

IS THERE A SILVER LINING TO COVID-19?

MASTER ROSEMARY JEFFREYS

On 19 March, it was decided that court hearings could only take place if at least one participant attended remotely, and on 23 March, jury trials were halted altogether for several months.

Many barristers have not been in (physical) court since the Covid-19 crisis began. An excellent webinar in late July, organised by the Barristers' Committee, and led by Matthew Richardson of Coram Chambers and Darren Howe of 1 Garden Court, gave some really good practical advice about remote participation in court work, for which those able to attend were truly grateful.

I had been thinking for some time about the changes in working practice brought about by Covid and whether any of them might be for the better and which might remain in the longer term. I talked to several younger members of the Inn, from different areas of practice, to seek their views. Without exception, they were coping thoughtfully and ingeniously with the many problems. One of the most difficult things has been the uncertainty of not knowing how long the current state of affairs will continue.

It seemed easiest to conduct our conversations in a structured way, with questions on the following lines:

- How has your area of practice been affected by Covid-19? Are you doing any court work in person, or is it all remote?
- Are there any advantages to working remotely?
- What are the main disadvantages?
- How has your style of advocacy changed?
- What permanent changes do you think we will see?

Lucinda Orr

Lucinda is Chair of Gray's Inn Barristers' Committee; her area of practice is commercial litigation and she is a partner, as an employed barrister, in a specialist disputes firm. She has a three-month trial due to begin in October, but the judge has yet to order how much will be heard remotely – possibly all of it. Since the lockdown began, Lucinda has had two interlocutory hearings conducted

remotely which would have been heard in person, and one contested strike-out, which settled. A six-week trial due to have taken place in March was postponed till January 2021.

Although many of those due to attend a hearing in her cases travel from abroad, it does not necessarily save money to hold a hearing remotely, as the costs of setting it up can be high. There are many obvious disadvantages, including, most importantly, that one cannot see the *whole* witness giving evidence remotely. We should not forget that most litigants want their day in court, and a bit of the mystery is lost with remote hearings. There are many practical difficulties in the stages leading up to the hearing, whether itself remote or in person: it is more difficult to engage with witnesses and face to face discussions with foreign lawyers, while normally desirable, will involve quarantining for most of those who travel.

Looking at the conduct of the remote hearing itself, now that people might not necessarily be at home alone but could be giving evidence from conference rooms in offices, there can be tricky questions arising, such as how to ensure that witnesses are not in the same room as the solicitors and barristers or being prompted by people off camera. Such hearings, of course, require the most careful preparation: you can't just hand up a document, and it is even more important than ever to make sure that people who do want hard copies have them (not the easiest thing to organise in a lockdown).

One of the things that attracted Lucinda to employed practice was team work, which has changed considerably with the lockdown. She has observed that junior lawyers are not learning and developing as fast as they do in a more normal office/chambers environment, and it is important for team leaders to be aware that people further on in their careers, who are normally quite happy to work alone, may have childcare responsibilities that make it exceptionally hard to work at home. Much of the invaluable 'chat by the water cooler/photocopier' or 'popping in for a quick check' has had to go, for now: it takes more effort to pick up the phone. On the plus side, Lucinda has found that the new way of working has made it much easier to concentrate, uninterrupted, on drafting.

Libby Anderson

Libby is a criminal practitioner – both defence and prosecution. She continued attending court throughout lockdown, but has not done a trial since March. Libby has found, as did everyone else I spoke to, that admin matters can work very well remotely: case management hearings for example. One benefit is that when hearings are listed remotely it often makes it possible for instructed trial counsel to attend, which all too often was not possible pre-lockdown, due to diary clashes. However, anything involving weighing the credibility of a witness really does not work at all, and persuasive advocacy, such as a plea in mitigation, is much better done in person. The difficulty of communicating with clients is something that the rest of us can only sympathise with; solicitors have found that it can take months, literally, to arrange a video-conference with a client in prison.

The Crown Court started back at the end of May, and a few trials are now taking place. The requirement for social distancing means that two to three courtrooms are used for a single trial, in order to space the members of the jury, meaning that fewer trials can be heard: at the last count, 60 to 70 per week, across the whole country. The existing backlog in the criminal courts is ever increasing, which has led to at least one judge refusing to extend the custody time limit for a defendant awaiting trial.

Thought is being given in the Court Service to various solutions to reducing the backlog, such as extended court operating hours, involving a morning and afternoon shift. Practitioners, however, fear that this would cause particular difficulties for those with childcare responsibilities, as well as restricting the time available for counsel to complete essential work such as trial preparation, drafting and taking instructions.

Gwyn Evans

Gwyn undertakes a mixture of property and family financial work. He has seen some hearings, which have all been remote, though none has involved live evidence – they have been mainly case management hearings, interim applications or FDR appointments. Like everyone else to whom I spoke, he has found that administrative hearings can work well remotely, and he is pleased to avoid a 50-minute commute each way every day. Good organisation is key, and good computer hardware, software and connectivity are essential.

On the family law side, he understands from colleagues that children cases have been very difficult. With his own financial remedy practice, though, he has observed that far more is done by email than before – especially negotiations between counsel, and communications about drafting, which would otherwise have taken place in person at court. He noted the ascendancy of written advocacy, and the increased need for attention to detail, and attention to concision, in written submissions, application notices and witness statements.

Samantha Jones

Samantha has a mixed practice: in her case, a mix of civil (clinical negligence and PI) and public law, which over the last couple of years has mainly meant the Grenfell Tower Inquiry. As it happens, her part at this stage was always going to be behind the scenes, preparatory to her involvement in later modules in Phase 2 – even before Covid. She is Lead Junior Counsel for the Inquiry, and over the past months has been concentrating on preparing the documents for the next stage. Like Lucinda, she found that working in teams requires more organising, and that is necessary to have weekly team meetings, for example, in order to give proper support. She has found, on the civil side, that case management hearings have become much easier when done online, and some PI clinical negligence matters can also be dealt with conveniently on the phone. She has had some hearings involving advocacy, which have been perfectly workable, but, as with all persuasive advocacy, would be much better done in person. The structure of online hearings has stayed the same with formal submissions, dress etc, but of course the set-up has changed. One minor thing she has found quite difficult is the etiquette of hearings on line: knowing when to speak for example, as I have noticed myself when participating in large meetings on Zoom, putting my hand up to ask to speak!

Thomas Jones

Tom is at the junior common law Bar. For him, there was a period, for about a month or so, when the County Court was running very few, if any, cases. For the junior members of his chambers, this was a worrying time. The common law sets started to think of creative ways to keep the most junior members busy, including attempting Fast Track and Small Claims mediation services online.

Tom does a lot of Court of Protection law, and managed to arrange a part-time secondment to the Court of Protection team at the Welsh NHS's litigation department. He described this as a very interesting way of filling the gap caused by the reduced court work. Much like Gwyn, he has also found that email traffic has increased, taking the place of pre-hearing discussions at court.

On the whole, he has had a broadly positive experience of attending remote hearings. However, he – like his junior colleagues in chambers – is missing the cut and thrust of in person advocacy: as he put it to me, 'it's just not the same cross-examining a witness in your shorts and slippers'!

In closing ...

I will just say that I am most grateful to everyone I spoke to for sharing their thoughts, but this is a huge topic, and I am conscious that I can do no more than skim the surface in a short article. I hope that it will nevertheless prove of some interest, and maybe prompt further contributions. ■