



Ensuring fairness in socially distanced trials

JUSTICE position

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Introduction

1. On 23 March 2020, all new trials were suspended because of fears that they might contribute to the spread of COVID-19. The suspension meant that those remanded in custody faced an indefinite period deprived of their liberty without a determination of guilt. Parties and witnesses also faced increased uncertainty and a lack of closure. All the while, the existing backlog of cases continued to increase.
2. Some jurisdictions moved to online proceedings fairly quickly. Others slowly introduced hearings with a mixture of in-court and on-video participants. On 11 May 2020, it was announced that jury trials would resume 'under special arrangements'. The trials, starting at the Central Criminal Court in London and Cardiff Crown Court, would use multiple courtrooms for the jury, reporters and participants in the trial. The courtrooms would be linked by closed circuit TV. These are all ways to enable socially distanced proceedings to continue.
3. This is an important moment to carefully consider how the changes to our courts will affect the administration of justice. This paper focusses in particular on the criminal trial, since this is where most research has been conducted. However, the principles that we consider are relevant across the justice system – criminal, civil and administrative. JUSTICE has three key concerns about the fairness of socially distanced trials:
 - a. Participants in socially distanced trials are likely to be concerned about the **health risks** of going to court, which will inhibit their engagement;
 - b. Socially distanced trials raise **fair trial concerns** because they may involve less diverse juries, impede effective participation, have poor sightlines and create barriers to open justice; and
 - c. The small number of socially distanced trials which are able take place **will not substantially deal with the backlog** of cases in the criminal justice system.
4. In order to enable trials to resume in a safe and fair way, JUSTICE has been testing the concept of fully remote jury trials, where all participants – judge, clerk, jury, counsel, defendant, witnesses - join the virtual court via video, with the hearing able to be

livestreamed to the public.¹ We have held three test trials so far, making improvements each time in response to professional, academic and lay feedback. The independent academic evaluation concluded that there is a ‘convincing case’ for rolling out the pilot.²

5. The purpose of this paper is to set out JUSTICE’s concerns over socially distanced trials and to use our recent work to consider how to ensure fair processes in response to COVID-19.

Court users’ concerns over the health risks of going to court

6. Despite certain courts receiving Public Health England approval for the resumption of socially distanced trials, court users are likely to have significant concerns over the health risks of attending court in person.
7. Court users will be well aware of news reports which have highlighted research that questions how the virus is spread, not only through close contact but through prolonged periods of time spent in the same room as an infected person, irrespective of social distancing measures.³
8. Many court users will therefore be concerned that, even if the court buildings are thoroughly and regularly deep-cleaned with strict social distancing measures in place,⁴ socially distanced trials may pose a serious health risk. This is because of the time that court users have to spend in the same room as one another, the volume of people

¹ See our website for footage of the trial <https://justice.org.uk/our-work/justice-covid-19-response/>

² See 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’ April 2020, available at <https://justice.org.uk/wp-content/uploads/2020/04/Mulcahy-Rowden-Virtual-trials-final.pdf>

³ See, T. Hesman Saey, ‘Why 6 feet may not be enough social distance to avoid COVID-19’, 17 April 2020, Science News, available [here](#); See, S. Miller, ‘Coronavirus drifts through the air in microscopic droplets – here’s the science of infectious aerosols’, The Conversation, 24 April 2020, available [here](#); Thatcher et al., ‘Effects of room furnishings and air speed on particle deposition rates indoors’, Atmospheric Environment vol 36 issue 11, April 2002, available [here](#); Li et al., ‘Evidence for probable aerosol transmission of SARS-CoV-2 in a poorly ventilated restaurant’, 22 April 2020, available [here](#). Note, currently undergoing peer review; E. Bromage, ‘The risks – Know Them – Avoid Them’, 6 May 2020, available [here](#).

⁴ See HMCTS Guidance on Keeping court and tribunal buildings safe, secure and clean, 29 March 2020, available at <https://www.gov.uk/guidance/keeping-court-and-tribunal-buildings-safe-secure-and-clean>

at court, the method of travelling to the court centre and the need to touch surfaces while navigating around it.

9. Concerns over health risks are likely to limit the ability of certain jurors, defendants and witnesses to participate in trials at all, or, while there, impact upon their experience.
10. However, virtual trials do not have to contend with the health worries of court users because there is no health risk involved in fully remote hearings, which take place with all parties participating from home or custody.

Socially distanced trials and fair trial concerns

11. Socially distanced trials raise fair trial concerns regarding jury composition, sightlines, the effective participation of those appearing via video link and open justice.

Jury composition

12. Socially distanced jury trials would exclude those who are particularly susceptible to COVID-19. This group includes those with certain pre-existing health conditions, the BAME community and over 70s and those with childcare responsibilities while schools remain closed. It may also include people who have to rely on public transport but feel unsafe using it during the pandemic. In short, socially distanced jury trials are far more likely to involve depleted, less diverse jury pools than fully remote trials. There is also the risk that, even after safety measures have been put in place, the trial may collapse if a juror falls ill and can no longer participate.
13. It has been argued that fully remote jury trials would discriminate against people without spare rooms or access to the internet.⁵ David Lammy MP and Lord Falconer wrote:

“Unfortunately, many people across the country do not have [quiet or private rooms] or access to the required technology. Until

⁵ Amanda Pinto QC, Chair of the Bar recently wrote: How will those potential jurors who don't have a spare room which they can sit in quietly on their own for five hours be accommodated? Will we resort to a sort of faux-selection based on economic factors?, 'The new normal', April 2020, Counsel. Available [here](#).

comprehensive solutions are found to prevent remote juries from becoming socially unbalanced juries, we cannot support them.”⁶

14. While this is a valid consideration, the risk of socioeconomic and/or digital exclusion in fully remote trials can be minimised through providing individuals with the necessary technology and support. Our next virtual mock trial will test jurors congregating in a large hall, within walking distance of home and at socially distanced desks from which they can log into the virtual court. This will involve some travel and health risk, but at a minimal level. For those without access to technology but with space to participate, inspiration might be drawn from the commercial courts where iPads and SurfacePros have been sent to litigants and judges with the requisite video platforms already set-up.⁷

15. Indeed, fully remote jury trials are better able to facilitate a diverse jury pool because they can draw upon a wider geographical area. Those with disabilities who may have found accessing a courtroom too difficult will also be able to attend more easily.⁸

Sightlines

16. The Courts and Tribunals Design Guide recognises that:

Effective configuration of hearing rooms includes appropriate layouts that consider sight lines of all parties, so that users recognise a design built around their needs, which may limit their stress and anxiety.⁹

17. When a hearing is spread across several rooms, participants have to look at several different screens, as well as whoever was in the same room. This is not only likely to be distracting, but it will affect the ability of court users to see the whole hearing. A recent study by the University of Surrey on video enabled hearings (where some participants would appear in the criminal proceedings via video) found that the camera

⁶ Owen Bowcott, ‘Labour: livestream court cases during and after Covid-19 crisis’, Friday 1 May, The Guardian, available [here](#).

⁷ See, e.g. Gayatri Sarathy, ‘Remote Hearings: Some Practical Tips, 9 April 2020, Blackstone Chambers, available [here](#).

⁸ Especially in light of permanent court closures resulting in some people living several hours away from a court.

⁹ HMCTS, *Court and Tribunal Design Guide*, public version 1.1, p. 14, available [here](#)

of the courtroom was unable to capture all participants. For a defendant who is only able to see some of the courtroom from the side, there is a risk that they will feel alienated from their own trial. One court user noted:

*...what you see remotely is really not good sometimes. I very often only see the prosecutor, or I only see the clerk, or I only see the magistrates. I would say very rarely do you see the whole court.*¹⁰

18. We have heard reports from magistrates' courts where social distancing measures are being imposed that it has been hard to see the screens showing video links of defendants.¹¹ This problem would be exacerbated in a jury trial spread across many rooms. Getting the acoustics and lighting right across different rooms of various sizes will be a complex task. An Australian study on the use of video in criminal trials found that specialist skills are required to succeed in creating the desired immersive experience of using screens within the courtroom, with attention paid to where the screens are placed, how sound travels in the courtroom and the need to replicate eye contact through the camera lens.¹²

19. A clear benefit of the JUSTICE mock virtual court was the improved ability of the jury and defendant to see all participants in the hearing. As the academic review noted:

*"Lay participants generally had a much clearer view of everyone unimpeded by the usual interrupted sightlines in physical courts. This gave a much stronger sense of participation"*¹³

20. Indeed, Mulcahy and Rowden observed that the JUSTICE pilot improved sightlines not only in comparison to socially distanced trials, but also when compared to in-person trials. The architecture in many physical courtrooms is often not conducive to the effective participation of lay users. As Mulcahy and Rowden highlight, many

¹⁰ University of Surrey, Video Enabled Justice Evaluation, March 2020, p 96, available [here](#).

¹¹ See, <https://twitter.com/PenelopeGibbs2/status/1258321427528396800>

¹² David Tait et al., 'Towards a Distributed Courtroom', 2017, Western Sydney University, p 69 and p 72, available [here](#).

¹³ Mulcahy, above note 2 p 4 para 12.

courtrooms have flattened floors which means that, when barristers stand up to speak, they often prevent the defendant from being able to see the judge.

21. Sometimes sightlines in physical courts are deliberately interrupted to prevent intimidation of witnesses or the jury.¹⁴ However, when all court users are in full view, the intimidation of vulnerable users becomes more difficult.¹⁵ This was evidenced in the JUSTICE pilot, in which the evaluation noted that, because everyone is able to be seen at the same time, it makes it “difficult to look someone directly in the eye with a view to intimidating them”.¹⁶

Effective participation of those appearing via video link

22. Amid discussions around the increased use of video technology in hearings across the justice system during the COVID-19 pandemic, JUSTICE considers it important to stress the differences between physical hearings in which some participants appear remotely (“video-conferencing”), as opposed to fully remote hearings where all participants appear via video. Both mechanisms are being used across the justice system in response to the crisis.

23. In our 2019 report *Understanding Courts*, we highlighted two particularly important principles to guide the use of both video-conferencing and fully remote hearings:¹⁷

- a. Lay users appearing by video **must be in no worse position** than they would be in a physical hearing/appearance; and
- b. HMCTS must ensure the **practical effectiveness** of hearings involving the use of video.¹⁸

¹⁴ Mulcahy, above, p. 20.

¹⁵ David Tait et al., ‘Towards a Distributed Courtroom’, 2017, Western Sydney University, p 11, available [here](#).

¹⁶ Mulcahy, above, p 20. The evaluation also found that once lay users had been trained in using the technology, “in some instances it caused less stress than going to a physical courthouse” at p 4 para 12.

¹⁷ Drawing on JUSTICE working party report, *Immigration and Asylum Appeals: a Fresh Look* (2018), available [here](#), paras 5.4 – 5.13.

¹⁸ JUSTICE working party report, *Understanding Courts* (2019), available [here](#) at paras 2.74-79. The Working Party also raised a number of practical considerations applicable to both kinds of hearing, including the need for greater research into how video can impact the participation of users with disabilities and vulnerabilities, guidance for judges and magistrates on running a video hearing, and

24. Despite these universally applicable principles, JUSTICE considers that hearings involving video-conferencing pose particular difficulties relating to effective participation when compared to fully remote hearings.¹⁹ Many of these issues were raised in a recent study by the University of Surrey on video enabled criminal hearings.²⁰ They include:

- a. The **greater risk of alienation, stress or fatigue** faced by litigants appearing via video, where the focus is on the physical hearing and those participating in person.²¹ The University of Surrey research similarly reported concerns over the ‘distancing’ effect of video-conferencing which may result in defendants appearing less engaged and less willing to bring a matter to the court’s attention.²²

In contrast, participants in fully remote hearings are all following the same “rules of the game” because everyone appears via video;

- b. Hearings involving video-conferencing may place a **strain on the client-representative relationship**. The representative in a hearing with video-conferencing faces a choice: consult with the client in person and appear alongside them via video, while other participants appear in the physical hearing. Alternatively, appear in person but consult with the client over video link. Appearing alongside the client may enhance communication and trust, but the representative may feel better able to defend their client in person.

In fully remote hearings, it is possible for the client and representative to be co-located on the screen while appearing via video and to use a private breakout

ensuring all participants have the necessary hardware and stable internet connections, the use of e-bundles and IT support.

¹⁹ JUSTICE, *Understanding Courts*, para 2.75.

²⁰ University of Surrey, Video Enabled Justice Evaluation, March 2020, p 70, available [here](#)

²¹ JUSTICE, *Understanding Courts*, para 2.75. See, C. McKay, ‘Video Links from Prison: Court “Appearance” within Carceral Space’, *Law, Culture and the Humanities* (2015), Vol.14, issue 2, pp. 242-262 and Penelope Gibbs ‘Defendants on video – conveyor belt justice or a revolution in access?’ (Transform Justice 2017), available [here](#).

²² University of Surrey, Video Enabled Justice Evaluation, above note 20.

room for confidential communication. There is no disadvantage faced by either the client or the representative because no part of the hearing is taking place in a physical courtroom.

25. In light of the concerns regarding hearings involving video conferencing, JUSTICE considers that fully remote hearings will often be preferable. However, JUSTICE does not consider the difficulties involved in video-conferencing to be insurmountable. With careful planning, it is possible to reduce feelings of alienation through training of judges and magistrates and video link familiarisation for litigants.²³ In the JUSTICE mock virtual trial, we provided written information for jurors and witnesses which we continued to improve following feedback. In the third iteration of our virtual trial, we included an introductory video which could be replicated for litigants appearing via video link.²⁴ Communication between the client and representative can be better facilitated by allowing time either side of the hearing for conferences.²⁵ Sightlines can be improved through attention to the screen's positioning and image quality.²⁶

Open justice

26. There are a number of concerns about how the principle of open justice will be maintained in socially distanced hearings. Section 58A of the Courts Act 2003 (as temporarily amended by section 55 and Schedule 25 of the Coronavirus Act 2020) currently only permits public broadcasting when the hearing is conducted 'wholly' by video or audio, suggesting that those unable to travel to the socially distanced trial will have to rely on press reporting or transcripts.

27. To the extent that public galleries are open at all, they are operating at a drastically reduced capacity due to social distancing guidelines. There have also been reports of

²³ Mulcahy, above, Appendices A and B.

²⁴ See, <https://www.avmi.com/news-and-resources/avmi-develop-and-pilot-first-ever-virtual-mock-jury-trial-service-with-justice/>

²⁵ JUSTICE, *Understanding Courts*, para 2.79; University of Surrey, Video Enabled Justice Evaluation.

²⁶ The Australian study on the use of video in criminal trials found that specialist skills are required to succeed in creating the desired immersive experience of using screens within the courtroom, with attention paid to where the screens are placed, how sound travels in the courtroom and the need to replicate eye contact through the camera lens: Tait, above, p. 69 and p. 72. Participants in the University of Surrey report suggested using a wider camera lens to enable the defendant to see the whole court and larger, adjustable screens in court. University of Surrey, p. 95.

courts not putting up listings, making court reporting and legal commentary even more difficult.²⁷ Further questions include whether the proceedings will be filmed to compensate for the depleted public gallery? Will there be recordings of all the rooms? Will only counsel be filmed? Will additional participants be required to attend to film the proceedings, thereby adding to the health risks?

28. In fully remote hearings, open justice is secured by livestreaming the proceedings, which all take place on one screen. To enable confidential communication, during the JUSTICE mock virtual court pilot, private jury room and defence consultation rooms were used as well as a private chat function for jury technical difficulties and questions to the judge.

Socially distanced trials will not substantially reduce the backlog

29. Before the crisis, the backlog in the Crown Court was around 37,000. In normal times, there are approximately 370 jury trials every week across England and Wales.²⁸ Socially distanced trials require a great deal of planning, personnel and, most importantly, space. Only a small number of jury trials can be held under the 'special arrangements'. As a result, socially distanced trials will not reduce the backlog of cases in the criminal justice system.

30. Remote jury trials do not face the same spatial limitations and will therefore enable many more trials to proceed. We consider that the virtual court could hear those cases involving straight forward issues with up to two defendants. We estimate that this would cover around a third of all jury trials.

Conclusion

31. There are valid concerns about the fairness of socially distanced trials. Nevertheless, we recognise that it is essential for the administration of justice that trials resume as soon as possible. We consider that many concerns regarding video-conferencing can be addressed. However, our testing of remote jury trials has demonstrated that the virtual court is a viable option for ensuring safety and fairness. Fully remote trials are

²⁷ See, for example <https://twitter.com/PenelopeGibbs2/status/1258321427528396800>; <https://twitter.com/jshmellor> and <https://twitter.com/kirrkorner>

²⁸ Criminal Court statistics, Crown Court plea tool, March 2020, available at <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-october-to-december-2019>

able to respect, even enhance, the fairness of a trial by ensuring diverse juries, improved sightlines, effective participation and open justice. Crucially, remote jury trials can achieve these aims without causing concern to court users over risks to their health.

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