

Remote Hearings: All Change, Please, All Change?

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There has been a shift in the work and workings of all courts since 23rd March 2020 and a lot of talk (in and out of courts) of the 'new normal'. This article does not propose to explore those wider or more esoteric issues. Changes were sudden and it does not seem unreasonable (at least to this author) that individuals and institutions needed some time to adjust to them. In the immediacy of 'lockdown', judges and court staff were forced to make quick decisions about what was 'manageable' in the days, and possibly weeks, ahead. In those days and weeks, however, discussion has continued about the ways in which courts might function, including the 'types' of cases which might be suitable to be heard remotely.

Recently, the three DCJs for the Western Circuit have issued a Protocol for remote hearings in that area. It is unlikely that this will be radically different from practice in other areas. There is an emphasis on collaboration and co-operation between parties over and above what was anticipated in the heady days of the Woolf reforms and introduction of the CPR.

There are, and will remain, a number of practical considerations in terms of hardware (and software) which will be available to parties in litigated civil claims: again, this article does not seek to explore which platforms may be considered preferable, available, etc. What the lawyers should keep in the forefront of their minds is how the witness(es) will be able to participate in the trial. Consider, for example, whether the witness is self-isolating/shielding and if s/he has access to suitable equipment/wifi/credit to attend remotely. Is there anyone in the same house/room? The facilities in the individual court will also have an impact. All of these practical considerations will be common to all jurisdictions.

There has been some, at least anecdotal, discussion about whether remote hearings are suitable for civil trials although the judicial encouragement to 're-energise' civil proceedings is clear. Perhaps inevitably, the most contentious area of discussion has related to trials where there are allegations of fundamental dishonesty: doubtless this is based upon the judge being able to form a fair and accurate view of the witness' credibility and whether this

is feasible remotely. Few (if any) civil cases would have been considered to carry the same urgency as some of the cases requiring the courts' attention in the sphere of public law family work where issues of child protection meant that some hearings had to proceed in some form. Can the civil practitioner take anything from the judgments already delivered from the Family Division on this question?

The first reported judgment on the question of remote hearings was given by the President of the Family Division: Re P (A Child: Remote Hearing) [2020] EWFC 32. Importantly, from a practitioner's perspective, the issues in this case involved allegations that the child's mother had intentionally inflicted harm upon her through a "fabricated, or induced illness [FII]". Cases of this nature typically involve allegations that the carer has sought medical treatment/intervention on behalf of the child by claiming that the child has symptoms which s/he does not, or by the carer causing such symptoms so as to merit such medical intervention. The President described these "particularly unusual cases" as "a particular form of child abuse which requires exquisite sensitivity and skill on the part of the court." This case had been described as "extremely complicated".

The President said, "It is a type of hearing which, certainly at first blush, seemed to be well outside the categories of hearing which could be contemplated as being appropriate for remote hearings before the Family Court. I make that observation in the narrow context of this being an allegation of FII. ... [F]rom a judge's perspective ... it is a crucial element in the judge's analysis for the judge to be able to experience the behaviour of the parent who is the focus of the allegations throughout the oral court process; not only when they are in the witness box being examined in-chief and cross-examined, but equally when they are sitting in the well of the court and reacting, as they may or may not do, to the factual and expert evidence as it unfolds during the course of the hearing."

Shortly thereafter, and without criticism of the earlier decisions, the general assessment of witnesses was considered by Lieven J in the case of A Local Authority v Mother and Father and SX [2020] EWHC 1086 (Fam). Here, the scheduled hearing was to decide, amongst other things, which of a baby's parents had inflicted serious injuries upon it (if, indeed, they were non-accidental) and caused its death. The hearing had begun entirely remotely and the court had heard evidence from various expert witnesses during the first five days. Lieven J's helpful discussion begins at paragraph 15 of her judgment with an overview of the background and a review of many of the points in Re P and the 'intervening' decision in the Court of Appeal in Re A (Children) (Remote Hearing: Care and Placement Orders) [2020] EWCA Civ 583 (in which the President also sat). The judgment becomes particularly relevant to the civil practitioner (and court) considering cases involving questions of fundamental

dishonesty at paragraph 23. The quotation set out (in fact, from *R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391) is too lengthy to be repeated in this article, but is cited by Lieven J with evident approval and urges great caution about the emphasis to be placed upon the 'demeanour' of any particular witness and the conclusions which may be legitimately drawn therefrom. It bears reading. The court also noted that it is not unusual in family and criminal courts to have witnesses give evidence via a video link for a variety of reasons: 'historically' this has not been thought to diminish that evidence and indeed has been used to good effect to elicit 'best evidence' from some vulnerable witnesses. As was highlighted, it will very often be the other available evidence or inconsistencies in the witness' own account(s) which fatally undermine, or otherwise impact, the question of his or her credibility. Lieven J decided (albeit for a variety of reasons, not based solely on the ability to see the parents in the 'actual' courtroom) to continue with the trial entirely remotely.

It is worth noting that a great many family cases involve the credibility of witnesses. Anecdotally, some professionals who have conducted remote trials have commented that, whilst reduced in size, the focus on a witness' face 'on screen' during his or her evidence can seem to leave "fewer places to hide".

Even in the few weeks since the world appeared, to some, to shift on its axis, courts are, at least in places, returning to something we all recognise from before, although few (if any) professionals think things will ever be the same again. On 9th June, Sir Andrew McFarlane issued some further 'guidance' in his document "[The Road Ahead](#)" in which he envisages a 'long road', rather than a rapid return to what we used to know. He recognises what we have been seeing around us: more courts are gradually and carefully 'reopening', with a return to jury trials and so on. All manner of hearings are being arranged which take into account all of the individual circumstances of any given case, including 'hybrid' hearings, where some participants may attend physically in the court room whilst others may be 'remote'. What the various guidance documents and these (and subsequent) reported judgments of the family courts have emphasised so far is that these decisions about how hearings may be conducted are ones that must be taken on a case by case basis: on their truly individual circumstances. The 'Conclusions' reached by Lieven J were as specific to that case as those in *Re P* were to Sir Andrew MacFarlane P. What they also establish, however, is that there is unlikely to be a wholesale granting of lengthy adjournments and there is no category of case which is simply unsuitable for a remote hearing: the need to assess a witness' credibility is not a determinative factor, *per se* in the resolution of that question.

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