

When normality returns

Geoffrey Bindman reflects on the future for remote justice after the pandemic



We are assured that the pandemic will end and normal life will be resumed. But it is becoming clear that some lasting changes to the legal system are inevitable. Some are already under way.

The most far-reaching could be a switch from close human contact in dedicated work environments, which has been the norm hitherto, to remote communication, even when no longer demanded by the risk of infection. Working from home has obvious attractions compared with commuting to centralised offices. Combined with a developing trend to reduce the physical presence of lawyers in court hearings, the prospect looms of a drastic upheaval.

If disputes no longer require the physical presence of lawyers in court, do we need courts at all? And if lawyers can do all their work at home, do they need to keep up separate offices?

Long before the pandemic, the pressure to replace traditional judicial structures had begun. Gathering litigants, lawyers, witnesses, and judges together in a single room is surely a pointless extravagance when technology enables them to communicate effectively from a distance, even from their own homes. Governments love the idea. Think how much money can be saved with no expensive buildings and travel costs.

Such changes have been championed in reports by Lord Briggs and others and are already enthusiastically promoted by government. The Ministry of Justice describes a detailed reform programme on its website—though there have been delays in implementing it. Now the Remote Courts Worldwide Project has been launched by the guru of legal technology, Richard Susskind, president of the Society for Computers and Law (see *NLJ*, 3 April 2020, p5). Roll on universal justice at the press of a button!

Since the coronavirus began to spread, the pressure has accelerated. Online courts now have a twofold selling point. They save time and money. And they avoid the risk of infection through personal proximity. As many lawyers have found since the pandemic erupted, not only court hearings but all other face-to-face contact in the daily business of the legal profession must be minimised. Not only the humble telephone, but a variety of electronic platforms such as Zoom, WhatsApp and Skype are being pressed into service. We can see and be seen at a distance as well as talk.

In *NLJ*, 27 March 2020, p19, Nageena

Khalique QC and Sophia Roper discuss *Clinical Commissioning Group v AF & Ors* [2020] EWCOP 16 in which they represented the Official Solicitor. This was the first case to be heard entirely online using Skype for Business. The issue was whether a hospital patient should continue to receive clinically assisted nutrition and hydration. The day before the trial was due to start, on 17 March, the Prime Minister announced that all non-essential contact should stop because of COVID-19. Mr Justice Mostyn called an urgent telephone hearing to discuss whether the trial should go ahead. He ruled that it should, but online. Arrangements were rapidly made for the five parties, 11 witnesses, court staff and judge to be linked up.

'With a very short extension to the court day,' the two counsel write, 'we finished in the allotted three days. Was anything missing? In truth nothing that mattered,' they conclude, pointing out that pre-hearing discussions could take place before the judge was connected, and that using a computer for the hearing left everyone's phone free for the equivalent of notes being passed during examination or whispered instructions. While not claiming this as a model for all future litigation, they advocate this as the way forward for many cases once the pandemic is over.

However, there is another perspective, which is not addressed in the Khalique and Roper article. What about the client? The patient's daughter (let us call her Sarah) was a witness and apart from her father the most important participant, with an acute concern for the outcome. She was in a remote solicitor's office in an otherwise empty building. She was accompanied by her solicitor and by Celia Kitzinger, honorary professor at Cardiff University School of Law and Politics and co-director of the Coma and Disorders of Consciousness Research Centre, who has much experience of similar cases. Except when giving her evidence, Sarah was invisible to the other participants. Professor Kitzinger (see 'Remote justice: a family perspective'; guest post at transparencyproject.org.uk, 29 March 2020), says that families in other cases have often talked about the gravitas attached to the courtroom hearing. It can feel intimidating but 'it is also reassuring evidence of the seriousness attached to the case and the ceremonial impartiality of justice'. Sarah was denied it.

Professor Kitzinger records her eloquent protest: 'In a courtroom people can see body language. They can feel the pain and emotion when you speak about that moment of utter desperation you went through. But I was in a little one-inch box on a screen and being honest. I bet half of them weren't even engaged in looking at it—as the judge couldn't monitor them to make sure they were paying attention. Skype took away from me the ability to look these people in the eyes—these people who have their opinions about my Dad and only knew him through third hand notes. I wanted to look them in the eyes and make them hear the truth but I was looking at a computer screen.'

The pressure to abandon face-to-face adjudication in favour of cheaper online methods is relentless but economy and the convenience of lawyers must never be allowed to sideline those directly involved. When the personal and direct involvement of individual participants is of vital importance, face-to-face hearings will have to continue. Online communication will not do.

Will we then have a dual system? Real courts could remain for personal issues—family, health, social welfare, crime. For such matters direct contact between lawyers and their individual clients would have to be maintained in some form. The great body of commercial and financial work could be moved to the virtual sphere.

Technological developments and the coronavirus have now fortuitously combined to compel us to confront the polarisation of the profession. The whole of legal practice will have to be re-evaluated. Some large firms are already outsourcing work to far-flung places where costs are lower. Why not the whole firm?

Such questions will occupy the thoughts of many lawyers over the next few months and years. What will happen to the lavish office buildings, with their huge empty atriums (or should it be atria?). They could alleviate the housing shortage by conversion into flats. Economic prospects will be the primary factor in the anxious discussions which will be taking place in every firm and chambers but the Law Society and the Bar Council will also need to grapple with the overall direction of the profession. Interesting times are ahead.

NLJ

Sir Geoffrey Bindman QC, *NLJ* columnist & senior consultant, Bindmans LLP.