



England and Wales Report

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ENGLAND AND WALES REPORT

Michael ZANDER Qc*

I. In what situations is there lay participation?

Lay participation in criminal trials in England arises in two very different contexts.

Crown Court cases One is the jury. The jury functions in all cases tried at the higher level. (The English system does not permit the defendant to elect to be tried by some alternative method.) In former times the higher level criminal courts were the Assize court and the Quarter Sessions court. In 1971, the Courts Act abolished the Assize court and the Quarter Sessions court and replaced them with the Crown Court. Every contested case in the Crown Court is heard by a judge and jury. The judge in the Crown Court is either a full-time judge (High Court judge or Circuit judge), or a part-time judge (Recorder or Assistant Recorder who are barristers and solicitors in private practice.)¹ Approximately 70 per cent of Crown Court cases are guilty pleas. The jury therefore functions in some 30 per cent of Crown Court cases – currently just under 30,000 cases per year.

The jurisdiction of the Crown Court is based on two categories of case. The first is serious ('indictable only') cases. These are defined by legislation as so serious that they must always be tried in the Crown Court. Examples include murder, manslaughter, robbery. They make up about 20 per cent of cases dealt with in the Crown Court. The second category is that of 'either way' cases which can be tried either in the Crown Court or in the magistrates' court.

If the offence is an either way offence, the magistrates' court first decides whether it is prepared to take jurisdiction or whether it regards the case as too serious. There are guidelines for the courts in making that decision.² If the court decides that it is prepared to take jurisdiction, the defendant is asked whether he is content to be tried by the magistrates or whether he wishes to elect for trial in the Crown Court. He has an absolute right to opt for trial in the Crown Court. So,

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1. High Court judges hear some 2% of Crown Court cases, Circuit judges some 65% and the balance are heard by Recorders and Assistant Recorders.

2. See *Practice Note* [1990] 3 All E.R.979.

in an either way case, the defendant can insist on trial in the Crown Court. His wish to be tried in the magistrates' court can be overruled by the magistrates but he can only be tried in the magistrates' court with his consent.

The great majority of defendants opt to be tried by magistrates. Of the either way offences that are tried in the Crown Court, about 70 per cent are sent there for trial by the magistrates and 30 per cent are the result of the defendant's choice. In 1997, the defendant's choice of the Crown Court was exercised in some 22,000 cases, though the number of such cases which end as contested trials is much less since a high proportion of those cases end as guilty pleas so that there is no jury trial.

The most important category of either way offences is theft. There has been a great deal of debate over the past twenty or more years whether small theft cases should be transferred to the category of 'summary only' offences which can only be tried in the magistrates' court. So far the wish of successive governments to make this change has been successfully resisted.

The decision as to which level of court deals with the case can be affected by decisions of the prosecutor. Charges are laid in the first place by the police. But the final decision as to the charges lies with the Crown Prosecution Service (CPS). The CPS decides whether the case should go forward and if so, on what charges. So if the offence is charged as 'summary only' it can only be dealt with by magistrates; if it is charged as 'indictable only' it can only be dealt with by the Crown Court and if it is charged as 'either way' there is a choice.

The charging process can also be affected by negotiation between prosecution and defence. Sometimes the defendant will agree to plead guilty in order to reduce the charges from 'either way' to 'summary only'.

Magistrates' courts The second kind of lay participation is in the magistrates' court since the overwhelming majority of magistrates are lay persons. This system has operated since the 14th century. There are some 30,000 magistrates of whom all but a tiny number are lay persons. The lay magistrates are unpaid, though they are reimbursed for their expenses.. They sit usually one day every two weeks. In addition to the lay magistrates, there are also some 90 or so professional, full-time, paid magistrates (called 'stipendiary' magistrates). The lay magistrates and the stipendiaries have the same jurisdiction and the same powers except that stipendiaries sit on their own whilst lay magistrates must sit with a minimum of two and usually sit with three.

II. Composition of the court

The Jury In England the jury (in both criminal and civil³ cases) always consists of 12 persons. (In Scotland the jury consists of 15 persons.)

Magistrates Lay magistrates usually sit with a bench of three. Stipendiaries sit alone.

III. The role of the lay judges in the taking of evidence

The jury The jury has no role in the taking of evidence. The most a member of the jury can do in that respect is to try to ask a question of a witness - through the court. But this virtually never happens.

The witnesses are called by the parties. The case for both the prosecution and the defence is conducted by a barrister in private practice. Until now only a barrister in private practice had the right to appear as advocate (known as 'the right of audience') in the higher courts. As from 1995, solicitors have had the right to qualify to appear for the defence in the higher courts but few have so qualified and not all of these actually conduct many cases in the Crown Court. Lawyers employed by the Crown Prosecution Service do not yet have the right to appear as the lead advocate in contested cases in the Crown Court though the present Government is at the moment changing that rule in the Access to Justice Bill now before Parliament.⁴

The Bar has a rule that a barrister is not permitted to interview his own witnesses before the trial - though this rule does not apply to the defendant nor to expert witnesses. The purpose of the rule is that the barrister should not 'coach' the witness in what answers he should give.

The witnesses for the prosecution give their statements to the police. Those statements are passed to the CPS who in turn pass them to the barrister who is to prosecute the case. It is very rare for the CPS to interview the witnesses, though they are permitted to do so. But the CPS will ensure that the witness statement (known as the witness' proof) is in a satisfactory form.

The statements of prosecution witnesses who are to be used in the trial must be passed to the defence in advance of the trial. They are also in the bundle of papers that the judge receives but the judge is not required to read the witness statements before the trial. Some judges do so; others do not. Since the court has

3. Juries used to be common in civil cases but in the past thirty years they have become almost extinct. Of the tiny number of civil cases tried by juries, almost all are defamation cases.

4. Under the proposed new rule, lawyers employed by the Crown Prosecution Service will be given the same right to qualify to conduct contested cases in the Crown Court as barristers and solicitors in private practice. The proposal was defeated in the House of Lords but the Government immediately stated that it intended to reverse the decision of the House of Lords and since it has a huge majority it will presumably achieve that.

no function in eliciting the evidence of the witnesses it is not vital that the trial judge be aware of the evidence in advance. Also it is rare for the trial judge to have had any previous involvement with the case. Even in the rare case where there is a pre-trial conference of some kind, the judge will generally be someone different from the judge who later conducts the trial.

The non-involvement of the court in the questioning of witnesses at the trial applies equally to the pre-trial stages. There is no equivalent of the French *juge d'instruction*. Nor is there a *dossier* prepared by a pre-trial judge. There is just the bundle of statements of prosecution witnesses. If the prosecution has other material that it does not intend to use as part of its case, (known as 'unused material') it may or may not have to be revealed to the defence.⁵ But even if it is revealed to the defence it would not normally be shown to the court and it would never be shown to the jury.

Moreover, neither the court nor the prosecution will have the statements of the defence witnesses. The defence is not under an obligation to make witness statements available to either the prosecution or the court. The fact that the judge therefore cannot get both sides of the story before the trial may be one reason why judges generally prefer to hear the evidence from the witnesses at the trial rather than pre-reading the depositions of one side only before the event.

But even if the judge has read the witness statements (called 'depositions') he will not normally involve himself in questioning the witnesses. To do so is contrary to the legal culture.

The jury simply listens to the evidence presented in court by the two sides. Jurors may or may not be aware that they have a right to ask questions but it is rare for them to do so. Insofar as they see documents in the case it will only be because they have been given the documents by the parties because they are part of the evidence.

The victim plays no part in the English procedure. There is no equivalent to the system of the *partie civile* bringing proceedings as part of the criminal case. If the victim brings an action against the defendant it will be in separate proceedings brought in a civil court.

The victim has no right to take any part in the proceedings *qua* victim, directly or indirectly, whether in the selection of the jury, the calling of witnesses, the questioning of witnesses or presenting either arguments or submissions. The victim is at liberty to pay privately to have a lawyer at the trial ('a watching brief') but such a lawyer cannot take any part in the proceedings. It is rare for the victim to be represented by counsel.⁶

5. The rules have recently been changed in the direction of narrowing what has to be revealed to the defence - see Criminal Procedure and Investigations Act 1996, Part I.

6. In recent years the English system has improved the position of the victim - largely as the result of the work of Victim Support, an organisation set up in the early 1980s to assist the victims of crime, particularly by ensuring that they receive information and explanations and that compensation

The magistrates The position in the magistrates' courts is in essence the same. The prosecution's case is put to the court by the CPS. The magistrates have no role in the taking of evidence - if by that is meant the calling or the questioning of witnesses. It sometimes happens that the court will ask a witness a question to clarify the answer to a question posed by a lawyer. Or if a defendant who is pleading not guilty is not represented by a lawyer, the court might sometimes become involved in helping the defendant to draw out the witnesses' story. But this is quite rare. One reason is that only about 6 per cent of defendants in the magistrates' court plead not guilty and of those who do, a significant proportion are represented by a lawyer. But even if the number of unrepresented defendants pleading not guilty were much greater than it actually is, the court is reluctant to embark on trying to question the witnesses either 'on behalf of the defendant' or on its own account. The common law system at least in England does not encourage the court to question witnesses, other than questions to clarify answers already given. The traditional approach is to leave the parties to make their respective cases. Curiously, the court does actually have the technical power in a criminal case to call a witness but it is virtually never done.

IV. Which factual and legal questions must the lay judges decide and how are they formulated?

Jury cases

The jury must decide the facts and must apply the law.

They will hear the facts first from the opening statement of prosecution counsel outlining the case and what the evidence will show, then from the examination of the witnesses ('in chief' by the party calling the witness, then through 'cross-examination' by the other side, sometimes followed by 're-examination'), then from counsel's closing speeches and finally from the judge's summing up.

The judge's main role in regard to evidence during the trial is to rule on questions of admissibility. As just stated, it is unusual for the judge to take a very

and, where appropriate, protection are provided. Victim Support also runs the Crown Court Witness Service which offers help to victims and witnesses at Crown Courts. The organisation gets 96 per cent of its funding from the Government. It has some 900 employees but most of the work is done by some 16,000 volunteers who attend at court. In 1990 the Home Office published a Victim's Charter and in 1996 issued a revised version. In November 1993 the Crown Prosecution Service published a 'Statement on the Treatment of Victims and Witnesses by the CPS'. See also *Speaking Up For Justice*, Home Office, June 1998, the report of an InterDepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System.

active role as the evidence is elicited from witnesses. Rulings on questions of admissibility will often be after submissions from opposing counsel in a *voir dire*⁷

There are also a variety of other issues on which the judge may be required to give a ruling. One of the most important is to rule, at the end of the prosecution's case, if the defence submit that there is no case to answer. If the judge considers that the prosecution case at that stage is so weak that it does not require an answer, he will direct the jury to acquit.⁸

In his summing up the judge is supposed to rehearse the main components of the evidence for both sides. Unlike the rule in some other common law jurisdictions (such as the USA and Scotland) the judge may also give the jury a hint of the view that he takes as to the credibility of witnesses and the weight of evidence. In giving the jury a glimpse of his view the judge must be very careful in what he says. He must make it absolutely clear that questions of fact are for the jury. But providing he does that, he can then go on to suggest to the jury that 'Members of the jury you may think that in regard to the conflicting evidence on that point of Mr Jones and Mrs Smith. . .' and then tell them what they may think - i.e. what he thinks. The Runciman Royal Commission on Criminal Justice in its report in 1993 recommended that judges should not be permitted to do this.⁹ Implementation of that recommendation would presumably be done by way of a Practice Direction issued by the Lord Chief Justice. No such action has been taken.

The judge will also direct the jury on the law. Normally he will do that orally, though, where relevant, he will use as his text standardised directions approved by the Judicial Studies Board. There is nothing to stop the judge giving the jury a copy of his direction and he would do so in a complicated case. Or he might give them a summary of the crucial part. Or he might formulate a check list of issues or questions for them to consider. He would agree any such material with counsel beforehand. But normally the jury will not have an official written text setting out the law to take into the jury room. They may or may not have a record of what he said in the form of a note taken by one or more of the jurors. (It has become quite common for jurors to take notes.¹⁰) It has become normal for the judge to tell counsel before they make their closing speeches and in the absence of the jury, how he proposes to direct the jury on the law. They will then have an opportunity

7. In England that phrase is used to describe not the process of selecting the jury as in the USA, but the hearing of admissibility of evidence questions in the absence of the jury.

8. See especially *R v Galbraith* [1981] 1 WLR 1039 (CA).

9. The need to be fair to both sides, the Commission said, required 'that judges should be wholly neutral in any comments that they make on the credibility of the evidence' (p.124, para.23). It was 'inappropriate for judges to intrude their own views of whether or not a witness is to be believed' (*ibid*).

10. In the Crown Court Study (see below), two-fifths of jurors said they took notes and in three-quarters of the cases other jurors also took notes - sect.6.2.3.

to make submissions to the judge to attempt to influence his view of the relevant law.

It is very rare for the jury to be asked formally to answer a list of questions (a special verdict). The jury will not be told of the range of penalties relevant to the charge(s) on the indictment. Sometimes the jury adds a rider to its verdict - for instance, recommending leniency - but such a rider has no legal status and the judge is not required to follow it. They will not be told of the possibility of doing this by the judge.

The jury has no function in regard to punishment. Sentencing may take place immediately after the verdict or it may be postponed to a later date. But the jury plays no part in that part of the process.

Magistrates' courts

The procedure in the magistrates' courts is obviously different in that the bench has to decide both questions of law and fact. On questions of law, the lay magistrates will be guided by their clerk who is supposed to be legally qualified. (In practice the extent and nature of the clerk's legal qualification varies. Some are barristers or solicitors, some only have a law degree, or a magistrates' court clerk's qualification. Some have no formal qualification but have done the job for a considerable period.¹¹) When lay magistrates want advice on the law during the case the clerk will give it in open court. But if they want advice on the law after they have retired to consider their verdict he will give it in their retiring room so the lawyers in the case have no idea what advice has been given.

V. Deliberation and deciding questions of fact, law and guilt

The judge is not permitted to take any part in the jury's deliberations.

If, during their deliberations, the jury have questions either about the evidence or about the judge's directions on the law, such questions have to be dealt with in open court. The judge is informed (normally by way of a note from the foreman) that the jury has a question. Everyone will re-assemble in the court room. It is a public procedure. The judge will read out the note and will then deal with the question. That will never involve re-hearing witnesses, let alone hearing new witnesses. But it may involve the short-hand writer being asked to read a portion of the evidence or a portion of the tape-recording of the evidence might be played. (In the Crown Court there is always either a tape recording of the

11. The present Lord Chancellor recently suggested that magistrates' court clerks appointed after January 1 1999 would have to be barristers or solicitors and that existing court clerks would be given ten years to get such qualification. But after representations, the proposal was modified. Serving clerks over the age of 40 would be exempt from the new requirements.

evidence or a short-hand writer. Sometimes there is both.) If the question relates to the judge's direction on the law, he may amplify or clarify what he has said.

The jury will sometimes have documents or physical evidence (called the 'exhibits') in the jury room. The judge will decide with counsel what exhibits the jury should take into the jury room. But technically the jury are entitled to have any exhibit and can ask for them. The jury do not see the witness statements (save in the rare case that they become exhibits) and, if they asked for them, the request would be denied. They are not permitted to take audio or video tapes they have heard in the trial into the jury room.

The jury have to answer the question posed - Guilty or Not Guilty - on each charge. They are not asked to give reasons for their decision and they do not do so.

The judge will not tell the jury that they can decide the case according to their conscience or their opinion about the law or the 'merits'. He will usually tell them that they must decide the case according to the evidence and according to law. But there is no way that juries can be prevented from reaching a decision that is contrary to the evidence or contrary to the judge's direction on the law. The judge is required to enter the jury's verdict whether he agrees with it or not and even if he thinks the verdict is a perverse one. This is regarded both as one of the blessings and as one of the curses of the jury system.

In England, until 1967 the decision of the jury had to be unanimous. The Criminal Justice Act 1967 provided that the jury could reach its decision by a majority of not fewer than ten out of twelve. (In Scotland, the decision can be by a simple majority of eight out of fifteen.) The annual proportion of guilty verdicts by a majority is currently around 20 per cent. There is no official information about the proportion of acquittals by a majority as the jury cannot be asked the question¹² for fear that the acquittal would be treated as 'second class'. In the Crown Court Study for the Runciman Royal Commission¹³; it was possible to establish that the proportion of jury acquittals by a majority was the same as convictions by a majority (Sect.6.1.4)

The jury are not informed about majority verdicts until their deliberations have gone on for quite a while. It is a matter for the judge to decide at what point to tell them. The court is not supposed to entertain the possibility of a majority verdict until at least two hours and ten minutes(!) have elapsed.¹⁴ In a complex case the judge will wait much longer than that before telling the jury about the possibility of a majority verdict.

The Crown Court Study showed a clear association between the statistical likelihood of a majority verdict and the length of the case. Where the case lasted

12. Criminal Justice Act 1967, s.13(2).

13. M.Zander and P.Henderson, *The Crown Court Study*, Royal Commission on Criminal Justice, Research Study No.19, 1993.

14. *Practice Direction* [1970] 1 W.L.R. 916.

under a day, 2 per cent of verdicts were by a majority; where the case lasted 1 to 3 days the proportion rose to 13 per cent; where the case went on for more than 3 days it was 23 per cent.¹⁵

Most cases are short. In the Crown Court Study a quarter took up to a day, 60 per cent took under two days, 80 per cent took under three days. Only two per cent took over two weeks.¹⁶

There is no set procedure for the jury's deliberations. Each jury has to decide how to proceed in regard to selecting a foreman and generally.

Jury deliberations are usually very short. In the Crown Court Study, in a third of cases the jury was out for under one hour, in nearly two-thirds (62%), they deliberated for under two hours, in almost nine out of ten (88%) for under four hours. The jury deliberated for over 12 hours in only 1 per cent of cases.¹⁷ Unsurprisingly, the length of deliberations is again correlated with the length of the case. Where the case lasted under half a day, the jurors reported being out for under two hours in 96 per cent of cases. When the case lasted 3-4 days the jurors were back within two hours in only 15 per cent of cases. When it lasted over two weeks, the jurors took more than four hours in three-quarters of the cases. (p. 225)

If the jury has not reached a verdict by the end of the working day the judge will decide at a certain point that they should cease their work and start again the next day. In the Crown Court Study the jury continued its deliberations overnight in only 1 per cent of the total of 821 cases. (p.225) It is for the judge to decide whether they are allowed to go home at that point or whether they should be kept together in a hotel until they have completed their deliberations. The English practice was that the jury could go home at the end of the day until they started to deliberate but that from that moment they should stay together ('sequestered') until they reached their verdict. The Runciman Royal Commission recommended the judge should have a discretion to decide whether they should be sequestered during their deliberations and this was implemented by the Criminal Justice and Public Order Act 1994, s.43.

15 Table 6.4, p.162.

16. Ibid., Table 8.22, p.224.

17. Table 8.23, p.225.

VI. The decision

The jury's verdict

As has been seen above, the judge has to accept the jury's verdict. The judge cannot substitute another verdict for that given by the jury. A person perversely acquitted by the jury against the weight of the evidence is acquitted.

The magistrates' decision

The rule in the magistrates' court is different to the extent that the prosecution has a right of appeal from an acquittal by magistrates - but only on a point of law. The appeal goes to the Divisional Court of the Queen's Bench Division which sits with a mixture of Lords Justices of Appeal and High Court judges. Two or three judges sit. If the appeal is successful the Divisional Court can substitute a verdict of guilty or it can remit the case to the magistrates with a direction to convict.

VII. The appeal

No appeal against an acquittal

A jury verdict of not guilty cannot be appealed. The only exception is if a defendant is acquitted and someone has been convicted of an administration of justice offence involving interference with or intimidation of a juror or a witness in the proceedings that ended in the acquittal. If the trial considers that there is a real possibility that but for the intimidation or interference the defendant would not have been acquitted he can certify that fact and an application can then be made to have the acquittal quashed by the High Court. (Criminal Procedure and Investigation Act 1996, s.54)

Statutory grounds of appeal

Under the Criminal Appeal Act 1907, s.4 the grounds of appeals were that the jury's decision could be set aside on the grounds that it was 'unreasonable or cannot be supported having regard to the evidence' or on the ground of a wrong decision on a point of law or that on any ground there was a miscarriage of justice. The Criminal Appeal Act 1966 altered the grounds. It provided for appeals on the ground that the jury's verdict was 'unsafe or unsatisfactory' or on the ground of a wrong decision on a point of law or a material irregularity in the course of the trial. This formula was amended again in the Criminal Appeal Act 1995 which provides for only one ground of appeal - that the verdict is 'unsafe'. Leave to appeal is required and in most instances it is refused. Leave is normally

sought on the papers without a hearing from the 'single judge' – a High Court judge. If he refuses leave, the application for leave to appeal can be renewed to the full court of three judges at a hearing. Both the single judge and the full court have the power to penalise a misconceived application for leave by adding on an extra 90 days to the sentence for wasting the court's time.¹⁸

Court of Appeal's approach to appeals on the ground that the jury got it wrong

The Court of Criminal Appeal (1907-1966) developed the attitude that it would only allow an appeal against conviction in respect of the jury's verdict if the verdict could not have been reached by a reasonable jury. So in effect the verdict had to be perverse before the Court of Appeal would intervene. The Court of Appeal Criminal Division (1966 to date) said that it would quash a conviction if it had a 'lurking doubt' about the verdict¹⁹, but in practice it was rarely willing to apply this broad and very liberal test. The new formula in the 1995 Act, that the verdict will only be quashed if it is unsafe, looks as if it will result in a narrower approach than before.²⁰

Jury nullification as a ground of appeal

The refusal by the jury to apply the law correctly has never been a ground of appeal. An appealable error of law means an error by the judge in directing the jury, not an error by the jury in applying the law to the facts.

Fresh evidence

The Court of Appeal has the power to allow new evidence to be introduced on the appeal. But it must be established that the new evidence is significant and that it was not evidence that could have been produced at the trial. It must really be new evidence. The Court of Appeal is reluctant to receive fresh evidence but it will do so. The new evidence may be heard in the form of oral evidence. Having heard the new evidence the Court of Appeal can then either uphold the conviction on the ground that the new evidence makes no difference, or quash the conviction on the ground that the new evidence makes the conviction 'unsafe' or order a retrial.

Retrials

The power to order a retrial used to be available only where the court received fresh evidence. Since 1988 it has been available whenever the Court of Appeal believes it to be 'in the interests of justice'.²¹ The Runciman Royal

18. Such 'time loss' orders are made very rarely – half a dozen per year.

19. *R v Cooper*[1969] 1 Q.B.267.

20. See for instance *R v Chalkley* [1998] 2 All E.R. 155.

21. Criminal Justice Act 1988, s.43.

Commission recommended that the Court of Appeal be readier to order a retrial - in preference to quashing a conviction - and in the past few years there have indeed been a greater number of retrials.²²

Harmless error

There used to be a harmless error rule²³, but it has now in effect been subsumed in the new formula 'unsafe'.

Indeed under the new formula even serious errors of law or serious procedural irregularities or serious misconduct by the prosecution authorities may not necessarily result in a successful appeal. It all depends on whether the Court of Appeal decides that the error or irregularity or misconduct makes the conviction unsafe. Probably, this will depend on the composition of the court. Some judges will give the new statutory formula a narrow interpretation and will uphold the conviction where the evidence of guilt is strong notwithstanding all sorts of grave errors and misconduct by the prosecution. Other judges will hold that the error or the irregularity or the prosecution misconduct renders the conviction unsafe.

How many appeals?

An appeal from the Crown Court lies first to the Court of Appeal Criminal Division. Leave to appeal is required. Leave can be obtained from the Crown Court itself (very rarely requested) or from the Court of Appeal. An appeal lies from the Court of Appeal to the House of Lords but only on a point of law of general public importance. It is extremely rare for a criminal case to reach the House of Lords. (In 1997, the House of Lords dealt with 71 appeals of which 11 were appeals from the Crown Court. It allowed the appeal in only two of the 11.)

Most appeals from the Crown Court are appeals against sentence. (In 1997, the Court of Appeal Criminal Division heard 526 appeals against conviction (of which 186 or 35% were allowed) and 1,912 appeals against sentence (of which 1,331 or 70% were allowed).

22. In the five years 1989 to 1992 the annual numbers were 1,3,15,12,20. In the four years 1994 to 1997 they were 51, 52,53, 30.

23. It was called The Proviso - namely the proviso to s.2 of the Criminal Appeal Act 1968, 'Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred'.

VIII. Circumventing the jurisdiction of the lay court

If the case is triable only on indictment, the only way of circumventing jury trial is if the defendant avoids a trial by pleading guilty or if the judge directs an acquittal either at the outset when the prosecution offers no evidence or at 'half-time' when the judge upholds a defence submission that the prosecution's case is not strong enough to require a response from the defendant.

If the case is triable 'either way' (see p.1 above), there is the additional possibility of avoiding jury trial by having the matter dealt with by the magistrates' court. About 80 per cent of either way cases are dealt with in the magistrates' courts because that is what the defendant prefers and the magistrates do not think the case is one that should go to the Crown Court. In the great majority of those cases the defendant pleads guilty.

Plea bargaining

Plea bargaining does take place on a significant scale. The Court of Appeal has repeatedly said that a guilty plea would normally entitle the defendant to a discount of some 25-30 per cent off his sentence. No doubt this is one of the reasons why some 70 per cent of defendants in the Crown Court and over 90 per cent of defendants in the magistrates' courts plead guilty. But although 70 per cent of Crown Court defendants plead guilty, 30 per cent pleading not guilty can hardly be said to be an insignificant proportion.

It is now provided by statute that the earlier the plea the greater the discount.²⁴ The section provides that in determining what sentence to impose the court should take into account a) 'the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty and b) the circumstances in which this indication was given'. Section 48(2) states that if the court gives the defendant a discount in response to his guilty plea 'it shall state in open court that it has done so'. There is no empirical evidence as yet that throws light on how the courts operate this new provision.

There is a major difference between plea bargaining in the US and in England. In England the prosecutor is not permitted to express a view to the sentencing court as to what he regards an appropriate sentence. As a result, it is not possible to negotiate a plea on the basis that 'If the defendant pleads guilty, we will urge that he gets a three year sentence whereas if he pleads not guilty we will ask for a five year sentence'. But a guilty plea can be negotiated (and very often is) on the basis, 'If the defendant pleads guilty to the lesser charge, we will drop the more serious charge'.

One of the great problems of the system has been that of 'cracked trials', a term of art to signify a case that is in the list as a not guilty plea which turns into a guilty plea at the door of the court as a result of last minute discussions between

24. Criminal Justice and Public Order Act 1994, s.48.

prosecution and defence lawyers. Last minute guilty pleas are extremely costly in terms of wasted resources - in preparation of a case that does not in the event come to trial, in the time of witnesses who come to court and are then not needed, in assignment of court time and judge time which may then be under-utilised, etc. Cracked trials are very common.²⁵

In 1995, a new system of Plea and Directions Hearings was introduced for all Crown Court cases. The main purpose of the Plea and Directions Hearing (PDH) is to have a brief hearing shortly after the case is first sent ('committed') for trial at the Crown Court. It is an opportunity for the defendant to receive advice not only from a representative of his solicitors' firm but also from a barrister. As a result of that advice, the defendant who previously would have delayed his guilty plea until the day of the trial may now be prepared to plead guilty weeks or months earlier.

For another recent procedural innovation with the same objective of bringing guilty pleas forward earlier see s.49 of the Criminal Procedure and Investigations Act 1996 which permits the court to ask the defendant how he intends to plead at an earlier stage. He is not required to answer and, if he does not, he is deemed to be pleading not guilty. But if he does indicate that he intends to plead guilty, the court treats that as a plea and proceeds either to sentence the defendant or to send him to the Crown Court for sentence. If the case is sent for sentence to the Crown Court, the defendant retains his right to change to a not guilty plea.

It was thought that this procedure would apply especially to defendants charged with either way offences who previously would have had their cases sent to the Crown Court because the magistrates declined jurisdiction.²⁶ It is too early to say how this provision is working.

IX. Who are the lay judges and how are they selected?

The Jury

Until 1974, eligibility for jury service was based on wholly out-of-date property qualifications. The subject was the subject of inquiry by an official committee which reported in 1965.²⁷ The committee found that only 22.5 per cent of those on the electoral register were eligible for jury service. In particular, women and young persons were under-represented. The Morris Committee recommended that the property qualification be abolished and that eligibility to vote be the basis

25. The Crown Court Study suggested that cracked trials were 26 per cent of all Crown Court cases and 43% of cases excluding those listed as guilty pleas. (sect.5.1, p.149) Since then the proportion has decreased to 19% in 1997. (*Judicial Statistics*, 1997, p.64.)

26. Of the either way cases sent to the Crown Court, over 70 per cent are sent there because the magistrates think the case is too serious to be dealt with by them whilst just under 30 per cent are cases where the defendant elects for Crown Court trial. See p.1 above.

27. *Report of the (Morris) Departmental Committee on Jury Service* (1965 Cmnd.2627)

of eligibility for jury service. The Juries Act 1974 provided that anyone between the age of 18 and 70 is eligible to serve on a jury. It is compulsory for anyone summoned who is between 18 and 65. For those summoned between 65 and 70 it is optional.

Those ineligible, disqualified or excused

A person is *ineligible* if he is on the statutory list of occupations involved with the justice business - judges, lawyers, police officers, court clerks, probation officers, prison officers - who are kept off juries for fear that they might exert undue influence in the jury room by virtue of their inside knowledge. Clergymen are also ineligible for fear that they would exercise undue influence because of their office. A person is *disqualified* if he has been convicted and sentenced to certain punishments - life imprisonment at any time, a sentence of five years or more of imprisonment, a suspended prison sentence or community service order during the previous ten years, or a probation order in the previous five years. Also anyone currently on bail is disqualified. It is a criminal offence to serve on a jury whilst disqualified. A person can be excused as of right if he is on a list of occupations that are deemed to be even more important than jury service - mean hours of Parliament, doctors, dentists, full-time members of the armed services etc²⁸. One can also try to negotiate ad hoc excusal on the ground of some personal circumstance - ill-health, annual holiday booked, taking an exam, having a baby etc.

There is no formal test of literacy or intelligence. The Runciman Royal Commission on Criminal Justice considered but rejected the proposal that there should be.

There is no special jury for special cases - but see below for the question of special juries for long fraud cases.

Jury selection

Selection is done locally by court officials using a computer to draw names randomly from the electoral register for the local area according to a system devised by the Royal Statistical Society.

A sufficient number of names are warned - usually with several months notice - that they are required to present themselves for jury service for a two week period starting on a named date. It is an offence not to come.

There is now an official video about jury service which prospective jurors will all be shown on their first day.

Names are then drawn for the particular case. The method for doing this varies from court to court. There is no standard procedure. Usually it is done by putting cards with numbers or names into a box. Cards are drawn from the box by a court official. Usually some 20 names are drawn and those individuals are

28. Juries Act 1974, Sched.1.

brought into the back of the court room. The clerk calls out the names and each in turn comes forward to be sworn (or not) as members of the jury in that case until the jury has twelve members. (There is no system for swearing in alternate jurors in case any fall ill or for some reason cannot serve.)

Participation of the parties in the selection of the jury

The basic philosophy of jury selection is reflected in a *Practice Note* first issued by the Lord Chief Justice in 1973 and re-issued in a slightly revised form in 1988:

Jury service is an important public duty which individual members of the public are chosen at random to undertake. The normal presumption is that unless a person is excusable as of right from jury service . . . , he or she will be required to serve when summoned to do so. There will however be circumstances where a juror should be excused, for instance where he or she is personally concerned in the facts of the particular case or is closely connected with a party or prospective witness. He or she may also be excused on grounds of personal hardship or conscientious objection to jury service.²⁹

The parties have no right to participate in the procedures leading to the creation of the jury panel but there are procedures that to a very limited extent allow the parties to affect the choice of jurors for the particular case.

The parties can get access to the list of names. The list used to show names, addresses and occupations. But occupations are no longer shown.

There used to be a right for the defence to exercise *peremptory challenges*, without having to give any reasons. Each defendant originally had 35 peremptory challenges. In 1509 this was reduced to twenty; in 1948 it was reduced to seven and in 1977 to three. It was abolished in the Criminal Justice Act 1988 on the (unsubstantiated) ground that it was being abused by the defence to secure unjustified acquittals by eliminating educated jurors.

Both the prosecution and the defence can *challenge for cause* whereby they try to persuade the judge that the juror should not be permitted to serve because of some potential bias. But, unlike the rule in the United States, no questions can be put by to the potential juror to establish whether there might be some such cause for challenge. So challenge for cause is virtually never used and the selection of juries takes minutes where in the United States it takes hours, days or weeks. Exceptionally the judge will agree to ask questions suggested by counsel for one side or the other but this happens very rarely.

The prosecution has two other procedures. One is *stand by for the Crown* under which the prosecution can ask a juror to stand to one side for the time being. If a jury can be empanelled without him/her the juror will not serve on that case. If not, the juror will serve unless successfully challenged for cause. Stand by for the Crown is therefore a kind of unlimited peremptory challenge available

29. Practice Direction (Jury Service Excusal) (1988) Cr.App.Rep. 294, [1988] 3 All E.R. 177.

only to the prosecution. After the abolition of the right of peremptory challenge in 1988 the Attorney General issued guidelines to prosecutors that stand by for the Crown was to be used to ensure that persons do not serve on juries who the defence agree are 'manifestly unsuitable' for jury service. The example given is an illiterate person in a complex case. The guideline states: 'It is generally accepted that the prosecution should not use its right in order to influence the overall composition of a jury or with a view to tactical advantage'.³⁰ There is no suggestion that this right is abused.

The other procedure available to the prosecution is *jury vetting*. This only applies to cases where national security is involved and some of the evidence is likely to be heard *in camera* and in terrorism cases. If the case is in one of those categories the prosecution has the right to run the names of those on the jury panel through the various vetting systems available to MI5, MI6 and the police. If any name is identified as an 'undesirable' for jury service in such a case the prosecution will be told and will use its right of stand by for the crown to ensure that that person does not serve on the jury. There are only a handful of cases per year when this procedure is used. Jury vetting requires the personal permission of the Attorney General.

Apart from jury vetting in national security and terrorism cases there is no practice of either the prosecution or the defence investigating potential jurors before trial.

The judge is ultimately in charge of the process of jury selection but his powers are restricted by the law and practice of the system. Thus for instance the judge cannot legitimately alter the normal process of selection in order to achieve a racial mix - even in a case in which race is an especially sensitive issue. This was established in the Court of Appeal's ruling in *R v Ford*³¹ in which the then Lord Chief Justice said that a judge had a right to discharge a juror who was unfit for jury duty because he was deaf or blind or otherwise incompetent to serve. But this discretion did not extend to discharging a competent juror in order to secure a jury drawn from a particular section of the community nor otherwise to influence the overall composition of the jury. There was no principle that juries should be racially balanced for that would depend on an underlying premise that jurors of a particular racial origin were incapable of giving an impartial verdict in accordance with the evidence.³²

Financial compensation for jurors

30. *Practice Note* [1988] 3 All E.R. 1086, para.1.

31. [1989] 3 All E.R.445.

32. The Runciman Royal Commission on Criminal Justice adopted a suggestion put to it by the Commission for Racial Equality that in racially sensitive cases there should be a procedure whereby the judge would authorise the selection of up to three jurors drawn from ethnic minorities. (p.133, para.63.) But the recommendation was strongly opposed, by, amongst others, the Lord Chief Justice, and it has not been implemented.

Jurors receive a financial loss allowance graduated depending on the length of the case. At present, for the first ten days they are paid a flat rate of £50 a day even for the retired and the unemployed. After the first ten days, the loss-of-earnings allowance is subject to a maximum of £100 a day. Jurors also receive a modest subsistence allowance to cover meals plus reasonable travel expenses.

Who serves on juries?

There are only two studies of jury composition in England.³³ The first was an investigation of 326 juries empanelled in 1975 and 1976 in the Birmingham Crown Court. During the study the court authorities kept records of each juror's sex, age, occupation and race and the number of times he had previously sat on a jury. The study showed that the recommendations of the Morris Committee had had a considerable effect. According to Lord Devlin, in 1956 juries were 'predominantly male, middle-aged, middle-minded and middle class'. This was no longer so. The researchers found that 'the juries in question had acquired a distinctly working class character: indeed a majority of jurors were manual workers, or the wives of manual workers.'³⁴ Nevertheless, when compared with census data for the area, manual workers and especially unskilled manual workers were still somewhat under-represented.³⁵ In regard to age, there was 'a remarkable congruence' between those who sat on juries and residents of Birmingham.³⁶ In regard to sex, women were distinctly under-represented—72 per cent of jurors were male. The authors explained this by two facts—more women than men asked for excusal and, as a result, an unofficial policy (since discontinued) was followed of calling twice as many men as women for jury service.

The other great discrepancy between the jury and the local population was in regard to an under-representation of racial minorities. Only 28 out of 3,912 jurors (0.7 per cent) were of West Indian or Asian origin, when the census figures suggested that one could expect 10 to 15 times that number.³⁷

The researchers investigated whether jury decisions could be correlated with any of these factors, but found that 'however one regarded the material, no consistent patterns were apparent.'³⁸ The presence of women, younger or working-class jurors appeared to make no difference to jury results. They concluded: 'We can confidently state that no single social factor (nor, so far as we could detect, any group of factors operating in combination) produced any

33. Extract from Michael Zander, *Cases and Materials on the English Legal System*, 7th edn., Butterworths, 1996, pp.374-76.

34. J BALDWIN AND M MCCONVILLE, *JURY TRIALS* (Clarendon, 1979), p 95.

35. The census figures showed 8.8 per cent of the local population in the category of unskilled Social Class V, as compared with 3.4 per cent in the sample of jurymen. *Ibid.*

36. *Ibid.*, p 97.

37. p 98.

38. p 100.

significant variation in the verdicts returned, . . . The truth of the matter is that most juries in Birmingham were extremely mixed, and it is to be expected that the amalgam of personal and social attributes that make up a jury will produce verdicts that reflect that unique social mix rather than the broad social characteristic of the individuals concerned.³⁹ This finding appears to be confirmed by an unpublished Home Office study which compared the overall acquittal rate on a national basis for three months before the changes made by the Juries Act 1974 with three months after the Act came into force. No significant differences emerged.⁴⁰

The Crown Court Study carried out by the writer for the Runciman Royal Commission included responses from over 800 juries sitting in every completed contested case in every crown court in the country for a two week period in February 1992. Returns were received from some 8,300 jurors. The profile of jurors that emerged from this national sample showed:

Sex Males were slightly over-represented—53 per cent as against 48 per cent in the whole population; foremen were much more disproportionately male—78 per cent.⁴¹ Age Young jurors were almost exactly proportionate to their numbers in the population (18–24, 15%, compared with 14% in the general population, 21–34, 21%, compared with 20% in the general population). The other age groups were slightly over-represented—which was not surprising given that there were virtually no jurors over the age of 65—an age group that accounts for 20 per cent of the population. Surprisingly, the age distribution of jury foremen was not very different from that of the jury as a whole. Even the 18–24 age group contributed the foreman in 11 per cent of cases.⁴² There was no jury in the sample where any age group dominated disproportionately. The average age of the 8,338 jurors was in the middle band (35–44).⁴³ In 65 per cent of juries the number of young jurors (18–24) ranged from one to three.⁴⁴ In one fifth of juries there were no such young jurors. The acquittal rate of juries with an average age of 25–34 was 42 per cent—a little lower than the 44 per cent for juries with an average age of 35–44 or 45–54.⁴⁵

Work status The great majority of the jurors were working (69% full-time, 13% part-time). Only 2 per cent had been unemployed for over 2 years. 6 per cent were retired persons.⁴⁶

39. pp 104–5.

40. cited by BALDWIN AND MCCONVILLE, *op cit* p 96, n 24.

41. para 8.13.1.

42. p 236.

43. p 236.

44. *Ibid.*

45. Table 8.39, p 237.

46. para 8.13.3.

Social class The social class measures were somewhat crude but it appeared⁴⁷ that 19 per cent were skilled manual (compared with 23% in the general population), 7 per cent were unskilled manual (exactly the same as the general population), 29 per cent were professional/managerial (compared with 31% in the general population).

Ethnic mix Jurors were asked to identify their own race or ethnic background on a list of seven categories. The results showed a very close approximation between the sample and the general population. Whites were 95 per cent of the jurors—almost exactly the same as the general population. Non-white jurors were 5 per cent of the sample, compared with 5.9 per cent of the total population according to the 1991 census. In fact Black-Caribbean and Indian were over-represented, each being 2 per cent of the sample, compared with 1 per cent of the national population. In 65 per cent of juries there was no non-white jurors, in 16 per cent of juries there was one non-white person, in 9 per cent there were two, in 5 per cent there were three, in 5 per cent there were more than three.⁴⁸

Language problems 96 per cent of the sample said that English was their first language. Of the 273 who said English was not their first language, 32 said they had a little difficulty in following the case. None said they had a lot of difficulty.⁴⁹

Defence counsel in the Crown Court Study said they had no concerns about the composition of the jury in 83 per cent of cases. Of those who expressed concerns, the most frequently mentioned issue was the racial mix.⁵⁰ When the defendant was black, defence counsel expressed concern about the racial mix on the jury in 18 per cent of cases, and therefore had no concern in just over 80 per cent of these cases.⁵¹

However, concerns of defence counsel did not correlate with the result of cases. Defence counsel had no concerns about jury composition in 80 per cent of cases ending in acquittal, compared with 81 per cent of cases ending in conviction.⁵²

The magistrates Magistrates are all appointed by the Lord Chancellor. Nominations come from local Advisory Committees – whose membership is secret. There are some 2,000 members of these committees which range in size from five to thirty. Most have around ten members. They too are appointed by the Lord Chancellor. Appointment is normally for six years but it is renewable for a further period of six years. Twelve years is normally the maximum. Most committee members are themselves justices.

47. Table 8.41, p 238.

48. pp 241–42.

49. para 8.13.7, p 242.

50. Table 6.14, p 176.

51. p 176.

52. *Ibid.*

For most of this century politics has been regarded as an important part of the process of appointment of justices. Indeed, the form of recommendation for appointment to the bench actually required that the proposer states the party affiliation, if any, of the candidate. When submitting names for appointment, the local committee which advises the Lord Chancellor is required to specify the numbers of votes cast locally for the main parties. Also the annual confidential report made by such committees is supposed to state the number of magistrates with affiliations with each of the main parties.

The attention given to political persuasion stems directly from the report of the opinion of the Royal Commission of 1909-10 on the Magistrates that 'It is not in the public interest that there should be an undue preponderance of justices drawn from one political party' and that 'appointments influenced by considerations of political service and interests are highly detrimental to the public interest.' The 1948 Royal Commission on Justices of the Peace thought likewise that appointments should not be for political service. But there is no doubt that service in local politics has been and remains one of the main, or possibly even the main background for appointment to the bench. Every study that has been done in modern times about the background of lay magistrates shows that involvement in local politics plays a key part in the processes which lead to the selection of a high proportion of those chosen as justices and equally of those who serve on the advisory committees that select them.

In October 1998 the Lord Chancellor's Department issued a Consultation Paper ('Political Balance in the Lay Magistracy') raising for consideration whether it was still appropriate to regard political affiliation as part of the process.

Surveys have also shown that the great majority of magistrates are middle class. The Royal Commission in 1948 found that only 15 per cent of male JPs were wage earners. By 1966 a sample found the proportion had only risen to 15.9 per cent. Another study in 1971/72 found only 13 per cent of the sample in that category. Another study in a 1979 study had 12 per cent wage earners.⁵³

The gender balance of the magistracy is virtually equal. (In 1998 there were 15,700 male and 14,600 female lay magistrates.)

New magistrates are required to undertake training. In the past the requirement was based on a minimum number of hours of training per year over three years. No attempt was made to assess outcomes. A new system being introduced at present is based instead on acquiring certain competencies. Newly appointed magistrates have experienced magistrates appointed as mentors to assist them acquire the required competencies. The system involves appraisal. Existing magistrates will be appraised at least once every three years against the competencies required for the areas of work they do. The competencies to be

53. See ROGER HOOD, *SENTENCING THE MOTORING OFFENDER* (Heineman, London, 1972) Table 1, p.51; J.Baldwin, *The Social Composition of the Magistracy*, BRITISH JRNAL. OF CRIMINOLOGY, vol.16 (1976) pp.171-74; E.BURNEY, *MAGISTRATE, COURT AND COMMUNITY* (Hutchinson, 1979) p.65.

tested include knowledge of law and procedure; knowledge regarding the local area (including the local economy, basic social history, demography, crime statistics); decision-making (including labelling and stereotyping, language and cultural differences, body language, personal prejudices, note-taking, observing conduct).

X. A brief history of lay participation in the criminal trial⁵⁴

Both the jury and lay magistrates are ancient institutions which go back many centuries.

The jury:

Originally the function of the jury was to report as to what they knew of the facts.⁵⁵ It was only gradually that their role was transformed to one of finding the facts from the evidence.

The jury system replaced earlier methods of determining guilt or settling civil disputes – trial by ordeal, trial by battle or by compurgators.⁵⁶

The transformation of the medieval active jury into the passive courtroom triers of fact is not well understood either in its timing or its causes. Probably in the later fifteenth century, but certainly by the sixteenth, it had become expected that the jury would be ignorant of the facts of the case.⁵⁷

The Old Bailey Sessions Papers⁵⁸ were so-called 'chap books' – pamphlets written by non-lawyers for sale to the general public, each pamphlet recounting the details of the latest cases. They ran from 1674 for nearly two and a half centuries. During that time they underwent major changes of format and function, from chap books to newspapers to true law reports. The newspaper phase had been reached by the mid-1680s. At that time they were published regularly and they recounted a considerable number of cases. The Old Bailey sat eight times a

54. The writer does not pretend to be a historian and lacks the time to do justice to this section.

55. NB The word 'verdict' derives from verum (the truth) and dicere (to say).

56. Compurgators were persons called by the parties to swear that their version of the matter was the truth.

57. For an assessment of the role of the jury in the early centuries see especially T.A.GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL, 1200-1800* (Chicago University press, 1985). Green suggests that part of the historic role of the jury was to mitigate the rigour and harshness of the criminal law and its penalties - not just occasionally but on a massive scale. On the developing respective roles of the judge, the jury and the lawyers see especially J.H.Langbein, *The Criminal Trial Before Lawyers*, 45 *UNIVERSITY OF CHICAGO LAW REVIEW*, 1978, p.263; and Stephen Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 *CORNELL LAW REVIEW*, 1990, p.498.

58. Extract from MICHAEL ZANDER, *CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM*, 7th ed. Butterworths, 1996, pp.414-16 - a short historical section based mainly on Langbein's research on the Old Bailey Sessions Papers for the period 1670-1730.

year and a Sessions paper was produced for each session. In the early years they ran to four pages and everything was highly compressed. In the 1720s they were eight pages long and in the 1730s they burgeoned to twenty-page pamphlets. In the late 1730s the reports of a single session required two twenty-page pamphlets. They were seemingly written mainly for laymen and are therefore not an ideal source for understanding of the system of trial. But Langbein says that they 'are probably the best accounts we shall ever have of what transpired in ordinary English criminal courts before the late eighteenth century'.⁵⁹

The features of the trial at that time included the following:

- (1) A single jury was empanelled to hear a large number of cases. Typically, there were only two twelve-man juries for the whole sessions—a London jury and a Middlesex jury. A session lasted several days and processed 50–100 felony cases. In December 1678, for instance, there was a two-day session. On the Wednesday morning the London jury tried two cases, the Middlesex jury tried seven. In the afternoon the London jury tried three cases. The next morning the Middlesex jury had eight cases and the London jury six. On Thursday the London jury was discharged whilst the Middlesex jury had six cases. Between them the two juries returned verdicts in 32 cases involving 36 accused in two days!
- (2) The cases were commonly tried and decided in batches. The jury would hear a number of trials and would then go off to deliberate on all the cases together. In the cases in December 1678, for instance, the Middlesex jury which heard twenty-one cases deliberated only three times. The first batch consisted of seven cases, the second of eight cases and the last of six cases.
- (3) Many of the jurors were veterans of earlier sessions. Jurors it seemed were drawn from a tiny cohort.
- (4) As is obvious from the facts already related, trials took place at amazing speed. Most cases were not-guilty pleas but they were disposed of in short order. Typically a jury heard twelve to twenty cases in a day. Many of the not-guilty pleas, it is true, were somewhat half-hearted. The accused made no reply or offered no evidence or brought only character witnesses. One reason for the striking speed of events was that trials tended to take place within a few weeks of the event and the recollection of witnesses was therefore fresh. Most of the trials at the December sessions concerned crimes that had occurred in October or November. Also the cases were normally based on committal papers prepared and even presented by the justice of the peace or his clerk. The committal procedure often resulted in the accused making a statement or confession and the not-guilty plea that then followed was more

59. JH Langbein, *op.cit.* at p. 271.

pro forma than real. There were no lawyers either for prosecution or defence. The prosecution was at least allowed to have a barrister whereas the defence was not. In important cases, reported as State Trials, the prosecution was always represented, but in ordinary cases normally it was not. In the December 1678 session, for instance, there was no mention of any prosecution counsel in any of the 32 cases. In the absence of a lawyer there was no opening and closing speech, no examination or cross-examination of witnesses and no motions on points of evidence. Questioning of witnesses was done by the judge himself, or by the accused. The accused could not give sworn evidence but he could question both prosecution witnesses and call and question defence witnesses. He would be asked by the judge what reply he made to prosecution evidence and it was normal for him to respond rather than to rely on any right of silence or right not to incriminate himself.⁶⁰ Also the judge gave few instructions to the jury about each case. Jury deliberations were often perfunctory. Sometimes the jury did not even retire to reach a verdict.

- (5) The judge played a far more directing role than would be permissible today. In Bushell's case in 1670 the principle was established that jurors could not be fined for returning a verdict contrary to the trial judge's instructions. But Bushell's case was untypical. The Old Bailey Sessions papers show the judge normally exercising so much influence over the jury that Langbein suggests 'it is difficult to characterise the jury functioning autonomously'.⁶¹ The judge often served in effect as examiner-in-chief of both the witnesses and the accused. In this capacity, as well as in summing up to the jury, he exercised what seems to have been a wholly unrestricted power to comment on the merits of the case. Sometimes the judge did not bother to use the power. But when he felt like it he would tell the jury what verdict to find, and normally the jury followed the judge's indications.
- (6) Sometimes if the judge did not think the evidence for one side or the other was sufficient, he would stop the trial and tell the party in question to get evidence on the point in question and start again. Today the double-jeopardy rule prevents the prosecution from stopping a case that is going badly and starting afresh. But in the seventeenth and eighteenth centuries this occurred not infrequently. The power seems to have been used mainly in order to assist the prosecution rather than the defence.
- (7) There is evidence in the reports of some instances of exchanges between the judge and the jury as the case was proceeding. The jury would comment as the case was developing, or would ask questions or would ask for certain

60. Langbein says that in the entire 60-year period from the 1670s he did not come across a single case in which an accused person refused to speak in reliance on the right of silence.

61. At p 285.

witnesses to be called. Moreover it often gave reasons for its decisions and sometimes would be questioned about the verdict by the judge.

- (8) In some instances the judge rejected a verdict, probed the jury's reasoning, argued with the jury, gave further instructions, and told it to go away to deliberate afresh. If the judge did not agree with a jury's conviction of the defendant, it was common for him to recommend a pardon or commutation of sentence and such recommendations were often influential.
- (9) The Old Bailey Sessions Papers also threw light on the rules of evidence that were then applied. Hearsay evidence seemed to be admitted quite commonly. If the judge ruled that hearsay evidence should be excluded, no warning was normally given to the jury to disregard the excluded evidence. Nor was the jury sent out of the court room while the argument went on as to the admissibility of the evidence. Since there was normally no lawyer for either side, this was not appropriate.

The Sessions papers also show that, contrary to the modern rules, evidence of previous convictions was frequently considered by the jury as part of the evidence.

Langbein suggests that the modern concept of fairness to the accused requiring exclusion of evidence that would taint the jury had not developed by that time. At a time when the judge dominated the jury there was little thought of keeping prejudicial evidence away from them. The law of evidence, with its modern exclusionary rules, developed not in order to control the judges but as part of the rise of the lawyer as a participant in the criminal process. The rise of lawyers cost the judges their commanding role and thereby made the jury more dangerous, since the judge could not control it so well.

The rule that the accused could not have a lawyer started to break down in about the 1730s. Until then, according to Langbein, the absence of defence counsel was justified by three main arguments. First, the trial judge was supposed to serve as defence counsel. Secondly, the requirement of a high degree of proof was regarded as a safeguard. If proof of that level could be mustered against the prisoner it would be useless for him to have a lawyer since he would plainly be guilty. Third, the accused knew more about the case than anyone else and could not therefore be properly served by an intermediary. On the other hand, curiously, lawyers were allowed for misdemeanour cases though not normally for felonies. Lawyers were also permitted if there was some point of law to argue. If the court did not see the point, however, it was left for the accused himself to raise it and to persuade the judge to allow him to have a lawyer. Defence lawyers began to play a role in examining and cross-examining witnesses in the 1730s, though the accused himself continued to play the same role as before as well. There was no real differentiation of function between counsel and the accused. But gradually the role of the lawyer developed and, as Langbein puts it, the lawyers eventually broke up the ancient working relationship between judge and jury 'and cost the

judge his mastery of the proceedings'.⁶² In the period covered by the Sessions Papers studied by Langbein, the accused in effect therefore lacked the safeguards both of the inquisitorial and of the adversarial systems. There was neither proper investigation of claims of non-guilt nor rules of evidence, neither assistance of counsel nor appropriate rules for the selection, instruction and control of the jury.

Justices of the Peace (Lay magistrates): The term 'Justice of the Peace' appeared for the first time in 1361 in a statute which provided that three or four of the most worthy in each county should be assigned to keep the peace and to arrest and punish offenders. In 1362 justices were required to meet four times a year – from which the term Quarter Sessions is derived.

A great part of the work of justices concerned local administration – including maintenance of highways, dealing with vagabonds and beggars, fixing prices and recruiting for the militia.

The justices lost most of their administrative functions in the nineteenth century – though they still retain their role of licensing premises for sale of alcohol etc.

Most criminal offences were dealt with by trial on indictment by judge and jury. Justices had an extensive criminal jurisdiction when sitting in Quarter Sessions with a jury, but their summary jurisdiction was very limited. Miscellaneous statutes gave justices the power to punish certain types of offenders but these measures, of which the Statutes of Labourers and Poor Laws were examples, were often concerned with transgression of administrative rules rather than with criminal offences proper.

Justices began also to hear criminal cases sitting out of Quarter Sessions in what eventually came to be called Petty Sessions. (The first statute that recognised this name was the Petty Sessions Act of 1849. In 1889 Petty Sessions were statutorily defined as 'A court of summary jurisdiction consisting of two or more justices sitting in a petty sessional courthouse'.) Stipendiary magistrates were first appointed in the eighteenth century.

The criminal offences justices were empowered to deal with 'out of sessions' were very minor matters. Thus an Act of Elizabeth I empowered a single justice to deal with robbers of gardens and orchards and persons proved to have broken hedges and fences. The justices could order him to be whipped. In 1747 justices were empowered to fine profane swearers – one shilling for labourers, seamen and soldiers and five shillings for gentlemen.

62. At p 314.

In 1847 justices in petty sessions were empowered to try (with their consent) children of 14 or under for simple larceny. The maximum sentence was a fine of £3 or three months imprisonment. In 1855 this was extended to adults (with their consent) for simple larceny of property valued not above five shillings. The Summary Jurisdiction Act 1879 consolidated much of the earlier legislation. For the first time it listed the indictable offences triable summarily with the accused's consent.

Gradually more and more offences were added to the list triable by magistrates. The standard maximum sentence on summary conviction was set at six months imprisonment and a fine of £100.⁶³ Magistrates' courts deal with some 98 per cent of all criminal cases.

XI. Empirical studies of the effectiveness of lay participation in the country⁶⁴

The first English study of decision-making by juries was by the Oxford Penal Research Unit and was based primarily on the views of barristers and the police. Its principal finding was that most acquittals were 'attributable to a single cause—the failure of the prosecution (normally the police) to provide enough information, or to present it in court in a way that would convince both judge and jury of the defendant's guilt'.⁶⁵ Very few verdicts were found to be perverse.

The present writer's study of acquittals at the Old Bailey and the Inner London Crown Court was based on interviews with the barristers for the prosecution and the defence. It was striking that there was no great difference of view between prosecution and defence lawyers as to the reasons for the acquittals. Again, there was little evidence of perverse verdicts.⁶⁶

A study based on 30 cases heard by 'shadow' juries conducted by the Oxford Penal Research Unit showed the jury approaching its task very soberly. The shadow juries listened to real cases and when the real jury withdrew to consider their verdicts, so did the shadow jury. The authors summarized their results:

Of course the 'shadow' jury discussions and verdicts were not comparable with those of the real jury since the future of the defendant was not at risk, but the fact that many of our volunteers felt like jurors encourages us to make certain comparisons where real and 'shadow' jury verdicts agree.

63. Today it is six months imprisonment or a fine of £5,000.

64 Extract from MICHAEL ZANDER, *CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM*, pp.385-93.

65. See SARAH MCCABE AND ROBERT PURVES, *THE JURY AT WORK* (Blackwell, 1972), p 11.

66. See M Zander, *Are Too Many Professional Criminals Avoiding Conviction?* 37 *MODERN LAW REVIEW*, 1974, p 28. For the report of a series of experiments with 'mock' juries who listened to tape-recorded trials, see AP Sealy and WR Cornish, *Juries and their Verdicts*, 36 *MODERN LAW REVIEW*, 1973, p 496, and LSE Jury Project, *Juries and the Rules of Evidence* (1973) *CRIMINAL LAW REVIEW*, p 208.

Summary of results

3. The 'shadow' juries showed considerable determination in looking for evidence upon which convictions could be based; when it seemed inadequate, they were not prepared to allow their own 'hunch' that the defendant was involved in some way in the offence that was charged to stand in the way of an acquittal ...

5. There was little evidence of perversity in the final decisions of these thirty groups. One acquittal only showed that sympathy and impatience with the triviality of the case so influenced the 'shadow' jurors' view of the evidence that they refused to convict. One other unexpected acquittal seemed to be wholly due to dissatisfaction with the evidence.⁶⁷

But a less favourable view of jury decisions emerged from a later piece of research⁶⁸ selected a random sample of 500 defendants in the Birmingham Crown Court who pleaded not guilty. In the event, 116 of these were acquitted by the judge before the case had run its full course and another 14 changed their plea to guilty during the case. This left 370, of which 114 ended in acquittal. The researchers asked the trial judge, the defence solicitor, the prosecuting solicitor, the police and the defendant himself about these cases—the first three groups by questionnaire and the last two by interview. The response rate was very high (over 95 per cent for the judges, the prosecuting solicitors and the police). The table below shows the opinions of the different groups regarding the 114 acquittal cases.

No strong view expressed	Judge solicitor %	Defence solicitor %	Prosecuting %	Police %
that the acquittal not justified	62	83	64	48
Some doubts about acquittal	6	7	9	8
Serious doubts about acquittal	32	10	26	44
Total	100(114)	100(114)	100(114)	100(114) ⁶⁹

The acquittal was seen as doubtful or highly questionable by one respondent in 30 instances (27 per cent of the 114), by two respondents in 16 (14 per cent) and by three or more respondents in 28 (25 per cent).⁷⁰ There were 41 cases in which both judge and one other respondent found the acquittal doubtful (p 54).

67. Sarah McCabe and Robert Purves, *The Shadow Jury at Work*, 1974, pp 60–3.

68. JOHN BALDWIN AND MICHAEL MCCONVILLE, *JURY TRIALS* (Clarendon, 1979).

69. Source: *JURY TRIALS*, Table 5, p 46.

70. *Ibid*, Table 6, p 47.

Convictions were less often found doubtful or highly questionable, but 8 per cent were so regarded by one or more respondents.⁷¹

The researchers concluded that in respect of a few acquittals it might be said 'that the jury's verdict was primarily conditioned by its sympathy for the defendant or antipathy towards the victim' and 'some questionable convictions can possibly be explained on the basis of sympathy with the victim or prejudice against the defendant'. But in general 'the performance of the jury did not always appear to accord with the principle underlying the trial system in England that it is better to acquit those who are probably guilty than to convict any who are possibly innocent. On the contrary, the jury appeared on occasion to be overready to acquit those who were probably guilty and insufficiently prepared to protect the possibly innocent'.⁷² There was nothing in the composition of the jury (age, sex or social class) which correlated with the decisions.

The study is significantly different from previous studies in suggesting a considerable measure of disagreement between jury verdicts and those of the other key actors.

The Crown Court Study

The Crown Court Study¹² produced new material bearing on the issue under consideration here. The study was based, inter alia, on the responses of jurors, prosecution and defence barristers, judges and police officers concerned in some 800 contested cases in every crown court in England and Wales in a two week period in February 1992.

Did the jury understand the evidence? Jurors were asked, 'How difficult was it for you to understand the evidence in this case?' Half (50%) thought it 'Not at all difficult', 41 per cent thought it 'Not very difficult', 8 per cent 'Fairly difficult' and 1 per cent 'Very difficult'.⁷³ The same question was asked in cases where there was scientific evidence. Surprisingly, the results were very similar – 56 per cent 'Not at all difficult', 34 per cent 'Not very difficult', 9 per cent 'Fairly difficult', 1 per cent 'Very difficult'.⁷⁴

Jurors were then asked 'Do you think the jury as a whole was able to understand the evidence?' The response broadly was yes. Over half (56%) said that all the jury understood the evidence and nearly half (41%) said that most understood, 2 per cent said that 'Only a few understood' and a mere 0.4 per cent said 'None of them understood'. (The response from jury foremen was virtually

71. 2 per cent by one respondent, 3 per cent by two and 3 per cent by three or more respondents—Table 9, p 51.

72. P. 128.

73. P. 206, sect 8.2.1.

74. P. 206, sect 8.2.2.

identical.⁷⁵ There were however 143 juries (17% of the 821 in the study) in which one or more jurors said 'Only a few understood' or 'None of them understood'. 116 juries had one such member, 20 had two such members, 6 had three and one had four.⁷⁶

The prosecution and defence barristers were asked whether they thought the jury had trouble understanding the evidence. 94 per cent of prosecution barristers, and 90 per cent of defence barristers thought they had no trouble, 1 per cent and 4 per cent respectively thought they had trouble.⁷⁷ As a result of an oversight this question was not put to the judges, but they were asked whether the jury could understand the scientific evidence in cases where there had been some. In no fewer than 93 per cent of these cases the judges thought all the scientific evidence was understandable by the jury.⁷⁸

Could the jurors remember the evidence? Jurors were asked 'How difficult was it for you to remember the evidence when it was time for the jury to consider its verdict?'. Again, over ninety per cent said 'No difficulty' (50%) or it was 'Not very difficult' (41%). Nine per cent said it was 'Fairly difficult', 1 per cent said it was 'Very difficult'. When jurors were asked whether the rest of the jury could remember the evidence, the verdict was even more favourable—60 per cent thought none of the other jurors had any difficulty and 34 per cent that only a few found it difficult.⁷⁹ The views of the barristers was to the same effect. 97 per cent of prosecution counsel and 96 per cent of defence counsel thought the jury could remember the evidence, only 1 per cent thought they would have had some difficulty in remembering the evidence.⁸⁰

Not surprisingly, the percentage of jurors who had difficulty increased in proportion to the length of the case. Where the case lasted under a day only 4–5 per cent of jurors said they had some difficulty, where it lasted between two to three days, this went up to 9 per cent, where it lasted three to four days, to 16 per cent and where it lasted over two weeks, over a quarter of jurors (27%) said they had some difficulty.⁸¹

Could the jury understand the judge's summing up? The judges were asked 'How easy was it for the jury to understand the summing up on the facts?' Over two-thirds (68%) thought it was 'easy' and 29 per cent thought it was 'fairly easy'. Only 1 per cent thought it was 'difficult' and 3 per cent 'fairly difficult'.⁸² When the

75. P. 207, sect 8.2.3.

76. *Ibid.*

77. P. 177, Table 6.15.

78. *Ibid.*

79. P. 209, Table 8.9.

80. P. 178, Table 6.16.

81. P. 209, Table 8.8.

82. P. 178, sect 6.2.11.

jurors were asked about the judge's summing up on the facts, about half (48%) said that managing without the judge's summing up on the facts would have made no difference.⁸³ The judges were asked the same question in regard to the summing up on the law. Over two-fifths thought it was 'easy' and another 43 per cent thought it was 'fairly easy'. Three per cent said they thought it was 'difficult' and 13 per cent that it was 'fairly difficult'.⁸⁴

The views of jurors were not very different. About a quarter said they were not sure but of those who gave a response, 6 per cent said they had found it 'fairly difficult' and only 0.4 per cent 'very difficult'.⁸⁵ Their view (and that of the foremen) of how it had been for the other jurors was very similar.⁸⁶

Was the jury's verdict surprising? Different participants in the trial were asked 'In your view, was the jury's decision surprising in the light of the evidence?' In the great majority of cases the answer was No. The verdict was surprising in the view of 27 per cent of the Crown Prosecution Service, 25 per cent of the police, 18 per cent of the defence solicitors, 15 per cent of the prosecution barristers and 14 per cent of the judges and the defence barristers.⁸⁷ The two sets of barristers and the judges were almost identical in their overall response. But they were not always surprised at the same verdicts. So, there were 248 cases where both the prosecution and defence agreed, and 48 where they disagreed. The judge and the defence barristers agreed in 287 cases but disagreed in 66 cases.⁸⁸

In the main, acquittals gave rise to surprise considerably more often than convictions:

Percentage of cases in which respondents were surprised

	Acquittal %	Conviction %
Judges	25	4
Prosecution barristers	26	3
CPS	44	10
Police	47	8
Defence barristers	10	14
Defence solicitors	14	26 ⁸⁹

The differences were striking. Thus the police and the Crown Prosecution Service were surprised at no fewer than 44 per cent and 47 per cent of acquittals

83. P. 214, sect 8.6.1.

84. P.79, sect 6.2.12.

85. P. 216, Table 8.14.

86. P. 217, Table 8.15.

87. P. 163, Table 6.5.

88. P. 163.

89. Source: *Crown Court Study*, Table 6.6, p 164.

respectively, compared with a quarter of the judges and prosecution barristers and 10–14 per cent of defence barristers and defence solicitors.

What did the jury's decision mean? Respondents were asked 'Which of the following comes closest to your view of the jury's decision?':

- (1) Understandable in the light of the evidence
- (2) Against the overall weight of the evidence, but explicable
- (3) Against the judge's directions on law, but explicable
- (4) Inexplicable

The responses to these numbered questions were rather similar:

	(1) %	(2) %	(3) %	(4) %
Judges	85	12	1	2
Prosecution barristers	83	12	0	4
Defence barristers	84	13	0.2	3
Defence solicitors	87	10	1	2
Police	78	13	1	8 ⁹⁰

The great majority of respondents in all the categories thought the verdict was understandable in the light of the evidence. Those who thought it was against the weight of the evidence but explicable gave a long list of explanations: sympathy for the defendant, antipathy toward the complainant, case too trivial or stale, misconduct by the police, concern over sentence, quality or lack of quality of the respective counsel. Hardly any respondents thought the decision was against the judge's direction on law. The prosecution and defence lawyers and the judges all agreed that 2–4 per cent of jury decisions were inexplicable. The police thought that 8 per cent were inexplicable.

When the judges, the prosecution barristers and the police thought that the verdict was against the weight of the evidence it was an acquittal in about 90 per cent of instances. When defence barristers and defence solicitors thought the verdict was against the weight of the evidence just under half were acquittals.⁹¹

There were 64 cases in the sample where the police regarded an acquittal as problematic (as being against the weight of the evidence, or against the judge's summing up on the law or inexplicable). In 31 of these cases the police view was the view of the majority of the respondents. (In 23 of the 31 the police view was shared by the judge and by one or more of the defence team.) In the 22 cases where the police view was not the majority view, the judge agreed with the police in two and disagreed in 16. (There were four cases where the judge did not return a questionnaire; in all four the prosecution barrister disagreed with the police view.)

90. Source: Table 6.7, p 165. The CPS were not asked the question.

91. Table 6.9.

On the basis of these figures it appears that 'problematic jury acquittals' constituted 31 per cent of all jury acquittals for prosecution barristers, 29 per cent for the judges and 16 per cent for defence barristers.⁹² As will be seen, jury acquittals are about 40 per cent of all acquittals in the crown court.⁹³ On that basis, problematic acquittals would be between 6 and 12 per cent of all acquittals.

The Crown Court Study also showed that there were some (though far fewer) problematic convictions. Judges and prosecution barristers thought that 2 per cent of convictions were problematic, whereas defence barristers thought that 17 per cent were problematic.⁹⁴

Is the jury system a good system? The judges and the barristers in the survey were asked: 'What do you think of the jury system in terms of generally getting a sensible result?' Seventy nine per cent of the judges, 82 per cent of prosecution barristers and 91 per cent of defence barristers thought the jury system was a 'Good' or 'Very good' system; eight per cent of the judges, 4 per cent of prosecution barristers and 2 per cent of defence barristers thought it a 'Poor' or 'Very poor' system.⁹⁵ The same question was put also to the jurors. Their view was much the same. Seventy nine per cent of jurors (and 81% of foremen) rated the jury system 'Good' or 'Very good', 6 per cent (and 3% of foremen) thought it 'Poor' or 'Very poor'.⁹⁶

Research by Julie Vennard, then of the Home Office Research and Planning Unit, tends rather to support the view that juries decide rationally and on the basis of the evidence.⁹⁷

XII. Criticism of lay participation

There is remarkably little criticism of lay participation in the criminal justice process in England.

When criticism of juries is voiced it is usually on one of two grounds: 1) the jury's inability to give reasons for its decisions with resulting difficulty in bringing a

92. P. 170.

93. See p 410 below.

94. Pp 170-71.

95. Table 6.13, p 172.

96. P. 173.

97. See J Vennard, *The Outcome of Contested Trials*, in *MANAGING CRIMINAL JUSTICE*, ed D Moxon, 1985, pp 126-51; and *Evidence and Outcome: a Comparison of Contested Trials in Magistrates' Courts and the Crown Court*, Home Office Research and Planning Unit, Research Bulletin, No 20, 1986, p 48.

successful appeal against a jury's decision and 2) the jury's alleged tendency to acquit too readily.

It is generally considered that juries cannot be expected to articulate reasons. Some have urged that that is in itself sufficient reason to abolish the system. This is a view held by a tiny minority.

The view that the jury acquits too readily is espoused principally by the police. In 1972, the then Commissioner of the Metropolitan Police, Sir Robert Mark, made it the main theme of his Dimpleby Lecture, an hour-long televised lecture. But it did not lead to a campaign to abolish jury trial. Even the police appear to accept that the jury system is there to stay.⁹⁸

On the rare occasions when there has been a spectacular apparently perverse acquittal against the weight of the evidence it has tended to be taken as evidence *for* rather than evidence against the jury system. (The acquittal of Clive Ponting in 1985⁹⁹, or of Michael Randall and Pat Pottle in 1991¹⁰⁰ were classic examples.)

It is an interesting question whether televised trials could have the effect of destabilising public confidence in jury decisions. People felt that their opinion about the verdict in the O.J.Simpson case was valid because so much of the evidence was available to the television audience. The public believed that it was in a position to judge. This is a new phenomenon. Hitherto the public has been inclined to accept the jury's verdict even when it was felt to be surprising because 'the jury heard the evidence'. If everyone feels they too have heard the evidence, this deference to the jury's superior knowledge of the case may be diminished, or in highly publicised cases, even destroyed.

But the issue does not arise in relation to trials in England since televising trials is not permitted and there seems to be no sign that this rule will be changed.

XIII. Reform proposals

There are no fundamental reform proposals affecting lay participation in criminal trials under discussion in England. There seems to be broad satisfaction both with the ancient tradition that serious criminal cases should be tried by juries

98. Note: The fact that the jury acquittal rate is higher than the acquittal rate in magistrates' courts - 40 per cent as against 25 per cent - is seen by some as valuable and an argument against proposed restrictions on the right to elect jury trial.

99. Ponting, a senior civil servant, was prosecuted for passing secret information to an MP about the sinking of the Argentinian ship 'The General Belgrano' during the Falkands War. His acquittal was in plain defiance of the facts. The jury clearly regarded it as an example of legitimate 'whistle-blowing.'

100. They were prosecuted for assisting the notorious spy George Blake to escape prison to the Soviet Union *25 years earlier!* Again the facts were not in dispute. The prosecution was brought after they had boasted of the exploit in a book. But the jury obviously regarded the prosecution so long after the event as misconceived and even oppressive.

and that less serious cases should be tried mainly by lay magistrates and with the main features of the two systems of trial. The proposals for changes being considered, though important, are not fundamental.

The issues currently under discussion are:

* **The defendant's right to elect jury trial for 'either way offences' should be abolished.** The suggestion is that the decision should be taken instead by the magistrates' court. This proposal was the single most controversial of the 352 recommendations made by the Runciman Royal Commission in its 1993 report. Runciman proposed that, if the prosecution and defence cannot agree on mode of trial, the court should decide. Subsequently a Home Office report by Mr Martin Narey, a senior civil servant, repeated the recommendation subject to the variation that the magistrates' court should decide in any event, i.e., that the matter should not be determined by agreement between the two sides.¹⁰¹

The proposal has not yet been implemented though there are indications that the present Government is inclined to implement it.¹⁰²

An important motivation for this proposal is to save taxpayer's money as it is thought that it will probably lead to many more cases being dealt with in the magistrates' court. Trial in the magistrates' court is very much less costly than that in the Crown Court.

But crude economics is far from being the whole issue. The Runciman Royal Commission (of which the writer was a member) also had in mind a variety of other considerations:

- That the decision as to mode of trial should be based on an objective evaluation of the seriousness of the case to the defendant, the system and the public interest and not be left to the subjective wishes of the defendant.
- That it is as wrong to give a defendant the right to choose his mode of trial as to give him the right to choose his judge.
- That the fact that the Crown Court acquits in a higher proportion of cases than magistrates is not in itself a reason to give the defendant the choice of venue.
- That the great majority of defendants who elect to be tried by the Crown Court end by pleading guilty. The wasted costs of these 'cracked trials' occur not only directly in the form of legal aid and prosecution costs, but also indirectly in worry to victims and witnesses as well as in prison places since defendants sentenced in the Crown Court tend to get significantly longer prison terms than those sentenced in the magistrates' courts.

101. *Review of Delay in the Criminal Justice System*, Home Office, February 1997, pp.33-35.

102. See Home Office, 'Determining Mode of Trial in Either-Way Cases', Consultation Paper, July 1998.

Opponents of the reform claim that the right to elect jury trial is a fundamental privilege; and that defendants should not be deprived of the advantage of being able to choose the better quality trial by jury.

It is widely believed that the defendant's right to claim trial by jury dates back to Magna Carta. This is a misconception. In fact the defendant was first given the right to claim trial by jury in the higher court by the Summary Jurisdiction Act 1879. It applies to all offences carrying a maximum sentence of over three months imprisonment.

*** Complex fraud cases should not be tried by ordinary juries**

The question of whether a different mode of trial should be introduced for complex fraud cases has been on the political agenda for nearly thirty years. In 1986, the Roskill committee reporting on this topic recommended that in a small number of the most complex fraud cases - maybe two dozen a year - there should be a special tribunal consisting of a judge and two lay members chosen from a panel of persons with expertise

in complex business transactions.¹⁰³ There was a powerful dissent on this issue by one members of the Committee. The Roskill Report led to many reforms in the way fraud cases are handled but the recommendation of a special tribunal was not implemented.

Recently, the Government has returned to the issue in a 50-page Consultation Document.¹⁰⁴ After canvassing the pros and cons of jury trials for such cases the Consultation Document asked for views whether the present system should be replaced by one of four alternatives:

1. *Special juries* Either randomly selected jurors would be screened for their suitability to sit on a fraud trial jury or a pool of 'special jurors' would be maintained from which jurors for fraud trials would be drawn.
2. *Judicial option* Different methods for conducting a trial with a single judge, or a panel of judges, who in either case could be with or without the assistance of expert assessors.
3. *Tribunal option* A special tribunal like that proposed by the Roskill Committee where a judge would sit with specially qualified lay members.
4. *Single judge with jury for key decisions* A judge could narrow the issues and produce a document like a summing up on the facts. A jury could then be called to decide key issues such as dishonesty.

The Consultation Paper said: 'The Government recognises that there are concerns that the present system for handling some major complex fraud trials is not working satisfactorily. It considers that there may be a case for considering

103. Report of the Committee on Fraud Trials, 1986.

104. 'Juries in Serious Fraud Trials', Home Office, February 1998.

some change to the system to ensure that justice can be delivered more effectively in such cases and that public confidence in the system can be maintained. But the Government has not reached a conclusion on whether the ending of jury trials in serious fraud cases is desirable in principle, nor formed an opinion on any particular option for change'.¹⁰⁵ The Consultation Paper asked for views by the end of May 1998. A year later there was still no indication of the Government's response to the consultation exercise.¹⁰⁶

More stipendiary magistrates? From the Government's perspective more stipendiary magistrates means justice administered more quickly and more efficiently. But lay benches value their role and resent the encroachment of professionalism into the magistrates' courts. There is therefore, understandably, a divergence of attitude as to the policy of increasing the number of stipendiaries which now stands at just over 90. In any event, there is no serious suggestion that the number of stipendiaries should be increased significantly.

105. p.2.

106. For recent research on whether jurors can be expected to master the evidence in long fraud cases see T.N.Honess, M.Levi and E.A.Charman, *Juror Competence in Processing Complex Information: Implications from a Simulation of the Maxwell Trial* [1998] CRIMINAL LAW REVIEW, 763-73. The results of the study suggested that with some screening in selection and more focused help for the jury, non-specialist jurors are sufficiently competent to understand and evaluate the evidence in complex trials.

NB *Diplock courts in Northern Ireland* With reference to the importance of jury trials for serious criminal cases it is worth noting that in Northern Ireland, since 1973, 'scheduled offences (i.e. terrorism cases) have been tried by a single judge without a jury. It has been estimated that in the period 1973-95 no less than 10,000 cases were dealt with under this system. (J.JACKSON AND S.DORAN, *JUDGE WITHOUT JURY*, 1995, Clarendon, Oxford, p.19.)