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Virtual hearings in English litigation

BY MARK HUMPHRIES

Well before the 2020 coronavirus (COVID-19) pandemic removed the element of choice, virtual hearings were already fairly common in English civil litigation. The most usual format was the telephone hearing – useful for a case management conference in which parties or their legal representatives would otherwise need to travel significant distances.

This was hardly a surprising development. The Civil Procedure Rules had declared that the "overriding objective" to deal with cases justly and at proportionate cost included the saving of expense and the active management of cases so as to deal with them without parties needing to attend at court.

It could be argued that the requirement to try to avoid attendances at court had not been interpreted sufficiently robustly by case management judges. It seems to have been thought that it mandated the avoidance of court hearings altogether, whereas it could equally be interpreted flexibly as a direction to avoid wasteful travel time and costs where more efficient alternatives such as virtual hearings exist.

Telephone hearings are now on the wane. Almost all hearings are currently dealt with by video link. This is a helpful development. Most people have moved away from landline telephones to mobile devices and the best reception is now obtained via broadband internet. The savings in time, travel and accommodation costs, to say nothing of the reduction in carbon footprint, are significant.

But the most notable aspect of virtual hearings is that there has arguably been no material change in the quality of the court experience. That indicates that the efficiencies of virtual hearings are achievable with no countervailing impact on the ability of the court to deal justly and fairly with the case before it. If that is the experience of court users generally, then it must follow that virtual hearings are here to stay.

Of course, there are inevitably certain issues with virtual hearings that would not arise if the hearing took place in the courtroom. The most obvious is the occasional technological hiccup. But, after one or two serious problems had been encountered at the beginning of the pandemic, these issues appear to have been resolved and interruptions tend to be brief and quickly resolved with specialist IT support at hand. Although it would be wrong to single out specific courts and tribunals for special commendation, it would be hard not to mention the quality of the streaming services made available by the Supreme Court and the Competition Appeal Tribunal.

Less obvious, but important, is the reported feedback from judges and

advocates that time spent in virtual hearings can be more intense, and therefore tiring, than in the courtroom. That may be just because the online environment is less familiar; but in any event, it is a problem that can easily be dealt with by mid-morning and mid-afternoon breaks which are very common in any event in hearings that are being transcribed by stenographers who themselves cannot be expected to work for hours without a break.

Sir Julian Flaux, chancellor of the High Court, has warned that new advocates, whose careers have been formed in an era of virtual hearings, risk losing the inherent sense of how to behave in court. It is difficult to see that as a serious risk, given the education and training that advocates have to undertake. But some things need to change in an online setting.

By way of example, it is inevitable that ways need to be found to accommodate the fact that barristers, solicitors and clients in different geographical places still need to communicate with each other. If that involves messages being passed among legal teams via WhatsApp or comparative instantaneous communication technologies, it is difficult to criticise. But there is little evidence of a loss of decorum, of any changes in the way that judges are addressed or any other absence of formality, at least not among legally qualified advocates. There may perhaps be other challenges in cases involving litigants in person, but those same challenges exist in the physical courtroom. Sufficient tools are available to the judiciary to maintain standards while still embracing the latest and most efficient technology.

Absent these minor challenges, nobody seriously doubts the virtues in civil and commercial cases of making permanent the temporary availability of virtual hearings that was introduced by the coronavirus legislation. There can be no going back – no presumption that the way things were is the way things should be. That which began out of necessity should continue because it is advantageous to most litigation stakeholders. For most clients and witnesses, as with most solicitors and barristers, it is easier and less expensive for them to appear at court via their home computers.

It may be the case that some judges and some of the older generation of lawyers will regret this development, believing that the overall court experience can never be as satisfactory in a virtual courtroom. But, at the risk of sounding unsympathetic, lawyers' experiences are of little interest to clients, witnesses and the very many entrepreneurial lawyers who understand the need to reduce the cost of litigation above almost every other consideration. It would be different if virtual hearings resulted in serious harm to the quality of the litigation process, but there is no evidence that they have done anything other than to increase efficiencies.

There is still much to do if we are to reflect the efficiencies of virtual hearings in other aspects of the litigation process. One aspect that has developed apace as a consequence of hearings taking place remotely is that hearing bundles are now almost exclusively electronic and used by all stakeholders. It is now the case that, when an advocate asks everyone to turn to page 2,456 in the court bundle, everyone can get to the very same page by typing a few characters on a keyboard. There is no time for opening and closing files and no justification for the environmental damage caused by excessive printing. Other parts of the litigation process still lag behind in the dark ages. Once the curse of general disclosure has been removed, for example, we will begin to feel that we have a dispute resolution process fully fit for the digital age.

Going forward, virtual hearings in civil and commercial cases should be the norm. There will need to be very good reasons for requiring all stakeholders physically to attend court when technology has rendered that unnecessary. ■

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