

“Justice is Not Justice Through a Computer Screen”

Introduction

1. ‘I’m here live, I’m not a cat!’ cried Rod Ponton as the avatar of a kitten peered wistfully at the 394th Judicial District Court in Texas from the *Zoom* tile where Ponton’s face should have been. A video of this went ‘viral’ and shows the technological difficulties faced by those whose work moved online because of the COVID-19 pandemic. ‘These fun moments’, said Judge Roy Ferguson, who presided in the matter, ‘are a by-product of the legal profession’s dedication to ensuring that the justice system continues to function.’¹
2. The same dedication was evident in this country when home working became widespread following the UK Government’s March 2020 decision to implement social distancing measures to slow the spread of COVID-19 and prevent the NHS from being overwhelmed.² These impacted the court system and remote meeting technologies like *MS Teams*, *Skype* and *Zoom* were harnessed so that legal matters could continue remotely where possible.³ In the House of Lords Select Committee on the Constitution Hazel Genn, Professor of Socio-Legal Studies at UCL, described the UK court system’s starting position and capacity to deploy technologies in the service of justice as ‘below sea level’.⁴
3. Despite this handicap, technology was deployed for hearings in courts and tribunals around the country. On 23rd March 2020, 550 hearings were conducted using remote audio and

¹ Adam Gabbatt, ‘Texas Lawyer, Trapped by Cat Filter on Zoom Call, Informs Judge He is Not a Cat’, *The Guardian*, 10th February 2021, available online at: <<https://www.theguardian.com/us-news/2021/feb/09/texas-lawyer-zoom-cat-filter-kitten>> accessed 16th February 2021.

² BBC News, ‘Social Distancing May be Needed for ‘Most of the Year’’, *BBC News*, 20th March 2020, available online at: <<https://www.bbc.co.uk/news/uk-51977802>> accessed 13th February 2021.

³ UK Parliament, Justice Select Committee, ‘Coronavirus (COVID-19): The Impact on Courts’, 30th July 2020, available, online at: <<https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/519/51902.htm>> accessed 12th February 2020.

⁴ UK Parliament, Select Committee on the Constitution, ‘Corrected Oral Evidence: Constitutional Implications of COVID-19’, 3rd June 2020, available online at: <<https://committees.parliament.uk/oralevidence/462/pdf/>> accessed 12th February 2021.

video technology. By 24th April 2020 this number had risen to 2,800.⁵ Some lawyers have praised the benefits brought by remote working, like the ability to conduct large amounts of work from home without the need for extensive travel.⁶ However remote working also brought hazards. In *C (A Child)*, these had starker consequences than those experienced by Rod Ponton, when the Court of Appeal considered a matter where a judge was overheard making pejorative comments about a litigant. She had been unaware her laptop was still connected to proceedings when she retired.⁷ This essay considers how the courts have responded to the challenges and opportunities remote technologies have brought, the balances they have sought to strike between effectiveness and efficiency in their use, before turning to what might be lost when conducting justice through computer a screen.

Remote technologies in action

4. The pandemic has seen the courts acknowledge the importance of assessing when the use of remote technologies in judicial matters is appropriate and when it is not. In *Re A (Children)* the Court of Appeal set out 10 factors family courts should consider when making a decision on whether to use remote technologies or whether hearings should be conducted in person. These included the nature of the issue to be determined, the need for urgency, whether parties were legally represented and the ability of lay parties to engage with and follow remote proceedings meaningfully.⁸
5. Setting out the factors to be considered in deciding how a case should be heard shows the courts' recognition that remote justice is possible, but that it carries risks and may not be suitable in every instance. It is right that the court highlighted the capacity of lay parties to

⁵ UK Government, 'Courts and Tribunals Data on Audio and Video Technology Use During the Coronavirus Outbreak', 30th April 2020, available online at:<<https://www.gov.uk/guidance/courts-and-tribunals-data-on-audio-and-video-technology-use-during-coronavirus-outbreak>> accessed 12th February 2020.

⁶ Aishah Hussain, 'Majority of Legal Workers Say Working from Home has Improved their Work-life Balance', *Legal Cheek*, 1st September 2020, available online:<<https://www.legalcheek.com/2020/09/majority-of-legal-workers-say-working-from-home-has-improved-their-work-life-balance/>> accessed 16th February 2021.

⁷ *C (A Child)* [2020] EWCA Civ 987.

⁸ *Re A (Children)* [2020] EWCA Civ 583 at paragraph 9.

engage in proceedings remotely and the stress and burden remote hearings place on participants, a point picked up the next day in the Court of Appeal in *Re B (Children)*.⁹ This is because accessing justice remotely depends upon both technologies and an ability to make proper use of them. Similarly, justice through a computer screen is regulated by class and social dynamics in the same way that access to remote education during the pandemic has been, with the result that society's already marginalised have felt this disparity of experience most keenly.¹⁰ Similar factors were highlighted in the 2020 report published by the Nuffield Family Justice Observatory. These ranged from regional differences in internet connectivity to access to funds to pay for phone credit and issues with data allowance. The report showed language barriers and the problems faced by non-native English speakers could be exacerbated by conducting hearings remotely.¹¹ It is encouraging, therefore that the Court of Appeal in *Re A (Children)* and *Re B (Children)* advanced a holistic approach to assessing when to conduct hearings remotely and recognised the potential they have to create new difficulties or even worsen existing ones.

6. In the criminal courts, remote hearings have been praised for reducing the 'often wasted period between charge and first appearance', but more research is required into the impact of remote attendance for decisions on bail and sentencing, as well as in relation to defendants' effective participation.¹² Questions on assessing evidence remotely yielded conflicting views across different areas of law before the pandemic. In civil matters it was suggested in *R (SS)* that the 'only objective and reliable approach is to focus on the content of the testimony and consider whether it is consistent with other evidence'.¹³ This can be done remotely as it does not require focus on the manner and characteristics of witnesses. This contrasts with criminal law where it was suggested in *R v Popescu* that the demeanour of a witness may be an important factor in assessing the weight to give to particular

⁹ *Re B (Children)* [2020] EWCA Civ 584 at paragraph 4.

¹⁰ Jane Wakefield, 'COVID-19: The Challenges of Home-schooling', *BBC News*, 11th January 2021, available online at: <<https://www.bbc.co.uk/news/technology-55573803>> accessed 15th February 2021.

¹¹ Mary Ryan, Lisa Harker and Sarah Rothera, 'Remote Hearings in the Family Justice System: A Rapid Consultation', *Nuffield Family Justice Observatory*, May 2020, available online at: <<https://www.nuffieldfjo.org.uk/resource/remote-hearings-rapid-consultation>> accessed 12th February 2020.

¹² Howard Riddle, 'COVID-19 and the Criminal Courts', *Criminal Law Review*, 2021, 3, 159-162.

¹³ *R (SS) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 at paragraph 41.

evidence.¹⁴ This raises broader questions about the use of technology in criminal matters that has been a subject of academic treatment since before COVID-19, for example the use of special measures for vulnerable witnesses in certain matters.¹⁵ The debates that have emerged around the ability of complainants in rape trials to give evidence via live link suggests more fundamental questions about the balance to be struck between the need to provide conditions that will produce the best quality evidence with those which enable evidence to be scrutinised fully.¹⁶

Balance and the limits of justice through a computer screen

7. The courts' treatment of the use of remote technology, both before and during the pandemic, illustrates the tension and balance to be found between efficiency and effectiveness in the administration of justice. The pandemic has shown that remote technologies do not yet provide a level playing field, and those least equipped to manage the strains of the legal system are often those likely to struggle most to access and use remote technologies in a safe and dignified fashion.¹⁷ These are however problems, which proponents of technologically-driven reform to the justice system argue may be within our gift to resolve.¹⁸ However, alongside questions of efficiency and effectiveness, there is a more important question about what, if anything might be lost by moving justice online and making its provision through computer screen more widespread.
8. The story of 37-year-old Punithan Genasan provides a lens through which to consider this question. Genasan, a Malaysian national, was convicted of drug trafficking offences in

¹⁴ *R v Popescu* [2010] EWCA Crim 1230 at paragraph 36.

¹⁵ Louise Ellison and Vanessa Munro, 'A Special Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials', *Social & Legal Studies*, 2014, Vol 23(1) 3 – 29.

¹⁶ Andrew Sanders, Mandy Burton and Roger Evans, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales', *International Journal of Evidence and Proof*, 2007.

¹⁷ Louise Tickle and Lisa Harker, 'Remote Family Court Hearings are not Just or Humane', *The Guardian*, 2nd June 2020, available online at: <<https://www.theguardian.com/society/2020/jun/02/lisa-harker-family-court-hearings-justice-failed-coronavirus-crisis>> accessed 15th February 2021.

¹⁸ See Richard Susskind, *Tomorrow's Lawyers: An Introduction to your Future*, Oxford University Press, 2017 and Richard Susskind, *Online Courts and the Future of Justice*, Oxford University Press, 2019.

Singapore in 2011 and sentenced to death by hanging over computer screen in 2020.¹⁹ Using remote technology, in the name of efficiency, to pass the gravest sentence imaginable is absurd in its cruelty.²⁰ There is a sick irony that Genasan was sentenced to death via *Zoom*, a product boasting the mission to ‘make video communications frictionless and secure’ and a culture of ‘delivering happiness’.²¹ This extreme example illustrates territory into which justice through computer screen should not be permitted because of the disconnection between people that it permits. The proximity of people in legal proceedings is not essential in every instance but there are matters where physical proximity and connection is not only desirable but serves to ensure justice is conducted fairly. This is because in law, human connection separates the utilitarian aspects of legal procedure from an ethical understanding of their importance and consequences. To borrow the language of Emmanuel Levinas, in the *face* of the other, we find an ‘anchoring of ethics’.²² These risks being lost when we proceed in legal matters with the view of our interlocutors restricted to the corner of a computer screen.

9. This restriction has ramifications for the public’s ability to access the administration of justice, the framework for ensuring ‘public confidence in our legal system’,²³ and guaranteed under Article 6(1) of the ECHR, subject to some exceptions.²⁴ Conducting justice through a computer screen raises questions about whether remote mediums can truly be called public and a debate emerges about the constitution of ‘public space’ and the degree to which remote technologies do or do not offer reasonable substitutes for public hearings as they have traditionally been understood.²⁵ My view is that whether or not technology can facilitate public access to courts is of secondary importance to what may be lost when the

¹⁹ John Geddie, ‘Man Sentenced to Death in Singapore on Zoom call’, *Reuters*, May 20th 2020, available online at: <<https://www.reuters.com/article/us-singapore-crime-idUSKBN22W016>> accessed 16th February 2021.

²⁰ Stephanie McLennan, ‘Singapore Judge Issues Death Sentence by Zoom: Use of Capital Punishment Out of Step with Global Standards’, *Human Rights Watch*, 27th May 2020, available online at: <<https://www.hrw.org/news/2020/05/27/singapore-judge-issues-death-sentence-zoom>> accessed 17th February 2020.

²¹ See ‘About Zoom’, available online at: <<https://zoom.us/about>> accessed 17th February 2020.

²² Jean-Joseph Goux, ‘On the Trace of Emmanuel Levinas: the Face of the Other at the Risk of the Incommensurable’, *Philosophy Today*, Vol. 55, Issue 4, November 2011, 386 -391.

²³ *Guardian News and Media Ltd v AB* [2014] EWCA Crim (B1) at paragraph 2.

²⁴ *Clibbery v Allan* [2002] EWCA Civ 45 at paragraph 81.

²⁵ *Riepan v Austria* [2000] ECHR 35115/97 at paragraph 29.

court, as a centralised physical space, becomes diminished, whether because of a crisis like the pandemic or systematised approaches to streamlining the courts more generally. What is lost is a human connection to justice that serves to re-enforce its ethical aspects at the expense of its more functional ones.

10. The case law around the use of remote technologies in court shows there is scope for conducting justice through a computer screen. It can be effective and fair but determining where it should be deployed is a question of proportionality. It is vital that pushes for widespread use of remote technologies in the justice system are tempered by recognition that beyond the mechanics of legal procedure, the law mediates relationships between people. Establishing what procedures can be conducted remotely without losing site of this principle can and should be done. It is however a task with grave consequences for litigants and those involved in trials if handled improperly. It should be approached with the caution and humility that reflects the responsibility accompanying this undertaking.

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Further Resources

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