must now be given'.³⁵ The importance of effective communication between the judge and jury in order to ensure the fairness of proceeding and the safety of verdicts cannot be underestimated,³⁶ a

²⁰ M. Fouzder 'Magistrates' sentencing powers scaled back' *The Law Society Gazette* (London, 10 March 2023) <<https://www.lawgazette.co.uk/news/magistrates-sentencing-powers-scaled-back/5115396.article>> Accessed 27 June 2023.

²¹ D. Ormerod 'The Judicial Review and Courts Bill' [2022] 5 Crim LR. 353 – 357 at 355-356.

²² For the seminal analysis of the fallacies of trial by jury, see: Darbyshire (n 11).

²³ For an interesting overview of such cases and an analysis of Law Commission proposals to tackle such issues, see: N. Monaghan 'Judicial guidance on the award of compensation for miscarriages of justice: issues of accountability and compatibility with the presumption of innocence' (2013) 18(2) Cov. L J 1-10.

²⁴ (1670) 1 Freeman 1.

²⁵ *Bushell's Case* (1670) 1 Freeman 1. See further: D. Hewitt 'Who says it's perverse' (2017) 167(7767) NIJ 22.

²⁶ K. Crosby 'Controlling Devlin's jury: what the jury thinks, and what the jury sees online' [2012] 1 Crim LR 15-29.

²⁷ *Ibid* at 28.

²⁸ [1985] Crim L.R. 318.

²⁹ Contrary to the then Official Secrets Act 1911 s.2(1).

³⁰ See: E. Johnston and T. Smith *Criminal Procedure and Punishment* (2nd edn, Hall and Stott Publishing 2020) at 173. The term 'jury nullification' has also been used to illustrate this point. See: Crosby (n 26) at 16.

³¹ See: Johnston and Smith (n 30) at 172.

³² Darbyshire (n 11) 750 – 751.

³³ Hewitt (n 25).

³⁴ Judges are provided guidance on how to do so in the ever-growing Crown Court Compendium. See: Judicial College 'Crown Court Compendium: Part I: Jury and Trial Management and Summing Up' (June 2022) <<https://www.judiciary.uk/guidance-and-resources/crown-court-compedium/>> Accessed 27 June 2023.

³⁵ *Ibid* at viii.

³⁶ To this end, Lord Pannick noted, citing the Bar Council and the Law Society, '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

fact which necessitates the courtroom remaining as the epicentre of the jury trial. The next section analyses the extent to which remote attendance at trials by jurors undermines their role as core participants.

5.3 The jury: keeping core participants in the room

Given that the fundamental task of jurors is to listen to the evidence and deliberate in secret, it would not be unreasonable to arrive the conclusion that the role of jurors in court-room communication is dutifully inert in nature. Indeed, aside from delivering their verdict at the conclusion of the trial, and perhaps sending a note to the Judge, the jury *appears* to undertake a very passive role at the hearing itself.

However, this fundamentally underplays the extent of the importance of jurors in court-room communication, a point made clear by Lord Pannick when commenting on the concept of counsel and jury being located in separate physical spaces.³⁷ In the same way that advocates must ‘follow the Judge’s pen’ it is vital that advocates are in the best position to, as far as is possible, to ensure that jurors are following the following the evidence.

In his speech during the debate pertaining to the PCSCA22, Lord Pannick’s compares the challenges which may be faced by jurors attending remotely, to those suffered by parliamentarians who were required to engage in parliamentary business remotely during the pandemic.³⁸ Similar concerns might well be articulated by academic teaching staff engaged in online teaching and learning activities, with Glazier noting that the ‘[h]olding synchronous classes via videoconference may seem like a perfect way to connect with students, but it takes care and thoughtfulness to ensure that this format is not impersonal and isolating.’³⁹ As such, the creation of a distance relationship between the jury and the courtroom gives rise to risk of a feeling of detachment between members of the jury and the trial itself, undermining the extent to which jurors recognise the extent to which they are central to the proper administration of justice in the context of trial by jury.

With that being said, in their experiment involving mock virtual jury trials, Mulcahy, Rowden and Teeder duly indicate the pivotal role a trial judge can play in mitigating these issues. Notably, they indicate how the judge can explain the technology to the jurors. In particular, the judge informed jurors taking part in the trial that ‘the mute function on their microphones ... was to prevent sound distortions’.⁴⁰ Initially, such a comment might raise concern, as this might be interpreted by jurors as a requirement for them to say nothing during the course of the trial. However, in the course of doing so, the judge reminded members of the jury that they ‘did have a voice’ through the chat function, indicating that this represented their mechanism to communicate directly with him.⁴¹ In addition, the judge informed the jury that he would be monitoring them closely throughout the course of proceedings and would take steps to re-engage them, should their attention wander.⁴² The findings of the report indicate that this warning appeared to have worked, noting that ‘participants commented on the fact that the jury was very engaged with the case. Many of the jurors were actively taking notes, asked pertinent questions’.⁴³ It must though be noted that jurors were aware they were taking part in a mock trial and, with evidence to suggest that members of the jury find their role intimidating and stressful,⁴⁴ renders it questionable as to whether jurors would have felt as confident in doing so in a live trial.

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.’ HL Deb 10 January 2022, vol 817, col 920.

³⁷ Ibid.

³⁸ Ibid.

³⁹ R. Glazier ‘Making Human Connections in Online Teaching’ (2021) 54(1) PS 175 – 176 at 176.

⁴⁰ 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-content/uploads/2020/06/06165935/Mulcahy-Rowden-second-evaluation-report-JUSTICE-virtual-trial.pdf> accessed 27 June 2023 at 20.

⁴¹ Ibid.

⁴² Mulcahy et al (n 40) at 19.

⁴³ Ibid.

⁴⁴ O. Bowcott ‘Are courts demanding too much from jurors?’ *The Guardian* (London, 7 November 2011) <<https://www.theguardian.com/law/2013/jul/29/jurors-jailed-contempt-court-internet>> accessed 27 June 2023.

The extent to which such an approach can be transposed into live trials remains untested in England and Wales, given that no such trials have taken place within the jurisdiction. As such, for a real-world appraisal of juror engagement in the context of jury trials, the discussion must turn to an appraisal of Scotland who, very early on in the pandemic, legislated for remote jury trials,⁴⁵ with some 300 remote trials taking place, with many being beamed from courtrooms to cinemas and theatres, where jurors settled into comfy seats and followed the case on the big screen, remote jury trials became a core part of the Scottish justice system, at least for the duration of the pandemic.⁴⁶ As a result, primary research into the experiences of jurors who took part in remote trials has been possible.⁴⁷

As part of the research, jurors were asked questions pertaining to their experience of the trial itself.⁴⁸ The data suggests that jurors were, for the most part, able to “see and hear all those available in the hearing either “fairly” or “very” well.”⁴⁹ In addition, 66% of those surveyed who had experience of in-person and remote attendance suggested their experience of attending a trial remotely was better or no different to attending court.⁵⁰ This data suggests that, from the perspective of jurors, attending trials remotely was something of a positive experience. However, what is rather concerning, is that 56% of jurors who indicated they experienced technical issues stated that these technical issues were never resolved. In effect, this indicates that jurors in live trials were excluded from some aspects of the evidence which, from the perspective of safety and fairness, is worrisome and might be considered affected jurors as leaving the room and not returning. As a result, it is vital that the technology used is robust enough to ensure that connection failures are extremely rare. This appears to be a problem with which the criminal justice system is grappling on a regular basis, a fact which is not least evidenced by the technological issues experienced by those attempting to watch the sentencing of David Carrack via the link.⁵¹ The performance of the Cloud Video Platform, as utilised by courts in England and Wales has, on occasion, demonstrated itself to be unreliable to such an extent, that HMCTS⁵² felt the need to apologise for jurisdiction-wide connection issues.⁵³ This seriously undermines the extent to which Cloud Video Platform constitutes a viable dependable alternative to in-person jury trials.

It might be argued that such issues can be remedied through an increased use of pre-recorded evidence. In his latest article, Jackson advances the notion that an increased use of such evidence might increase efficiency and veracity of the fact-finding process in criminal trials.⁵⁴ Should the use of pre-recorded evidence be expanded, this would give rise to greater control over the process of jurors seeing evidence via a video link, reducing the risk of connection issues impeding jurors’ ability to hear and see witness testimony. For example, the recording may be paused, or perhaps even replayed, where connections fail. However, it might also be argued that such a practice increases the extent to which jurors are viewed as passive-bystanders rather than core participants in jury trials. This rests on the premise that jurors hear live evidence, which includes an appraisal of the demeanour and body language of a respective witness, in addition to their spoken word. The existing measures which allow for the pre-recording of evidence of vulnerable witnesses, including those who are victims of serious sexual offences and/or at risk of

⁴⁵ See: Anon (n 5).

⁴⁶ 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 27 June 2023.

⁴⁷ Wellside Research ‘Court User Satisfaction Survey 2021/2022: 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 27 June 2023.

⁴⁸ Ibid at 8, 36 – 41.

⁴⁹ Ibid.

⁵⁰ Wellside Research (n 47) at 41.

⁵¹ L. Dearden ‘David Carrick’s victims unable to hear sentencing because of broken court video link’ *The Independent* (London, 7 February 2023) <<https://www.independent.co.uk/news/uk/crime/david-carrick-court-victims-police-b2277327.html>> accessed 27 June 2023.

⁵² His Majesty’s Courts and Tribunal Service.

⁵³ See generally: M. Fouzder ‘HMCTS apologises for CVP connection problems’ *The Law Society Gazette* (London, 12 March 2021) <<https://www.lawgazette.co.uk/news/hmcts-apologises-for-cvp-connection-problems/5107762.article>> Accessed 27 June 2023.

⁵⁴ J. Jackson ‘Rethinking the orality/ confrontation paradigm in a world of remote evidence’ [2023] 4 Crim. LR. 265-285 at 268.

intimidation from organised criminal groups are entirely proportionate.⁵⁵ However, an increased shift to pre-recorded evidence merely for efficiency purposes constitutes an affront to the adversarial principles upon which the criminal justice system is based and should be avoided as a mechanism for improving the fairness of trials where a jury attends remotely.

The use of remote juries has been incredibly limited on a global level. In the United States' jurisdictions,⁵⁶ where trial by jury remains a prevalent feature in both criminal and civil proceedings,⁵⁷ a fully remote trial was performed in relation to a misdemeanour traffic offence. In 2020 Judge Nicholas Chu, then Justice of the Peace in Travis County, ordered that the case of *State of Texas v Calli Kornblau* take place entirely remotely, notably with all jurors attending from their own personal location and via video link.⁵⁸ Whilst the jury in this trial successfully arrived at a verdict, one of the jurors had to be dismissed due to a connection failure. In addition, Judge Chu 'that his biggest concern with virtual trials was that jurors might be distracted by email, children or something else in their homes'.⁵⁹

In essence, it is clear that remote jury trials are capable of enabling jurors to engage with the trials taking place at a different location. Judges play a key role in ensuring that members of remote juries continue to feel central to the jury trials. However, in the absence of robust and well-managed video and audio platforms, the present state of affairs does not proffer confidence in the ability of the available technology to ensure jurors remain engaged with the trial and, where a judge to exercise their discretion under s.51 CJA03, it is humbly asserted that they would be risking the safety of the trial over which they preside.

5.4 Impact on *how* jurors perceive evidence

The previous section alluded to the fact that a jury which attends a trial remotely by a video link will experience the evidence differently when compared to those hear a case in which all participants appear in the same physical space, particularly. The extent to which this issue might impact the way in which jurors perceive evidence shall now be explored.

At the outset, it is sensible to note the degree to which evidence heard via video-link might be perceived differently when compared to evidence heard in-person is by no means a new debate.⁶⁰ There has long existed mechanisms through which empowered judges to direct that live evidence be given via a video-link, mechanisms which are a facet of the special measures afforded to vulnerable victims and witnesses, in order to ensure their evidence is reliable as possible.⁶¹ Donoghue, in citing a study pertaining to the cross examination of adult rape complainants giving evidence via a live-link (as opposed to in-person), notes that justice-based arguments against doing so may well be unfounded.⁶² However, Donoghue goes on to highlight that 'remote testimony may affect how jurors process demeanour evidence and make credibility assessments'.⁶³ Given that a witness's credibility goes to the heart of whether their testimony is believed, it is fair to say that a witness giving evidence remotely has the potential to directly influence the weight attached to their evidence and, ultimately, the extent to which that evidence contributes to

⁵⁵ See: Youth Justice and Criminal Evidence Act 1999 ss.27 - 28. See further: J. Donoghue 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice' (2017) 80(6) MLR 995–1025 at 1011 - 1013.

⁵⁶ It is recognised that the United States has jurisdictions which exist at both Federal and State levels, hence the use of the plural 'jurisdictions'.

⁵⁷ In relation to the significance of jury trials in the civil context, see the opening remarks of HHJ Martin Hoffman: Judge Martin Hoffman 'First Remote Trial in Dallas County Voir Dire November 17, 2020' (17 November 2020) <<https://www.youtube.com/watch?v=ApKcPAOPdFQ>> accessed 27 June 2023.

⁵⁸ J. Jouvenal 'Justice by Zoom: Frozen video, a cat — and finally a verdict' *The Washington Post* (Washington D.C., 12 August 2020) <https://www.washingtonpost.com/local/legal-issues/justice-by-zoom-frozen-video-a-cat--and-finally-a-verdict/2020/08/12/3e073c56-dbd3-11ea-8051-d5f887d73381_story.html> accessed 27 June 2023.

⁵⁹ Ibid.

⁶⁰ Donoghue (n 55) at 1013 - 1015.

⁶¹ Youth Justice and Criminal Evidence Act 1999 ss.16-30.

⁶² Donoghue (n 55) at 1014 - 1015.

⁶³ Donoghue (n 55) at 1013 – 1014 citing M. Roth, 'Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth' [2000] 48 University of California Law Review 18.

proving guilt. If this is the case, the same must be said when the medium through which the jury attends trial is changed. Only further research which directly compares the decision-making of in-person and remote juries will provide an indication as to whether this is the case, and it is somewhat concerning that the law now provides for the power for a judge to direct that a jury attends remotely in the absence of convincing evidence that jury deliberations shall not be unduly affected.

Hoyano makes an interesting point in relation to the availability of physical evidence to jurors.⁶⁴ In a traditional trial, where all participants are physically present, 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. As such, akin to the abovementioned issues pertaining to how juries attending remotely may perceive witness evidence differently to those attending in person, the same might be said for physical evidence. It might well be the case that such exhibits could be transported to the location of the jury. However, it is envisaged that transport and storage costs, not to mention the risks posed to the security of such evidence, would render this an undesirable solution which might only be directed by judges when circumstances render it absolutely essential. This provides an entirely plausible illustration as to when a remote jury would have reduced access to evidence when compared to a jury attending in-person.

As noted at the outset of this chapter, the fragility of jury trials, particularly in the context of how verdicts are reached is problematic enough, even in the absence of any difference in how juries attend trials. In the absence of research which deals with this very point, it is recognised that any arguments advanced in this regard are somewhat speculative. That being said, research into the perception of witnesses attending remotely indicates the existence of a risk that argument goes to witnesses and/or counsel attending remotely impacts perception. This, in addition to the matters raised in this section pertaining to physical evidence, indicates a clear risk of deference in the way in which juries attending remotely perceive evidence when compared to juries attending in person an entirely unacceptable consequence of trial by remote jury.

5.5 An increased risk of jury irregularity?

One of the key components of a fair trial is presence of an impartial jury which acts in accordance with the directions given to them by the trial judge and tries the case based on the evidence placed before them during the course of the trial. Examples of jury irregularity include the use of a Ouija board to contact a murder victim,⁶⁵ to jurors accessing the internet and speaking with those outside the jury in relation to the case.⁶⁶ In fact, the internet has long been labelled a facilitator of juror misfeasance, with jurors using the internet in order to find answers to questions they have about the trial.⁶⁷ Procedural propriety often relies on jurors reporting other jurors behaviour to a judge or jury bailiff, which leads to juries being discharged, retrials ordered and significant criminal consequences for the jurors involved.⁶⁸ There exist two significant concerns in this context with regard to remote jury trials.

The first pertains to an increased risk of juror misfeasance, which is posed due to the removal of jurors from the court environment. Court buildings and rooms, particularly those in the Crown Court, are intimidating arenas in which jurors are under the watchful eye of the judge, counsel, journalists and, of course, the public. This, coupled with the fact that the solemnity of the occasion is deeply felt when sitting in a courtroom, is arguably key to jurors recognising the importance of their role and, fundamentally, the need to exercise their duty in accordance with their oath. By contrast, whilst it is

⁶⁴ Hoyano (n 12) at 1043.

⁶⁵ *R v Young* (1995) QB 325.

⁶⁶ *R v McAleer* [2018] EWCA Crim 856.

⁶⁷ N. Monaghan 'The problem of jury misbehaviour in an internet age: recent case and the Law Commission's consultation' (2013) 18(1) *Cov. LJ* 73-85 at 80 - 81.

⁶⁸ O. Bowcott 'Two jurors jailed for contempt of court after misusing internet during trials' *The Guardian* (London, 29 July 2013) <<https://www.theguardian.com/law/2013/jul/29/jurors-jailed-contempt-court-internet>> accessed 27 June 2023.

recognised that, quite sensibly, the law does not permit jurors to try cases from home,⁶⁹ if inspiration is taken from Scotland, jurors shall be sitting in locations which are places they usually go for leisure activities with friends.⁷⁰ Perhaps slightly more appropriate, is the suggestion of dedicated jury centres, such as that utilised by the mock jury in the study undertaken by Mulcahy *et al.*⁷¹ However, the images provided in the study are representative of rooms akin to open-plan offices, with which a number of jurors are likely to feel a sense of similarity with their usual place of work, which is not conducive to their feeling the same sense of duty when compared to trying a case in court. Linked to this, is the fact that, by taking jurors out of the courtroom, they might be less likely to report wrongdoing by fellow jurors, due to the reduced sense of solemnity of the occasion felt by being in a place other than the courtroom itself. This has the potential for internet searches, outside discussions and perhaps even the use of Ouija boards,⁷² to go unreported, potentially leading to an increased risk of miscarriages of justice. Should a remote jury trial ever take place in England and Wales, online drop boxes dedicated to whistleblowing should be utilised.⁷³ This would highlight the importance of reporting wrongdoing and would provide jurors with a clear mechanism for doing so.

In essence, it is far too soon to provide any concrete analysis of the impact remote attendance might have on juror behaviour in England and Wales, not least given the fact that a judge is yet to exercise their power to direct that a trial be heard by a remote jury. What is clear, is that careful consideration must be afforded to how juror behaviour is monitored, and wrongdoing is reported.

5.6 Remote jury trial: the impact on trial advocates

As noted earlier in this chapter, Lord Pannick when commenting on the concept of counsel and jury being located in separate physical spaces, highlighted the importance of counsel and the jury being located in the same physical space in order to ensure the effective communication between jurors and advocates.⁷⁴ Thus, in the same way that advocates must follow the Judge's pen, it is vital that advocates are in the best position to, as far as is possible, to ensure that jurors are following the evidence. This is particularly challenging when communicating via a live link.⁷⁵

Further, training to be an effective trial advocate involves understanding how to 'develop a relationship of trust with [a] jury'.⁷⁶ As D'Alton-Harrison notes:

An advocate will need to apply the communication skills of persuasion ... to influence the jury into seeing the strengths of their case. The role of the advocate is to serve the information to the jury artfully, even creatively but always in a reasoned way ... the advocates words must find their way into the jurors' memory.⁷⁷

Both building relationships of trust and succeeding in the art of persuasion are a more difficult to achieve when communicating online as evidenced by a study, indicating that the effectiveness of cross-examination is undermined where witnesses are questioned by counsel via a video link.⁷⁸ Moreover, most

⁶⁹ Criminal Justice Act 2003, s51(2) requires that, when exercising their discretion to direct a jury to participate from a remote location, such a direction must require the jury to be gathered in the same physical space.

⁷⁰ As noted above, the Scottish Courts and Tribunals Service used cinemas and theatres.

⁷¹ Mulcahy *et al* (n 40).

⁷² As was the case in *R v Young* (1995) QB 324.

⁷³ The Law Commission proposed the introduction of drop boxes for jurors in 2012. See: Monaghan (n 67) at 77.

⁷⁴ HL Deb 10 January 2022, vol 817, col 920.

⁷⁵ This is also true of witnesses giving evidence. See: P. Graham 'Communication issues in virtual courts cannot be ignored' <<https://hlca.co.uk/resources/communication-issues-in-virtual-courts-cannot-be-ignored>> Accessed 27 June 2023.

⁷⁶ R. D'Alton-Harrison *Advocacy for SQE 2* (Abingdon, Routledge 2023) at 139.

⁷⁷ D'Alton-Harrison (n 76) at 140.

⁷⁸ C. Bao, A. Masser and S Puchkov 'The psychological impact of remote hearings' <<https://media.thinkbrg.com/wp-content/uploads/2021/08/05105717/BRG-Remote-Hearing-Impact-2021-Final.pdf>> Accessed 27 June 2023.

advocates on circuit will have received no training in ‘online advocacy’,⁷⁹ and such advocacy is yet another example of a skill in which advocates have been required to become overnight accomplished specialists with little-to-no training or support.⁸⁰ If trial by remote jury is to become a characteristic of the criminal justice system, comprehensive training courses need to be provided and online advocacy should be added to the curriculum for Bar Training Courses in order to ensure advocates are able to demonstrate, via video-link, the enviable skill and brilliance they do during in-person jury trials.⁸¹

5.7 Concluding thoughts: To stay or go? The case for repealing s.51(2) Criminal Justice Act 2003

Based on the discussion throughout this chapter it is evident that, notwithstanding the fact they bear the power to do so, no judge should direct that a jury attends a trial remotely. The technology available is substandard and advocates are, respectfully, not trained to perform to jurors who are not merely a few feet away from them. Finally, insufficient research evidence is available, which demonstrates that jurors attending cases remotely will try cases in a manner which is consistent with that of an in-person jury. Notably, the requirement that jurors are located in the same physical space does little to alleviate the concerns raised throughout this chapter and, in fact, suggests that in the absence of another outbreak of a contagious disease, the curbing of which requires social distancing measures, there is no palpable benefit to the remote attendance of jury panels. If nothing else, the need for additional locations which can facilitate the remote jury trials,⁸² which would inevitably lead to additional costs, in terms of accommodation, equipment and possibly staffing.

Moreover, it would appear that judges in England and Wales have not used their power to direct that a jury panel attend a trial remotely once in the year since the coming into force of the new s.51(2) CJA2003 and Scotland phased out remote jury trials soon after the relaxation of social distancing restrictions.⁸³ It is, therefore, fair to say that there is a significant case in support of repealing s.51(2) CJA 2003.

⁷⁹ Save, perhaps, for those who undertook the vocational stage of their training during the Coronavirus pandemic.

⁸⁰ Professor Laura Hoyano (n 12) compares this to the roll-out of the Digital Case System.

⁸¹ For an interesting insight into how one lawyer in the United States prepared for advocacy via video link, see: D.A. Lowe ‘Trial by Zoom: A strange but true story of how one lawyer prepared for court’ <<https://www.abajournal.com/voice/article/the-strange-but-true-story-preparing-for-a-trial-by-zoom>> Accessed 27 June 2023.

⁸² As was seen in relation to the use of cinemas by the Scottish Courts and Tribunals Service. See: C. McCall ‘Scots taxpayers shelled out £26million to Odeon to rent out cinemas as court rooms during Covid pandemic’ *The Daily Record* (London, 4 July 2022) <<https://www.dailyrecord.co.uk/news/politics/odeon-cinemas-scotland-court-rooms-27387106>> accessed 27 June 2023

⁸³ ‘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 27 June 2023

Table of Cases

Bushell's Case (1670) 1 Freeman 1

R v Young (1995) QB 325

R v McAleer [2018] EWCA Crim 856

Texas v Calli Kornblau (Unreported)

Table of Legislation

County Courts Act 1984

Criminal Justice Act 2003

Judicial Review and Courts Act 2022

Official Secrets Act 2011

Police, Crime, Sentencing and Courts Act 2022

Protection of Freedom Act 2012

Senior Courts Act 1981

Sentencing Act 2000

Youth Justice and Criminal Evidence Act 1999

Bibliography

Anon, 'News' [2020] 23 SLT 147

BBC News, 'Covid: Restrictions end in England and NHS staff challenges in Scotland' <<https://www.bbc.co.uk/news/uk-60499042>> accessed 27 June 2023

Bao C, Masser A, and Puchkov S, 'The psychological impact of remote hearings' <<https://media.thinkbrg.com/wp-content/uploads/2021/08/05105717/BRG-Remote-Hearing-Impact-2021-Final.pdf>> accessed 27 June 2023

Bowcott O, 'Two jurors jailed for contempt of court after misusing internet during trials' *The Guardian* (London, 29 July 2013) <<https://www.theguardian.com/law/2013/jul/29/jurors-jailed-contempt-court-internet>> accessed 27 June 2023

Bowcott O, 'Are courts demanding too much from jurors?' *The Guardian* (London, 7 November 2011) <<https://www.theguardian.com/law/2013/jul/29/jurors-jailed-contempt-court-internet>> accessed 27 June 2023

Crosby K., 'Controlling Devlin's jury: what the jury thinks, and what the jury sees online' [2012] 1 Crim LR 15

Darbyshire, P, 'The lamp that shows that freedom lives – is it worth the candle?' [1991] Crim LR 740

D'Alton-Harrison R., *Advocacy for SQE 2* (Routledge 2023)

Dearden L, 'David Carrick's victims unable to hear sentencing because of broken court video link' *The Independent* (London, 7 February 2023) <<https://www.independent.co.uk/news/uk/crime/david-carrick-court-victims-police-b2277327.html>> accessed 27 June 2023

Donoghue J, 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice' (2017) 80(6) MLR 995

Fouzder M, 'Magistrates' sentencing powers scaled back' *The Law Society Gazette* (London, 10 March 2023) <<https://www.lawgazette.co.uk/news/magistrates-sentencing-powers-scaled-back/5115396.article>> accessed 27 June 2023

Fouzder M, 'HMCTS apologises for CVP connection problems' *The Law Society Gazette* (London, 12 March 2021) <<https://www.lawgazette.co.uk/news/hmcts-apologises-for-cvp-connection-problems/5107762.article>> Accessed 27 June 2023

Glazier R, 'Making Human Connections in Online Teaching' (2021) 54(1) PS 175

Graham P, 'Communication issues in virtual courts cannot be ignored' <<https://hlca.co.uk/resources/communication-issues-in-virtual-courts-cannot-be-ignored>> Accessed 27 June 2023

Hewitt D, 'Who says it's perverse' (2017) 167(7767) NLJ 22

HL Deb 10 January 2022, vol 817, col 920

Hoyano L, 'Postage stamp justice? Virtual trials in the Crown Courts under the Police, Crime, Sentencing and Courts Bill' (2021) 12 Crim LR 1029

Jouvenal J, 'Justice by Zoom: Frozen video, a cat — and finally a verdict' *The Washington Post* (Washington D.C., 12 August 2020) <https://www.washingtonpost.com/local/legal-issues/justice-by-zoom-frozen-video-a-cat--and-finally-a-verdict/2020/08/12/3e073c56-dbd3-11ea-8051-d5f887d73381_story.html> accessed 27 June 2023

Jackson J, 'Rethinking the orality/ confrontation paradigm in a world of remote evidence' [2023] 4 Crim LR 265

Jasinski D, '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?' in E. Johnston (Ed.) *Covid-19 and Criminal Justice Impact and Legacy in England and Wales* (Routledge 2023)

Johnston E, and Smith T, *Criminal Procedure and Punishment* (2nd edn, Hall and Stott Publishing 2020)

Judicial College, 'Crown Court Compendium: Part I: Jury and Trial Management and Summing Up' (June 2022) <<https://www.judiciary.uk/guidance-and-resources/crown-court-compendium/>> Accessed 27 June 2023.

Lowe D A., 'Trial by Zoom: A strange but true story of how one lawyer prepared for court' <<https://www.abajournal.com/voice/article/the-strange-but-true-story-preparing-for-a-trial-by-zoom>> accessed 27 June 2023

Monaghan N, 'Judicial guidance on the award of compensation for miscarriages of justice: issues of accountability and compatibility with the presumption of innocence' (2013) 18(2) Cov LJ 1

Monaghan N, 'The problem of jury misbehaviour in an internet age: recent case and the Law Commission's consultation' (2013) 18(1) Cov. LJ 73

McCall C, 'Scots taxpayers shelled out £26million to Odeon to rent out cinemas as court rooms during Covid pandemic' *The Daily Record* (London, 4 July 2022) <
<https://www.dailyrecord.co.uk/news/politics/odeon>> accessed 27 June 2023

Mulcahy L, Rowden E, and Teeder W, '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-content/uploads/2020/06/06165935/Mulcahy-Rowden-second-evaluation-report-JUSTICE-virtual-trial.pdf>> accessed 27 June 2023

Ormerod D, 'The Judicial Review and Courts Bill' [2022] 5 Crim LR 353

O'Sullivan K., '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 27 June 2023

Purwal, T S, 'Fit for purpose? A critique of the jury system within the English and Welsh Jurisdiction' (2022) 9(1) LIJ 47

Roth M, 'Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth' [2000] 48 University of California Law Review 18

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 27 June 2023

Thornton P. 'Trial by Jury: 50 years of change' [2004] Crim LR 119