

GENERAL CRIME BLOG

AN EXPERIMENT: REMOTE CROWN COURT TRIALS – FAIR & EFFICIENT?

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The week before last, I appeared as defence counsel in an experiment organised by [JUSTICE](#), the law reform and human rights group, in collaboration with [Corker Binning](#). Prompted by the coronavirus pandemic, the aim was to see whether it would be possible to conduct a fair and efficient Crown Court trial entirely remotely, with each individual participant in a separate location using a laptop or similar device to access the virtual court room. From jury selection through to deliberations and verdict, the entire trial was to take place with no participant coming into physical contact with another.

Our trial was, of course, entirely fictional. There is no provision under the Coronavirus Act 2020 to allow jurors to appear over live link, although remote criminal trials are permitted in the Magistrates' Court in certain circumstances¹. The exercise was broadcast on YouTube to a "public gallery" consisting of, amongst others, journalists, academics and representatives from HM Courts and Tribunals Services and was the subject of last week's Law section of The Times².

The defendant in our virtual case was the hapless Mr Hallett, on trial for an allegation of wounding following an unfortunate misunderstanding with a wheel brace and a much larger gentleman. He was played by Robert Hanratty of Corker Binning, with a calm

¹ Section 51 CJA 2003 and Schedule 23 Coronavirus Act 2020

² <https://www.thetimes.co.uk/past-six-days/2020-04-16/law/split-despite-success-of-remote-trial-tp383b3sh>

courtesy which belied the allegations before the court. There were two “live” prosecution witnesses, as well as the defendant and his witness. Exhibits were kept to a bare minimum, consisting of a couple of photographs and the defendant’s interview. On paper, it was the most straightforward of Crown Court trials.

The jury was comprised of 12 volunteer law students, all taking part from separate addresses. Including the judge, counsel, defendant and witness (who swapped places on screen with the clerk when necessary), there were 17 people in the virtual courtroom. All 17 were visible on the screen at all times, with members of the jury being afforded less space than others³.



On the morning of the experiment we were all sent a link allowing us to enter the virtual court in much the same way as Skype or Zoom. In theory, I would have been able to speak to my client on a private link at any time during the hearing, but this was not tested

³ Screen shot of the virtual court.

due to time constraints. Jury selection had been beset by technical glitches and delays. One juror could only see “frozen” faces on screen. Another seemed to be experiencing an issue with her computer’s camera. Any attempt by two people to speak at once resulted in nobody being able to hear anything. The fact that none of us suffered interruptions from dogs, children or Amazon deliveries was largely due to luck. That said, this was an exercise set up at very short notice and, in all likelihood, the technology could be improved so as to minimise delays and interruptions, at least to the level currently experienced in real trials.

There were definite advantages to holding a virtual hearing, the most obvious being the time and energy saved by not having to commute to court during rush hour. It is difficult to argue with the fact that virtual courts would allow for minimal disruption to the lives of all participants. Taking children to school would no longer be out of the question and the hours of travel time saved allow other work to be done.

There were other positives. The public gallery was no longer a potential source of disruption or anxiety for any party. It was entirely possible for observers to watch proceedings, but they did so remotely, without any possibility of coming into contact with someone from “the other side”. They could not bump into a juror. Any attempt to threaten or intimidate would be wasted, for want of an audience.

Another possible benefit for defendants is that they are afforded equal space on screen with other key participants. Their physical “presence” in the court is on a much more equal footing with others, without the physical barrier and location of the dock.

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In terms of positive technical aspects, the sound quality was generally excellent and, a few minor hiccups aside, the images of people were clear, albeit appearing at a fraction of the size that they would in a real courtroom.

Despite the undeniable benefits, there are concerns that any advantages, when applied to a real-life remote trial, would be outweighed by the disadvantages.

It quickly became clear that documentary exhibits of more than a handful of pages and CCTV, or other material requiring a screen, would present major problems. There is a facility to allow jurors to view “digital bundles”, but it would be impossible to see if a juror were looking at the wrong frame of CCTV and difficult to assist a witness flummoxed by a large, electronic jury bundle. Instances of individuals struggling with exhibits would be tricky to remedy or, more worryingly, may simply go unnoticed.

Ensuring that each juror views identical material is another area in which difficulties can be foreseen. Where the visual appearance of an item is important, or the identity of a person in an image is disputed, it may be impossible to ensure that each juror is looking at images of the same size, clarity and colour as everyone else.

Screen display is also significant in another respect. One of the most unexpected aspects of this experiment was how exhausting it was, in a way that normal trials, however complex or emotive, rarely are. I suspect that this was partly due to having to concentrate on evidence from witnesses who appeared barely larger than a matchbox on screen. The requirement to have the faces of each of the 17 participants displayed at the same time also meant that the screen was cluttered and the images constantly moving. At present,

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there seems to be no facility to allow different people to see some participants in the virtual courtroom but not others. Having no option other than to constantly view 17 individuals on a small screen may quickly become draining for most people. In addition, the implications in a case where a witness is eligible for special measures and chooses to give evidence behind a screen in order not to see, or be seen by, the defendant are obvious. I also have the utmost sympathy for those whose faces partially disappeared from view after trying, and failing, to maintain a “passport photograph” style pose for several hours.

Some of the problems we experienced, for example the judge accidentally becoming privy to jury deliberations via the chat function, could be swiftly rectified. Security nonetheless remains a concern. In order for the public to have equal faith in the justice of a remote trial, it would have to be ensured that defendants and witnesses, as well as jurors, are in a private place with no access to other electronic devices and no contact during the evidence with any other person. There would need to be confidence that the proceedings were not being recorded, in circumstances where anyone could do so quite easily without being detected.

However good the technology becomes, it is wholly dependent on human beings who are both willing and able to operate it correctly. The Justice experiment was able to run fairly smoothly, driven by a great deal of good will on the part of all participants who wanted to try to make it work as efficiently as possible. The reality in a criminal court may be very different. Not every individual will come to a virtual court in the spirit of seeking to make the trial proceed as seamlessly as possible. Many will be resentful about having to participate in a trial at all. It cannot be assumed that each person will be able, or inclined, to follow the instructions provided for joining a hearing at the correct time. If anyone fails to operate the technology correctly, whether wholly innocently or otherwise, substantial

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delays are inevitable. There may be a risk of those who are less “tech savvy” becoming overwhelmed by the process as well as people who do not have a quiet corner in their own home constantly fearing interruption.

As well as concerns about technology or the practicalities required for a successful remote trial, there are other less tangible considerations. One of the most controversial aspects of conducting an entirely remote trial is whether it is possible to properly assess a witness’s demeanour and make accurate judgements about their honesty over a video-link. Many advocates, and others, believe that evidence received remotely is somehow diminished and nuances potentially lost. That said, the existing system of permitting certain evidence to be received over a live link is largely regarded as having been a success. Many people who simply could not face being in a court room have doubtless been put at ease and the quality of their evidence improved immeasurably simply by being in a remote location. Others may have struggled to give evidence at all due to unavoidable commitments elsewhere. We are now used to witnesses appearing on a large television screen, in court, with the advocate’s face occupying only a fraction of the space visible to the jury. The witness will have been consulted and been willing, if not insistent, that they give their evidence remotely. Usually, it works well. Despite this, there is a reason why prosecutors in rape trials, for example, generally prefer a witness to be present in the room behind a screen while defence counsel, given the choice, would overwhelmingly opt for a complainant to give their evidence remotely. Rightly or wrongly, remote evidence is felt by some to lack impact. Whether there is real substance to this belief is debatable, but the perception that remote evidence may be less compelling is unlikely to be improved by a complainant or defendant being told that they have no option other than to appear over a remote link. Public confidence in the system is vital.

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Another quality which may be difficult to define is the significance of physical proximity between witness and juror, counsel and client. Human contact may not be strictly required for an efficient trial, but it may be important for a fair trial. There is a quality to speaking to someone face to face which is difficult to replicate over a video-link. There are valid concerns that it may be significantly more difficult to calm a witness' nerves, or build trust with a defendant, without physically meeting them.

The lord chief justice, Lord Burnett, while praising the fact that “great strides have been made in the use of technology”, is said to be adamant that remote hearings will never be suitable for “serious criminal trials”⁴. Some have taken that to mean that remote trials will never be considered for cases which are tried in the Crown Court, others believing that shorter Crown Court trials may, in future, fall to be considered. How to determine whether a criminal trial is “serious”, or who should make that decision, is unlikely to be capable of easy resolution. Each criminal trial, with few exceptions, represents a major incident in the lives of those directly affected. Few would believe that their case was not serious. Many of those involved in summary trials would argue that it is not safe to define seriousness according to trial venue when livelihoods and reputations, as well as liberty, are often at stake in the Magistrates' Court.

Most advocates will now have conducted conferences over Zoom and mentions over Skype. The experience of the past few weeks is likely to have made more of us ready to acknowledge the benefits of the available technology, even if not everyone has wholly embraced it. The Justice experiment has successfully demonstrated that, once we begin to emerge from lock-down and return to whatever “normal” will look like in the criminal

⁴ <https://www.thetimes.co.uk/article/lord-burnett-the-lord-chief-justice-hails-courts-tech-solution-to-coronavirus-crisis-7gp3qd06g>

courts, there are many areas in which cases can be progressed remotely. With efficiency and cooperation, almost all pre and post-trial hearings could be conducted without the parties having to physically attend a court building. What may require much more careful scrutiny is the ability to conduct a trial which is both fair and seen to be fair, with all key players appearing remotely.

This piece was produced by [Orla Daly](#). It should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at <https://www.qebholliswhiteman.co.uk/>.

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