The anatomy of a trial – from opening to closing statements:

A comprehensive analysis of the modern trial in Common Law jurisdictions, with suggestions for improvement and innovation. What are the risks to access to justice of efficiency measures such as the abolition of jury trials and the use of written submissions rather than oral argument? Is judicial case management necessary?

INTRODUCTION

In a 2016 publication "Transforming our Justice System" published by the UK's Ministry of Justice, with input from the then Lord Chief Justice of England and Wales and the Senior President of Tribunals, the introduction stated "Our justice system is the envy of the world. We have an outstanding independent judiciary that is widely admired as an international leader…We are right to be proud of our Common Law System, which has led the world for the past 1000 years and influenced so many jurisdictions.

The right to trial by jury – "the lamp that shows that freedom lives" as Lord Devlin described it – has been one of our great achievements. Across the world, the fairness of our criminal trial and the history associated with iconic courts such as the Old Bailey are celebrated."

Well, with an introduction like that, one might be tempted to think that there is little point in having this session. All you need to do is copy what we have, and all will be well. So we can take an early lunch!

But seriously I am not so arrogant as to believe that our system cannot be improved, nor that it necessarily remains the best in the world, although I am still prepared to have a vigorous debate about that! I am sure that we can all learn from each other and adapt, borrow, or dare I say, steal the best bits from each other.

I want to take a moment if I may to consider how we actually get to the trial process in England and Wales, given that one of the matters we are due to consider in this

session is judicial case management, as developments in recent years have led to cases being managed from a very early stage.

MAGISTRATES' COURT

In England and Wales, nearly all of our trials start in the Magistrates Court. There is an exception for a voluntary bill of indictment (Administration of Justice (Miscellaneous Provisions) Act 1933 2 (2) b) but I am going to ignore those for the purposes of this talk. The Magistrates deal with what we term "summary only matters", such as driving matters or low-level criminal damage which have to be tried there. Then we have triable either way offences which may stay in the Magistrates' Court, but which may be sent to the Crown Court, depending on whether the Magistrates decline jurisdiction, or the defendant elects to be tried by a jury. Theft and many offences of violence fall into this category. Then we have indictable only offences which have to be tried in the Crown Court, by Judge and Jury. Those offences include murder, manslaughter, serious violence, terrorism and serious sexual offences and it is Crown Court trial, trial before Judge and jury, that I propose concentrating on today.

In days gone by, all cases going to the Crown Court were dealt with by the Magistrates who would decide whether or not there was a case to answer and were known to keep the case for many weeks before eventually sending it to the Crown Court. Now if a case is triable only on indictment it is sent immediately to the Crown Court pursuant to section 51 of the Crime and Disorder Act 1998. Similarly, once the decision has been made in respect of a triable either way matter, that too is sent to the Crown Court.

ARRIVAL IN THE CROWN COURT

If the defence consider that there is insufficient evidence upon which to found the charge, they may make an application to dismiss the charge prior to arraignment of the defendant and a timetable will be set for that.

In theory this saves a considerable amount of time and enables the Crown Court to manage the case immediately. And that is something that the Judiciary and MoJ and HMCTS are very keen on in England and Wales these days, case management. And to help them they have the Criminal Procedure Rules ("CPR") and a series of Practice Directions from the Lord Chief Justice.

The Criminal Procedure Rules, which now run to some 795 pages, plus the Practice Directions, commence with "The overriding objective" which is something that everyone in the system is meant to sign up to. Rule 1.1 states that "The overriding objective of this procedural code is that criminal cases can be dealt with justly" It continues: "Dealing with a case justly includes: acquitting the innocent and convicting the guilty, dealing with the prosecution and defence fairly, dealing with the case expeditiously." There are others, but you get the flavour.

Rule 1.2 states "Each participant in the conduct of each case, must prepare and conduct the case in accordance with the overriding objective." And it goes on to define a participant as being anyone involved in any way with a criminal case.

Whilst I think the overriding objective is a laudable aim, I do struggle with the idea that anyone involved in any way with a criminal case is a participant and thus should be preparing and conducting the case in accordance with the overriding objective.

Whilst most people will think that an aim of acquitting the innocent and convicting the guilty is a good one, I am not sure that I have met many defendants who have signed up to the idea that the guilty should be convicted, far from it!

SERVICE OF EVIDENCE & DIRECTIONS HEARINGS

Once a person is sent to the Crown Court the Prosecution must serve the evidence on which they rely on them within 50 days of the sending if they are in custody and 70 days if on bail. The case will however be listed for a Plea and Trial Preparation hearing in the Crown Court within 28 days of sending. This is obviously before the

evidence is due to be served. At that hearing an electronic form is filled in which sets out a timetable for matters to be done by. Part 1 has general information, part 2 sets out the orders to be made at that hearing and then deals with various stages: Stage 1 is what should be dealt with by the 50 or 70-day deadline. Stage 2 which is 28 days after the stage 1 deadline sets out what the defence has to do. Stage 3, 14 or 28 days later deals with further matters for the prosecution and stage 4 a further 14 or 28 days later deals with outstanding defence matters.

The aim is that everything can be managed so that the trial can be reached with no further hearings, or very few. For my part it does sometimes feel as though we are being managed to within an inch of our lives and I sometimes fear that it is a bit heavy handed. If anyone wants my opinion, I would prefer a lighter touch.

TECHNOLOGY

We are also implored these days to use technology wherever possible. In the Crown Court, briefs being delivered in paper form tied up with pink ribbon are a thing of the past. Evidence is now served electronically by the Crown Prosecution Service and we have what is called the Digital Case System ("DCS") where all the papers and directions and orders and skeleton arguments are uploaded. This is, on the whole, a good thing, provided the DCS is working. It had a spectacular crash earlier in the year.

The wifi in the Courts can also be rather hit and miss. But when it works, it works pretty well and it has certainly made my back a lot easier no longer having to carry around huge numbers of lever arch files.

Defendants in custody are, more often than not, produced over a tv link from prison for pre-trial hearings. Counsel may appear in Court virtually from another court by way of a link. I myself have been able to take advantage of this on a number of occasions; most notably when defending an alleged terrorist. The directions hearings were listed at the Central Criminal Court, London, where all terrorist offences are

managed, whilst I was part heard in Birmingham. I was able to link in to London from Birmingham, thus saving me a lot of time and cost and avoiding disruption to my trial in Birmingham. I have also dealt with some cases in the Magistrates Court by way of telephone hearings and on the tv link. In one case I argued a bad character hearing over the telephone, having submitted a written skeleton. I only tell you because I won!

We move on to the trial:

THE TRIAL

JURIES

The jury is sworn if there is to be a jury. There have been floated on occasions the suggestion that we should dispense with the jury, particularly in large fraud cases and that we replace them with a Judge and two lay assessors, perhaps with an accounting background. I for one would be against that, and thankfully, in my view, the provision that would have allowed for jury-free fraud trials (s 43 Criminal Justice Act 2003 ("CJA '03") was repealed without ever having been brought in to force. It is the job of the prosecution advocate to make the case understandable. We do though have the possibility of a trial without a jury (s44 CJA '03) if there is evidence of a real and present danger of jury tampering and that notwithstanding any steps which might be reasonably taken to prevent it, the likelihood that it would take place is so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

But that is a very rare occurrence and so I will assume for this talk that we have a jury. It is becoming increasingly common now in long trials for a questionnaire to be agreed between prosecution and defence and sent to the Judge with any issues that may affect jury selection and matters that it is thought should be drawn to the attention of the jury before they are picked. We increasingly find in long trials that a jury panel is selected and sent away overnight before being sworn to check whether

they have any issues. That of course invites the more creative jurors to come up with excuses, but by and large it has not caused problems. It also enables them to speak to their loved ones who may have had something planned of which they were unaware. If you do use a list of questions, try to ensure that all eventualities are catered for. In a murder trial I defended in two years ago there was an issue which made it essential that we had no serving police officers on the jury. We included a question "have you or do you or any members of your close family work for the police?" Fairly straightforward you may think. Nobody indicated they had or did and so we chose a jury. Two weeks into the trial we received a request from a juror not to sit on a particular day as the note said "He had an interview with the Police." We all assumed he had done something bad and was being invited in for interview. Far from it. He had actually applied for a job with the Police. The questionnaire had said "have or do you work for the police". Nobody had thought of the possibility of anyone having an outstanding application for a future post with the Police being a possibility. It may have said more about the quality of that particular juror, than the quality of the question, but he did not last much longer on that jury.

We also now have the possibility in cases which are expected to last more than 2 weeks of having two alternate jurors sworn who hear the opening of the case and can be substituted for any of the initial 12 should anything happen during the opening which leads to a juror or jurors being discharged. That I have seen happen on a number of occasions and is a welcome development. The alternates, if they have not been used, are discharged before evidence is heard.

OPENING

Once the jury is sworn the trial commences with the Prosecutor opening it. Whilst in theory a time limit can be placed on speeches these days, I am not aware of any Judge having done that, yet, although that might be something that will be considered in future. In England and Wales we now have the opportunity for the defence advocate to set out to the jury immediately after the prosecution opening

what the nature of the defence case is (CPR 25A.2). That was first used in the News of the World phone hacking trial. Its aim is to provide the jury with focus as to the issues which are likely to arise. It is of use if a trial is to take a long time and enables the jury to know what the issues are. I have not though seen it used much as yet. There is the difficulty that a defence advocate may go too far in what he or she says. There is also the danger that the evidence may not come up to proof. But in certain cases I can see an advantage. There is also an issue if one defence advocate wants to do it and another doesn't, in which case, the Judges I have seen raise it have not allowed it.

EVIDENCE

We then get down to the nitty gritty of the trial. We still have witnesses called and if their evidence is agreed, it can be read or made the subject of formal admissions or agreed facts.

How is evidence given? Obviously we still have witnesses attend at Court and give live evidence from the witness box. In cases involving vulnerable witnesses however, they are normally granted the use of special measures and appear behind screens or on a link away from the actual court room. In cases of sexual abuse, victims may be recorded shortly after the event, which is then used as their evidence in chief. We are also piloting a scheme whereby victims are recorded and then shortly afterwards they are cross-examined, which is also recorded, and that evidence is subsequently played to the jury.

We have run a programme to re-educate criminal advocates who have to cross-examine vulnerable victims so as to not ask leading or tagged questions and to ask questions in a very simple form. A Judge will consider at a ground rules hearing what questions are proposed to be asked and will stop some if it is thought that the witness will not understand. The Judge though will then explain to the jury why the questions have been asked in the way they have and if any questions have been

prevented will explain what they were. Initial indications are that conviction rates have not altered.

TECHNOLOGY

Some courts are now paper averse given the move to the digital system. Personally, and with the greatest of respect to any Judges here who may think otherwise, I do not think it is for the Judges to force an advocate to go paperless. In a series of trials I prosecuted last year which had over 10,000 pages of exhibits, I printed my bundle of statements and had a small bundle of major exhibits, but had the rest digitally. I gave the jury just two lever arch files of exhibits. When they retired we also provided them with a laptop with all of the photos and videos they had seen to watch at their leisure.

One of the problems that we face is the level of technology in Court. In some courts the tv screens are too far away to do this and so in my trials we put screens in the jury box. Another complication is how the advocate plays material or shows it to the jury. Many advocates are now having to purchase a second laptop as they cannot work on one whilst also playing victims videos or showing photographs or exhibits.

In the bigger cases you may have the luxury of having the prosecution provide a technician to assist, but that is very rare.

There is also an issue of the amount of video booths available. If every prisoner is produced on a link the advocates need to speak to them. How is that to be managed? Where are all the video booths? It can also be quite difficult talking to your client over a link.

I have conducted trials where witnesses have been video-linked in from abroad and that has gone well, saving time and money rather than having to fly them back. I doubt though that an entire trial could be done virtually, and we still have no ability for a defendant to give evidence on a tv link.

DEFENCE

The defence then give evidence if they wish. If the defence are calling evidence other than the defendant dealing with the facts then they can make an opening speech, as well as the speech that was made after the Prosecution opening.

Although the defendant may not use the tv link, their witnesses may.

If you have negotiated the trial this far, then it is time for speeches and summing up. The practice in England and Wales now is for the Judge to do a split summing-up, to deal with the law prior to Counsel's closing speeches and to sum up the facts after. There is in my opinion room for debate as to whether Judges should sum up the facts at all, which is what happens in Scotland. The advantage of summing up the law prior to speeches is that is should remove the opportunity for any misunderstanding on the part of the advocates. It should also shorten their speeches.

Of course a Judge can limit the length of speeches as well as the length of cross-examination.

RICHARD ATKINS QC,

Chair of the Bar of England and Wales,

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