Judicial management of jury trials - stages of the trial process

Introduction

There is a considerable body of case law regarding jury selection, management and judicial management of jury trials, in addition to the statutory framework provided by the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act").

This chapter is intended as a statement of best practice in this area for the assistance of judges who preside over jury trials drawing on relevant case law and judicial experience and expertise (see *Pullar v HM Advocate* 1993 JC 126, where the High Court provided guidance on certain aspects of the problems that can arise).

Jurors are expected to approach their task with open minds, untainted by preconceptions, prejudices or by any private knowledge which they may have of the case or of the individuals involved in the charges. The jury oath or affirmation binds the jurors to "well and truly try the accused and give a true verdict according to the evidence". They are presumed to adhere to this oath and to follow the directions in law which the trial judge gives them. Jury selection and management procedures must therefore ensure, as far as possible, that this is in fact what happens. Of course it must be recognised that jury service is a considerable disruption and inconvenience for members of the public, especially if they are involved in a long case. Also, in small courts in rural areas there is a greater chance that prospective jurors will have heard of the circumstances of some local crime (and the accused) and therefore may not be as objectively impartial as complete strangers. Further, it would be foolish to disguise the fact that some prospective jurors (no doubt a small minority) are not public spirited, or do not have a sense of civic responsibility and may deliberately seek to avoid jury service. While this may be a sad commentary on our life and times, the fact cannot be avoided and ought to be faced squarely.

Procedures for jury selection and management must recognise these competing strands. The jury system would doubtless fall in public estimation if active steps were not taken by all concerned to deal with jurors and their problems openly, fairly and with respect, but also recognising the important public duty which jurors are asked to perform.

See the Appendix: A Paper on Jury Management by Lord Wheatley (Chairman, Judicial Studies Council, 2002 - 2006).

Equality and juror engagement

The public sector equality duty under the Equality Act 2010 applies to SCTS and extends to its engagement with those cited for jury service. The Court Service is obliged to make such reasonable adjustments as are needed to enable a disabled juror who wishes to serve to participate effectively in the process.

Judges may wish to familiarise themselves with changes introduced by SCTS in November 2019 which aim to widen juror engagement for potential jurors with sight and hearing impairment. The Judicial Institute has published a Briefing Paper, entitled "Widening Juror Engagement", which aims to provide judges with practical information on the changes.

The practical changes made by SCTS as of November 2019 are:

- The appointment of Jury Liaison Officers who have received in-house training devised in consultation with RNIB Scotland and deafscotland.
- The purchase of portable easy to use hearing units and magnifiers to aid those with sight and hearing impairments for use in the court room and jury deliberation environment.
- A short one page information sheet published on the SCTS website in various formats to encourage early engagement by the potential juror.

Judicial preparation

General

It has been emphasised that it is the duty of the trial judge/sheriff to ensure that she/he has available, in advance of the trial, all that she/he considers necessary to prepare for and be properly informed about the case (*SG v HM Advocate* [2020] HCJAC 68, 2020 SLT 63).

This will include:

- a copy of the indictment, including lists of witnesses and productions;

- copies of the written records and minutes of procedure;
- copies of any special defences;
- copies of documentary productions;
- in cases involving the commission of alleged sexual offences, a copy of any application(s) made in terms of section 275 of the Criminal Procedure (Scotland) Act 1995 and the decision(s) thereon (see *SG v HM Advocate* above); and
- copies of any preliminary minute(s) and the decision(s) thereon.

In addition, so far as possible / known about, the judge / sheriff should give consideration in advance of the trial to issues likely to arise in relation to the playing of distressing images in court or any late applications or late lodging of special defences, so that these matters can be addressed with parties at the outset.

The judge / sheriff should be made aware by the clerk of any known equalities issues in relation to the cited jurors (see above).

Playing of distressing / disturbing images in court

Where footage/ images lodged in evidence have the potential to be distressing / disturbing to those in court, including the jury, the Appeal Court has recently commented that:

> "Great care must be taken by both prosecution and defence when deciding whether it is necessary to show such images to members of the jury and to others in the court room... If such images are deemed a necessary element of the proof, their use ought to be discussed by the parties and should be raised with the court at the Preliminary Hearing.....The manner in which [images should be played] ...ought...to be the subject of a considered case management decision." (*Smith v HM Advocate* [2021] HCJAC 35, 2021 JC 236, postscript at [26])

Whether or not the issue has been discussed at the preliminary hearing, judges should, in relevant cases, consider canvassing this matter with parties at the trial diet. At present the remote ballot offers an opportunity to raise the issue and once in-court balloting resumes, an opportunity can be found to discuss the issue in the absence of the jury at an early stage in the trial.

Late lodging of special defences – Section 78(1)(b)

The criteria for determining this issue are laid down in *Darbazi v HM Advocate* [2021] HCJAC 10, 2021 JC 158.

In contrast to the test under section 275B for the late presentation of a section 275 application, i.e. the requirement that "special cause" be shown, the test in determining an application to intimate a special defence late is essentially "where the interests of justice lie". Even if the accused acted in a careless or deliberate manner, which has resulted in the special defence not being lodged timeously, cause is shown if the interests of justice lie in the special defence being lodged late. This applies even when account is taken of the desirability of avoiding the unnecessary disruption of the criminal process in the public interest. Account has to be taken of substantial inconvenience to a complainer/witness(es) albeit the weight attributed to this may not be great compared to the exclusion of the only defence for an accused.

There is no legal bar to an accused changing his/her position. The issue is whether this change in position results in prejudice to the prosecutor and/or complainer.

Deprivation of an accused's defence is a very serious matter. Postponement of the trial may entitle the court to refuse to allow an accused to present a positive line of defence in circumstances in which an accused has manifestly, or deliberately, refused to comply with the procedural rules for doing so. These instances are considered to be rare and involve the prosecutor/complainer being seen to be materially prejudiced. If the trial can proceed as scheduled without any substantial new investigations, the balance is weighed heavily in the defence being lodged late, particularly if it is the only defence. The Crown can make the jury aware of the late change of position and possibly cross examine on this point.

Amendment

The power to amend is set out in section 96 of the 1995 Act which provides:

> "96.— Amendment of indictment.
>
> (1) No trial shall fail or the ends of justice be allowed to be defeated by reason of any discrepancy or variance between the indictment and the evidence.
>
> (2) It shall be competent at any time prior to the determination of the case, unless the court see just cause to the contrary, to amend the indictment by deletion, alteration or addition, so as to:

(a) cure any error or defect in it;

(b) meet any objection to it; or

(c) cure any discrepancy or variance between the indictment and the evidence.

(3) Nothing in this section shall authorise an amendment which changes the character of the offence charged, and, if it appears to the court that the accused may in any way be prejudiced in his defence on the merits of the case by any amendment made under this section the court shall grant such remedy to the accused by adjournment or otherwise as appears to the court to be just.

(4) An amendment made under this section shall be sufficiently authenticated by the initials of the clerk of the court."

There is a useful discussion in Renton and Brown at 8-70 to 8-78.

The criterion to be adopted ultimately is the interests of justice as explained by the Lord Justice General in giving the opinion of the court in a mid-trial appeal against a judge's decision to refuse to permit a docket to be amended (*HM Advocate v Loughlin* [2022] HCJAC 42, 2023 JC 75)

The decision illustrates the court's approach to the common situation where objection is stated on the basis of a lack of fair notice of a crime not charged or narrated in a docket which the Crown seeks to cure by amendment.

With reference to *Nelson v HM Advocate* 1994 JC 94, the court restated the requirement of fair notice, at paragraphs [8] and [9], and confirmed that such a failure will not be cured by the disclosure regime. This does not mean that the fact of disclosure could not have relevance in assessing the question of prejudice to the accused in considering whether to allow an amendment.

The court explained what a judge should be considering when an amendment is opposed in paragraph [9]:

> "…Where the narrative in the libel is incomplete or otherwise defective, amendment may be allowed. **The purpose of allowing an amendment is to ensure that the ends of justice are not defeated by any discrepancy or variance between the libel and the evidence (ibid s 96(1)); that is to say, the test of whether to allow an amendment is whether it is in the interests of justice to do so. That involves not only consideration of any material**

> **prejudice to an accused, and the degree to which the Crown may have been at fault, but also the interests of a complainer, and the wider public, in seeing that justice is done, and seen to be done, in the particular case."**
>
> [Emphasis added]

In paragraph [10], the court explained that a docket can be amended, applying the same criteria, and in particular by considering the interests of justice. In paragraph [11], the court explained that principles of fair notice apply to a docket as much as they do to a charge.

The court gave its decision in paragraphs [12] and [13]:

> "In the present case, and despite the Crown's protestations to the contrary, the libel in the docket is defective in that it does not cover, and thus give fair notice of, the testimony which the Crown seek to adduce relative to the non-consensual sexual activity involving NA, other than any "stealthing" episodes. That material cannot be adduced unless the libel in the docket is amended. If it is not amended, what are very serious substantive charges, which involve the complainer MM, will not be capable of proof. It is not suggested that the respondent will suffer any prejudice, beyond that consequence. It is on that basis that the court considers that the trial judge erred. It is in the interests of justice that the amendment should be allowed. The trial judge ought, although he was not initially asked to do so, to have allowed amendment and consequently repelled the objection.
>
> [13] The court will accordingly: allow the appeal; allow the docket to be amended… thus making it clear that [the complainer's] testimony of the various rapes referred to in her police statement is competent and admissible; and repel the objection to that testimony. That having been done, the case will be remitted to the trial judge to proceed as accords."

It is competent to amend at any stage until "the determination of the case," i.e. sentence has been passed (*Cochrane v West Calder Co-operative Society* 1978 SLT (Notes) 22; *McGlynn v HM Advocate* 1996 JC 224).

The ballot and route map for the commencement of a trial

A new process for balloting jurors remotely has been developed. This new process will reduce the number of jurors having to come to court by approximately 50% and will continue post-pandemic.

The new process is supported by Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Jury Ballot) 2020/200 which came into force on 19 July 2020.

To enable the jury to be balloted in their absence the following procedure will take place:

Day one

1. On the morning of day one, between 9.30 and 12 noon, the clerk of court will phone potential jurors to ensure that they are available to attend for jury service; those available will be placed in the ballot bowl;
2. The case will then usually call in open court at about 2pm;
3. The first step is always to check that the appropriate means are in place for maintaining an accurate record of everything that happens in open court.
4. Assuming that the proceedings are to be digitally recorded (see the SCTS guidance on digital recording; and in respect of shorthand writers below: In the exceptional case where there is a shorthand writer (probably only where the recording equipment is completely inoperable and cannot be made to function without considerable delay), they will normally take their place on the bench beside the judge or at another convenient place from where they can hear clearly all that is said. A rule of procedure that is no longer necessary is for the clerk to minute the administration of the oath de fideli to the shorthand writer (Criminal Procedure Rules 1996, r.14.7). But the rule does not specify that the oath need not be administered. Although probably not necessary, a few judges continued to administer the oath in the standard form: "Do you swear by Almighty God that you will faithfully carry out the duties of shorthand writer at this trial?" If this is done, the judge should remember to repeat the procedure if a different shorthand writer is used on subsequent days during the trial or sitting) the judge should ensure that the clerk has checked the recording equipment and that it is functioning satisfactorily. The clerk will maintain a minute throughout the day of the

names of the witnesses and the times at which the various parts of their evidence begin. It may, however, be of considerable assistance to the judge, in the event that the playback facility requires to be used, to take a note (at suitable intervals of perhaps 10 minutes, or perhaps at the top of each page of the notebook) of the times of the day at which evidence is given. See "*All hearings to be recorded*" below.

5. The judge then deals with any preliminary matters, such as tendering of pleas, late notices or lists of witnesses, confirmation that a special defence lodged is being insisted on or withdrawn as the case may be, section 67 notices etc.

    a. If the accused pleads guilty, in whole or in part, whether or not the partial pleas are to be accepted by the Crown, proceedings associated with this should take place outwith the presence of unempanelled jurors, to avoid any risk of prejudice (*Fraser v HM Advocate* 2003 SLT 592).

    b. Where pleas of guilty to some charges have not been accepted by the Crown, the fact that these pleas were tendered and rejected cannot be founded on by the Crown, and the trial has to proceed in the ordinary way. The trial judge must give the usual directions on onus, standard of proof and corroboration (*McLean v HM Advocate* [2007] HCJAC 51, 2008 JC 97 at paragraph [9]). Since 2020, this will have been done by the judge reading the written introductory directions at the start of the trial.

    c. Before the jury ballot commences, it is important for the trial judge to check the terms of any special defence carefully and to raise any problems with the defence before the ballot starts. In *GW v HM Advocate* [2019] HCJAC 23, 2019 JC 109, the Lord Justice General explained in the context of a notice of consent, but in remarks which are of general application, that:

        > "34… All that should be stated in such a defence is that the complainer consented to the conduct libelled or that the accused had a reasonable belief that she had consented to that conduct. The defence, which is intended only to provide notice to the Crown, should not be used as a vehicle in which to provide the jury with a narrative of the accused's account of

> events in advance of, and potentially in the absence of, testimony to that effect from the accused or other witnesses." [Emphasis added]

Coercion and automatism are regarded as special defences for this purpose (see 1995 Act, section 78(1) and (2)).

6. The balloting stage of the trial will be an opportunity for the judge to identify with parties the topics which will require to be the subject of written direction in addition to those which apply in all cases (see below re Day two). It is also an opportunity to ascertain if there can be further agreement of evidence and, having sought the views of parties, to make directions under the Coronavirus (Scotland) Act 2020 schedule 4, where appropriate, that professional and police witnesses give evidence remotely;
7. Parties will be asked by the judge whether this case is one of high profile that may require extra substitute jurors, i.e. more than five. If so, the court may, of its own accord or on the application of parties, direct that the reserve list be increased to a maximum of 10 jurors;
8. Fifteen names ("the first list" plus five or more substitutes ("the reserve list") are drawn by the clerk;
9. There is no longer any right of peremptory challenge, but a juror may be excused on joint application of all parties notwithstanding no reason is given (see 1995 Act, section 86). A juror may be objected to by a party on cause shown;
10. Judge considers making an order under section 4(2) of the Contempt of Court Act 1981 to restrict reporting until the commencement of the trial: otherwise the media could report that a jury in the case has been balloted. This could alert the jurors to the case that they are presiding over and they could carry out research as they have not yet been directed by the court not to;
11. **In relation to Remote Jury Centres which remain in operation only:** Judge makes an order under paragraph 2(3) of schedule 4 of the Coronavirus (Scotland) Act 2020 directing that the jurors need not physically attend the trial courtroom but will attend by electronic means, namely by a television link between the RJC and the trial courtroom. The following wording is suggested:

Style direction – appearance by electronic means

> "By virtue of paragraph 2(3) of schedule 4 of the Coronavirus (Scotland) Act 2020, having given all parties an opportunity to make representations, the court considers that a direction under paragraph 2(3) will not prejudice the fairness of proceedings or otherwise be contrary to the interests of justice, and therefore directs that the jurors need not physically attend the trial courtroom but will attend by electronic means , namely by a television link between [Courtroom X] and the said trial courtroom";

12. The clerk of court will then telephone the balloted jurors telling them to attend the next day. It will therefore be necessary for the trial judge, during the ballot procedure, to ascertain the time at which those selected will require to attend.

Day two

1. On arrival each juror is given a pack containing the indictment, special defences and a copy of the written directions which the judge will later deliver (see below re written directions). The jurors are advised not to look at their pack until told by the clerk that they may.
2. The clerk must speak to all 20 or 25 balloted jurors before the court is convened. In addition to checking the names and addresses of the jurors who have responded to their citations, and covering any relevant safety issues, the clerk will advise them of the name or names of the accused and anyone else named in the indictment and any special defence (*Pullar v HM Advocate* 1993 JC 126 at 134). This is to ensure that, so far as reasonably practicable, potential jurors are made aware of the names of all of those persons knowledge of whom on their part might give rise to the suspicion of prejudice. The clerk should tell the jurors that if they do have knowledge of such a person, they should speak to the clerk privately about the matter, so as to avoid the risk of tainting other jurors and to give the clerk an opportunity to assess what is said and, if necessary, bring it to the attention of the judge and the parties;
3. The judge should check with the clerk of court before she/he takes the bench that the clerk has carried out these duties and if not, ask them to do so.

4. Jurors will each be given by the Jury Attendant a copy of the document "Your Responsibilities as a Juror".
5. If the priority trial cannot commence see "Repurposing jurors" below.
6. The judge will come onto the bench (see "Procedure after judge takes the bench" below). [For trials proceeding via the Edinburgh Remote Jury Centre, the judge will ask for jurors to be connected by audio/video link. The clerk will call the case. The judge may want to ask the jurors if they can (see and) hear proceedings effectively.]
7. At this stage the judge may want to thank the jurors and substitutes for attending and explain that everyone present should listen to what is said, or could do so after the clerk has called the case and invited the jurors to enter the jury box. (See "Before the indictment is read" below)
8. Not guilty pleas and appearances will be confirmed by parties in the presence of the jury. (See "Tendering a plea" below).
9. Before the indictment and any special defence is read, the judge will invite the jury to retrieve those documents from their jury pack.
10. The judge will hand over to the clerk who will read the indictment [and any notices of special defence.] (See "Reading the indictment and any special defence" below)
11. The clerk will administer the jury oath or affirmation. (See "Swearing the jury" below) A procedure was approved for remote trials by the Lord Justice Clerk. The procedure aims to avoid affirming jurors having to move to the front of the jury and do so individually.
12. The judge will then make appropriate opening remarks such as 'suggested opening remarks and impartiality questions'.
13. The judge will deal will address unused substitutes and allow them to leave with the court's thanks and either confirm that their jury service is complete or provide appropriate instruction on what they must do.
14. The judge will address the jury using words such as those in 'Suggested introductory remarks: Introducing the case and procedure to the jury'.

15. At the conclusion of those remarks, the judge will read the part of the 'Written Directions' which apply in all trials and any of those in the menu of further introductory directions which are applicable in the trial.

16. The additional directions on: Addressing Rape myths; CCTV footage; and Lack of criminal responsibility by reason of a mental disorder, will require to be edited by judges in light of the particular circumstances of the case. The other additional directions should not require to be adapted.

Swearing in the Jury

When administering the oath to jurors, they should raise their right hand, say I do and also nod when taking the oath.

Affirmation

If any juror wishes to affirm they will do so while remaining in their allocated seat and, if there is more than one, they will take the affirmation collectively. The clerk will not ask them to raise their hand. They will be asked as a group, if more than one, to repeat the following, stating their name as noted at the start:–

> "I, (name), do solemnly, sincerely and truly declare and affirm that I will well and truly try the accused and give a true verdict according to the evidence".

Repurposing jurors

Section 88 of the 1995 Act provides as follows:

> "(1) Where the accused pleads not guilty, the clerk of court shall record that fact and proceed to ballot the jury.
>
> ....(4) Notwithstanding subsection (1) above, the jurors chosen for any particular trial may, when that trial is disposed of, without a new ballot serve on the trials of other accused, provided that—
>
> (a) the accused and the prosecutor consent;
>
> (b) the names of the jurors are contained in the list of jurors; and
>
> (c) the jurors are duly sworn to serve on each successive trial." [Emphasis added]

If jurors have been balloted for trial A and attend court the following day, but trial A does not proceed for some reason [e.g. the accused pleads guilty or fails to appear, an essential witness is absent] **AND** the Crown has a back-up trial, B, which can proceed, the court can, if all parties consent, use the jurors balloted for trial A as the jury in trial B, which can then start.

The basic requirements to invoke the use of section 88(4) are:

1. that jurors have properly been balloted for "a particular trial"; and
2. "that" trial has been "disposed of".

This does not mean that the "case" be disposed of. The focus is on the "particular trial" for which the jury have been balloted, not the case.

If the section 88(4) procedure is in play and trial B is due to proceed with the re-purposed jury, then the court should proceed as follows:

- The trial which is not proceeding, and for which the jurors have been balloted, should call and should be "disposed of" for the day, whether by postponing/adjourning, deserting, granting a warrant for the accused etc;
- The clerk should check with the jurors in attendance, as would be normal, that they do not know the accused or a witness in trial B and that there is no other reason for them not to serve;
- Whilst it may be preferable if the back-up trial calls, with the accused present, and the matter of utilising the section 88(4) process is aired, it is not essential (*Lamont (William) v HM Advocate* 1943 JC 21). Consent can validly be given by the accused's legal representative in the accused's absence. What is required is that (Act of Adjournal Criminal Procedure Rules 1996, Rule 14.4):
    1. The clerk in the first trial engrossed the names and addresses of the jurors in the record of proceedings;
    2. the record of proceedings of the subsequent trial states that the jurors who served on the preceding trial also served on the assize of the accused then under trial and that no objection was made to the contrary; and
    3. those jurors must be sworn together in the presence of the accused in the subsequent trial.

As it is put in Renton and Brown at paragraph 18-39:

> "The consent of the accused need not be his personal consent but may be given on his behalf by the counsel or agent appearing for him even although he is not present at the time. It would appear that, at any rate in the latter case, the consent can be withdrawn at any time before the jury is sworn."

Jurors are then sworn etc. in the normal way.

Note: If there is a chance that the back-up trial might go ahead the judge will need to have prepared the written directions (see below re introductory written directions) for that trial just in case, so that they can be printed and put into folders. It may of course turn out that these are not needed or at least not needed there and then, if the priority trial goes ahead.

All hearings to be recorded

The High Court has recently commented that:

> "it is quite inappropriate to have what appears to be regarded as informal hearings in solemn proceedings. Any oral exchanges between parties and the sheriff should take place at a hearing after the case has been formally called. Where … the calling is at a trial diet all proceedings require to be recorded." (*McGarry v HM Advocate* [2022] HCJAC 18, 2022 JC 148)

Jurors with disabilities

The fact that a juror suffers from a disability is not of itself a reason to exclude a juror, unless s/he seeks excusal on that basis. Any issues in that regard should have been flagged up in advance of the trial with the Jury Liaison Officers (see Briefing Paper on Widening Jury Engagement) so that reasonable adjustments can be made where required, but if issues arise on the day of trial with a balloted juror, the judge should make enquiries via the clerk of court as to what adjustments that person needs in order to participate fully in the trial.

Procedure after judge takes the bench

Before the indictment is read

At this stage - i.e. before the indictment is read and the jury sworn – it may be helpful for the judge / sheriff to address both empanelled and unempanelled jurors along the following lines:

> "Good morning/afternoon. Thank you for coming in in answer to your citation to serve as jurors. (Apologies for any delay)
>
> Can I ask that everyone, those picked for the jury and potential substitutes / those who have not yet been picked, to listen carefully to all that is about to be said?"

This may save court time in the event that a substitute juror requires to be sworn – see below.

Reading the indictment and any special defence

The indictment is read using the third person and omitting any reference to the designation of the accused, whether that is "*Prisoner in the Prison of…"* or *"whose domicile of citation has been specified as … "*. Otherwise the indictment is read in full, including any docket thereon, although the judge may direct the clerk to read an approved summary in cases where the indictment is lengthy or complex.

Provision is made in section 88(5)(b) for a summary of the charge (or charges), as approved by the trial judge, to be read to the jury *"because of the length of complexity of the indictment"*. Such a procedure would require some advance work by the prosecutor and defence to prepare such a document for approval and distribution to the jury

Then the clerk reads any special defence which is insisted upon. This requirement may however be dispensed with on cause shown (see 1995 Act, section 89(2)), although in that event the judge must inform the jury of the lodging and general nature of the special defence.

The clerk must not read to the jury any notice lodged by one accused under section 78(1) of an intention to incriminate a co-accused. A judge should be vigilant to ensure that no reference is made to such a notice in the presence of the jury. When

this has occurred it has sometimes led to desertion and starting again with a new jury.

If an accused intends to incriminate someone other than a co-accused, then that is a special defence which requires to be read.

Swearing the jury

Once the foregoing is complete, the Clerk of Court should ask the jurors to rise, if they have been allowed to remain seated so far. The clerk then asks each of the jurors to raise her or his right hand and to say "I do" after the clerk has read over the oath to the jury. A juror is entitled to affirm, rather than take the oath. Once the jurors are sworn, they resume their seats.

Once the oath/ affirmation has been administered, the judge makes her or his introductory remarks.

Introducing the case to the Jury: introductory remarks and written directions

Introducing the case to the jury

At one time, it was quite common for a jury trial to proceed immediately with the leading of the first Crown witness, but the practice developed over time of judges introducing the case to the jury, to provide jurors with an overview of the legal and evidential rules governing all cases, to acquaint them with the procedures to be followed and introduce them to agents/counsel involved

During the COVID-19 pandemic significant changes were introduced to the arrangements for conducting jury trials, including to introductory procedures to be followed by judges. Detailed guidance about these procedures is provided in this throughout this chapter. Whilst some of the procedures are expected to be temporary, such as the location of juries at remote sites, others, namely the judge's introductory remarks and the provision of written materials and directions, will continue beyond the pandemic as standard practice as the Lord Justice Clerk explained in giving the opinion of the court in *Hattie v HM Advocate* 2022 SCCR 80. Arrangements which relate to Remote Jury Centre trials only are detailed in the chapter entitled "Specialities in Remote Jury Centre Trials".

Introductory written directions

Since July 2020 all jurors have been provided with the following written materials at the start of the trial:

1. A note of their duties and responsibilities; and
2. A document, entitled "Written Directions for Jurors in Scottish Courts", explaining the general directions that apply in every case, including, if appropriate, specific directions in relation to:
    a. Dockets;
    b. Notices of special defence;
    c. Multiple charges;
    d. Multiple accused;
    e. Concert; and
    f. Mutual corroboration
    g. Rape myths and stereotypes

It is the judge/sheriff's duty in each case to ensure that the appropriate written directions are provided to and read to the jury (see further guidance below), including such of the specific directions at part C of the written directions, as are relevant to the case. Please note that the additional directions of Addressing Rape myths; CCTV footage; and Lack of criminal responsibility by reason of a mental disorder, will require to be edited on a case by case basis by judges in light of the particular case. The other additional directions should not require to be adapted.

In all sexual offence trials and those involving allegations of domestic abuse, judges and sheriffs should consider the material in "Addressing Rape Myths and Stereotypes".

In addition, the judge/sheriff may consider it appropriate or useful in certain cases to provide additional written directions, either before the case commences or to supplement her/his charge. See "Consideration of Additional Written Directions" for further guidance on this.

Introductory remarks

Wording is suggested for opening remarks at the very start of the trial including suggested questions to ensure the impartiality of the jurors. There is also a suggested form of introductory remarks, setting out what may be termed "housekeeping arrangements". Judges should feel free to impart this information in their own way and in their own words, reinforcing what is said in the written directions along with the note of responsibilities referred to above, which the jury will already have in their packs.

Before making the suggested introductory remarks, judges should address the issue of whether any juror, on hearing the indictment (and any special defence) being read over, realises that he or she knows something about the case or one of the persons named.

It has become standard practice to ask the jury, and to make it clear that all those present who may be picked as substitutes must also listen, a series of questions along the following lines, before adjourning to allow the jury to settle in.

Jurors should be asked not to answer the questions in open court but to bring any issue to the attention of the clerk of court (via the macer or court officer) during the adjournment (see below) so that any difficulty can be considered and addressed. They should be told not to share any such difficulty with any fellow jury member(s)

1. Do you know the accused [name(s)] either directly or indirectly?
2. Do you recognise the person sitting in the dock, between the two uniformed officers?
3. Do you know any other person mentioned in the indictment [or the person(s) named in the special defence]?
4. Do you know of any person who is or might be a witness to this case?
5. Do you know of any reason why you could not impartially serve as a juror?
6. It is impossible to predict with certainty how long the case will last, but those who are familiar with it expect it to take around [..number…] days. Does the length of the trial cause you a really serious difficulty?

Section 88(7) of the 1995 Act gives the court power to excuse a juror from serving in a trial where the juror has stated the ground for being excused in open court. A

literal application of section 88(7) of the 1995 Act runs the risk that a juror says something like "I know the accused because he broke into my house last year".

The judge will be informed of any problem by the clerk and, where appropriate, the judge can have the clerk share the information with parties, or can do so personally in open court, absent the jury. It is for the judge to decide whether or not a particular circumstance is a sufficient ground for excusing the juror. It is then possible to comply with section 88(7) following the adjournment without risking a juror saying something which may derail the whole trial at great inconvenience and expense.

A judge can simply pose a leading question, asking the juror to answer yes or no, e.g.;

> "Am I right in understanding that in response to the questions I asked you gave certain information to the clerk of court?"

If a juror has given a valid reason as to why they should not serve, they should be excused and a fresh juror balloted. The indictment (and special defence) must be read over again unless the judge determines under section 88(5) and section 89(2) to direct the clerk in the case of the indictment or him/herself in the case of a special defence to offer summaries. Some judges have sought and obtained the agreement of parties to summarise the charges for a new juror if a long indictment has already been read and have proceeded to do so without difficulty.

The judge can assess whether it is necessary to go through the questions again with the new juror or whether it is safe to assume that they have been listening from the public benches. (see above)

If, as suggested above, all jurors and potential substitutes were asked to listen to the jury questions, it would be sufficient to ask the new juror:

> "Did you hear the questions I asked the original jury? Please answer yes or no; did any of the questions I asked earlier cause a difficulty in your serving on this jury?"

The answer will usually be negative, but if not then the juror should be asked to speak privately to the clerk and the court could be adjourned briefly for that purpose.

Internet searches

Before any adjournment, the jury should also be given a caution about internet searches. Appendix F includes a suggested form of words.

In this regard, the Appeal Court's observations in *Fraser v HM Advocate* [2013] HCJAC 117, 2013 JC 115 at paragraph [55] are informative:

> "In order to combat the possibility of jurors conducting their own web searches, the courts have adopted a strategy of telling jurors at the start of a trial not to do so and explaining to the jurors why they are being told this. It is a common, and advised, practice to tell jurors that they are not the detectives and that they should not make any investigations or enquiries of their own about anything or anyone connected with the case. They are told that it is vitally important to the administration of justice that they should resist any temptation to carry out an internet search. The reason is often stated as being that the case has to be decided solely on the evidence that the jurors are to hear in court. Some judges ask the jurors to inform on their colleagues in the event of an apparent breach of these words of caution and warn the jury of serious consequences should any juror be involved in such a breach. However, other judges may regard this as overly intimidating and may simply tell the jurors that, if it were discovered that one of them had accessed relevant information on the internet, that could result in the premature termination of the trial or, if a verdict had already been returned, the overturning of the conviction upon appeal. In either case, the jury would be told, a re-trial may be the practical result with all its attendant problems, including inconvenience to almost all directly involved."

Adjournment after commencement of introductory remarks

It is good practice at this point to have a short adjournment, in order that any issues arising from the questions above can be dealt with and to allow the jurors to go to the jury room to leave coats, bags etc, to get their bearings and to settle themselves down. The macer or court officer should therefore be instructed to take the jurors to the jury room for this purpose; in some courts in which lunch is provided in the court building, menus are available and these can be completed at this point in the jury room.

Unempanelled jurors

During the adjournment, the unempanelled jurors or substitutes should be asked by the judge to remain in the courtroom, in case a substitute juror does require to be taken from their ranks or in case they will be required immediately for a ballot in

another courtroom. The judge should also take the opportunity to discuss with the Crown the day or hour at which the unempanelled jurors should return to court for another case (if at all). In busy jury courts, jurors are cited in batches for cases throughout the sitting and some courts maintain a telephone "Helpline" which is updated every afternoon with information as to when jurors may be required. Accordingly, on the basis of discussions with the Crown and with the clerk of court, the unempanelled jurors can be given some indication, albeit tentative, as to when their services might be required again. It would also be appropriate at this stage for the judge to explain to the unempanelled jurors that court staff will do all that they can to avoid inconvenience to them, but that jury service is a very important public duty, etc. A jury citation lasts not just for one case, but for all cases in the sitting.

After this has been done, the judge may require to rise briefly while the macer or court officer checks that the empanelled jurors are ready to return to the courtroom and, if so, to bring them back from the jury room.

Once the empanelled jurors return to the courtroom, and it is clear that no substitute juror is required, the unempanelled jurors can be released. This matter is dealt with in *Pullar v HM Advocate* 1993 JC 126 at 135, where it is suggested that if there has been a brief adjournment as suggested, there has thus been an opportunity for any juror to communicate with the clerk about any potential difficulty s/he might have and the trial may simply proceed.

Reading the written directions

After the adjournment, the judge should conclude the introductory remarks and then go on to read the written directions to the jury.

(If the judge thinks it necessary to say something about the pandemic a suggested form of words is contained in "COVID-19 Jury Information" below. As jurors return to court rooms from July 2022 onwards, it can be anticipated that there may be a degree of anxiety for some jurors. In considering whether to use the wording in the "COVID-19 Jury Information" section, it may be useful for judges to know that from 4 July onwards, in line with current public health guidance, clerks and other SCTS staff will convey to jurors that the following measures to mitigate the risks of COVID-19 are in place:

- Whilst no longer mandatory, we continue to strongly recommend using face coverings when in our buildings and seated in courts, in the interest of everyone's safety;
- We encourage everyone to take a common sense approach to maintaining and respecting others' personal space whilst in our buildings and when possible to do so;
- We are maintaining enhanced cleaning arrangements across the estate;
- We are maintaining ventilation levels in line with guidance.

It is the judge/sheriff's duty in each case to ensure that the appropriate written directions are provided to and read to the jury (see further guidance below), including such of the specific directions at part C of the written directions, as are relevant to the case. In addition, the judge/sheriff may consider it appropriate or useful in certain cases to provide additional written directions, either before the case commences or to supplement her/his charge. See "Consideration of Additional Written Directions" for further guidance on this.

In his Memo to Sheriffs Principal of 26 November 2020, the Lord Justice General concluded as follows:

> "Some judges and sheriffs may think it burdensome to use this new procedure. Some may feel that it delays unnecessarily starting the trial with the leading of evidence. The answer to such thoughts and feelings is that our court system should not be designed for the convenience of judges and lawyers, but to provide effective and efficient justice. The evidence is clear. The provision of substantive written directions, and to do so in advance, enhances the capacity of jurors to recall and understand the evidence and the content and effect of the legal directions. I would therefore be grateful if you could forward this note to the sheriffs in your sheriffdom and advise them that both I and the Lord Justice Clerk are of the view that the interests of justice require that solemn trials in the sheriff court should be conducted following the same procedure. **The adoption of the new process of providing written directions should not be regarded as optional**" [emphasis added]

Further, the judge should not seek to depart radically from or summarise these directions, as underlined by the Appeal Court in *Hattie v HM Advocate* [2022] HCJAC

13, 2022 JC 100, where the court opined (per Lord Justice Clerk Dorrian at paragraph [16] et seq):

> "[16] Judges are very strongly encouraged, and advised, to use the specimen pre-instruction directions. The specimen written directions are prepared in a clear, concise manner designed to be easily read, digested and understood. Their origin was explained by Lord Turnbull in giving the opinion of the court, comprising also the Lord Justice General and Lord Menzies, in *SB v HM Advocate* [2021] HCJAC 11 at paragraphs 49 and 50 (emphasis added):
>
> > "49. The second matter concerns the recent introduction of some quite radical changes to the way in which instruction is delivered to juries by judges. In discussion between the Lord Justice General, the Lord Justice Clerk and the Jury Manual Committee of the Judicial Institute, it was agreed that from July 2020 jurors should be provided with certain materials in writing at the start of the trial. These are, a note setting out the duties and responsibilities of a juror and a document setting out the general directions which apply in every case, as well as, if appropriate, setting out specific further directions which the judge considers are appropriate in the circumstances of the particular case.
> >
> > 50. Accordingly, at the commencement of trials jurors are now given general oral guidance on the functions of the personnel and information about the timetabling of the case, all of which is intended to reinforce the written note setting out juror responsibilities which is issued to each juror on their arrival at the jury centre or court. This is then followed by the issuing of written instructions, which the trial judge will read to the jury, concerning the separate functions of judge and jury, the nature of evidence, how to assess witnesses, what is meant by an inference, the duty to decide the case only on the evidence, the presumption of innocence, the burden of proof, the standard of proof, corroboration, and how these issues impact upon the defence. Other written directions may be given as necessary concerning issues such as the purpose of a docket, a notice of special defence, the law as to concert and the concept of mutual corroboration."

[17] It is well recognised that whilst slavish and, in particular, unthinking, adherence to the words in the Jury Manual is not to be desired, a judge should not depart from the Manual, in respect of the general pre-trial directions in particular, unless satisfied that it is necessary so to do for the purposes of achieving a fair and proper trial. The issue was addressed in *White v HM Advocate* 2012 SCCR 807 (Sy), paragraph 13:

> "… it should, on the other hand, be appreciated that the contents of the Jury Manual, which have been devised by the judiciary for the judiciary, are intended to be an encapsulation of sound law and good practice over the years. If a sheriff or judge wishes to depart from these contents, he is of course free to do so in a given case, but he requires to take care, in an ordinary case, before omitting a normal direction as described in the Jury Manual, or including an unusual direction or observation. This is particularly important when giving the jury the general directions applicable in almost every criminal case."

As the point is expressed in Renton & Brown, Criminal Procedure, 6th edition, paragraph 18.79.1

> "while judges are not obliged to use the ipsissima verba of these directions, they would be well advised to do so."

These observations apply equally directly to the specimen written directions, which are designed to address only the most commonly encountered issues.

[18] It is imperative that the written directions are read to the jury by the judge at the outset of the case. It is not enough to give the directions to the jury and tell them to refer to them if they wish, as the trial judge did in this case, saying "you may care to acquaint yourself with that in due course". The judge must go through the directions with the jury as part of the introduction to the case.

[19] The written pre-instruction directions should be exactly the same as those spoken by the judge. If, as should very rarely happen, the judge chooses not to use the specimen directions, as the trial judge here chose, the directions should cover the same subjects as the specimen directions. Critically, they should be expressed in a similarly clear and concise way. It is to be borne in mind that the purpose is to assist the jury in the task ahead of them, to understand how to assess the evidence they are about to hear, and to

> recognise its significance in the context of the case. Clarity and concision are required to assist this process. It is not helpful, as happened in this case, for the trial judge to deliver the pre-instructions in a lengthy, verbose, discursive fashion. It is even less helpful to deliver those directions orally and yet issue the jury with the specimen written directions which have not been read to them and to which only fleeting allusion is made. The jury here were in fact given two different sets of directions at the start of the case: the specimen written directions, which were not read to them; and the more convoluted ones prepared by the judge, which were read to them but not furnished in writing. In this case, given that there had been a clear and serious misdirection on the police interview, the issue of whether a material misdirection resulted from the provision of different written and oral directions at the same time, and the reference to concert, did not arise, but it is difficult to see that the effect of these would have been other than highly confusing for the jury."

Judicial conduct and management of the trial

Witness warrants

Whilst the court has power to grant a warrant to arrest a witness who has failed to attend in response to a citation, or who has taken steps to avoid giving evidence (1995 Act section 90A), it is rarely, if ever, appropriate to grant such a warrant in respect of a vulnerable witness, and never in the first instance.

In *Barr v HM Advocate* [2023] HCJAC 9, 2023 JC 79, concerning a prosecution brought under section 1 of the Domestic Abuse (Scotland) Act 2018. The complainer was a deemed vulnerable witness, and the court explained its thinking in responding to a suggestion that the Crown was at fault for not seeking a witness warrant for the complainer, at paragraph [21] of its opinion:

> "…This is unrealistic. It runs entirely contrary to the modern understanding of the inherent vulnerability of complainers in sexual and domestic abuse cases and the suitably cautious approach of the Crown Manual (above). It is quite inappropriate in sexual and domestic abuse cases for complainers, who may be regarded as vulnerable, to be arrested and thus kept in custody pending liberation at a court appearance, or perhaps even until the trial diet, thus adding to any trauma which they might have already sustained. The appropriate course is, at least initially, to persuade the complainer to attend

> the trial, no doubt by, amongst other things, putting in place vulnerable witness measures. Better still, as was made clear in *Graham* (at paragraph [20]), steps should be taken to have the complainer's testimony taken on commission. It would certainly have been wholly unsatisfactory, in the circumstances narrated, effectively to end the prosecution, especially without knowing the reasons for the complainer's reluctance to appear in court."

That said, there can be proportionate ways of securing the attendance of a witness via warrant if circumstances are sufficiently compelling. In a High Court trial in 2024, the Law Officers approved the Advocate Depute seeking witness warrants for complainers who were deemed vulnerable witnesses but who had important testimony to give with relevance wider than their own charges. The trial judge granted warrants on specific condition that the warrant for each witness would not be exercised before 9am on the day on which it was proposed that the witness would give evidence and that the witness was only to be arrested as a last resort.

In each case, once shown the warrant, the witness was content to accompany the police to court without formal arrest. On arrival of the witness at court, the Crown moved the court to recall the warrant, and the witness gave evidence from liberty in the normal way.

Before taking such a step, a judge or sheriff would need to be confident that there are clear lines of communication to ensure that the conditions were accepted and given effect.

Effective use of court time

In 2021-2023 our solemn courts confronted an extraordinary backlog of criminal trials with many accused persons and witnesses having to wait years for trial. As 2025 approaches problems continue. The number of indictments in the High Court is growing substantially on a rising trajectory. The emergency provisions extending the solemn time limits will not be renewed past November 2025. The backlog, and long delays before trial constitute a serious social problem with an obviously acute impact on those remanded in custody, some of whom will be acquitted. There is a substantial impact on witnesses, many of whom may be vulnerable, who are kept waiting for years before giving evidence. The backlog puts considerable strain on lawyers, court staff and judges.

Finding ways to shorten trials is the most effective thing that judges can do to address the backlog because shortening trials enables more trials to be run within the same court capacity. By increasing court capacity in this way, we will make better progress in reducing what is proving to be a very durable as well as substantial backlog. Many sheriffdoms have succeeded in reducing the gap from first diet to trial but, for whatever reason, it remains stubbornly long in the High Court.

We are running historically high numbers of jury trials in both the High Court and Sheriff Court with extra capacity created to address the backlog. It goes without saying that judges should ensure that optimum use is made of extra capacity.

Recognising the problem, and drawing on our collective experience, that of colleagues and other resources, notably High Court Practice Note No.1 of 2013, and Criminal Courts Practice Note No 1 of 2024 in relation to the Sheriff Court (both available on the Scotcourts Website), the Jury Manual Committee has created this subsection focussed on effective use of trial court time. Many judges may have worked out other ways in which to ensure that time is used effectively but we offer some suggestions judges can apply as appropriate in the circumstances of their cases.

At all stages of procedure, reducing the number of witnesses called through effective pre-trial preparation and diligent and imaginative use of joint minutes is the most effective measure available to shorten trials and increase court capacity.

Even before the acute difficulties caused for jurors by the COVID-19 Pandemic it was recognised that jury service involves considerable disruption to the lives of members of the public to whom we owe it to take no more of their time than necessary. Practice Note No. 1 of 2018 which introduced the Long Trial Protocol was another step on the journey to achieving this objective where possible.

For all of these reasons, sound case management and good use of court time are now more important than ever

There is potential to make better use of court time at different stages which are examined in turn.

Pre-trial judicial management

Effective case management at preliminary hearing and first diet is of crucial importance in ensuring that trials require no more court time than is necessary in the interests of justice. These considerations may appear to belong less in the Jury

Manual and more in other works such as the Preliminary Hearing Bench Book, with particular reference to what is written at paragraphs 6.7, 6.7.1 and 6.7.2 on the subject of agreement of evidence. Nevertheless, they bear repeating and some will continue to be relevant at commencement of trial and throughout its duration.

- Encouraging parties, and particularly the Crown, to make more and better use of statements of uncontroversial evidence is an obvious first step towards shortening the time needed for trial.
- Ensuring that parties comply with their statutory obligation, under section 257 of the 1995 Act, to identify evidence which can be agreed.
- Ensuring that parties, and particularly the Crown comply with the obligation to identify those witnesses who will be called in the trial.
- At PH/FD, it may be useful to remind practitioners of the terms of Practice Note No. 1 of 2013 at paragraph 7:

> "7. Adjournments should not normally be granted in the middle of a trial in order for parties to carry out preparatory or other work which should have been attended to before the commencement of that trial. In particular, adjournments to "edit" transcripts, "sort" productions and related matters, which ought to have been completed in advance, should not, normally, be permitted."

Delay in starting a trial for a short joint minute to be typed was subject to trenchant criticism by the appeal court in *McClymont v HM Advocate* [2020] HCJAC 1, 2020 SCCR 160. At paragraph [50] the court observed that where possible a joint minute should have been completed and signed at first diet and "in any other circumstances joint minutes ought to be prepared outwith court hours."

At paragraph [51] the court referred to prospective jurors being kept waiting for the joint minute to be prepared as unacceptable, explaining that: "This sort of unnecessary delay undermines the court's reputation and standing in the mind of the public and ought not to be repeated."

It continues to be the case that substantially more witnesses than necessary are called to give evidence in solemn trials. Unless there is a very strong presentational or other reason for adducing a witness to speak to undisputed evidence, the relevant facts should have been established by SoUE or joint minute.

Long trials bring a host of problems many of which can be avoided with effective case management at preliminary hearing/first diet by adopting the guidance in the Long Trial Protocol – Practice Note 1 of 2018 (this can be found on the Criminal Courts Practice Notes and Directions page of the scotcourts website). It is best if such cases are managed through pre-trial diets by a nominated judge who will preside over the trial.

Change of representation

In giving the opinion of the court in *Robertson v HM Advocate* [2024] HCJAC 45, 2025 SCCR 1, Lord Justice General Carloway remarked on the importance of pre-trial procedures being complied with and effectively implemented, at paragraph [29], before explaining:

> "[29] …The court retains a discretion to allow late applications in certain circumstances. However, a change in the accused's counsel or solicitor advocate at or about the time of the trial diet is not a sound basis for re-setting the clock whereby the new legal representative is entitled to review matters, which should have long since been dealt with, and to lodge applications as if the PH had never taken place. Although there will be exceptions, where the interests of justice so require, any new representative must have regard to what has occurred prior to his or her involvement and to the duty which is owed to the court in assisting the progress of the trial."

He continued, with some important general observations about trial management:

> "[30] **The desirability of trials commencing on time and proceeding in an efficient and orderly manner, without multiple adjournments, should not be underestimated.** In this case, for example, although it may have remained open to the appellant to seek a report on his mental state, that ought not to have delayed the progress of the trial unless and until evidence of unfitness became available. In that context, the trial judge was highly indulgent to the appellant in permitting an adjournment pending Prof MacPherson's views. Any application under section 275 should not be entertained just because a newly instructed representative has taken a different view from former counsel (see 1995 Act, s 275 B(1)). Once more, the trial judge was over indulgent to the appellant in permitting the application to be made. The judge was also well-founded in criticising the manner in which the section 259 application, and its associated documents, was presented." [Emphasis added]

The remote ballot

So long as a trial begins with a remote ballot, which considerably reduces inconvenience for potential jurors and must also save considerable costs in jury expenses, there is an inbuilt loss of trial court capacity of a day at present or half a day in cases where it is possible and convenient to both perform the remote ballot and introduce the case to the jury on the same day.

The remote ballot stage presents an excellent case management opportunity. With no jurors present, it is possible to have a very candid discussion with parties to see if more evidence can be agreed which may reduce the number of Crown and defence witnesses who need to attend. The preparation of any joint minute can be accomplished whilst the clerk is telephoning balloted jurors avoiding the situation which drew the ire of the appeal court in *McClymont*. Discussion with the Crown as to which witnesses are being called, and whether they are actually necessary, can claw back a lot of time and reduce the number of witnesses required who are also travelling and congregating in witness rooms. So there is a wider public benefit as well as the benefit of shortening the trial. Whilst in an ideal world all such matters would have been sorted out at PH/FD it is still better late than never at the start of the trial.

Getting started

If the Crown seek time to consider seeking a witness warrant, judges may usefully encourage the clerk to tell them to get on with it. Once they have the warrant, they do not have to execute it, but they then have some leverage over a witness who may be reluctant. Different considerations apply if the witness is vulnerable; See "Witness Warrants" above.

Problem solving as the trial proceeds

In current circumstances it is not possible always to permit the Crown, or defence, to insist on adducing witnesses in a particular order, however advantageous it may seem to parties to be for presentational purposes. Court time is a precious resource which must be treated as such.

- If there are problems about the availability of civilian or professional witnesses, is there a police interview recording which can slot in until they arrive? Or an evidence on commission recording?

- If a problem arises during the evidence of a particular witness, judges can encourage the making of progress by interposing another witness using the power under section 263(2).
- The production of a handwritten witness statement, whilst useful is not compulsory as a matter of law. There may be no written statement and yet the sense of what another witness will say about what a witness has said can be put for contradiction. The typed versions are sufficient almost all of the time although in most cases the handwritten statements are available anyway.
- Further agreement of evidence can be used to avoid delay in waiting for a Crown or defence witness if parties apply their minds to the problem and find a mutually acceptable formula for presenting agreed facts which a witness would otherwise have spoken to.
- In the High Court, judges have solved sudden witness availability problems by allowing, with the agreement of parties, evidence to be taken remotely under the emergency coronavirus legislation. It has been used to allow a witness who started giving evidence in person but had to Covid-isolate during a weekend adjournment, to finish remotely from home. A defence witness whose babysitting arrangements fell through was permitted to give evidence remotely from home. Her evidence was not controversial but considered important by the defence. No problem arose in either instance, but judges would be well-advised to consider the views of parties and would need to consider the particular circumstances before determining whether to proceed in this way.

Note - although certain duties under section 257, to identify facts which might be agreed, subsist only until the start of the trial, there is no restriction under section 256 or at common law to joint minutes of agreement being entered into during the trial and introduced into evidence at times which are convenient for both prosecution and defence. There is no absolute requirement that it must be done at the start even if that is often preferable. It is a common occurrence for parties to enter into further agreement as the trial proceeds and one which is to be encouraged, but as the court explained in *McClymont* it should not delay the trial. In the High Court parties are adept at producing joint minutes outwith court hours.

The judicious use of joint minutes assists the jury, by reducing the number of decisions which they have to make. It benefits parties by conclusively establishing certain facts which are not in dispute.

Proceeding in the absence of the accused - Section 92 and 92(2A)

Ordinarily, all of the trial must take place in the presence of the accused as provided by section 92 of the 1995 Act. This is subject to the provision in subsection (2) relating to misconduct and removal and subsection (2A) Subsection (2A) empowers a judge, on Crown motion and having heard parties, to proceed with and conclude the trial in the absence of the accused if an accused fails to appear after evidence has been led which substantially implicates the accused in respect of any of the charges on the indictment and where the court is satisfied that it is a stage of the proceedings where it is in the interests of justice to do so.

Plainly there are criteria to be met and judgment is required on where the interests of justice lie but the power has been used in the High Court on a number of occasions allowing trials to be concluded rather than delayed or deserted. It has been used when an accused failed to appear at the stage of speeches and where an accused failed to appear for the judge's charge.

In a multiple accused murder trial, where a remanded accused could not be moved from prison because he was medically unfit in circumstances where it could be inferred that he must have taken illicit intoxicants, the court used the power at a stage when the unfit third accused had already given evidence and the fourth and final accused was giving evidence. The fourth accused continued to give evidence and call witnesses in the absence of the third accused who was permitted to rejoin the trial the following day when he was fit. The third accused appealed on the ground that the situation was not catered for by section 92(2A) and there had been a miscarriage of justice. In refusing leave at first and second sift the court confirmed that the conditions of the subsection were met and there was no miscarriage of justice; *Ross Fisher v HM Advocate*, leave to appeal refused by Lord Justice General, Lord Pentland and Lord Matthews 30 September 2022.

Trial court time and making the best use of it

The trial judge is responsible for ensuring that best use is made of court time as Lord Justice General Gill explained at paragraph 11 of Practice Note No. 1 of 2013:

> "The responsibility of ensuring compliance [with the terms of the PN] rests with the trial judge. In that regard, the judge should not always wait until his/her court is 'ready', but should secure that it is ready for him/her on time at the start of each session."

The Practice Note should be considered by all judges undertaking solemn criminal business who should particularly note the following from it:

- Courts should commence at 10 am on every day of the trial;
- A morning break should be kept to a maximum of 20 minutes at the end of which all personnel should be back in place;
- Judges are encouraged to sit on after 4pm if it will permit a witness, and particularly a vulnerable witness, to conclude their evidence.

In the High Court some judges will sit on till 5, 5.30 or later in order to finish the evidence of a vulnerable witness. Where it can be anticipated, it is helpful to prepare the jury for such a possibility by having the clerk find out, ideally during the lunch break, how late jurors can sit and what arrangements they may need to make for this to be possible. It is also important that parties and court staff are not taken by surprise by the judge deciding to sit late, for example after 4.30pm, so that they can, if necessary, make appropriate arrangements.

- It is open to the trial judge to sit earlier than 10am, in particular if there is a need to claw back lost time, which will require checking that parties and the court can accommodate an earlier start and the accused, if in custody, can be made available.
- Preliminary business such as adjourned diets for sentence should be scheduled to conclude before 10 am and paragraph 6 of the PN states:

  > "Accordingly, although legal representatives may attend to commitments in other first instance courts, provided they are scheduled to conclude before the trial commences/recommences, this should not be permitted to delay trial proceedings."

- Paragraph 5 of the PN is of particular importance in setting out what is required in order to make the best use of court time in trials:

  > "Time should not be wasted as the result of early afternoon adjournments. For example, in the normal case, there is no reason why,

> if time permits, speeches should not be "split" overnight. Equally, there is no reason why a charge should not be "split" overnight. In short, in the absence of exceptional circumstances, speeches and charge should proceed up to the end of the normal court day."

It follows that there is no reason why a jury should not be invited to start their deliberations late in the afternoon so long as judges are careful to ensure that jurors are aware that they will have as much time as they need to consider their verdict. The situation before amendment to section 99 in 2003 was different. Jurors could not separate and would face the prospect of being taken to overnight accommodation, but even then, a jury being put out at 15:50 and returning a verdict at 18:09 having been given a cut-off of 19:00 was not a miscarriage of justice (*Sinclair v HM Advocate* 1991 SLT 1093).

In recent times High Court judges have been putting juries out to start considering their verdict up to and after 4pm without attracting appeals. In such circumstances juries generally require to come back the next day, but they will have made a start and time is not wasted.

Conclusion

Adhering to the terms and spirit of Practice Note No. 1 of 2013 to the greatest extent possible will serve to reduce the backlog and reduce its associated pressures on all concerned.

Day-to-day adjournments

From time to time during the trial, a judge may consider it appropriate to remind the jury that they must not discuss the case and the issues in the case with people outside the jury; that they have not heard all of the evidence and that the time for reaching decisions and conclusions on the case and the issues in the case will come when they commence their deliberations after closing directions; and that they should not seek to access outside sources of information about the case and any issue it raises.

Section 88(8) of the 1995 Act covers the exceptional situation in which the court may, either ex proprio motu or on the motion of the prosecutor or the accused, order that the jury should be kept secluded during an overnight adjournment. There appear to be no reported cases in which this particular section has been used. It is of course distinct from section 99(4), which covers the wholly exceptional situation in which a

jury has to be secluded overnight when considering its verdict: see "Will overnight accommodation be required?" below.

Pleas of guilty from co-accused during trial

The tendering of a plea of guilty from a co-accused during a trial does not prejudice the fair trial of the remaining accused. If the co accused has a record, this should not be tendered until the jury have delivered a verdict on the other accused (*McHale and another v HM Advocate* [2017] HCJAC 35, 2017 JC 11).

Judicial intervention and questioning of witnesses

Questioning from the bench should be undertaken with extreme caution (see *Donegan v HM Advocate* [2019] HCJAC 10, 2019 JC 81 paragraphs [54] to [56], *SG v HM Advocate* [2019] HCJAC 68, 2020 SLT 63 paragraphs [26] to [28]). In *SG v HM Advocate* the following excerpt from *Livingstone v HM Advocate* 1974 SCCR (Supp) 68 was highlighted:

> "I must deprecate the practice of such constant interruptions by a presiding judge. Basically his function is to clear up any ambiguities that are not being cleared up either by the examiner or the cross-examiner. He is also entitled to ask such questions as he might regard relevant and important for the proper determination of the case by the jury, but that right must be exercised with discretion, and only exercised when the occasion requires it. It should not result in the presiding judge taking over the role of examiner or cross-examiner. Normally the appropriate time to put such relevant questions as he may think necessary for the proper elicitation of the truth is at the end of the witness's evidence, and not during the course of examination or cross-examination."

In referring to that dictum, the court observed in *Green and others v HM Advocate* [2019] HCJAC 76, 2020 JC 90 that a presiding judge was entitled, if not required, to clear up ambiguities which the parties have failed to address. This would normally be undertaken when such ambiguities occur. It was not desirable to delay such action until the conclusion of the evidence from a witness. The court further observed that an intervention aimed at questions, which were relevant and important for the proper determination of the case and which remained unanswered, should be posed at the conclusion of the evidence from a witness. These would tend to be obvious questions which had not been asked but it was felt had to be asked prior to

the jury considering its verdict. Such situations were considered to be rare and great care should be exercised to avoid opening a matter which parties had deliberately not probed.

The presiding judge/sheriff requires to ensure that questions asked for clarification do not verge on cross examination of a complainer. Further, any comments made from the bench, even outwith the presence of jury/witness, of necessity require to be measured. It is essential that no witness is treated in a bullying or disrespectful manner. The right of cross examination does not extend to insulting or intimidating a witness (*Dreghorn v HM Advocate* 2015 SLT 602 and *KP v HM Advocate* [2017] HCJAC 57, 2018 JC 33). In *Donegan v HM Advocate* [2019] HCJAC 10, 2019 JC 81, judges and sheriffs were reminded to temper the use of questions of a derogatory and insulting nature, notwithstanding they might be asked without objection from the legal representatives.

The judge at first instance must be prepared, where appropriate, to intervene when cross examination strays beyond proper bounds, both in terms of its nature and length for which a complainer can be expected to withstand a sustained attack (*Dreghorn v HM Advocate* at paragraph [39] and *Donegan v HM Advocate* at paragraphs [54] to [56]).

In *Wilson v HM Advocate* [2019] HCJAC 36, 2019 SCCR 273 criticism was made of the removal, at the conclusion of the complainer's evidence in chief, of the screen which had been employed to enable the complainer to give evidence, so that dock identification could take place. It was made clear that this should not have occurred.

Objections to evidence

Objections to the admissibility of evidence ought to have been addressed at the preliminary diet/first diet per section 72(6)(b)(ii) or section 71(2) and section 79.

Once a trial has commenced an objection may only be raised with leave of the court which must apply the criterion in section 79A(4) of the 1995 Act:

> "(4) Where the party seeks to raise the objection after the commencement of the trial, the court shall not, under section 79(1) of this Act, grant leave for the objection to be raised **unless it considers that it could not reasonably have been raised before that time.**" [Emphasis added]

Before the court can consider such an objection the judge must be satisfied that it "could not reasonably have been raised before that time". The Appeal Court has held that this prohibition should be strictly adhered to and does not contravene the accused's right to a fair trial (*Bhowmick v HM Advocate* [2018] HCJAC 6, 2018 SLT 95). The provision has considerable benefits in the management of the conduct of the trial.

Nevertheless, as the Appeal Court observed in *Ahmed v HM Advocate* [2020] HCJAC 37, 2021 JC 19 it is part of the professional responsibility of any representative acting on behalf of an accused to object to the eliciting of inadmissible evidence or any other questions which appear to contravene the law of evidence and procedure. Subject to the terms of section 79A(4) (above) the presiding judge requires to hear an attempt to meet the criterion in that section and if so satisfied, the objection itself, unless it is patently misconceived.

Whenever one of the parties makes an objection to a question put by her or his opponent, the judge has to decide whether to ask the jury to retire when the point is argued. To the extent it can be practically facilitated, time is sometimes saved if the lawyers are invited to have a private word in a corner of the court room away from microphones. This often resolves the issue without requiring to exclude the jury. Whilst exclusion of the jury will sometimes be necessary, some objections can be dealt with immediately if the point is short. The real question is whether the discussion between parties and judge will reveal something which the jury ought not to hear and which might taint their view of the case. This may not be immediately obvious, in which case the judge may require to hear at least some of the argument before deciding whether to put the jury out. The parties themselves may suggest that the objection should be argued outwith the presence of the jury, a suggestion which the judge may choose to follow immediately or may seek a brief and coded explanation of why that would be necessary before deciding if the jury are to be excluded.

Of course, in a case with frequent objections, repeated retirals may annoy the jury but the judge should always ensure that any exasperation which s/he feels is not communicated openly in the presence of the jury, lest it be thought that the judge is favouring one side or the other.

Closed courts in cases involving sexual offences - section 92(3)

It is important to consider the terms of section 92(3) of the 1995 Act in all trials involving sexual offences. The section provides:

> "From the commencement of the leading of evidence in a trial for rape or the like the judge may, if he thinks fit, cause all persons other than the accused and counsel and solicitors to be removed from the court-room".

It is the duty of the presiding judge to consider whether or not to close the court even if no motion is made by the prosecutor. The provision must always be considered. Most often the prosecutor will make a motion to close the court for the evidence of the complainer in a rape trial. Where no motion is made and the judge is considering closing the court, parties should be given the opportunity to be heard.

The provision is not restricted to the evidence of the named complainer and can apply to the leading of other evidence in the case. It is the nature of the trial, not the evidence the witness will give, that brings the section into play.

Closing the court should be considered whether the evidence is being given in court in person, by pre-recorded means (commission or JII), or by live link. The provision is as much about protecting the dignity of complainers as protecting their experience in court.

Despite the terms of the section the press are invariably allowed to remain in court. Witness supporters will remain as might a designated person supporting a vulnerable accused.

Sexual offences: Restrictions on evidence - sections 274 and 275 of the 1995 Act

In sexual offences cases it may be necessary to consider the application of sections 274 and 275 of 1995 Act. Section 274 places restrictions on the types of evidence which may be admitted and the questions which may be asked in a sexual offence trial; section 275 provides that the court may, on application, admit such evidence, or such questions, if the tests set out in section 275 are met. The two sections must be read together as a "unified statutory scheme" (*Daly and Keir v HM Advocate* [2025] UKSC 38, 2025 SLT 1253, at paragraph [88]).

Any application in terms of section 275 will normally have been disposed of prior to the trial diet at a preliminary hearing or first diet. It is, therefore, important that the

trial judge knows whether such an application has been granted and, if so, the terms in which it has been granted including any conditions as to inferences that may be drawn from the evidence. In the course of a trial, judges may require to: (i) ensure that prohibited evidence is not admitted without application; (ii) keep under review any earlier decision to permit evidence, including the possibility of limiting the evidence/questioning previously allowed or revoking an earlier decision (section 275(9); and (iii) determine any late application in terms of section 275.

Detailed guidance on the operation of the provisions, and the relevant decisions of the High Court of Justiciary and the UK Supreme Court, is provided in Chapter 9 of the Preliminary Hearings Bench Book. It is important that judges are familiar with that guidance which addresses the considerations arising for both the preliminary hearing/first diet judge and the trial judge.

Judges should also consider the appropriateness of any comment on the operation of sections 274 and 275 made in the course of speeches to the jury, or during questioning. For example, any comment about there being restrictions on what a complainer may be asked which appears to invite speculation that there may be important material being concealed from the jury may require to be addressed by the judge. Where such a comment is made, the judge should consider intervening immediately and, if that is not possible, should consider giving a clear direction to address the issue.

The Lord Justice General has in mind to raise this with the professional bodies if it recurs and requested that any further instance of such conduct in the High Court should be reported to him in order that he can raise what appears, at the very least, to be an ethical concern with Faculty of Advocates or the Law Society of Scotland as the case may be.

Jury directions under section 288DA and section 288DB during or after a witness' evidence

[Judges may wish to consider whether to give the statutory directions at the end of, or during, a witness' evidence rather than in closing directions only. This may be appropriate if much has been made of delay etc or in a lengthy trial.]

Possible directions during, or at the end of, a witness' evidence

DELAY IN REPORTING

"You heard evidence suggesting that the complainer did not tell, or delayed in telling, anyone/a particular person about an offence, or did not report, or delayed in reporting it to the police. You [also] heard questions being asked or statements made with a view to bringing out, or drawing attention to, evidence of that nature.

"The defence have suggested that a delay in reporting suggests the complaint is untrue …."

[*Where appropriate - You heard the complainer explain…*]

"When you come to consider your verdict, you will have to consider why a report was not made earlier but you must not assume that because it was delayed it is untrue. The fact that a complaint is made late does not necessarily make it untrue. Experience shows that it is very common for a person who has been sexually assaulted/abused not to tell anyone about it for a long time and some sexual crimes are never reported.

"You will need to bear in mind that there can be good reasons why a person against whom a sexual offence is committed may not tell anyone about it, may not report it or may delay in doing so.

"You should look at all the circumstances. Experience shows that different people react to situations in different ways. Some people may tell someone about it straight away. But others do not feel able to do so. This can be out of shame, shock, confusion or fear of getting into trouble, not being believed, or causing problems for other people."

[*Where appropriate - delayed reporting in child abuse case – adapt if appropriate*

"When children are abused they are often confused about what is happening to them and why it is happening. They are children and if a family member is abusing them in his own home or their own home, who can they complain to?

"Child sexual abuse will usually occur secretly. A child may have some idea that what is going on is wrong but very often children feel that they are to blame in some way, even though they are not.

"A child may find it very difficult to speak out. They may be fearful that they may not be believed, a child's word against a mature adult, or they may be scared of the consequences or fearful of the effect upon relationships, or their only relationship.

"These are all matters for you to consider. I am explaining these points so that you will think about them in considering your verdicts.

"You should consider all of the evidence and I remind you that it is for you the jury to decide what to make of the evidence and what inferences should be drawn from it."

LACK OF PHYSICAL FORCE OR PHYSICAL RESISTANCE

"Members of the jury, you will understand from the definition of the crime that there is no need for the accused to have used violence or force in committing rape/sexual assault. Nevertheless, you heard [adapt as appropriate] evidence suggesting that sexual activity took place without physical force being used to overcome the will of the complainer or without physical resistance on the part of the complainer. You [also] heard questions being asked or statements made with a view to bringing out, or drawing attention to, evidence of that nature.

"When you come to consider your verdict, you will have to consider if these matters are of any significance. You will need to bear in mind that there can be good reasons why unwanted sexual activity can take place without someone using physical force to overcome the will of the complainer or without physical resistance from the complainer.

"The fact that a person has not used physical force or that the complainer has not physically resisted does not necessarily mean that the allegation is false.

"Experience has shown that different people can respond to unwanted sexual activity in different ways. Some may protest and physically resist throughout the event. Others may not. This may be out of fear, or because they are not a very forceful person, or for other reasons."

[*Where appropriate]* You will also have to consider the explanations given as to why there was no physical force or resistance. E.g. *The complainer told you that when the accused began touching he/she/they froze*.]

"You should consider all of the evidence and I remind you that it is for you the jury to decide what to make of the evidence and what inferences should be drawn from it."

Submissions as to sufficiency of evidence

Sections 97 and 97A deal with submissions in relation to sufficiency of evidence that may be made at the close of the Crown case, the close of the whole of the evidence and the conclusion of the prosecutor's jury speech respectively.

Section 97: No case to answer submissions

See generally Renton and Brown at paragraphs 18.74-18.75.3.

A submission that there is no case to answer can be made at the close of the Crown case by the defence and the prosecutor is entitled to reply. Such a submission must be made in the absence of the jury,

A submission in terms of section 97 is essentially directed to the entirety of a charge or any alternative which would arise. Different provisions permit submissions to be directed to a part of a charge, but at a subsequent stage in proceedings.

Section 97 of the Criminal Procedure (Scotland) Act 1995 provides as follows:

> "97. No case to answer.
>
> (1) Immediately after the close of the evidence for the prosecution, the accused may intimate to the court his desire to make a submission that he has no case to answer both-
>
> (a) on an offence charged in the indictment; and
>
> (b) on any other offence of which he could be convicted under the indictment.
>
> (2) If, after hearing both parties, the judge is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused being convicted of the offence charged in respect of which the submission has been made or of such other offence as is mentioned, in relation to that offence, in paragraph (b) of subsection (1) above, he shall acquit him of the offence charged in respect of which the submission has been made and the trial shall proceed only in respect of any other offence charged in the indictment.
>
> (3) If, after hearing both parties, the judge is not satisfied as is mentioned in subsection (2) above, he shall reject the submission and the trial shall proceed, with the accused entitled to give evidence and call witnesses, as if such submission had not been made.

> (4) A submission under subsection (1) above shall be heard by the judge in the absence of the jury."

The test for sufficiency

The submission is concerned only with the quantity of evidence and not its quality. All assessments of the meaning and quality of the evidence are for the jury to make.

The proper approach to such a submission was explained by the Lord Justice General (Hamilton) in *Mitchell v HM Advocate* [2006] HCJAC 84, [2008] HCJAC 28, 2008 SCCR 469 at paragraph [106]:

> "…when any question of sufficiency of evidence arises, in the course of a trial or on appeal, the evidence relied on by the Crown is to be taken 'at its highest', that is, for this purpose it is to be treated as credible and reliable and is to be interpreted in the way most favourable to the Crown."

In a circumstantial case, the threshold for sufficiency is explained in the opinion of a full bench in *Megrahi v HM Advocate* 2002 JC 99 in an often referenced explanation of what may be done with circumstantial evidence at paragraphs [31] to [36].

It is open to a trial court, i.e. the jury, to hold the guilt of the appellant to be proved on the basis of circumstantial evidence coming from at least two independent sources.

In a case concerned with the significance of the finding of DNA, the Lord Justice General, Carloway, explained in *McPherson v HM Advocate* [2019] HCJAC 21, 2019 JC 171, at paragraph [10] that:

> ". . . if one reasonable inference from the evidence is that the accused was the, or a, person who committed the crime, there will thereby be a sufficiency of evidence, notwithstanding the existence of other possible explanations. It is only if the inference is an unreasonable one that an insufficiency will arise (*Reid v HM Advocate*, Lord Justice-General (Carloway), paragraph 18, citing *Hamilton v HM Advocate*, Lord Sands, p 5). Where more than one reasonable inference may be drawn, or if the inference is one which may or may not be drawn, it will be for the fact-finder to determine the result, applying the customary standard of proof. In that situation, the issue is not one of sufficiency of evidence, but one of its quality or strength."

In a straightforward case in which there is a primary source of evidence such as an eye witness describing the commission of the crime by the accused or an admission to the crime by the accused, the requirement for corroboration was explained by a full bench in *Fox v HM Advocate* 1998 JC 94. The decision in *Fox*, is the basis for the written direction now given on corroboration. That direction was described as a proper direction and applied by the appeal court in *CR v HM Advocate* [2022] HCJAC 25, 2022 JC 235, the Lord Justice Clerk, Dorrian, explaining at paragraph [19] of the opinion of the court:

> ". . . In order to be corroborative, evidence does not require to be more consistent with guilt than with innocence. It is sufficient if it is capable of providing support for or confirmation of, or fits with, the principal source of evidence on an essential fact (*Fox v HMA*). The trial judge properly directed the jury that where there is a primary source such as an eye witness, all that is required for corroboration is evidence that provides support for or confirmation of, or fits with the main source of evidence about an essential fact."

The jurisdiction to determine that no reasonable jury could convict is exclusively an appellate one. See section 97D:

> "97D No acquittal on "no reasonable jury" grounds
>
> (1) A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge.
>
> (2) Accordingly, no submission based on that ground or any ground of like effect is to be allowed."

In assessing submissions under section 97, it is important that the judge does not stray into consideration of matters that are more properly within the function of the jury. In *HM Advocate v BL [2022] HCJAC 15, 2022 JC 176* a case involving consideration of application of the *Moorov* doctrine, the Lord Justice Clerk (Carloway) commented,

> "[10]..it is not for the judge to conduct an intensive analysis of the respective accounts at the stage of a submission of no case to answer. In particular the judge should not be induced into a detailed consideration of whether a jury's

> determination that mutual corroboration applied would be reasonable. (see Criminal Procedure (Scotland) Act 1995, s 97D)
>
> [11] The type of evaluative exercise which was carried out by the judge, involving questions of fact and degree, nuance and impression, falls quintessentially within the province of the jury. The jury's role in that regard must be respected. The judge has to ask himself simply whether on no possible view of the evidence could it be said that the respective accounts of abuse constituted component parts of a single course of criminal conduct systematically pursued. This is a very high test. It is one that in modern practice will rarely be capable of being passed in cases of child sexual abuse."

See also *HM Advocate v I (M) [2022] HCJAC 19, 2022 SLT 1150*.

Judges should also keep in mind that section 97(2) requires that: "**the judge** is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused being convicted . . .". That being so, where a no case to answer submission attacks the sufficiency of the evidence on one basis, the submission should not be upheld if the evidence led by the prosecution discloses that a corroborated case exists on some other basis. That situation might arise, for example, where the application of the *Moorov* doctrine is challenged but where the charges in question are, nonetheless, capable of independent corroboration: See: *HM Advocate v CM [2025] HCJAC 40*.

There are many illustrations of these principles in the "Corroboration in rape cases" chapter.

Implications of section 97

It follows from the terms of section 97, that if on a charge of theft by housebreaking the accused could be convicted of theft or reset, the submission could not succeed. If on a charge of murder the accused could be convicted of assault, the submission would not succeed.

As it is put in Renton and Brown at 18.75

> "…Section 97 will not apply where there is sufficient evidence on any part of a charge (e.g. on some elements of a charge of assault or some articles in a charge of theft) since that evidence would justify a conviction on the charge libelled which is deemed to include an allegation that the accused did all or part of the acts charged."

That statement is then refined for cases where truly separate offences are combined in one charge; what matters then is substance rather than form. Whether that is the position in a particular case may be a matter of fine judgement and assistance will be found in: *Cordiner v HM Advocate* 1991 SCCR 652 at 671 per Lord McCluskey; *HM Advocate v Young* 1998 JC 9 and *Wilson v HM Advocate* [2019] HCJAC 36, 2019 SCCR 273. *Wilson* was a case in which a single charge contained instances of assault which had occurred on a number of separate days and the Lord Justice General Carloway adopted what was said by Lord McLuskey in *Cordiner* stating, at paragraph [40] of the opinion of the court, that:

> "…Where there are separate assaults libelled in a single charge (i.e. those occurring on different occasions) an accused is entitled to make a s.97 submission in relation to each one. The spirit of the provision cannot be circumvented by libelling an omnibus charge…"

Submissions after the close of the evidence

Submissions as to sufficiency of evidence in terms of s97A of the 1995 Act

In common with a section 97 submission, such submissions are concerned only with the quantity of evidence and not its quality. All assessments of the meaning and quality of the evidence are for the jury to make. The evidence relied on by the Crown is to be taken 'at its highest', that is, for this purpose it is to be treated as credible and reliable and is to be interpreted in the way most favourable to the Crown."

Section 97A(2)(a) permits a submission of no case to answer to be made at the close of the evidence or after the Crown speech but it is difficult to see how it could succeed if it did not succeed at the close of the defence case. It could conceivably succeed if made for the first time at the close of the evidence or after the Crown speech.

Section 97A(2)(b) permits a submission at one or other but not both of these points that there is some part of the libel of a charge on which "… there is no evidence to support some part of the circumstances set out in the indictment."

These are questions of pure legal sufficiency and are not concerned with quality or reasonableness; see section on no case to answer above and section 97D which provides:

> "97D No acquittal on "no reasonable jury" grounds
>
> (1) A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge.
>
> (2) Accordingly, no submission based on that ground or any ground of like effect is to be allowed."

Section 97B directs the court how it is to deal with a submission made under section 97A (2)(a) i.e., that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence or any other offence of which the accused could be convicted under the indictment (a "related offence.")

Section 97C directs the court how it is to deal with a submission made under section 97A (2)(b) i.e., that there is no evidence to support some part of the circumstances set out in the indictment.

Inviting submissions prior to speeches and charge

Leaving aside the statutory provisions contained in sections 97A to 97C of the Criminal Procedure (Scotland) Act 1995, a judge presiding over a jury trial has an overarching duty to ensure that the proceedings are conducted properly and fairly. Accordingly, at the conclusion of the evidence, if the judge considers that there are matters which can usefully be addressed, submissions should be sought from the representatives of both Crown and defence outwith the presence of the jury.

Matters which may be usefully addressed include:

- whether alternative verdicts require to be the subject of directions;
- whether there are different groups or combinations of charges to which the principle of mutual corroboration may apply;
- how concert might apply in the circumstances;
- the potential withdrawal of any special defence; or
- exceptionally, whether parties agree that an acquittal verdict is not appropriate.

In this regard, if there is no apparent dispute that the constituent elements of the crime having been established, then there is merit in seeking clarification from the

parties as to whether that is indeed the case. In circumstances in which there is no such dispute it may be unnecessary to give directions regarding the crime itself which thus shorten the charge. The adoption of this approach has been encouraged (*Docherty v HM Advocate* [2014] HCJAC 71, 2014 SCCR 495 at paragraph [25]).

If deletions to the libel are thought appropriate these should be raised which may prompt the Crown to move appropriate deletions.

[Judges should be mindful of the danger of wholesale deletions removing all specification of how a crime was committed: see chapter on "Deletions from a charge"]

Whilst such discussions can be useful in appropriate circumstances, judges should tread carefully. It is not mandatory to hold such discussions and judgement is required as to their advisability. In *Hogg v HM Advocate* [2023] HCJAC 37, 2024 JC 54, the Lord Justice Clerk (Dorrian) explained that whilst a judge may choose to discuss with parties proposed directions on where corroboration might be found, it was the trial judge's responsibility to formulate the appropriate legal directions to give a jury, including those in relation to corroboration, and to direct them on all reasonably available sources of corroboration, whether or not those were referred to or relied upon by the prosecutor or defence lawyer. The court endorsed what was said in this regard by the Lord Justice General in *Garland v HM Advocate* [2020] HCJAC 46, 2021 JC 118.

Difficulties can occur if there has been a discussion as a result of which parties are given to understand that the judge would direct on a different basis to that ultimately used. In such circumstances a judicial change of mind ought to be communicated by the judge to the parties before speeches, and certainly before the defence speech.

The court in *Hogg*, acknowledged that it may be necessary to direct the jury on a source or sources of corroboration even if the need for the direction is identified at a stage when it is too late to seek the views of parties on the appropriateness of giving the direction, drawing an analogy with what was said about alternative verdicts in *Duncan v HM Advocate* [2018] HCJAC 60, 2019 JC 9. As the Lord Justice General (Carloway) observed in *Duncan*, at paragraph [28], such a procedure is in the nature of the adversarial jury system.

An illustration is seen in *Quinn v HM Advocate* [2010] HCJAC 124 in the opinion of the court given by Lord Reed. At trial, no discussion had taken place between judge

and parties on certain issues which arose from speeches. The Advocate Depute proposed a route to verdict on the basis of eyewitness identification which the judge considered was insufficient and not tenable. The defence addressed the jury on the basis that the eyewitness evidence could not be considered to be reliable and that the jury were therefore bound to acquit. In these circumstances, the trial judge directed the jury on the basis that there was sufficient evidence in DNA findings on a balaclava left at the scene by one of the assailants in a case of attempted murder. The appeal court agreed that this was sufficient and also rejected a contention that the trial had been unfair because the trial judge had not alerted the defence to the direction which would be given. Lord Reed explained:

> "[11] We are unable to accept these contentions. It is the responsibility of the trial judge to direct the jury on the way that the law applies to any reasonable view of the facts discussed by the evidence, so that they have a proper understanding of the way that the law is intended to work, depending on the view of the facts which they take (*R v Coutts* [2006] 1 WLR 2154 at paragraph 82 per Lord Bingham of Cornhill, cited with approval in *Ferguson v HM Advocate* at paragraph 33; cf Johnston v HM Advocate 2009 SCCR 518 , *Poole v HM Advocate* 2009 SCCR 577 and *Gardener v HM Advocate* 2010 SCCR 116). In particular, it is for the trial judge to direct the jury on the question of sufficiency according to his own judgment of the evidence (*Fraser v HM Advocate* 2008 SCCR 407 at paragraph 175 per Lord Justice Clerk Gill).
>
> [12] In the circumstances of the present case, the trial judge was not required as a matter of fairness to warn the appellant's solicitor, in advance of his addressing the jury, that he intended in due course to direct the jury on sufficiency in accordance with the case of *Maguire*: such directions were reasonably to be anticipated. The appellant's solicitor having however told the jury that, if they rejected the evidence of Miss D'Arcy, "there is no other evidence sufficiently before you to find that [the appellant] committed [the offence charged]", it was the judge's duty to correct that apparent mis-statement of the position. The contention that a trial judge should never correct counsel without giving counsel an opportunity to consider his submission before he addresses the jury does not bear scrutiny: a trial judge cannot be expected to anticipate counsel's mistakes. Nor is the trial judge required, as the ground of appeal suggests, to allow counsel to make a further address to the jury, after his mistake has been drawn to his attention.

> [13] In the present case, the trial judge corrected any misapprehension which might have been created by the solicitor's address to the jury, without expressing any criticism of the appellant's solicitor or even suggesting that he had made a mistake. What the judge did was to interpret the solicitor's submission as advancing an unobjectionable contention:
>
> > "Now it is implicit in Mr Wheatley's argument that it is going too far to draw the inference that the DNA got on the balaclava when the crime was committed and in effect he is arguing that you just cannot be confident as to when the DNA got inside the balaclava".
>
> That may indeed have been what the solicitor had meant. Whether that be the case or not, however, the way in which the trial judge dealt with the matter reminded the jury of the position which the appellant's solicitor had adopted in relation to the DNA evidence in his cross-examination of the forensic scientist, and avoided any risk that the position of the appellant might be prejudiced.
>
> [14] In these circumstances, we are satisfied that the trial judge was correct to give the directions complained of, and that there was no unfairness in the procedure which was followed."

Representatives' conduct and issues arising from speeches

In addition, the judge has a duty to ensure that representatives behave appropriately, not only in their conduct of the case in general but also in their speeches to the jury in order to secure a fair trial for an accused. The following observation from *Boucher v The Queen* 1954 110 Can CC 263 was endorsed in *KP v HM Advocate* [2017] HCJAC 57, 2018 JC 33 (at paragraph [17]):

> "It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction, - it is to lay before a jury what the Crown considered to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to it legitimate strength, but it must also be done fairly..."

In *Lundy v HM Advocate* [2018] HCJAC 3, 2018 SCCR 269 the appeal court also referred to the following observations by the Privy Council in *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237 at paragraphs [10] and [11]:-

> "To safeguard the fairness of the trial a number of rules have been developed to ensure that the proceedings, however closely contested and however highly charged, are conducted in a manner which is orderly and fair. These rules are well understood and are not in any way controversial. But it is pertinent to state some of them."
>
> "It cannot be too strongly emphasised that these are not the rules of a game. They are rules designed to safeguard the fairness of proceedings brought to determine whether a defendant is guilty of committing a crime or crimes conviction of which may expose him to serious penal consequences. In a criminal trial as in other activities the observance of certain basic rules has been shown to be the most effective safeguard against unfairness, error and abuse."

Serious contraventions of these accepted rules of practice will require detailed and emphatic action on the part of the trial judge (*Lundy* at paragraph [52]). What will constitute such contraventions will depend on the circumstances of each case and the content of the speech. If serious contraventions do occur the charge requires to address the resultant serious problems caused by such a speech and to restore the balance (*Morrison v HM Advocate* [2013] HCJAC 108, 2014 JC 74).

In particular, the prosecutor must not convey any impression that s/he believes the accused is guilty nor that investigations made by the Crown lead to that conclusion (*KP v HM Advocate* [2017] HCJAC 57, 2018 JC 33 at paragraph [17]).

Addressing issues raised by Crown / defence speeches

In the case of *Miller v HM Advocate* [2021] HCJAC 30, 2022 JC 33 the High Court emphasised that it is the responsibility of the Crown to provide "clear submissions [to the jury] as to the basis upon which it contends that the crimes charged have been established and as to the evidence relied upon for that purpose" (per Lord Turnbull at paragraph [67]). It is similarly the responsibility of the defence to provide clear submissions as to the basis on which they are proceeding. In the absence of such, judges and sheriffs may, before charging the jury, seek submissions from parties.

In *Garland v HM Advocate* [2020] HCJAC 46, 2021 JC 118 the Lord Justice General explained the obligations on a judge in directing the jury where the Crown speech fails to identify a relevantly corroborated case, at paragraph [20]:

> "it is unfortunate too that the trial judge did not give the jury clear directions on exactly where they might find standalone corroboration of the complainer's evidence. The directions merely stated what the trial judge understood the Crown's position to be and were therefore not very helpful….He ought to have given the jury clear directions on where corroboration might be found by identifying with reasonable precision any passages in the letter, or elements of the appellant's testimony, which might constitute corroboration."

Any propositions which are put to the jury in speeches by Crown and defence which are unsupported by the evidence which has been led during the trial require to be addressed and corrected in the charge (*MacDonald v HM Advocate* [2020] HCJAC 21, 2020 JC 244 at paragraphs [44] to [45]).

See also the observations in *Menni v HM Advocate* [2013] HCJAC 158, 2014 SCCR 203 where the judge's charge was challenged (unsuccessfully) *inter alia* as not having dealt adequately with the failure of an advocate depute to put certain documents to a witness whose credibility he challenged, when he later relied on those documents in his speech as undermining that witness' credibility.

In cases alleging sexual crime, if there is no evidence to support the contention that the complainer consented to the alleged act, the question of consent requires to be withdrawn from the consideration of the jury (*MacDonald v HM Advocate* at paragraph [41]). Similarly if there is no basis for reasonable belief in consent that has to be specifically dealt with in the charge (*W v HM Advocate* [2022] HCJAC 16, 2022 JC 164).

Further, great care requires to be taken to ensure that issues which are not live for the jury to consider are not the subject of direction (*MacDonald v HM Advocate* at paragraphs [41] to [43]).

In addition, in the event of a defence speech to the jury taking on the character of an undiscriminating and degrading attack on the general character of the complainer, this constitutes an impermissible attack on character and this should be made clear in the charge (*W v HM Advocate* [2022] HCJAC 16, 2022 JC 164). Similarly, if appropriate, reference to character of the complainer or attempts to evoke sympathy by a prosecutor will require to be specifically addressed in a charge.

If issues are raised concerning the failure to report the commission of any alleged sexual offence or physically to resist during the commission of such an offence, the

necessary directions envisaged in sections 288DA and 288DB of the Criminal Procedure (Scotland) Act 1995 require to be given (*MacDonald v HM Advocate* at paragraph [46]).

Clear and robust action is required in the event of a party providing the jury with a mistaken explanation of a legal principle.

It is not appropriate for a judge simply to point to what the prosecutor has said in lieu of any detailed legal directions required, in particular in complex cases involving mutual corroboration (see *Stalley v HM Advocate* [2022] HCJAC 12).

The scenarios in *Morrison v HM Advocate* [2013] HCJAC 108, 2014 JC 74, *Lundy* and *KP* provide examples of what a presiding judge may face and what steps might be required to rectify the situation. Thus, inappropriate comments by Crown or defence may require specific, clear, and even robust directions to remedy the situation. In extreme instances, it may be necessary to interrupt the speech and address the representative outwith the presence of the jury. In circumstances in which the content of a party's speech to the jury has no evidential basis a judge would be perfectly entitled to make comment to the jury (*Dalton v HM Advocate* [2015] HCJAC 24, 2015 SCCR 125 at paragraphs [14], [37], and [38]. See also *KP v HM Advocate* [2017] HCJAC 57, 2018 JC 33).

The fact that the representative of the accused may endeavour to counter robustly any such transgressions of the part of the prosecution in the speech to the jury is of no moment. It is not their role to correct the deficiencies of the Crown speech (*Lundy* at paragraph [60]).

Juror illness and COVID-19

(This section deals with information previously contained in the Amalgamated Briefing Paper on Restarting Solemn Trials, Appendix H.)

The clerk will tell jurors at the start of the trial that they should stay home / go home if they become unwell. Where that situation arises, the clerk will advise the judge and, in most cases, the juror will be excused.

From 2 May 2022 there is no longer an SCTS protocol on what is to be done if a juror displays symptoms of or tests positive for COVID-19. The process for managing this will thus be the same as for other cases of illness.

If a juror displays symptoms of illness that could be COVID-19 whilst at court or in a remote jury centre, the following procedure will be followed:

1. Juror informs an SCTS Official (jury attendant) that they have become unwell and explains what their symptoms are;
2. The jury attendant informs the clerk of court. The clerk will inform the judge.
3. The jury attendant will take the juror to a private room and will offer the juror a face covering if they wish to wear one. Supplies of disposable face coverings are held in all SCTS buildings;
4. The juror will be asked to go home where possible, they should minimise contact with others, e.g. use a private vehicle to go home. If it is not possible to use private transport, then they should be advised to return home quickly and directly, and if possible, to wear a face covering). They may then wish to consult their General Practitioner regarding their symptoms;
5. If the juror is so unwell that they require an ambulance, the clerk will phone 999 and let the call handler know the juror is displaying symptoms of a respiratory disease, if applicable;
6. The juror is discharged, court adjourns to the following day and the room is cleaned in the intervening period.

Whenever the situation arises and a juror is excused, the judge will have to say something to the remaining jurors about the missing juror, such as:

> "You will see, members of the jury, that one of your number is no longer with us. I have discharged that juror and the trial will now proceed with 14 / 13 / 12 of you"

More often than not the judge will also say something like:-

> "I cannot go into the reasons for that juror being discharged and you should not speculate"

In the case of the juror with COVID symptoms, the situation is different and unique and it is suggested that judges consider being more transparent about the reason for the juror's discharge, without going into any detail. Of course, this may risk remaining jurors feeling anxious and unsettled about taking part in the trial and more disruption to the progress of the trial. Reassurance from the bench might go some way to allay concerns and minimise such a risk. The judge might also take the

opportunity to underline for the remaining jurors the importance of following public health advice to minimise any risk. It is always a matter for the assessment and discretion of the judge, having regard to the particular circumstances of the case.

Jury misconduct, etc

If something arises during the trial which suggests juror misconduct or any other reason why a juror might have to be excused, then this ought to be brought to the attention of the judge immediately so that appropriate enquiry may be made and the matter dealt with. It is for the judge to determine the procedure to be adopted in making inquiry into such matters, having regard to the particular circumstances of the case. Judges have adopted different approaches in different cases and the key authorities are discussed in *Ferguson and Others v HM Advocate* [2021] HCJAC 15, 2021 SLT 790, where the court observed (per Lord Carloway at paragraph [39]) that:

> "These cases illustrate that, where an allegation of juror misconduct is made, the nature of any inquiry will depend on the particular facts and circumstances. If there is information which prima facie supports the allegation, some inquiry will almost certainly be necessary. It is important to note, first, that any such inquiry has to be made in the context of a continuing jury trial, which should not, for a variety of reasons, be unduly delayed or interrupted and in which the jurors' attention should not be unnecessarily distracted from the central questions in issue. Secondly it is equally important that any inquiry should be as transparent as is reasonably practicable."

All matters of concern should be raised with the parties in open court outwith the presence of the jury and not discussed in chambers. It may be necessary to hear argument in open court and exceptionally for the judge to question the juror concerned in chambers about the problem, in the presence of the clerk, although the court in *Ferguson* (supra) cautioned that "any such interview should, in the modern era, normally be recorded".

There are a number of reported examples of this, all of which turn on their own facts. For example:

- *Allegations of bias/prejudice* - The fact that a juror knows a witness is not *per se* a reason for assuming potential bias and acceding to a motion to reduce the jury to 14. There has to be something more, whereby the fair minded and informed observer, having considered the nature of the connection between

the witness and juror, can conclude that there was a real possibility that the juror (and hence the jury) would be biased (*McKay v HM Advocate* [2015] HCJAC 55, 2015 JC 282). Alleged prejudice of a juror towards an accused is discussed in *McCadden v HM Advocate* 1985 JC 98. The problem of "familiarity" more generally is dealt with fully in *Pullar v HM Advocate* 1993 JC 126 (and see also its sequel in the European Court of Human Rights: *Pullar v United Kingdom* 1996 SCCR 755) and in *Robertson v HM Advocate* 1996 SCCR 243.

- *Allegations of jury interference* - The question of attempts at interference with jurors is considered in *Stewart v HM Advocate* 1980 JC 103 (and *Hamilton v HM Advocate* 1986 SLT 663). Where a juror had been discharged on an assertion that he had been approached and offered a substantial bribe in return for influencing the other members of the jury, the trial judge should direct the remaining jurors that they should put out of their minds anything which had been said by the discharged juror. It was unnecessary and inappropriate to tell them that there had been a suggestion that improper pressure had been brought to bear on the discharged juror. That could only encourage them to search for any clues in his words or conduct that might point to the source of the improper influence, and that could only tend to distort, one way or the other, an objective and balanced approach to the evidence (*Murray & O'Hara v HM Advocate* [2009] HCJAC 47, 2009 JC 266).

Where it is inappropriate for a juror to continue to serve: section 90 of the 1995 Act

Section 90 of the 1995 Act (as amended by section 62 of the Victims, Witnesses, and Justice Reform (Scotland) Act 2025)) deals with the situation in which either a juror dies during the course of a trial, or the court is satisfied that it is, for any reason, inappropriate for a juror to continue to serve as a juror. In terms of section 90 the judge may determine that the trial shall proceed before the remaining jurors, providing: (i) that there remain at least 12 jurors; and (ii) that the judge is satisfied that so doing is in the interests of justice. Such a determination need no longer proceed on the application of one of the parties, but before deciding whether to proceed with a reduced number of jurors, the court must give the prosecutor and the accused an opportunity to be heard. Where the judge does decide to proceed without one or more jurors, the remaining jurors are a properly constituted jury.

Where one or more jurors have been discharged, for whatever reason, it must be borne in mind that, in terms of section 99A of the 1995 Act, the number of guilty votes required for conviction is determined by the number of jurors remaining at the time of voting. The judge will require to give directions on that matter at the end of the trial. Section 99A provides:

> "(1) [. . .]
>
> (2) The jury may return a verdict of guilty only if a majority of the jurors are in favour of that verdict.
>
> (3) Otherwise, the jury must return a verdict of not guilty.
>
> (4) For the purposes of subsection (2), a majority of jurors are in favour of a verdict if—
>
> > (a) in the case of a jury consisting of 14 or 15 jurors, at least 10 of the jurors are so in favour,
> >
> > (aa) in the case of a jury consisting of 13 jurors, at least 9 jurors are so in favour,
> >
> > (b) in the case of a jury consisting of 12 jurors, at least 8 jurors are so in favour.
>
> (5) [. . .]"

The judge charges the jury

Timing of the charge

In *Aitken v HM Advocate* 1984 SCCR 81 (when juries were normally secluded overnight), it was observed that the jury should not be asked to retire late in the day, especially after a long or difficult trial. Now that juries are usually sent home for the night when deliberating, the issue is of less importance.

It is, however, a matter for the trial judge's discretion whether to commence the charge at the conclusion of the speeches, to deliver part of the charge immediately with a view to concluding it the next day or to decide that the point in the court day has been reached at which it would be appropriate to adjourn.

No absolute rules can be laid down and these matters must be left to the discretion of the presiding judge in each case.

The sort of issues to be considered are the jury's ability to concentrate on and retain the content of speeches and charge at the close of the day, the number of charges and accused and whether speeches and/or the charge should be split over two days. Regard should be had to paragraphs 4 and 5 of the Practice Note No 1 of 2013 (this can be found on the Criminal Courts Practice Notes and Directions page of the scotcourts website) from the Lord Justice General where it is emphasised that speeches and charge should proceed up to the end of the normal court day, in the absence of exceptional circumstances.

Content of the charge

The content of the charge to the jury depends, of course, on the circumstances of the case. The judge has the sole responsibility of giving the jury proper directions on the law which they have to apply. Detailed guidance and specimen charges in relation to particular offences are provided in the following chapters.

As said in *McGartland v HM Advocate* [2015] HCJAC 23, 2015 SCCR 192 (Lord Malcolm at paragraph [31]), however,

> "in general the jury manual does not remove the trial judge's duty to tailor the charge to the specific circumstances of the case, or with a view to giving proper and clear directions to the jury … Juries are entitled to a bespoke charge adapted to the evidence and to the particular issues arising in the trial."

In particular where there are evidential and/or legal complexities, the judge must ensure that clear guidance is provided as to the route to verdict available to jurors. If necessary, the judge can require submissions from parties to make clear the basis on which they are proceeding, in particular from the Crown as to the basis on which it seeks a conviction and on what evidence it relies (see above discussion of *Miller v HM Advocate*).

To encourage greater jury note taking, or engagement with the evidence, the trial judge should, in their concluding remarks, before sending the jury out to consider their verdict, consider inviting jurors to take a short period of time at the start of their deliberations to review the notes they have taken, or reflect on the evidence they have heard.

Recapping of written directions

In *SB v HM Advocate* [2021] HCJAC 11 the court confirmed that there is no requirement in the charge to repeat at length all of the written directions provided at the start of the trial. This principle is illustrated in *Brown v HM Advocate* [2024] HCJAC 4, 2024 SCCR 96. The appellant argued that where a witness had not adopted a crucial and incriminating passage in his statement which was put to him, the trial judge should have given a specific direction to remind the jury that he had not done so. The court rejected this contention. The written direction at the start of the trial was sufficient and left the jury in no doubt that the prior statement was not evidence to prove fact.

In all cases the jury should be reminded that they have copies of the written directions and that they must follow those as well as the directions provided in the charge. One possible formulation is to say at the start of the charge:- "I gave you directions in law at the start of the trial and you have a copy of them. You must apply those directions when considering your verdict. I will not repeat all of them but I will expand on or revisit some of them in light of the evidence in this case."

The degree to which those directions require to be repeated, refined or expanded upon will be informed by matters such as:

- the evidence and the precise nature of the issues raised;
- the conduct of the trial;
- the length of the trial parties' submissions and speeches;

In a *Moorov* case, for example, directions on corroboration will need to be very specific (see further guidance in the chapter on Corroboration: the Moorov Doctrine). Or, where corroboration is an issue, such as in a wholly circumstantial case or one where corroboration of a witness was to be found in circumstantial evidence, more will be required. In other cases, such as an assault where the only issue is self-defence, the introductory directions on corroboration may suffice.

Whatever requires to be repeated or elaborated upon, reference should still be made to the guidance in the chapter on General Directions.

In summary, at all times it should be remembered that the introductory directions are just that. While they cover much of what is to be found in the opening part of a

charge they will not be sufficient of themselves in every case. Directions in the charge must always be tailored to the circumstances of the case.

And finally

Once the charge has been completed, the judge should *not* ask the parties whether there are any other directions which they wish given (*Thomson v HM Advocate* 1988 SLT 170). The Clerk of Court, however, maintains a check-list of the general directions which have to be given in every case and uses this while the charge is being delivered. So, if the judge forgets to tell the jury anything about, for example, corroboration, it is possible/likely that the clerk will draw this to the attention of the judge before the jury retires. It is possible too that the prosecutor or the defence ex proprio motu may ask the presiding judge to give other or further directions or point out any slip of the tongue.

Closing of the court during charge

There once existed a practice of preventing the public from entering the court during the judge's charge.

It was reinforced by notices on the doors saying something like "No entry-Judge's Charge". The exact origins of the practice are unclear.

In normal circumstances there is no warrant for preventing access to the Court. It may indeed be unlawful to do so as a general rule, hence the need for section 92(3) of the 1995 Act.

At times it may be appropriate to exclude members of the public, such as when they are being disruptive or intimidating witnesses. Judges can use their discretion in dealing with them but the default position is that the court must remain open.

There is no reason why a sign asking the public to enter and leave quietly or some such wording should not be affixed in a prominent place, if that is not already the position, but there is no special rule in relation to the charge as opposed to any other part of the proceedings.

The jury retires

It is of paramount importance that the jury be given sufficient time to consider its verdict.

In some cases it may be appropriate to emphasise to the jury members that they are under no pressure of time from the court to reach a verdict and that they must take whatever time, however long or short, they need to consider their verdicts.

The lunch interval

It often happens that a jury is asked to retire to consider its verdict in the morning and has not completed its deliberations before lunch. Most judges consider it sufficient to send the clerk to tell the jury to cease their deliberations and arrange for them to go/break for lunch. The jury should be told that if they are still deliberating at lunch time the lunch interval is not to be used for a continuation of their deliberations; they should simply avail themselves of the break which lunch provides.

The clerk of court is usually given the authority to ensure that the jury are brought back from lunch into the jury room and secluded thereafter. See generally section 99(4) of the 1995 Act, which is discussed further under the heading "Supply of meals, etc." below.

Jury wish to see productions

The jury have no absolute right to see any productions in the case; the matter is wholly within the discretion of the judge. For a recent discussion see *Begum v HM Advocate* [2020] HCJAC 16, 2020 JC 217. The cases are reviewed in Renton & Brown, *Criminal Procedure*, 6th ed at paragraph 18-87.

If the jurors wish to see a production, the Clerk of Court will communicate their request first of all to the judge. The judge should consider the matter and, if in any doubt about the request, the court should be convened and it can be canvassed then, in the absence of the jury, but in the presence of the parties including the accused. Even if the judge is inclined to exercise her or his discretion in favour of letting the jury see the production, she/he should nonetheless instruct the Clerk of Court to communicate the jury's request to each of the parties' representatives. If any one of them expresses any objection or doubt about the request, the Clerk of Court should bring that to the attention of the judge and again the court should be convened so that the whole issue can be canvassed in open court.

Care requires to be taken in the choice of words used in giving directions to the jury about access to productions. See *McLellan v HM Advocate* [2008] HCJAC 66, 2009 JC

47 at paragraphs [6] and [22], where the trial judge's choice of words may have carried an implication that the jury could not see one production.

Jury requests further directions

This often happens. The jury should be instructed by the clerk to produce their questions in writing, and the clerk should advise the parties of these (*Boath v HM Advocate* [2005] HCJAC 116 at paragraph [11]). When further directions are requested, the court must reconvene without the jury, in the presence of the accused, and the judge should invite views from parties on how the question should be answered. Whilst it is the judge's responsibility to determine how to answer, submissions can be helpful.

Thereafter, in the presence of the jury, the judge should read their request to them and confirm that this is the question to which they seek an answer.

Further directions may then be given as the circumstances require. Sometimes there is little a judge can say, but if the question was ambiguous, the judge could ask the jury if their question has been answered.

Once any further directions have been given, the jury should then be invited to retire again to consider their verdict. The necessity of giving further directions in open court is dealt with in *Cunningham v HM Advocate* 1984 JC 37 and in *McColl v HM Advocate* 1989 JC 80.

If the jury spontaneously ask a further question, the judge would need to decide whether to adjourn to seek the views of parties or whether the point was so clear that she/he can be confident that an immediate answer can be given. The former will often be the safer course.

Sometimes a jury requests further directions, but by the time everyone has assembled, they have changed their minds and do not require further guidance. In *Brown v HM Advocate* 1997 SLT 611, the request for further directions came at a point when another jury were being selected for the next case. There was a long delay in attending to the request and the jury decided to proceed regardless. An appeal against conviction failed; the court rejected arguments that the jury might have convicted in a fit of pique and held that it was not lightly to be inferred that jurors would betray their oath because of resentment at the delay; in any event the verdict actually returned in this particular case was a "discerning" verdict.

Sometimes the judge may decide ex proprio motu that further directions should be given. This is provided for in section 99(3) of the 1995 Act (and see *Cunningham v HM Advocate* above dealing with the corresponding section in the 1975 Act). Once again, this should always be done in open court in the presence of all parties (*Boath v HM Advocate* at paragraph [11]).

Once the jury has retired court staff such as bar officers should not answer any questions put to them by the jury, e.g., about the verdict: *McLeod v HM Advocate* [2006] HCJAC 79, 2007 JC 66.

Supply of meals, etc.

This is covered by section 99(4) of the 1995 Act. It is competent under this subsection for the judge to give such instructions as she/he considers appropriate about: the provision of meals and refreshments for the jury; the communication of a personal or business message, unconnected with any matter in the case, from a juror to another person or vice versa; and the provision of medical treatment or other assistance immediately required by a juror. Section 99(4) and (7) also covers the question of adjournment overnight after the judge has charged the jury and of provision of accommodation, if the judge concludes that the jury require to be secluded overnight, which is discussed in the Appendix - "Provision of overnight accommodation for the jury" (see also 1995 Act, section 99(1), (2) and (3)).

Will overnight adjournment be required after the jury have commenced discussing their verdict(s)?

Section 99(7) of the 1995 Act, inserted by section 79 of the Criminal Justice (Scotland) Act 2003, provides that the court may, if it thinks fit, permit the jury to separate after they have retired to consider their verdict. The jurors may, therefore, be allowed to go to their own homes overnight if they have not reached a verdict at the end of the day and this is now almost invariable practice.

Although the section is framed on the basis that the jury is to be secluded while considering its verdict unless a direction is made under section 99(7) to allow them to separate and go home for the night, such a direction is invariably given in practice and it is suggested that seclusion should nowadays only be ordered if there are

concerns for the safety or protection of the jurors which cannot be otherwise addressed.

In any event, since it may still be appropriate in some, albeit highly exceptional, cases for the jury to be secluded overnight and to be provided with overnight accommodation, detailed guidance as regards such exceptional cases is included in an Appendix, Provision of overnight accommodation for the jury.

It is a matter for the judge to determine at what time it may be reasonable to require the jury to break off their deliberations and adjourn overnight or for the weekend. That decision may turn to some extent on external considerations, including the weather and access to the court building or jury centre. A judge will also have to consider the particular circumstances of jurors who may have caring responsibilities or a long or difficult journey to get home.

At some point in the afternoon the question requires to be broached with the jury whether they expect to be able to deliver a verdict that day. Whilst older case reports describe such issues arising well after 6pm it is suggested that, subject to the foregoing considerations, it would generally be appropriate to leave the jury until about 4.45pm before making enquiry. If the jury let it be known before then that they are tired and wish to adjourn, many judges consider it reasonable to accommodate their preference.

This issue has been considered in a number of cases which were concerned with the pre-2003 Act regime where the jury required to be secluded in a hotel if there was an overnight adjournment. The relevant case law (considered in detail in the relevant Appendix) may be of assistance, although it is recognised that these cases were decided in a different era when the court was routinely considering arrangements which were complex and disruptive, not the least for jurors.

Whilst the court should be mindful of section 99 generally - the terms of subsection (5) suggest that a breach of the provisions of section 99 would lead to acquittal - the appeal court has explained that acquittal would follow only if an approach had been made to the jury which had as its purpose some improper influence or pressure being brought to bear on the jury with the aim of securing a conviction (*HM Advocate v McDonald* [2016] HCJAC 121, 2017 SLT 267, following *Thomson v HM Advocate* 1997 JC 55).

The general principles to apply when considering whether to adjourn are that

1. The judge should determine at what time the jury should be asked whether they wish to adjourn or to carry on considering their verdict(s) a bit longer.. In making any such enquiry, whatever else is said, the jury must be told that no pressure is being put on them to reach a verdict and that they can take as much time as they consider necessary It should not be suggested to the jury that an overnight adjournment will cause inconvenience to anyone. It will be for the judge to decide whether the case should be called in court for the judge to make the necessary enquiry of the jury or whether, as frequently occurs in practice, especially in the High Court, the enquiry is made by the clerk on the judge's instructions. The latter course is less cumbersome and saves time, but care is required as explained below.

2. Since the late 1990s the practice in the High Court has been for the clerk of court, on the instruction of the judge, to make the relevant enquiry of the jury by asking if they wish to adjourn for the evening or to continue their discussions. This can save time and inconvenience if the jury are close to delivering a verdict, provided that the court can accommodate that, in which case they can continue their discussions, but if the case is to be adjourned overnight the case will be called in court and the judge will require to reiterate the position as necessary.

3. Provided care is taken, this procedure does not breach the provisions of section 99 because the clerk is assisting the court, under the instruction of the judge, to address the issue of whether the jury should be secluded overnight or, in reality, to separate and go home per section 99(7).

4. The giving of the instruction by the judge to the clerk should be minuted. If the jury wish to carry on their discussions this should also be minuted and the parties informed.

5. The clerk should make it clear to the jury that it will be for the judge to determine if they should be directed to break off their discussions and to go home. If the clerk encounters any difficulty, then they should tell the jury to cease their discussions and advise that the case will call in court so that the judge can determine further procedure.

6. If the jury indicates to the clerk that they wish to adjourn, the case will be called in court in the presence of the accused and the judge should explain to the jury that the time has been reached when it would be appropriate to

adjourn for the day and reiterate that the jury are under no pressure to reach a verdict and should take as long as they consider necessary.

7. The jury should be directed to cease their discussions until the next court day and not to resume their discussions until the case has called again in court the next morning. At that point the diet should be adjourned.

8. On adjourning, the judge should also remind the jury that they should not be discussing the case and any issue in the case with people outside the jury and that they should not be carrying out any investigations of their own, through the internet or otherwise, about the case, the people involved in it and any issue it raises.

Discharge of jurors

At the end of the trial it is customary for the judge to thank the jury for their service, for their attention to the case and for carrying out their duties. If the verdict comes late in the day, it may be appropriate to discharge the jurors immediately the verdict is recorded by the clerk and confirmed by the jury as correct, so that the jurors do not have to wait during any pleas in mitigation etc. if they wish to leave immediately. But before discharging the jury, the judge should always check with the clerk of court as to whether the jurors are required to return for any further cases in the sitting. The clerk of court will normally take care of any problems with jury expenses. It is probably not necessary to tell the jurors, when discharging them, that they may receive a letter within a few days from the clerk of court asking them to come back and re-assemble (see *HM Advocate v Khan & Others* 1997 JC 40).

When a case has been exceptionally long or stressful, some judges have discharged jurors from further jury service for a specified period of years. Any jurors who have served on a jury are entitled to claim exemption from further jury service for five years from the date to which they were cited (Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 sections 1 and 1A and schedule 1, part III Group F (a)) and judges may wish to inform jurors, when discharging them, that they may wish to claim that exemption. It is nonetheless open to the trial judge in appropriate cases to direct the exemption of jurors for a longer period (1980 Act, sections 1 and 1A and schedule 1, part III Group F (b)) and to advise them accordingly. In either case it is suggested that the jurors should be referred to the Guide to Jury Service Eligibility and Applying for Excusal (which is available on the Scottish Courts website), and told to keep a note of

the dates of the present case so that they can ensure any timeous claim for exemption can be dealt with in due course.

Post-trial support for jurors

Most people most of the time will cope well with their jury service but some jurors may find certain evidence challenging and distressing. People may react in different ways: a dissociating juror may be more difficult to identify than one who is visibly upset. Other jurors may not feel the impact until well after the trial has finished. Because jurors are not able to discuss details of the trial or their final deliberations with their friends or family, they may not be able to rely on their usual coping strategies.

A free counselling service operated by NHS Rivers Service is available to jurors in High Court and Sheriff and Jury cases where the evidence has caused or is likely to cause distress. Jurors are given information in their jury packs which includes advice on coping strategies, on how to recognise if they are being affected by the evidence and how they can access support, confidentially, through NHS Rivers.

Jurors can access NHS Rivers support in the following ways:

1. Where the presiding judge approves counselling for the whole jury due to the nature of the case or particular evidence.

   If the judge considers it appropriate, they should advise all jurors before they are discharged that they are all being referred to NHS Rivers free counselling service. The judge should remind jurors of the information in their jury packs about the service. The jurors will then be supplied with information on how to contact the Rivers Centre. Jurors should be advised that only their names will be passed on and that it is entirely up to them if they wish to make contact with Rivers Centre or not. No juror will be contacted unless they first contact Rivers themselves. They can be reminded that there is no time limit and that the service is free.

2. Where a juror requests counselling (at the end of the trial or sometime later) and no whole-jury referral was made by the judge.

   The juror can contact the clerk of court using the information in their pack or from details available on the SCTS website. The clerk will, where possible, seek approval for a referral for that juror from the presiding judge. If approved, the

clerk will follow the same procedure as above, providing the juror with contact details, alerting Rivers and leaving it to the juror to make the initial contact.

Given the nature of the impact of trauma and the potential for some evidence to be challenging, especially in the High Court, Judges may not wish to be too prescriptive about the cases in which jurors are referred to the service, or hesitant in allowing support to a juror who seeks it. Whilst referral will usually be at the conclusion of the trial, it may be that it becomes obvious mid-trial that a juror requires support. Judges may wish to consider whether it is appropriate at that stage to refer the juror to Rivers following the above procedure. Care will require to be taken to explain to the juror that the purpose of the referral is to provide coping strategies to allow them to continue to hear the evidence and that the evidence must not be discussed. Reference can be made to the written directions, emphasising the importance that they are not influenced by or distracted by any outside source of information.

COVID-19 jury information

What follows is a short, suggested set of wording which judges may wish to use when speaking to the jurors about COVID-19. Alternatively, judges may wish to develop their own set of wording.

On the jury returning after the adjournment.

> "First of all, can I assure you that I recognise that there may be a level of anxiety in having to perform jury service while the pandemic continues. I acknowledge that and very much appreciate your coming to perform your public duty as a jury in these circumstances.
>
> Please be assured that your health and wellbeing are a priority. You have already been made aware of the arrangements in place to protect your safety during this trial. If you have any concerns at any stage please speak to the jury attendant or, if necessary, the clerk.
>
> I will now move on to give you some information on the trial, your role and the role of others in the trial and the fundamental legal principles which apply."