

Courts in the Pandemic – A View from the Bench

When we would otherwise be gathering for the Bench & Bar, Miss Senior from last year's event, Ruth Higgins SC, asked some questions of the Guest of Honour, The Honourable Justice Julie Ward CJ in Eq, about the view from the bench during the pandemic:

What, from the perspective of the Bench, can practitioners (both solicitors and counsel) do to make remote Court arrangements more effective, and enhance the presentation of their client's case? Does this differ depending on whether the hearing is conducted by telephone or over Microsoft Teams?

As the profession will be aware, judges in the Supreme Court are conducting "virtual" civil hearings in a variety of ways (mainly by use of the Court's video facilities or through Microsoft Teams), largely depending on: the court room in which the virtual hearing is taking place; the judge (and Counsel/solicitors' preference); and other relevant factors. Although at the start of the pandemic there was some difference between the two, in general both systems are now equally efficient (particularly with improvement in the bandwidth available to the Court, the "triaging" of virtual hearings, and increasing familiarity with the systems on the part of both bench and bar).

As to the presentation of cases in the virtual court room, those practical aspects that have the most impact on the presentation of a client's case are all about ensuring a clear conduit for the message Counsel are seeking to convey: having a secure internet line; making sure that the microphone picks up your pearls of wisdom (not just that the judge and witnesses can hear but that the court reporter or sound recording is accurate). Those apply whether the hearing is a video hearing or a hearing over the telephone.

Preparation is key – where are the participants to be located? How will you communicate between members of your legal team? How will you send through documents to the Court? Where will witnesses be located? How will you ensure the integrity of their evidence? Will interpreters be required? Where will they be located? Will the judge have all the relevant materials (difficult if you only email them through at the last minute before the hearing!!)

Remember the limitations of the virtual court room – on a telephone hearing it is very difficult for court reporters (let alone the judge) to know who is saying what if people do not identify themselves; and it is very easy for everyone to end up talking over each other (particularly if there is a time lag in the audio). And remember that even though it may not feel like a court room, it is! And there is much more that can be heard in sotto voce comments than might ordinarily be the case....

Is there anything about the current arrangements that you, or other Judges of the Court, prefer to the traditional arrangements, that you would like to see continue once court practice resumes?

As to what might be continued once the current arrangements change, there is no doubt that the current environment has led to improvement in the Court's technological functions (and has helped to educate technological luddites – like me – in virtual technology. On-line court technology and practices can only benefit from this.

Have the Covid arrangements changed the experience of being a Judge, both in empty courts and when working remotely from home? From a practitioners' perspective, many oddities have emerged. Perhaps most strikingly, parts of our homes have become extensions of the Court where improper conduct is punishable as a contempt. Are there equivalent kinds of new experience for the Bench?

The current Covid arrangements will have had an impact on all of us. It is surreal to be robed and sitting in an empty court – and very isolating to be bereft of the usual interaction (and intellectual sparring) with Counsel. From the view of the bench, perhaps the most annoying aspect is the phenomenon of calls being placed on hold – with the loud music that ensues (or in one case, an advertisement for the law firm in question!). That said, the Court is fully aware of the difficulties of practitioners operating from home, or witnesses giving evidence in more informal locations. So, the occasional barking dog in the background (or vocal parrot) is not an issue.

What has been the hardest thing for the Bench operating during Covid?

From a personal perspective, the hardest thing has been managing the Division during Covid – I thought coping with the Great Flood of 2017 was hard – this has been much harder. It is the logistical nightmare of keeping matters running, triaging the court times, and ensuring that the administration of justice continues notwithstanding the practical difficulties of virtual trials, that has kept me occupied since lock down. For individual judges, the complaints I hear about the most are of video lines dropping out, calls being interrupted, delays in the orderly conduct of the hearings, and concerns about the management of hearings. (Calls on hold are a big “bugbear” for those managing lists.) It has to be said that there is much to be said for the traditional court room – where one can see who is speaking and have a better opportunity to interact with Counsel. And I expect that it is better for witnesses to understand the court process if they are in an actual court rather than a virtual court.

The courts have been treated as an essential service during the Covid lockdown, in a manner that reflects their crucial role in the administration of justice and the maintenance of civic order. Judgments concerning adjournments have been linked to in the press’ Covid commentary. But certain exceptional arrangements have also been necessary; including deferring the swearing of oaths on affidavits, which practice has otherwise been necessary for many centuries. Do you believe that the community’s view of the legal system will have been altered at all by the arrangements adopted for the Courts during the lockdown, and if so in what ways?

I would hope that the community would respect the fact that the court has been able to adjust its processes so as to continue to operate under very challenging circumstances. I think that the community’s perspective of the administration of justice would understandably be lessened if we had not been able to battle on. I trust that any perception of informality conveyed by the current court processes will, however, be short-lived and quickly be dispelled once we return to a more traditional mode of operation.

And one last tip for the profession – avoid Reply All when responding to an emailed judgment. Although there may be something to be said, in this day and age, for immediate feedback on one’s performance – reply all direct to chambers is not the best way to do it!