Feature

Is it Now Time to Abolish the Dock in all Criminal Proceedings in England and Wales?

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1. New Australian research

A new empirical study in Australia[1] indicates a causal link between the jury delivering a guilty verdict and where a defendant physically sits in court. More than 400 mock jurors took part in a mock terrorism trial and were presented with the same witnesses and the same evidence. There were three separate scenarios: in the first scenario the defendant sat at a table beside his lawyer as is commonplace in the US. In the second scenario the defendant sat in an open dock. In the final scenario the defendant sat in an enclosed glass dock. When scenario one was used 36 per cent of the jurors delivered a guilty verdict. When scenario two was used 47 per cent of the jurors returned a guilty verdict and, finally, when scenario three was used 60 per cent of jurors returned a guilty verdict. The central conclusion was that the more restrictive the arrangement in court the more likely it was that the jury would return a guilty verdict based on subliminal prejudice. This could not be corrected by any trial judge's oral direction to ignore any potential prejudice caused by the defendant sitting in the dock. This research is now having a significant practical impact on the use of the dock in Australia where judges are increasingly having to deal with challenges to the use/form of the dock in specific high-profile cases. On this side of the world it should cause particular concern, because the use of an enclosed glass dock is on the increase with the construction of new Crown Court buildings in England and Wales.

2. Practical implications

Criminal defence practitioners have long suspected that the dock creates a prejudicial environment for the jury when considering the case against the defendant—the sense of isolation (being severed off from proceedings at the back of the court), the feeling that the defendant must have done something to justify being in the dock in the first place, and the fact that this defendant must be a dangerous individual otherwise he would not be in custody.

This potential prejudice is implicitly acknowledged in the Crown Court Bench Book direction that is given in every trial whereby judges routinely direct jurors that they should treat all witnesses equally before they step into the witness box, whether they are called from the prosecution or defence side. The rationale for this direction is to guard against the subliminal prejudice that exists given the prejudicial position in which the defendant sits in court. Prior to this new research it was believed that this standard direction would neutralise this prejudice. However, for the first time (since 2014) there is now reliable empirical evidence that such a direction does not cure the mischief it was designed to guard against.

Further, it supports the proposition that the whole trial process is flawed as fairness dictates that guilty verdicts should be based on the evidence and not on where and how an accused is sitting in court. In short, independent observers would ask: *why should the prosecution have a built-in advantage of securing a guilty verdict based on non-evidential considerations?* A built-in advantage that significantly increases with the more fortified the dock becomes. Both sides—prosecution and defence—should, according to rules of natural justice, have the right to have their respective cases evaluated in a fair and untainted environment. The research, in short, raises core issues for the defence barrister keen to redress the balance between the individual and the state and ensure a fair trial.

3. The American experience

American observers who attend UK courts are often puzzled and alarmed at our use of the dock in criminal proceedings. Why?

In a recent article, David Tait summarises the history and reasons for the US abolition of the dock which explain the adverse US reaction to our unquestioning use of the dock[2]:

"As American courts were built or redeveloped from the late nineteenth century the dock was quietly removed and defendants moved to the defence table. This change was supported by a range of judicial decisions based on right to counsel, then expanding to include the dignity of the accused, the presumption of innocence and the right to a fair trial."

A 1914 court ruling in Pennsylvania held that a dock violated the defendant's common law right to consult his lawyer[3] whilst in California in 1944 a seating arrangement where defendants were not alongside their lawyers was held to breach the state constitutional guarantee of right to counsel.[4]

The rulings about dignity and the presumption of innocence came in the 1970s and 1980s. In the US the Supreme Court found that the use of shackles affronts the "dignity and decorum of judicial proceedings that the judge is seeking to uphold".[5] In 1976 the Court banned the use of prison garb in court as a violation of due process rights.[6] In 1983 the US Court of Appeals for the First Circuit found the presence of a dock to be prejudicial to the rights of an accused person[7]: the court deemed that a dock was a "brand of incarceration" that they held to be "inconsistent with the presumption of innocence". It held that an accused person should appear unfettered before a jury unless there were very strong reasons for doing otherwise"[8].

1 By David Tait, Meredith Rossner and Blake McKimmie. Work presented as a paper entitled *The Dock on trial: courtroom architecture and the presumption of innocence* at the Australasian Jury Research and Practice Conference in Melbourne, October 2014, and at the London School of Economics Law Event in March 2015. Not yet published, but further details can be obtained from the second author: Meredith Rossner, Law Department, London School of Economics and Political Science, M.Rossner@lse.ac.uk

2 "Glass Cages in the Dock: Presenting the Defendant to the Jury", *Chicago-Kent Law Review*, Vol.86, Issue 2 (January 2011) 467-495; at 472-473.

3 *Commonwealth v Boyd* 92 A. 705 (Pa. 1914).

4 *People v Zamorra* 152 P.2d 180, 211-215 Cal 1944.

5 *Illinois v Allen* 397 US 337, 344 (1970).

6 *Estelle v Williams* 425 US 501, 512-513 (1976).

7 *Young v Callahan* 700 F.2d 32, 36 (1st Circuit 1983).

8 *Coy v Iowa* 487 US 1012, 1021 (1988).

Even in the penalty phase of a capital trial, where the person was now legally guilty, the Supreme Court held in 2005[9] "...that the dignity associated with the presumption of innocence now applied. Any form of visible restraint, shackles or a dock would fall afoul of this test."

In short, the present position in the US is that docks are now perceived as an historical anachronism. Indeed, US federal court guidelines make no provision for docks at all. Successful challenges by proactive defence attorneys have in effect removed what was perceived to be a fetter on a fair trial and an unnecessary layer of prejudice to the trial process.

4. The UK experience

In the UK, by contrast, there is a surprising lack of case law on the subject. This conundrum was referred to in a recent article by Linda Mulcahy (Professor of Law, LSE) who stated:

"In direct contrast with the United States the presence of the dock in English criminal courts has received very little attention amongst the public, judiciary or academic community... Textbooks on criminal procedure and human rights invariably avoid discussion of the dock and the indices of specialist books and journals are more likely to mention dangerous dogs than docks. The principles which govern the placing of the defendant are not mentioned in Bench Books and there appears to be no agreement as to the factors which should be taken into account when determining whether the use of the dock is appropriate. The result is that the majority of defendants who pose no security risk and may be accused of petty offences are routinely placed in the dock in English Courts. The placing of the defendant in the dock is commonly treated as the norm and procedural textbooks aimed at newly qualifying students do little to disrupt this expectation."[10]

The only case law that has touched on these areas is that relating to handcuffs—unless there is a danger of violence or escape a defendant ought not to be handcuffed or otherwise restrained in the dock[11]: the method of countering any risk should be such as to create the least risk of prejudice[12]; and that it is wise for a prison to warn prison escort and dock security contractors that there might be some risk of escape does not automatically mean that the risk is great enough to justify handcuffing in court; before ordering such measures, alternative means of guarding against the risk of violence or escape (e.g. having police officers strategically positioned in or outside the courtroom) must have been investigated.[13]

5. Previous failed challenges in the UK to the use of the dock—1938 to 1976

In 1966 the Law Society initiated a campaign for the launch of a pilot scheme in which defendants should be allowed to sit immediately behind their advocate: suggestions were praised as "long overdue"[14] and "imaginative and practical".[15] In 1976 the Howard League for Penal Reform campaigned for a more limited use of the dock. The League had been claiming for just under 40 years that the use of the dock was "arbitrary" and "an anachronism" and that its retention could be justified on no other ground than conservatism.[16] Unlike the Law Society, the Howard League did not recommend the immediate abolition of the dock. There was recognition that full abolition could raise security concerns in a small number of cases and the primary recommendation was that the dock should not be used unless the defendant was known to be violent or there was a clear risk of escape. Both these twin campaigns failed to secure change.

Linda Mulcahy, in the article quoted previously, puts the reason for failure as due to "concerns about the practical repercussions of reform, the conservatism of the Bar and the alleged political naiveté on the part of campaigners". There was the emergence of a "new sensitivity to danger in the courtroom which undermined and continues to disrupt the credibility of calls for reform". It became clear:

"that the various practical objections that emerged in response to the campaigns successfully trumped the more principled arguments of the campaigners that focussed on the importance of dignity, participation and due process. The outcome marked the clear success of the mundane over the principled".

In addition, it is reasonable to assume that the attacks by the IRA against the British establishment on courts and other public buildings would not have assisted the campaign for change whatever the competing merits of the argument. These events made dock abolition a politically toxic issue in the light of security concerns of the day.

6. The European Court of Human Rights dimension

There have been no serious UK challenges in Europe to the use of the dock *per se* in criminal proceedings comparable with the full US challenges of the previous century. The ECHR has accepted that certain forms of courtroom enclosure can amount to degrading treatment and undermine a defendant's human rights. However, the focus has been on the use of cages and barred docks in jurisdictions other than those in the UK.[17]

In the most recent case the Grand Chamber[18] held that there had been a violation of Article 3 (prohibition of torture and of inhuman or degrading treatment or punishment) and a violation of Article 6 (right to a fair trial within a reasonable time) in a case that concerned the practice of keeping remand prisoners in metal cages during hearings.

The court found that holding the applicants in a metal cage during court hearings on their case was a degrading treatment for which there could be no justification. Such treatment constituted in itself an affront to human dignity in breach of Article 3. The court also found that:

"the applicants must have had objectively justified fears that their exposure in a cage during court hearings conveyed to the judges a negative image of them as being dangerous, thus undermining the presumption of innocence".

It found:

"no convincing arguments to the effect that holding a defendant in a cage during a trial was a necessary means of physically restraining him, preventing his escape, dealing with disorderly or aggressive behaviour or protecting him against aggression from outside. Its continued practice could therefore only be understood as a means of degrading and humiliating the caged person".

9 *Deck v Missouri* 544 US 622, 628-29, (2005) (at 633).
10 "Putting the Defendant in their Place–Why do we still use the dock in criminal proceedings" *Brit. J. Criminol.* 2013, 53(6), 1139-1156.
11 *Vratsides* [1988] Crim.L.R. 251.
12 *Mullen* [2000] 6 *Archbold News* 2 (CA).
13 *Horden* [2009] 2 Cr.App.R 24 CA; and see further *Archbold* 2015, §3-232.
14 *Justice of the Peace and Local Government Review* – quoted by Linda Mulcahy, note 10 above.
15 *Law Society Gazette* – quoted by Linda Mulcahy, note 10 above.
16 A. Lieck *"The Prisoner on Trial"* (1938) *Howard Journal*, 5, 39-44.
17 *Ashot Harulyunyan v Armenia* (App. No.34334/04) ECHR June 15, 2010; *Sarban v Moldova (App.* No.3456/03) ECHR October 4, 2005; and *Ramishvili and Kokhreidze v Georgia* (App. No.1704/06) ECHR January 27, 2009.
18 *Svinarenko and Slyadnev v Russia* (App. Nos 32541/08 and 43441/08) —July 17, 2014.

The court reiterated that the:

"very essence of the Convention was respect for human dignity and that the object and purpose of the Convention as an instrument for the protection of individual human beings required that its provisions were interpreted and applied so as to make its safeguards practical and effective".

It found that:

"holding a person in a metal cage during a trial constituted in itself—having regard to its objectively degrading nature which was incompatible with the standards of civilised behaviour that were the hallmark of a democratic society—an affront to human dignity in breach of Article 3".

The right to a fair trial implies the right of an accused to be present so that he may participate effectively in the conduct of his case. This was the point at issue in a Strasbourg case that arose from the UK.[19] Here the applicant alleged that he had been denied a fair trial in Norwich because he could not hear all the evidence against him due to being in a glass-fronted dock. Whilst recognising the right of the defendant to "hear and follow the proceedings" and accepting that the defendant did have difficulties hearing the evidence, the court ruled that counsel should have brought the matter to the attention of the trial judge at the time. There was no evidence of professional negligence or incompetence so the court would not intervene. The court did agree that a "fair trial did require a person to be able to hear the evidence presented against him or her".

7. Core arguments for dock abolition in the UK

(i) The empirical research in the Australian 2014 study illustrates the danger of guilty verdicts based on subliminal jury prejudice concerning where and how a defendant is seated in the courtroom and not on the evidence. A prejudice that cannot be neutralised by the current routine bench book direction.

(ii) The need to ensure ability to communicate with the lay client during the trial. Even the most prepared and thorough counsel will be aware of the unpredictability of the trial process and the danger of the unexpected response to questions in cross-examination. At present with the defendant at the back of the court the ability to quickly consult with the lay client is rapidly lost. Further, the convoluted process of the defendant having to write notes on points which are then passed from the dock to the solicitor's clerk and then onto counsel (with a tug on the gown at an appropriate moment in the evidence) seem archaic and ineffective when compared to the advantages of having a defendant seated next to counsel as per the US system.

(iii) The successful arguments as deployed by proactive US attorneys are based on the right to counsel, the dignity of the accused, the presumption of innocence and the right to a fair trial. All these factors have been shown to outweigh security considerations requiring automatic use of the dock.

8. Core arguments for dock retention in the UK

(i) The belief that any subliminal jury prejudice can be cured by an appropriately worded trial judge direction. The problem with this argument is that the 2014 Australian empirical data strongly suggests this is ineffective.

(ii) Security issues—custody defendants (dangers of escape) and defendants with severe personality/psychiatric disorders (posing grave dangers to third parties). These concerns would not prima facie be applicable to defendants on bail.

The objection on security grounds could be neutralised by having security in less obtrusive ways. If the defendant were disruptive then there is the option as a last resort of using prison video links (PVL) in an appropriate way. US courts have specifically managed the risk of violent outbursts in a number of ways—the strategic placing of court bailiffs, uniformed or plain-clothed guards near to the defendant or courtroom exits, handcuffs, leg-cuffs and, *inter alia*, concealed shock belts. Linda Mulcahy (*supra*) points out that:

"enhanced security measures are only used when the security risk was clear, serious or necessary to prevent escape, protect others in the court room or maintain order. In order to guard the defendant against unwarranted use of restraints, a pre-trial hearing was commonly required to establish that restraints are necessary.[20] Even where such measures are used considerable emphasis has been placed in the US on the need to render restraints as invisible as possible.[21] This case demonstrates just how far US courts are expected to go in order to avoid prejudicing the defendant. The accused in that case had been sentenced to life imprisonment for first and second degree murder as well as aggravated sexual abuse. While in prison prior to trial he brutally killed a correctional officer and committed three additional acts of violence. The trial court determined that precautions were required in the trial on the grounds of safety. The defendant's legs were shackled and a black belt was used to restrain his hands. However, the tables were draped to hide the shackles and the defendant wore a black sweater to conceal the belt. In other instances the defendant may be seated in the courtroom before the jury enters in order to prevent them from seeing restraints being fitted and the defendant is not to be removed to a detention area until after the jury has left the court room."

The important lesson from a UK perspective is that defendant security issues can be resolved if approached from a more imaginative and mature perspective.

9. Conclusion—time for change?

The implications of the Australian jury research and the challenges that are currently taking place on this issue in various Australian courts will inevitably impact on the UK criminal justice system. The arguments that seek to justify the current retention of the dock lack the cogency of the successful arguments that were deployed in the US from the first rulings in Philadelphia in 1914 on this issue. It is submitted that it now time to seriously consider abolishing the use of the dock. This pressure is bound to increase when TV and cameras are eventually allowed into the trial courts. It seems the natural product of a transparent trial process. In January of this year, Lord Thomas of Cwmgiedd was quoted as saying that the removal of the dock would cut costs and improve communication.[22]

A trial needs to be a fair and open process that is not skewed by irrational jury prejudices that flow from where/how a defendant is seated in court. Different practical problems are presented by those defendants on bail and those in custody but it is clear that all security objections can be effectively met given the experience of the US model and how it has responded to these various challenges. The UK should not be afraid of change if it improves justice.

19 *Stanford v UK* (1994) Series A/282-A-No 16757/90–ECHR 1994 (*Archbold, Criminal Pleading, Evidence and Practice* 2015 Chapter 16-96 p1924.

20 *Holbrook v Flynn* 475 US 560, 106 S Ct 1340, 89; L.Ed.2d.525 (1986).

21 *United States v Battle* 173 F.3d.1343 (11th Circuit) (1999).

22 The dock has had its day says Law Chief", *The Times*, January 27, 2015, p.15.