**Video thrilled the Criminal Bar?**

Except that definitely does not seem to be the case. The usual place barristers gossip is the robing room but these days if you want to test the view of the Bar on virtual hearings it has to be via WhatsApp, Zoom and social media. Video hearings have attracted mixed reviews. Some are overjoyed that pointless travel is no longer required. Video hearings seem to be much shorter than in-court proceedings. We all occupy the same screen space in a video hearing. The downside is that the main platform hitherto is the virtually defunct Skype for Business. There are numerous technical glitches causing people to be invisible or inaudible or both.

A major cause for concern is defendant participation. Taking instructions is either impossible or extremely unsatisfactory, especially for defendants in custody. But the biggest issue is that no number of video case progression hearings will bring about the resolution of a contested case. To be a criminal barrister in 2020 feels like being a footballer endlessly on the training ground, an actor perpetually stuck in the rehearsal room or a pilot confined to the airfield.

It was widely commented that however difficult the commencement of lockdown would be emerging from it would be hugely more problematic and one only has to look at schools to see how true that is. But the harsh fact of the matter is that the Criminal Justice System stopped at the end of March and its resumption at the moment is entirely notional. A tiny handful of trials slowly occurring in courts observing strict social distancing. Given the case backlog now running to about 40,000 cases this is like bailing out a sinking ship with a thimble.

My expectation, shared by many I'm sure, is that Boris Johnson will imminently and arbitrarily announce that 1 metre's distance will suffice for distancing. That may or may not have a dramatic effect on the number of court rooms that can open. But even if it does there has to be a Plan B quickly devised and put into action. I enquired on Twitter towards the start of lockdown whether anyone had made an FOI request for the MoJ's pandemic planning. Not their response planning to Covid but their permanent contingency plan for any pandemic. I'm not at all convinced that such a plan existed, I certainly haven't seen any published plan.

The 'Plan Bs', it seems to me, are as follows:

1. Judge only trial (or variation with magistrates, recorders or pair of jurors)

2. Judge and jury trial but with reduced juries (most likely of 7)

3. Off site trials

4. Virtual trials

None of those options enjoy anything like universal support. Judge only trial is particularly contentious within the legal profession because of battle hardening but also a real danger once juries are gone they may not come back. Creating a panel may slightly reduce that risk but there is always the danger that in retirement the judge holds sway especially if sitting with recorders looking one day for a permanent job. I am not for a second casting aspersions on the judiciary, I have no doubt that the vast majority of judges would make excellent tribunals of fact. But we have trial by judge AND jury for a reason.

Reducing jury numbers may marginally alleviate the distancing issue but again it is hardly likely to enable any major denting of that unfathomably large number of trials awaiting resolution. There are also real concerns that the smaller a jury gets the greater the danger of a ouija board style miscarriage of justice.

My personal preference is for the use of off-site court facilities. Frankly I'm amazed they were not part of any pre-Covid contingency planning and even since the advent of Covid I do not understand why venues have not been identified and converted nationwide already. With an agonising lack of urgency it appears that the process is now underway but it seems probable that it will be many weeks if not months before any of these venues are up and running.

And so to virtual trials. The instinctive and immediate response of the profession seems to have been: No, Nein, Non. Indeed, at the start of lockdown, I would have counted myself among their number. I was aware that the excellent charity Justice was carrying out some kind of research project but it struck me as being of only potentially academic interest. Having endured the noises off or just noise off of Skype for Business hearings it seemed to me absurd to think it would be possible to conduct a jury trial relying on the internet connections of 12 random members of the public in their homes.

To my discredit I did not follow the project particularly carefully. However I was recently urged to look again and in particular was tipped off that a virtual mock trial would be conducted on 12 June but with the jury convened together in a remote location. I watched various parts of that trial via a live streaming virtual public gallery and...I was surprised...and impressed.

Here's what impressed:

1. On a level - with all parties sharing the same screen space there is not the indignity of the dock for the defendant.

2. Demeanour - some barristers swear by the importance of assessing demeanour in open court. The reality is that on the screen it is possible to assess a witness' demeanour much more closely than in a large court room. Furthermore it is possible to scrutinise the demeanour of individual jurors without that dreadful gaping at the jury that some barristers are prone to.

3. No paper - documents are shown digitally on the screen and the jury have a digital jury bundle in retirement so no more photocopying and collapsing lever arch files.

4. Public scrutiny - those watching from the public gallery see the same documents as the jury and the parties which makes for much more meaningful observation.

5. No time wasting - if the jury need to leave for legal argument their camera is turned off so there is no trooping in and out of court.

6. Home sweet home - counsel and indeed the judge can participate from home as potentially can the witnesses and the defendant.

Here are the drawbacks:

1. Instructions - obviously if defence counsel and the defendant are in different locations then the taking of instructions is impeded. Although if the defendant is in custody that could be obviated by all cameras (and recording!) being turned off to allow private consultation. If the defendant is on bail then a virtual trial will require them to be in a place with a good enough connection and an ability to give instructions. Potentially defence counsel could participate in the trial with the defendant from the solicitors' office or from chambers.

2. Screen strain - we are all dismally familiar with how exhausting a prolonged Zoom session can be. There is no avoiding the fact that staring at a screen for prolonged periods is wearing, this is especially so when viewing something as important as court proceedings. However unlike Zoom in court only one person should be speaking at a time so there should not be so much exhaustion caused by over-talking. Regular breaks would obviously be required.

3. Jury location and staffing - juries will still need to be convened and locations identified for that with the requisite facilities and staffing, although this would be hugely less expensive and problematic than trying to find adequate places to conduct the whole trial.

4. Technology - obviously it's got to work and obviously it's got to work all the time. There is no avoiding the fact that if this is not got right this will be a disastrous innovation.

5. Secondary recording - there needs to be a public gallery and it needs to function in such a way that the trial is not being recorded on mobile phones. The solution to this is to have supervised remote locations at which trial observers are able to log into a particular trial having surrendered any recording devices with the parties alerted to their presence.

6. Court control - it is undoubtedly the case that a judge sitting on their eyrie gets almost literally a bird's eye view of what is going on in court. If something happens it can be dealt with immediately and in the room. There is obviously a question as to what happens in a virtual trial once a defendant is convicted and they are far from the cells.

7. Type of case - in reality virtual trials are likely only to be appropriate for single handed cases, probably either way only. I am definitely of the view that they should only occur on the defendant's election and there is a chance that take up may be low. Accordingly virtual trial would be no panacea but I'm of the view that we should give the concept a real chance.

What is clear to me is that doing nothing is not an option. If we sit at home waiting for business as usual we will find there is no business and no usual. Times of great turmoil always have been and always will be catalysts for great change. If we really care about justice it is incumbent upon us to get it done, not at any cost obviously, but a virtual trial is better than none at all. Imagine at the start of lockdown resolving that if you could not see your parents or grandchildren in person that you would not see them at all. That would be cutting off your nose to spite your face and it would damage your relationship. We are no use to anybody sitting and waiting.

Even if you abhor just the thought of abandoning the court room I urge you to take the time to read what Justice are doing and it may cause you to think again: [https://justice.org.uk/our-work/justice-covid-19-response/](https://www.blogger.com/blog/post/edit/4160000081091691291/8997652655732784560)

If this works it will work forever and there is the prospect, in the future, of a genuinely speedy and streamlined Criminal Justice System.