TRANSCRIPT OF PROCEEDINGS

SCV/CCV WEBINAR

THE DOS AND DON'TS OF VIRTUAL HEARINGS

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Supreme Court of Victoria

Melbourne

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on

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CLAYTON JR: We might make a start and there will probably be some further participants who continue to join us. For those of you who don't know me, I'm Judicial Registrar Julie Clayton of the Common Law Division of the Supreme Court.

I acknowledge that I'm hosting this seminar from the lands of the Woi Wurrung and Wurundjeri peoples of the Kulin nation and I also acknowledge the traditional custodians of the various lands on which you all work today and the Aboriginal and Torres Strait Island people participating in this webinar. I pay my respects to elders, past present and emerging.

Over the past 10 weeks, we've all had the most extraordinary experience. There's been a lot to grapple with and in the midst of everything else, trying to master a new way of appearing in court has presented an enormous challenge. So, firstly, congratulations to all of you listening in today. You have clearly managed to get yourself into this webinar and that's something that might have been beyond some of us just a few short months ago.

You've all undoubtedly had now virtual meetings with your colleagues, your instructing solicitors, with clients, experts and witnesses and platforms like Zoom, Webex, Google Classroom, Microsoft Teams are now as familiar as AustLII and Jade. It has been, as they say, a lot and whilst within the community there's a sense that we are perhaps over the worst of it and can relax a bit, the reality is that we will continue in a virtual world at least in some fashion for a long while yet.

I am not sure, for example, if we will ever return to a packed court for a busy Friday directions list or queues at security as everyone starts their hearings at 10.30, pools of 200 jurors assembled in the County Court. So even as schools return and workers start coming back into the city, in all likelihood there will be at least some part of your work and of the court's work that continues in a remote environment. So that makes this a good time to have a seminar. We've had 10 weeks now of experimenting, learning, and sometimes blundering our way through. We've learnt a lot but there is more yet to learn.

We thought we would assemble a panel who have been working in the virtual environment since the beginning of the restrictions to share what we've learned about appearing in a virtual court. On our panel we have Justice Andrew Keogh, the joint head of the Personal Injury and Institutional Liability lists and the judge in charge of the Supreme Court circuits. Justice Keogh has just finished an entirely remote personal injury trial that ran to completion in the Supreme Court.

We are also joined by Judge Arushan Pillay in the County Court. If you have appeared in the County Court since COVID-19 began, you've been to one of the Judge Pillay's hands-on Zoom training sessions which I am reliably informed have been instrumental in assisting many practitioners master the basics of the virtual platform.

And we also have with us Richard Attiwill QC. Richard has a broad practice. He's currently briefed for the State of Victoria in the Royal Commission into National Natural Disaster Arrangements. It is particularly helpful to hear from Richard, not only because he brings his vast experience of being on the other side of the Bench to the discussion, but because, unlike the rest of the panel, he doesn't have an IT department to run to for help every time there's a technical problem. His experience in the world of virtual hearings will be particularly illuminating.

So before I turn to our panel and get their experiences, I wanted to share just four tips that have come up repeatedly when I asked judges for their feedback about their experiences in the virtual world.

The first thing is to remember that you're in a hearing from the moment you are admitted from the waiting room. Chitchat at the virtual Bar table will be heard by everyone and even when the judicial officer is not yet in the virtual court, it's likely that other court staff will be and can hear what they say. So proceed with caution.

Backgrounds: if you choose to use a virtual background, make sure it's neutral or one of the four court approved backgrounds which show different styles of courts and I'll give you a brief look at what those courts are. You can see one behind me now. This is another option. Something slightly more modern. And very old school. You don't have to use a virtual background, of course, but we'd recommend that you leave the Hawaiian beach holiday or the galaxy far, far away for your social calls.

Thirdly, don't be afraid to ask for an opportunity to confer with your junior or to seek instructions. Zoom offers the possibility of break out rooms and some judicial officers are now using these and I think they'll probably be more widely deployed as people get more familiar with the technology. But where the platform doesn't offer that option, for example, Webex, which is also used in the Supreme Court, it's fine to seek a moment to put yourself on mute and confer, just as you would at the Bar table.

And, finally, where the chat function is not disabled, use with great caution. It's very easy to unintentionally chat to everyone when you intended only to chat with your instructor, and as different platforms that you might be using all have slightly different interfaces, it's very easy to make an error. You might forget that the default setting is chat to everybody rather than to just the one person.

Turning now to the panel. Judge Pillay, can you firstly take us through your top tips for virtual attendance.

JUDGE PILLAY: The first top tip really is to maintain the notion that we are in a court hearing and it's a formal one and I say that because it leads to all sorts of problems if we don't maintain the notion that we are actually in a formal courtroom. It leads to problems with etiquette so that people don't address each other properly; it leads to problems with dress and the real problem with all of that is that it leads to the perception from witnesses or plaintiffs and defendants in person that they are not in a real serious court hearing and that's when I think there is a loss of faith in the justice that we're dispensing through this medium.

So my top tip is to maintain and just very practically that means dress properly, no polo shirts, wear a tie if you're a male, speak properly, address people using their surnames, don't say to your friend at the Bar table, 'Well, John said this' – use the proper name, as you would in court.

And, lastly, and I reiterate what you said, which is use the proper background. Don't have one which is inappropriate for a court setting, and it is your responsibility as a practitioner to make sure that the witnesses you are calling observe these rules as well.

It's not enough to say, 'This witness could only appear from (indistinct) on a phone at a building site' when that person is going to have bad coverage, can't see the documents and is constantly being interrupted by others on the site. It's your responsibility to ensure those witnesses are appropriately presented. Those are the top tips that I would have.

CLAYTON JR: Justice Keogh, have you got anything to add in terms of the primary things that you'd look to for your top tips for practitioners?

KEOGH J: I think Judge Pillay has stolen my thunder a little. I emphasise the same point. The mere fact that we're conducting virtual hearings doesn't mean that we're not all in the courtroom and you should behave and conduct yourself in a virtual hearing in exactly the same way that you would conduct yourself in a physical courtroom.

CLAYTON JR: What about in terms of business attire and robing? I know that there's been some different views taken about the need to robe.

KEOGH J: When I'm conducting a trial I will robe and I expect counsel to robe. I think that it's an important part of maintaining the seriousness of the court process and emphasising to witnesses and members of the public who might be viewing the proceeding that we're conducting serious business. I am in favour of robes.

CLAYTON JR: I know that the court – our court – on its website has said robing is not necessary and I think that for some judges that's the attitude that they take but I suppose the important message would be check with the chambers, just as you might in the ordinary course check with chambers if it's necessary to robe in certain sorts of applications. Does the County Court have a particular position?

JUDGE PILLAY: Yes. Our position is that if it would be usual to robe, that is for trial, then you should robe. If not, if it's directions hearings and you wouldn't robe, then you can appear in business attire. There's a whole other issue about whether counsel appearing in trial ought wig but that's perhaps not for this seminar.

CLAYTON JR: And we've had a question come through from the audience, and I encourage all participants to use the question and answer function; we'll answer them live when we can but where that's difficult, we'll answer them at the end, we will leave some time for that. And the question is, 'Are practitioners required to stand whilst addressing the court?'

KEOGH J: No, in my court and it will just create awkwardness, I think. We've got to change the process or I've changed the process of how we commence the court day to take account of the different environment. So I don't do standing because you get very awkward images of people on the screen and I don't do bowing but we try and introduce processes to ensure that practitioners and parties know when the court hearing is starting.

CLAYTON JR: Richard, I've got a question that's come through that I think you'll be more appropriate to answer. There have been stories, apparently, I haven't heard them, but apparently there are stories of lay witnesses appearing remotely having been 'allowed' by the judicial officer to behave in an informal manner, for example, smoking or talking to others off screen or behaving more aggressively than would be expected in person. What should counsel do? Is it incumbent on counsel to ask the court to pull up the witness in this situation?

MR ATTIWILL: Well, I think, in my experience when people are giving evidence remotely, so a witness, the court always inevitably asks them whether they're by themselves in the room – that's critical – and you should ensure that that's the case. I cross-examined somebody on their mobile telephone; that seemed to go okay. But there are risks – there's significant risks that somebody might be looking at their mobile phone while you're cross-examining. You'll never know the answer to that.

I haven't had smoking or drinking or having a cup of coffee – I think if that occurred that would be something for the judge to take up – or eating their lunch, for example. The only really matter that I've had was where I had a suspicion that somebody was receiving instructions on their mobile phone so I just asked them whether they can just look at me when they're answering the questions and that was about it.

CLAYTON JR: Thanks. All right. Well, moving on, what are the issues that the panellists have encountered when participating in virtual hearings. Justice Keogh, I'll ask you to answer that first.

KEOGH J: Well, the first thing I'd emphasise is issues with witnesses, picking up on what Richard was just talking about. It's important that the circumstance in which the witness is giving evidence replicates as closely as possible what would happen in a courtroom. So it's important, in my view, that the witness is in a room by themselves.

Often witnesses, when we're conducting remote hearings, will have difficulty with managing court books or their devices, the hiccups along the way. If that were to happen in a courtroom, then it would be the associate, somebody independent, who goes and assists the witness and ensures that the hearing can get back on track.

When we're dealing with a remote hearing, it's likely to be an instructing solicitor or somebody else within the solicitor's office who's assisting the witness and you've got to be careful in doing so that, firstly, you seek the court's approval to approach the witness before you approach the witness; secondly, that when you approach the witness you take account of the fact that the witness is giving evidence and you don't in any way interfere with that process.

Steps should be taken to ensure that the witness doesn't have any documents with them other than the documents to which they're going to be taken in evidence. Steps should be taken to ensure the witness doesn't have a device other than the device that they're using to participate in the hearing or perhaps some additional device so that they can look at a soft copy of the court book or documents to which they're being taken. So no phone, no other prompts.

I've had somebody describe to me a situation where a witness was giving evidence and constantly looking to one side apparently to look at a prompt and that will just rob the whole process of confidence and integrity. So practitioners have a very important role to play in ensuring that that sort of thing doesn't occur.

Of course, the usual rules apply that when a witness is being cross-examined, they can't be spoken to by practitioners on their side and if an order is made for witnesses out of court that that's dealt with in the same way as it would be in a hearing in a physical courtroom.

My preference is that witnesses, particularly lay witnesses – perhaps this really applies to lay witnesses – lay witnesses give evidence from a solicitor's office or perhaps from somewhere close to the barrister's chambers. I think that's important because of the duty that practitioners owe to the court and the role that practitioners, owing that duty to the court, will have in ensuring that integrity is maintained in the way a witness gives evidence. I don't know whether either Judge Pillay or Richard have any comments about that.

JUDGE PILLAY: I would reiterate what Justice Keogh has said about that and I would add only one thing which is that it is incumbent upon the instructing solicitor to make these arrangements. The court relies on instructors to make those arrangements and certainly we will reinforce that message when the witness comes to give evidence. So that's the first part of it.

The second thing, though, is about simply the technical device on which the witness gives evidence. As people become more and more familiar with the technology, there is more and more use of documents and screen sharing and annotation of documents, either photographs or diagrams.

And as that's going to become more and more prevalent, it's very important that witnesses are not on phones. Sometimes that's inevitable and we can deal with that but as much as possible, we should be trying to get witnesses to be using laptops or iPad devices, at least, where they've got the ability to manipulate the document and see it all.

So on a phone, for example, you can only see a little bit of an A4 page and then you've got to scroll across and try to read all of it. It becomes very difficult and almost impossible to mark it up. So I would say instructors and counsel should also really be looking at the device on which the witness is going to give evidence.

CLAYTON JR: In terms of those sorts of technical issues, have you been experiencing a wide variety of responses from practitioners in terms of the availability of appropriate internet connections and that sort of thing and how has your court been able to manage that?

JUDGE PILLAY: We have seen that occur a lot but it's occurring in a situation where it shouldn't. So, for example, someone says, a witness says, 'I can't come and give evidence at 2 o'clock on a Wednesday' and at that stage the witness says, 'Well, I'm going to be on a building site at I'm going to use my phone in my car. That's the only time I've got spare to give evidence'. Well, quite frankly, if we were back in the old days the witness would simply be sent a subpoena and they would have to come into court.

So they're managing to avoid all that but they then can't simply say, 'This is a minor inconvenience to my life and I'm going to treat it as such and therefore I'm not even going to break my work day to go to a secure area with an appropriate device to give evidence' and I think if we can, it we can in these difficult times, we should be saying what's a more appropriate venue and what's the more appropriate device. It can't work in every case but we should be trying.

KEOGH J: Judge Pillay, what do you think about the idea of requiring that parties in advance provide to the court and to other parties details of the arrangements for a witness giving evidence as in where they will be, what device they'll have, et cetera? So that the day beforehand or at some stage everybody knows what the arrangements are, including the witness.

JUDGE PILLAY: I would like to at least know that as the case is starting, we've got our witnesses lined up. I would hate to create another layer of administrative effort for instructors but they certainly should be making those inquiries and they should be able to tell the other party what those arrangements are because if it's going to be that a party is faced with cross-examining someone in completely inappropriate circumstances, then it might derail the entire trial and they should at least have a bit of advanced warning about that, so I am sure we could fashion something to that effect.

CLAYTON JR: I know that in the Supreme Court our IT department have a strong preference that they test all of the connections at least the day prior to the hearing and that include connections for witnesses but I know that this also can present problems, especially where there's a lot of expert witnesses who might not be available for a 15, 20 minute test the day before, and I think as we move on and the idea of remote hearings becomes less novel, the willingness for people to put aside a 20 minute slot the day before a hearing will reduce.

But I think in the early days everybody understood that there was a need for that because everybody was learning, but as people become more and more familiar with the technology, I think there are two possible repercussions of that.

One is that they get better at it so there's less need for testing and they know how to fix things up themselves but the other is that there will be less willingness to participate and I think it's important that the courts really keep an eye on that because, as we all know, poor connections, bad internet, poor devices really have a significant impact on the quality of the hearing that can be undertaken.

KEOGH J: And the question of whether a fair trial can be conducted.

CLAYTON JR: Absolutely.

KEOGH J: One other issue was the testing of the credit and reliability of witnesses. Obviously, there's been a traditional view that that's much more successfully done with witnesses and counsel present in court. I don't know what the experience of others has been in that regard in the virtual environment.

I must say from a judge's point of view if you've got a witness and you pin that witness as the picture on screen and the witness is taken through a lengthy cross-examination, you get a very good view of the witness' demeanour and reaction to the question, the level of emotion they display, whether they display things like frustration or agitation. In many ways I thought the view of the witness was better on the screen than it would be if the witness is in the witness box.

So, so far I haven't been troubled by the idea of testing a witness' credibility. I suspect, though, that it might be more an issue for counsel and developing a way of engaging with a witness that's successful and test them when you don't have the benefit of being in court in an environment that you're very familiar with and the witness is likely to be very unfamiliar with and perhaps intimidated by. Do you have any comment about that, Richard?

MR ATTIWILL: Yes, I do. Prior to my first virtual hearing, I had my serious doubts that it would be successful, that is the cross-examination, but for all the reasons that you've articulated, Judge, I found it to be completely fine. In fact, the cross-examination that I undertook where the witness was on their mobile phone was no impediment at all because I had actually a close-up view of the witness and the expressions and so forth.

But the critical thing, I think, in the cross-examination of a witness in a virtual hearing is that you've got to make sure that your own image, that is your visual image and also your audio is spot on to maintain the connection because, you know, for example – I can give you an example.

If I'm here and I'm talking like that and blah, blah, there's no connection so you've got to really test it out, so I get up a bit like this and maintain it and I found it to be completely fine. The witnesses aren't often distracted by drinking coffee and food and so forth but they find their own stresses, I think, in engaging with the technology a bit, which can be a bad thing really all round sometimes, but, on the whole, I think the cross-examination is fine.

I've heard of some judges actually calling the parties in because the judge has taken the view that the only way the judge can assess the credit is in the courtroom but from my provide, I think that you can easily assess the credit of a witness in a virtual hearing, as long as the audio and the visual is fine.

So that if the witness is prominent on the screen like Your Honours are, it's fine. I have seen a witness in a case in a huge boardroom where they're right at the end and you get a long panoramic shot, that's no good. So as long as that's not done it's a fine system.

KEOGH J: What about you, Judge Pillay, do you have any ‑ ‑ ‑

JUDGE PILLAY: No, I must admit – and a small war story – I saw Richard Attiwill cross-examine someone to tremendous effect on a virtual hearing and the potency of having the witness so close actually to you on screen made the task of assessing that witness' demeanour a bit easier. So I'd agree with what you've just said.

KEOGH J: In a sense, in a virtual hearing, there's nowhere to hide.

JUDGE PILLAY: No.

KEOGH J: You can't avoid being front and centre on the camera and everything you say and do is well and truly on display. I would emphasise that Richard, in my experience, is a very well-prepared, is very well-prepared counsel so – and that will be critical to successfully challenging a witness' credit and reliability, that level of preparation.

MR ATTIWILL: So, yes, you can have difficulties with court books and other documents so you've just got to make sure that that's working. So as long as the witness has got the court book, either electronically or hard copy, preferably in hard copy sometimes because otherwise they're distracted by too much technology, that can be a good thing.

CLAYTON JR: Richard, how have you found preparing for a virtual hearing to be different from preparing for an in-person hearing?

MR ATTIWILL: Well, I'd say that there's two major differences. One is basically just the technical aspects of the preparation and then two is the preparation for the hearing and the advocacy itself.

In relation to the technical aspects, and I won't just address this from a counsel point of view, but in a technical aspect the practitioners in an in-person hearing just turn up to court, so solicitor goes to the Bar table, sits down, the barrister sits on the other side and off they all go. So the most that might happen is there's a realignment at the lectern potentially a getting of the microphone for the transcript and re-positioning that. But if nothing else is working or the lights aren't on or something else or the door's looked, then that's all for the court to address.

The real difficulty that you've got to engage with in a serious way is when you're preparing for a virtual hearing as counsel or as a solicitor, what you've got to do is fully engage with all the technical aspects so that it works, so you've got to download the line of software, you've got to establish your background, your lighting, you've got to have the right microphone and so you've basically got to participate, together with counsel on the other side, in making the whole thing work.

If you don't do that and it doesn't work, then, in my experience, and I've seen some pretty major ways in which this has gone seriously wrong at the real prejudice to the party concerned, if you don't get it all right and your microphone's bad and your lighting's bad and your software is terrible and your internet connection's terrible then as counsel, basically, you're sort of like the mumbling barrister at the back of the courtroom, can't really be seen, can't really be heard, so it's very prejudicial, so you've really got to get it right.

And what I'd say is you can't just leave it for the 15 minutes that the court set aside to see if it's all working, you've got to get it working by yourself, test it with your friends or family, if you like, to make sure that it's all working properly.

And I just can't emphasise that enough. I have been recently in a reasonably major case and somebody was making a very important submission and their connection with terrible, you could only hear every sort of second word and basically the trier of law and factors wasn't really tolerant of the whole thing and really, as a result, their submission really heavily suffered. So you've got to get that right.

But the second thing I'd just briefly say is in relation to the hearing preparation, it's really critical that you think through how that's going to actually work as counsel and as the practitioner. So the first thing is the whole dynamic between the solicitor and the barrister, including senior counsel, is all disconnected in a virtual hearing, often you're in separate places, so you've got to formulate a plan and so I use WhatsApp often with instructors and junior counsel and you've really got to formulate how that's precisely going to work and on what device so that it's not on the same computer.

You've also got to work out precisely how you're going to work, firstly, as an advocate, so where are your documents going to be because if they're on this screen over there that I've got and you spend your whole time doing this, it's pretty unpersuasive and I've seen that happen a lot. I've seen cross-examination go like this, you know, 'I put it to you you've done this' and it's just disconnected so you've got to switch everything around.

Now, if you've got a massive screen, you might be able to have a document on your computer – I find I just have my documents set out unfortunately in hard copy often at the bottom of the screen. It's quite important because imagine if you're in a courtroom and you spent your whole time just doing this with the judge and the witness. It's just unpersuasive. So you've got to really think through how you organise your desk.

The only thing I'd say is a really another critical part, which is just your organisation of how you get documents to the court, and so you've really got to have a discussion between your instructor, junior counsel so everyone knows what's going to happen. So I've seen lots of instances where somebody will just say, 'We'll get that document to you, Your Honour' and then, you know, delay, mucking around, 'I don't have your email yet, it's not coming'. 'Let me share my screen'. 'How do you do that?' Just delay, delay, delay – big mess. So just sort it out.

One person should have responsibility for it; the person who's most able, whether that's the instructor or, in my case, the junior counsel, and you just know precisely what we're going to do. 'Right, we're going to send an email to the judge's associate' or, 'We're going to share this live on screen' and everyone knows what they're going to have to do.

So that's what I would say that you've really got to get the technical aspect right and don't just leave it for the 15 minutes beforehand and if you don't do that, you're at serious peril because if you don't have a great visual image of yourself as counsel and you don't have a great audio as counsel, then your persuasion goes out the window; and really prepare your work space so you know how it's going to work.

So you've got your WhatsApp off to the side, maybe, on your phone, and you can see that working as counsel, and as the solicitor you know exactly what role you're going to be playing with the barrister, so sending them WhatsApp messages or you're going to be providing the document. So you just sort those two things out. Once you do that, you will be fine.

CLAYTON JR: That leads nicely into a question from the audience, which is for some hearings counsel and solicitors for a party have been gathering at one location, for example, in chambers or a solicitor's office, and for other hearings counsel and solicitors have been joined from separate locations. From the court's perspective, firstly, and then also from counsel's perspective, has one approach worked better than other?

KEOGH J: Well, there can be technical glitches either way. If you're in a zoom hearing and two people are in the same room on different devices, then you can get – and both have their audio on, then you can get the feedback which creates real problems. If you're all sharing the same internet connection, that can create (indistinct) problems, as I understand it. Obviously, if you're in different locations then you're dependent on potentially the weakest connection.

Having said that, if you can get over the technical issues, my preference would be that a party's team is in good close connection and often that will be a physical connection where they're not too far apart. And, as I've already emphasised, I think certainly for lay witnesses my preference is that the lay witness be at the solicitor's office or at barrister's chambers in a separate room.

JUDGE PILLAY: I'd agree. I'd agree with exactly what Justice Keogh has said. I think it does work better for partly the technical aspects but also the presentation of a particular party's case where they're in close physical proximity. I've seen oftentimes counsel in the same set of chambers being able to resolve an issue very, very quickly while things are happening live. So I do think that physical proximity is very useful.

CLAYTON JR: Opposing counsel being in the same set of chambers, for example?

JUDGE PILLAY: Yes.

CLAYTON JR: Yes. Richard, do you have a preference or has it just been circumstance that's dictated how it happens?

MR ATTIWILL: Largely circumstance. Prior to virtual hearings I would have said there's no way I would be remote from junior counsel but, actually, I found it to be completely fine. It works very well as long as you've got a proper system in place. Once you don't have a system in place with WhatsApp and if you're not getting used to using it, then it's a mess; but if you've got a proper system in place, it's fine.

The rule of thumb I've given it now is that if I've got an expectation that there's going to be a lot of need for discussion and really passing a physical note from the junior and so forth, then I'll go into chambers and do it but I'd say that's only been, say, 20 per cent of the time at the moment. I mean, things might change but ‑ ‑ ‑

KEOGH J: But, Richard, what about if you're running a trial with, say, over a five or 10-day period with multiple witnesses?

MR ATTIWILL: Yes.

KEOGH J: Does it change in that circumstance, in your view?

MR ATTIWILL: Well, I think that it's – look, in some way – I think the answer is probably yes if it's a five to 10-day hearing with multiple witnesses but I think you do have to be careful because I've often seen the system not working and Your Honour's just pointed out, for example, in Zoom, the barristers together in one set of chambers in a room together, that doesn't work if they're both live on the system so you get feedback and static and so forth.

But, look, I've run a three-day case remotely that was completely fine with, I think, three witnesses and we just used the breakout room, made our own Zoom conferences and it all sort of seemingly went okay. Next week I've got a three-day hearing before the Royal Commission but I'll probably go into chambers there just for the immediacy of the instruction rather than relying upon WhatsApp.

So I think for a five to 10-day hearing with multiple witnesses I would probably go into chambers, but maybe not for all of it. So I would use my discretion so that there might be a whole day where another expert is going to be giving evidence, I might do that remotely, so I pick and choose a bit. You've just got to make sure that it's going to work.

KEOGH J: One of the things that I pick up on that Richard spoke about is the degree of preparation that's required and cooperation between parties and I think that's much greater for the virtual hearing than it would be for a hearing in a physical courtroom.

And the sorts of things that you need to prepare well and where there needs to be a significant degree of cooperation between the parties are court books or the folders of key documents so that that's prepared well in advance, it's prepared properly, the soft copy is hyperlinked; there is certainty in relation to the documents. You will be all be familiar with cases where there are two or three or four versions of the one document. It's critically important that everyone has the same version, include, in particular, the witness.

You also need to make arrangements in advance to ensure that those documents that are relevant to a witness' testimony are going to be in the hands of the witness in a way that the witness can interact with at the time they're giving their evidence. You'll have to think in advance about views and demonstrations, the arrangements that would be necessary to conduct a view – social distancing, the time that will be taken, whether a view can be conducted in advance and video recorded and shared during the hearing.

Physical exhibits: I know Richard and I were involved in a case where there were a number of physical exhibits and we muddled along with a process to try and ensure that that could be dealt with but you'll need to think in advance about physical exhibits. There's not much point getting in to day 3 or 4, calling a witness and trying to introduce a physical exhibit through the witness. Just how on earth will you do that?

You need to think about physical exhibits in advance of the trial and make arrangements with witnesses, with the other party and with the court to ensure that that can all work. It might involve introducing a physical exhibit at the very start of a trial or even a day or two beforehand so everyone gets a chance to have a look at it and then perhaps making video recordings of the physical exhibit so they can be used during a witness' testimony.

Obviously, the witness arrangements we've spoken about. Video surveillance is another thing that parties that want to rely on video surveillance will need to think of in advance so that perhaps they get the video surveillance to the judge's associate so that it can be dealt with reasonably seamlessly during the case rather than having to delay or stop the hearing until the video surveillance can be provided.

CLAYTON JR: Justice Keogh, we've had a question from the audience which I think is relevant to this part of the discussion. If cross-examining an expert on documents, is it better to do so by sharing the relevant document on the screen so that the document on the screen is the dominant feature of the screen rather than the witness' face or by referring the witness to the electronic court book? Do you have a preference, and from counsel's perspective, Richard, after the judges have had an opportunity to answer, which is more effective in maintaining engagement between counsel and the witness.

KEOGH J: My preference would be having the witness have access to the document separate from sharing it on the screen so that you don't interfere with what's otherwise seen on the screen. What about you, Judge Pillay, what do you think?

JUDGE PILLAY: Yes, that would be my preference but it really happens because most of the witnesses are just either at home with only one screen or in a car trying to escape what's happening inside the house for the time they're giving evidence.

But generally I do have the shared screen as the dominant feature with the witness off on a smaller tile to the side and that's just the way it's worked because once the relevant part of the document's identified, everyone's got it in their mind and we can then go back to having the witness as the dominant feature but that's the way that I use it.

KEOGH J: Richard, as counsel, how would you prefer it to be done?

MR ATTIWILL: Definitely from some sort of electronic court book or hard copy rather than on the screen. Because I've had instances where for 45 minutes you can't see anybody because you've just got this dominant document on screen and finding it hard to see people so that didn't work well.

One interesting thing is Your Honours have talked about the preference to have witnesses obviously at firms of solicitors and obviously, particularly in the height of the COVID-19 issues that we've had, that just wasn't possible but really post 30 June when people are going to be able to resume their workplace without restriction, so it seems, apart from social distancing, you think that that should be something that could be readily done more often, that is that witnesses should be giving evidence from the solicitor's premises insofar as that can be practically arranged. I mean, it's so much easier and better and ‑ ‑ ‑

KEOGH J: Yes, from the controlled environment.

MR ATTIWILL: Yes.

CLAYTON JR: I think that's very important.

MR ATTIWILL: Yes. Although I have had some instances with the solicitors, they have so much technology that they use their video conferencing facilities which just don't work, so, like I said, big panoramic shots in boardrooms and so forth – so they don't seem to be able to just set up a simple computer screen – and that's to be avoided because you just can't assess anyone's credit from big panoramic shots in a boardroom. So that's the only matter that's obviously to be avoided.

CLAYTON JR: Yes. In terms of the reduction in restrictions and the prospect that work will be returning to something like normal as at 30 June, we've had a question from the audience as to our best prediction about when courts will return to fully in-person hearings. And the answer to that is that we don't yet know and that the indications that we've had from government, like the indications that everyone has had, is that if you can work from home, you should work from home, and the court is taking that very seriously.

So it will be an ever-changing space, I've no doubt, and things will evolve but at the moment our expectation is that remote hearings will continue for quite some time. Now, that might not mean that a hearing that's a 35-day case with 70 witnesses will be entirely remote. It might be that there are ways in which there are sort of hybrid arrangements made, but I think that practitioners should be expecting things like directions days, circuit matters for the next little while, at least, and applications will largely be done remotely. Do you agree with that, judges?

KEOGH J: Yes. But there are other complications beyond the simple health restrictions that have been imposed that will have implications for us. There will be a real need to try and reintroduce jury trials in crime sooner rather than later. That will take resources in terms of space and personnel. Necessarily that will have an impact on what's available for, say, the Common Law Division and the impact of that will be that we're likely to have remote hearings continuing for a considerable period, in my view.

CLAYTON JR: All right. I'm mindful of the time so we have a number of questions from the audience, so we might start dealing with those. There are a number of questions about whether Zoom hearings are recorded and, if so, how that occurs and what the implications would be for both privacy and appeals. I can say that in the Supreme Court all hearings are recorded regardless of if they're in person or not, so there's always a recording made. Whether or not you choose to request a transcript of it doesn't alter the fact that there is a recording, and there's no difference in Zoom.

So if you have been in a directions hearing with me you will have noticed down in the corner there will be a little black box that says 'Auscript'. Auscript is actually coming along as a participant in hearings, but as well as that we are making a back-up recording in most instances because every so often the transcript goes wrong and there's a problem and we had that the other week where the transcript couldn't log on to our hearing and fortunately we had a back-up recording that we'd made.

So the recording that is made on a local computer is probably not as sophisticated as the recording that Auscript might be able to make, but it suffices in terms of being able to get the transcript. Where hearings in our court are conducted in an actual court, albeit remotely, then the transcript that is already – the audio recording services that are already in the court just kick in and record it in the normal way.

In terms of the privacy considerations that arise, and I know that at the outset of this there were a lot of concerns around privacy of Zoom and some government departments and so on have just made decisions not to use Zoom because of that.

One of the ways that our court has tried to resolve that is not to publish widely links to Zoom hearings so you have to be sent a particular link to be able to participate and we are very mindful of the access to justice issues so we do publicise on the daily list the fact that parties or people who aren't parties to the proceeding can participate by listening in but they do need to contact the judge's associate to get the link sent to them. It's not quite as easy as just being able to walk into any court that you like and sit in but you don't have to be vetted in any way, you will be a non-audio, non-video participant in a hearing.

JUDGE PILLAY: Yes, there's only one thing I'd add to that. We adopt a very similar process to that but we also have available a number of iPads in a room next to registry, so if someone comes in to watch any particular case, they will see the case listed as being 'at registry' which indicates it's a virtual e-Trial and they can then go to the room and log in to a particular iPad which will take them to that particular case.

CLAYTON JR: Yes. All right. Thank you. I've also got a question, and this is an interesting one, and I have to say I don't really know the answer, which is what if a solicitor does not have an office?

KEOGH J: Well, particularly in this initial period where we're all just getting used to virtual hearings, and that's been imposed on us, I think courts would be fairly understanding that not everyone is going to be geared up to participate fully, whether that be by reason of technology or office space or whatever, and if somebody can't participate for good reason, then it may well mean that fairness dictates that a matter's adjourned.

CLAYTON JR: I've got a question, 'Can witnesses attend court to give evidence?'

JUDGE PILLAY: If I could ‑ ‑ ‑

CLAYTON JR: Judge Pillay.

JUDGE PILLAY: In some exceptional circumstances at the moment our court is allowing people in person to come into court to give evidence but it is an exceptional circumstance where we might have, for example, complex interpreting issues, and so we have arrangements in court, shields and separation barriers and the like, if that was required but application would need to be made for it to be deemed an exceptional case.

CLAYTON JR: Yes. And I think that the situation is the same in the Supreme Court inasmuch as there is no absolute prohibition on an attendance in court but there would have to be a reason why that was the appropriate option. I know that within our court and probably something similar has happened in your court, Judge Pillay, we've had a team of people who have gone through the entire court, the court building as well as all of the courts, worked out how to achieve social distancing.

We've got a spreadsheet which says the numbers of people who can be at the Bar table, numbers of people who can be in the body of the court. Seats within the body of court have been roped off so that if people were to be in court, social distancing would be maintained and even within the hallways and so on, and the stairways there are things on the ground to indicate where you can stand to maintain social distancing.

So we are obviously preparing for a future in which people will be back in court but in a socially distanced way, and there are particular exceptional circumstances in which people might be back in court already but it would be the exception rather than the norm, I think.

Now, I've also had a question about the virtual backgrounds that I showed at the start of the session and those backgrounds are backgrounds that we were asked to provide by the Vic Bar and they are just photographs of four of the Supreme Courts. I think that the background that Richard is using is one that Victoria bar has developed itself; is that right, Richard?

MR ATTIWILL: This is a – I'm not sure. I think this is a County Court background.

CLAYTON JR: Or a County Court – the County Court might have come up with some backgrounds as well.

MR ATTIWILL: That's a Vic Bar one.

CLAYTON JR: Right.

MR ATTIWILL: This is another one that – very prestigious looking. (Indistinct words) looks very – I think I – obviously, I think that's the Supreme Court.

CLAYTON JR: Yes, the dome.

MR ATTIWILL: Yes.

CLAYTON JR: In terms of where they're available from, I am told that the Supreme Court virtual backgrounds will shortly be available on our website but at the moment I think that they're only available at Vic Bar, from Vic Bar.

JUDGE PILLAY: And just on that before every Zoom hearing we, and with the invitation we attach the neutral background that Richard's in front of.

CLAYTON JR: All right. Now, I'm just reading through a few of the questions. 'Apart from the court making a recording of the proceeding, is a solicitor permitted to make his or her own recording of the Zoom hearing?'

KEOGH J: No.

CLAYTON JR: I think that's a pretty categorical answer. I've got a question: 'When will plea hearings be done in court?'

JUDGE PILLAY: Can I jump in on that one?

CLAYTON JR: Yes.

JUDGE PILLAY: I can say that plea hearings in some ways are being done in court because for those pleas where someone is still in gaol, then the only way we can connect to them is via the judge going into a particular courtroom and then having that particular individual appear via Webex. But in the main we're still having counsel appear remotely, if possible, and that will continue to be the position for the foreseeable future.

CLAYTON JR: Yes, and it's the same in the Supreme Court, as I understand it. Again on the virtual backgrounds a question, 'If a background won't work, is it okay to have a background of a home office?' And I think the answer is that it's certainly entirely understandable to have a non-virtual background and sometimes virtual backgrounds just don't work on a device but I think everybody would agree that the background should be appropriate, so you don't want your washing hanging in the background or a scene of chaos, if I can put it that way.

Something very neutral, facing a bookshelf or a blank wall or a sort of an office-like set up I think is entirely appropriate. Anyone have anything to add on that?

MR ATTIWILL: In one of the hearings that I had, an important expert gave evidence and it all looked fine but there was a mirror, a prominent mirror and that was reflecting his unmade bed so it was a distraction. So we sort of solved that.

And also, too, don't underestimate that a lot of people are looking at your photos and your books and what you're reading and so forth so you've really got to – I just go for a virtual background, otherwise people are getting distracted on what's on your wall and the painting and one of the judge's remarked on something on my wall, they could see a map I had, so, you know, it's just a distraction, you just need to have a neutral background.

CLAYTON JR: Yes. This question has come through: 'An audiovisual recording of the hearing would enable an appeal court to be in the same position as the trial judge to assess evidence and credit. Will this lead to less cases being remitted for rehearing?'

KEOGH J: Somebody should have a look at the High Court decision in Pell and the comments made in the High Court about an appeal court reviewing the video of a hearing in order to try and put themselves in the same position as the jury. It's not necessarily the role of the appeal court, is the short answer.

CLAYTON JR: Yes. And, in any event, I think having a recording available doesn't necessarily mean that that is what would be considered by the appeal court; the appeal court would consider the transcript if they do, because we already have audio hearings available of all our proceedings but that is not what is provided ‑ ‑ ‑

KEOGH J: No.

CLAYTON JR:  ‑ ‑ ‑ to the court in the ordinary course. Well, I'm mindful of the time. Are there any closing comments that our panellists would like to make?

KEOGH J: With virtual hearings, there will be glitches. We all understand that it would be useful to let witnesses and participants know that in advance, if they're not familiar with the process. We just need to be mindful that it's a slightly different environment and you've got to take that into account in the way in which you communicate and communication is really what the court proceeding is all about.

CLAYTON JR: Judge Pillay.

JUDGE PILLAY: I'd only say that I understand that this is a difficult time and really all that the court is asking is that practitioners try their best in terms of maintaining the formality of these hearings so that we can continue to inspire confidence in the community that we are doing the right thing and that we are providing them a way to have their cases heard. That's all we're really asking.

CLAYTON JR: And Richard, finally from you.

MR ATTIWILL: Just say to counsel get your audio and visual thing as right as you can get it and really for solicitors I'd just focus on two systems: (1), the system with communicating with counsel, just get that right and just know exactly how you're going to do it, also; (2), get right the system for the provision of documents during the hearing to the court and the other parties and really think through exactly how that's going to be done.

And otherwise I would enjoy the virtual hearings because it's something different in our lives and so not much can really go wrong, it's just a question of getting it right and preparing for it.

CLAYTON JR: Thank you all to the panellists and thank you all to the attendees. It's been an extraordinary period of time that we've all lived through. Someone once said never to waste a good crisis and although I don't think anyone would have ever wished this upon us, we've learnt a lot from it and I think that there's no doubt that in terms of technological advances, the courts have been able to move incredibly rapidly to positions that would otherwise have taken years and years. I think that to some extent there's no going back.

There are changes now that have been put in place that will last forever in terms of the use of virtual hearings, particularly for witnesses who might live overseas – I can't see that there's just going to be justification in the future for bringing out, you know, 10 experts at great expense internationally now that people are so much more familiar with the technology. I think that electronic court books are here to stay and I know that I certainly will be conducting my circuit directions via Zoom from now on regardless of the COVID restrictions.

So we will all continue to learn, no doubt, but thank you all for attending, thank you for participating and we will see you next time. I am now going to formally end the session for everybody.

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