

NICK STANAGE
Doughty Street Chambers
London and The Hague

JURY TRIALS IN ENGLAND & WALES¹

In England juries first emerged as a way of determining the facts of criminal cases after the Church in the person of Pope Innocent III banned the normal method, direct judgment by God as manifested through trial by ordeal, in 1215.

Juries gradually involved into the jury, as it is known in criminal trials in England & Wales today: twelve people who in the Crown Court hear the facts of a case from witnesses and lawyers, and decide whether an accused is guilty beyond reasonable doubt, or not guilty.

In 1771 John Wilkes and Frederick Bull, two sheriffs of the City of London, produced A Letter to the Jurors of Great Britain, arguing in it:

‘As the people have a share in legislation, to prevent improper laws being passed; so likewise have they a share in the administration of justice, that these laws may not become engines of oppression’.

The jury system imposes a duty on citizens to participate in the criminal justice system and to decide the most serious criminal cases in this country. Jury service can be seen as a way of ensuring that society is involved in the administration of justice. The jury system has been called democracy in action.

Which cases will be tried by jury?

All criminal cases start in the magistrates’ court. Offences which are ‘summary only’ (i.e. less serious) are tried in the magistrates’ court without a jury.

Which cases will proceed to the Crown Court (where trial is by jury)?

- If an offence is ‘**indictable only**’ (i.e. can only be heard in the Crown Court) then the defendant must be sent to the Crown Court for trial by jury. See section 51 of the Crime and Disorder Act 1988.
- If a defendant in an ‘**either way**’ offence chooses to plead not guilty and requests a jury trial then he will be sent to the Crown Court. Such a defendant has a right to choose jury trial.

1



- Even if the defendant does not request a jury trial, magistrates can decide to send them for trial in the Crown Court if the offence is serious enough.

What criminal cases are 'indictable only'?

- Offences tried in the Crown Court are divided into three classes of seriousness.
- Class 1 offences are the most serious. They include treason and murder, and are generally heard by a High Court Judge, and jury.
- Class 2 offences include rape, and are usually heard by a circuit judge, under the authority of the Presiding Judge, and jury
- Class 3 includes all other offences, such as kidnapping, burglary, grievous bodily harm and robbery, which are normally tried by a circuit judge or recorder, and jury.
- Less serious cases and those involving juveniles are tried in magistrates' courts.

Even though juries decide less than 1% of all criminal cases in England and Wales, defendants in these cases are charged with the most serious criminal offences and face the greatest possible loss of liberty. The fairness of jury decision-making is therefore of fundamental importance to the criminal justice system. Opinion polls consistently show strong public support for jury trials.

The fact that only a small minority of criminal cases are disposed of by Crown Court jury trial in no way undermines the principle that it is an essential safeguard. Crown Court trials amount to a very considerable number of cases, including trials for the most serious offences.

Attorney-General Dominic Grieve QC in a speech in 2013 said:

'The right of the jury to return the verdict it collectively believes is the true one is inalienable. Well, you may say, do we want a legal system in which the jury can return a verdict which seems to us to fly in the face of the evidence? My answer is yes, it is essential that juries are trusted to take decisions, with proper direction, even if very occasionally those decisions will not accord with the view that lawyers, judges or the Crown may hold...'

'Experience of lawyers, judges and others working in the Criminal Justice System however is overwhelmingly that juries almost always do a conscientious job and do it effectively'.

What is a jury?

A jury is a panel of independent citizens randomly selected to assess the evidence produced by the parties involved in a dispute in court and to come to a verdict (guilty or 'not guilty') at the end of a trial. Juries are considered a fundamental part of the English legal system. Members of a jury are known as jurors.

It is a fundamental principle of our justice system that someone accused of a serious offence is tried by a jury selected at random.

Because a jury must decide the case only on the evidence given in court, it is essential that no one on the jury has any personal connection with, or personal knowledge of, the case or anyone associated with it.

Citizens of England and Wales are obliged to undertake jury service in court when asked. The Jury Central Summoning Bureau is responsible for finding juries for trials. The bureau operates on a national basis and selects names at random from the electoral register by computer, taking into account the number of prospective jurors needed for each area.

It is not permissible to exclude a potential juror or jury panel drawn from a particular section of the community or otherwise to influence the overall composition of the jury. Therefore the judge has no role in the selection of potential jurors, who must be randomly selected, independent and impartial.

Who may sit on a jury?

A jury panel is summoned from eligible persons who are:

- Registered electors aged 18 to 75
- Resident in the UK for at least 5 years since age 13
- Not mentally disordered; and
- Not disqualified for whatever reason.

Disqualification

Persons currently on bail are disqualified. Persons are disqualified for life if they have been sentenced to:

- A life sentence;
- Detention for public protection;
- An extended sentence; or
- Imprisonment or detention for 5 years or more.

Persons are disqualified for 10 years after:

- Sentence, or suspended sentence of imprisonment or detention;
- Imprisonment or detention (less than 5 years); or
- Community punishments or treatment orders.
- Persons "not capable of acting effectively as a juror" may be discharged by the judge.

People are excused from jury service if:

- they are currently a resident in a hospital or other similar institution, due to attend a hospital appointment or operation or recovering from an operation;
- they regularly visit a medical practitioner for treatment;
- a judge has decided they are not capable of managing and administering property or affairs because of mental disorder/mental health problem;
- they have already booked and paid for an important family event such as a wedding or a holiday;
- they have urgent work commitments which, if not completed on time, would have a detrimental effect to their business;
- they have been on jury service in the past two years (except coroner's juries), Individuals need to show the Jury Central Summoning Bureau evidence of this.

The jury summons to the member of the public

'YOUR JUROR'S NUMBER:.....

- You have been selected for jury service.
- Your name was randomly selected from the electoral register.

You must attend for jury service at:

Starting on:

usually for up to two weeks.

During your jury service you may be required to go to another court nearby.

WHAT THE JURY SUMMONS MEANS

Jury service is an important public duty. You will be asked to consider the outcome of a criminal trial in the Crown Court. You will be among many people chosen each year for jury service and you will have an opportunity to influence decisions affecting your local community'.

'WARNING

You may be committing a criminal offence punishable by a fine of up to £1,000 if:

- You do not attend for jury service without a good reason
- You are not available to be a juror when your name is called
- When your name is called, you are not fit to serve because of drink or drugs.

'It is a criminal offence, and if convicted you may have to pay a fine of up to £1,000, if: you refuse when requested to provide any information necessary to determine if you are qualified to be a juror or you give false information, or cause or permit someone else to give false information on your behalf, in order to evade jury service'.

Potential jurors: the role of the judge

There should be a consultation with the advocates as to the questions, if any, it may be appropriate to ask potential jurors. Topics to be considered include:

- a. the availability of jurors for the duration of a trial that is likely to run beyond the usual period for which jurors are summoned;
- b. whether any juror knows the defendant or parties to the case;
- c. whether potential jurors are so familiar with any locations that feature in the case that they may have, or come to have, access to information not in evidence;
- d. in cases where there has been any significant local or national publicity, whether any questions should be asked of potential jurors.

Can a judge exclude a potential juror?

At common law a judge has a residual discretion to discharge a particular juror who ought not to be serving, but this discretion can only be exercised to prevent an individual juror who is not competent from serving. It does not include a discretion to discharge a jury drawn from particular sections of the community or otherwise to influence the overall composition of the jury. However, if there is a risk that there is widespread local knowledge of the defendant or a witness in a particular case, the judge may, after hearing submissions from the advocates, decide to exclude jurors from particular areas to avoid the risk of jurors having or acquiring personal knowledge of the defendant or a witness.

Where a juror appears on a jury panel, it will be appropriate for a judge to excuse the juror from that particular case where the potential juror is personally concerned with the facts of the particular case, or is closely connected with a prospective witness.

Potential jurors: procedure

The jury to try an issue is selected from the panel by ballot in open court. It is normal practice to read out the jurors' names, selected at random, in open court. Where, exceptionally, there is a risk of juror interference, jurors may be called by number.

Following the ballot and any challenges the jury members are then each sworn.

Procedure: what the judge must check in advance

Before the jury panel enters the court the judge should consult the advocates as to any questions to be asked of the panel about any personal connection or knowledge they may have in relation to any aspect of the case such as:

Personal connection with or knowledge of anyone involved in the case whether as a witness (either prosecution or defence) or as someone who will be named (e.g. a deceased person, a co-defendant not before the jury or a person who was arrested but not charged). The defence advocate/s should be asked to identify any other significant names that might be referred to during the case or confirm that there are none;

(2) Personal connection with or knowledge of any place or organisation connected with the case (e.g. the location of the incident, D's home address, a public house or a business);

(3) Awareness of any publicity that the case has received in the local or national media.

Procedure: what the judge must tell the potential jurors

When the jury panel has entered, the judge should:

(1) Apologise for any delay, giving an explanation if it is possible to do so without prejudice to the case which is to be tried.

(2) Give the panel, in neutral terms, brief details about the case that they are going to try e.g. the date, location and general nature of the incident.

(3) Explain that the jurors who are to try the case will do so on evidence that will be presented to them in court and that, for this reason, it is essential that none of them has any personal connection with it.

To this end:

(a) Tell the panel D's name and ask them to look at him to ensure that no one knows him personally. Allow them time, and ensure that all members of the panel can actually see D.

(b) Tell the panel that they are about to hear a list of names of all potential witnesses and any other person connected with the case including, in the case of police or expert witnesses, their occupations, and ask the panel whether any of them knows anyone on the list.

(c) Ask the prosecution advocate to read the list: prosecution and defence witnesses should all be in a single list, already agreed by the advocates and approved by the judge.

(d) Ask the panel if any of them recognise any of the names which have been given.

(e) Explain that if, at any later stage of the case, a juror recognises someone connected it, for example a witness, notwithstanding that he did not recognise a name at this stage, he should write a note and hand it to the usher or the clerk.

(f) If applicable, ask the panel if any of them has any connection with a particular place, business or organisation (as previously identified in discussion with the advocates).

(g) If applicable, ask the panel if any of them are aware of any publicity that the case has received in the local or national media (as previously identified in discussion with the advocates).

Challenges to the array or the polls

Challenges for cause to the array or the polls may be made by either party. The challenge should be made before the juror is sworn.

The Attorney-General has issued guidelines on the use by the prosecution of the right of stand down. The Crown should assert its right to stand down only on the basis of clearly defined and restricted criteria: (1) where a jury check reveals information justifying the exercise of that right and its exercise is personally authorised by the Attorney General; or (2) where someone is manifestly unsuitable and the defence agrees that the exercise by the Crown of the right to stand down is appropriate.

A judge should always be made aware at the stage of jury selection if any juror in waiting is a serving police officer, prison officer or prosecution service employee. The test to apply is well established: "Whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

Juror's oath/affirmation

In the United Kingdom, each juror can opt either to swear an oath on the holy book of their choice (provisions are made for Christians, Muslims, Sikhs, and Hindus) or to affirm. The oath typically takes the form "I swear [by almighty God/by Allah/by Waheguru/on the Gita] that I will faithfully try the defendant and give a true verdict according to the evidence."

Affirmation, which was made available to Quakers and Moravians by the Quakers and Moravians Act 1838 and later extended to anybody who chooses to do so, takes the form "I solemnly, sincerely and truly declare and affirm that I will faithfully try the defendant and give a true verdict according to the evidence".

Payment

Jury service is unpaid, but people can claim for food and drink, travel and loss of earnings. Jury service usually lasts for ten working days, but can be longer. Jurors are obliged not to tell anybody about the trial, either before or during it, and not to post comments on social media websites. When the jury retire to the jury room to consider their verdict, they hold their discussion in private. The jury is not allowed to communicate with anyone other than the judge and an assigned court officer. The court ensures that nobody violates or eavesdrops on the deliberating jury.

Discharging individual jurors

The judge has a power to discharge a juror or jurors but the jury must never fall below 9 in number. A juror should only be discharged where there is a high degree of need.

Examples of situations in which it may be necessary to discharge a juror include: illness, misconduct or a juror having an unavoidable personal commitment.

CPD Trial 26 H2 provides further guidance:

"the judge must decide for him or herself whether the juror has presented a sufficient reason to interfere with the course of the trial. If the juror has presented a sufficient reason, in longer trials it may well be possible to adjourn for a short period in order to allow the juror to overcome the difficulty. In shorter cases, it may be more appropriate to discharge the juror and to continue the trial with a reduced number of jurors"

Moreover,

"The good administration of justice depends on the co-operation of jurors, who perform an essential public service. All such applications should be dealt with sensitively and sympathetically and the trial judge should always seek to meet the interests of justice without unduly inconveniencing any juror."

Guidance to judges on the appropriate directions to jurors at the start of the trial

The instructions given to the jury at the outset will reduce the risk of jurors engaging in behaviour which may jeopardise the fairness of the trial and lead to them being discharged. The instructions will repeat some of the information that has been provided on the jury DVD and in the address given by the jury manager.

Nevertheless, it is important that the jury is directed on these issues by the judge:

- (1) to make sure that jurors understand what is permitted;
- (2) so that the defendant and members of the public gain confidence from hearing the instruction in open court that the jury is to try the case on the evidence;

- (3) so that the jurors have received a court order that in the event that they do ignore the directions and engage in improper conduct that breach will be a contempt of court and a criminal offence under the Criminal Justice and Courts Act 2015;
- (4) in the event challenges on appeal it is clear what instruction the jurors have received.

At the start of the trial

Trial judges should give clear guidance on the following:

- i. The need to try the case only on the evidence and remain faithful to their oath or affirmation;
- ii. The prohibition on internet searches for matters related to the trial, issues arising or the parties;
- iii. The importance of not discussing any aspect of the case with anyone outside their own number or allowing anyone to talk to them about it, whether directly, by telephone, through internet facilities such as Facebook or Twitter or in any other way;
- iv. The importance of taking no account of any media reports about the case;
- v. The collective responsibility of the jury: *"There is a collective responsibility for ensuring that the conduct of each member is consistent with the jury oath and that the directions of the trial judge about the discharge of their responsibilities are followed.... The collective responsibility of the jury for its own conduct must be regarded as an integral part of the trial itself"*.
- vi. The need to bring any concerns, including concerns about the conduct of other jurors, to the attention of the judge at the time, and not to wait until the case is concluded. The point should be made that, unless that is done while the case is continuing, it may not be possible to deal with the problem at all.

The jury's responsibilities

The jury's tasks are to weigh up the evidence, decide what has been proved and what has not and return a verdict / verdicts based on their view of the facts and what the judge will tell them about the law.

Any juror should indicate immediately if he is not able to hear any of the evidence.

If a juror realises at any stage that he recognises someone connected with the case, notwithstanding that he did not do so when the names were read over before the jury were sworn, he should write a note immediately and pass it to the usher who will give it to the judge.

The jury must try the case only on the evidence and arguments they hear in court. From this it follows that throughout the trial each juror:

- (1) must disregard any media reports on the case;
- (2) must not discuss the case at all with anyone who is not on the jury, for example with friends or relatives, whether by face to face conversation, telephone, text messages, chat-lines or social networking sites such as Facebook or Twitter;
- (3) must not carry out any private research of their own with a view to finding information which is or might be relevant to the case, for example by referring to books, the internet or search engines such as Google, or by going to look at places referred to in the evidence;
- (4) must not share any information which is or might be relevant to the case and which has not been provided by the court; and
- (5) must not give anyone the impression that he or she does not intend to try the case on the basis of the evidence presented.

These instructions are given for good reasons:

- (1) They aim to prevent the jury being influenced by opinions expressed by people who have not heard to the evidence.

- (2) The prosecution and the defence are entitled to know on what evidence the jury have reached their verdict(s); otherwise the trial cannot be fair.
- (3) Information obtained from outside sources may not be accurate and may mislead the jury.

It is vital in the interests of justice and in the jury's own interests that they should follow these instructions strictly. If they do not it may well be necessary to halt the trial and start again with a new jury, causing a great deal of delay, anxiety and expense. In fairness to the jury they should be aware from the beginning that if they do not follow the instructions they may well be guilty of a criminal offence and at risk of a sentence of imprisonment.

Although the jury must not discuss the case with anyone outside their own number they are allowed to talk amongst themselves about the case, as it progresses. However, they should only do so when they are all together in the privacy of their jury room: they should not discuss the case in "twos and threes". The jury should wait until they have heard all of the evidence before forming any final views.

Each member of the jury is responsible for seeing that all the jurors comply with all these instructions.

The jury must be told that if they have any difficulties or problems while serving as jurors, including any problem they may have amongst themselves, they should write a note to the judge immediately and give this to the usher. If any such matter is not reported until after the trial is over it may be too late to do anything about it.

When the trial is over jurors may discuss with others their experience of being on a jury and speak about what took place in open court. However, they must never discuss or reveal what took place in the privacy of their jury room, whether by talking or writing about it, for example in a letter, text message or other electronic message such as on Twitter or Facebook. This is absolutely forbidden by Act of Parliament and, if done, would amount to a contempt of court.

Functions of judge and jury

The jury need to be directed that they are responsible for decisions of fact; the judge for decisions of law. Such a direction is not a mere formality. Without it, juries might get the impression that any comments made by the judge were matters to which they were bound to pay heed. It is the duty of the judge to ensure that the jury understand that responsibility for the verdict is theirs and not his.

There are no circumstances where a judge is entitled to direct a jury to return a verdict of guilty.

The jury does not have to resolve every issue of fact that has been raised but only those which are necessary to reach their verdict/s.

The jury must not speculate; they must decide the case on the evidence alone.

In some instances it will be necessary to direct the jury that if they find certain facts to be proved (to the relevant standard) then as a matter of law a particular issue is established. For example, in gross negligence manslaughter, it will be for the jury to establish whether certain facts were proved which, as a matter of law meant that a particular duty of care was owed by the defendant.

What the judge must tell the jury

The jury should be directed as follows:

- (1) The judge and the jury play different parts in a criminal trial.
- (2) The judge alone is responsible for legal matters. When summing up the judge will tell the jury about the law which is relevant to the case, and the jury must follow and apply what the judge says about the law.
- (3) The jury alone are responsible for weighing up the evidence, deciding what has or has not been proved, and returning a verdict/verdicts based on their view of the facts and what the judge has told them about the law.

(4) Where there are different accounts in the evidence about a particular matter the jury must weigh up the reliability of the witnesses who have given evidence about the matter, taking into account how far in the jury's view their evidence is honest and accurate. It is entirely for the jury to decide what evidence they accept as reliable and what they reject as unreliable.

(5) When D has given and/or called evidence: the jury must apply the same fair and impartial standards when weighing up the evidence of the witnesses for the prosecution and the defence.

(6) The jury do not have to resolve every issue that has arisen, but only those that are necessary for them to reach their verdict(s).

(7) The jury are permitted to draw sensible conclusions from the evidence they accept as reliable, but they must not engage in speculation or guess-work about matters which have not been covered by the evidence.

(8) It is important that the jury's verdict(s) should be based only on their own independent view of the evidence and the facts of the case. Therefore:

(a) Although the jury should consider the points made about the evidence and the facts by the advocates in their speeches, it is for the jury alone to decide which of those points are good and which are not.

(b) Should the judge give the impression when summing up the case that he has formed a view about any of the evidence or any of the facts of the case, the jury are not in any way bound by this, and must form their own view.

(c) When summing up the case, the judge will summarise the evidence but will not attempt to remind the jury of all of it. The jury should not think that evidence which the judge does mention in the summing up must be important, or that evidence which the judge does not mention must be unimportant. It is for the jury alone to decide about the importance of the different parts of the evidence.

(9) If appropriate: the jury must not allow themselves to be influenced by any emotional reaction to the case and/or any sympathy for anyone involved in the case and/or by any fixed ideas/preconceptions/prejudices they may have had.

In many cases the jury will be provided with a written summary of all / some of the judge's legal directions and/or a route to verdict.

Are juries fair?

Juries convict on almost two-thirds (64%) of all charges presented to them.

Are juries efficient?

Once juries deliberate they reach verdicts on virtually all charges (only 0.6% of all verdicts are hung juries).

Juries in civil cases: claims for compensation

Where a person, citizen or not, alleges that he has been unlawfully imprisoned or maliciously prosecuted (usually by the police or the prosecution service) then Parliament has legislated that the person's claim for compensation shall be tried by a civil jury. Senior judges have agreed, for interesting reasons:

In *Ward v Chief Constable of West Midlands Police* (1997) TLR, December 15 Hobhouse LJ observed:

'Trials such as this are conducted with the assistance of the jury because of the nature of the allegations made and the issues raised and the desirability in the interests of justice not only being done but being seen to be done of having a jury to decide disputed issues of facts.'

In *Darragh v Chief Constable of Thames Valley Police* (1998) 95 (43) LSG 32, (1998) *The Times*, October 20, CA Sir Patrick Russell stated:

'There is no doubt whatever that some of the issues in this case would be best tried by a jury, for example, allegations of police brutality and, generally, of police misconduct. Those issues are eminently suitable for the decision of a jury and are frequently within the province of the jury, not only in a civil court but more particularly in the criminal courts'.

Most authoritatively of all, Woolf MR said the following in the leading case on damages in civil claims against the police:

'there are arguments which can be advanced to justify the retention of the use of juries in this area of litigation. Very difficult issues of credibility will often have to be resolved. It is desirable for these to be determined by the plaintiff's fellow citizens rather than judges, who like the police are concerned in maintaining law and order. Similarly the jury because of their composition, are a body which is peculiarly suited to make the final assessment of damages, including deciding whether aggravated or exemplary damages are called for in this area of litigation and for the jury to have these important tasks is an important safeguard of the liberty of the individual citizen'.

in *Thompson and Hsu v Commissioner of Police for the Metropolis* [1998] QB 498 at 513.

December, 2016