

EIP

How video hearings have kept the Courts open

The COVID-19 outbreak is impacting people around the globe. The UK government has, like many other governments, been forced to take drastic action to curtail individuals' movements to enforce social distancing. Whilst the government has more important priorities, it has decided that it is important to maintain access to justice through this crisis. However, maintaining the traditional approach to justice and the courts is simply not possible. This has had different consequences in different parts of the justice system. At the time of writing, no new jury trials are starting in England and Wales. For those working in large commercial litigation, the traditional trial consisting of the judge, the court staff, parties' solicitors and counsel, witnesses, experts, and interested parties congregating in a single court room for several weeks is no longer possible.

From impossible to inevitable

With the traditional way of operating no longer possible the courts and lawyers have moved fast to adapt to new ways of providing justice. Fortunately, in the UK most people now have a computer connected to the internet with a microphone and camera. This has enabled the courts to move to video hearings at breakneck speed.

The government and courts have taken several steps to enable the use of video hearings in the courts to enable access to justice as well as to allow the public to watch proceedings, including:

The Coronavirus Act 2020 provides for the use of video links in criminal trials and certain magistrates hearings and for the recording of proceedings before the courts and the broadcasting of those to the general public.

The Civil Procedure Rules have also been updated with rules for video hearings in Practice Direction 51Y, which will remain in place during the crisis. These rules are there

to ensure that there is continued public access to justice. They enable this by mandating that third parties must be given access to the hearings, where possible through access to the video conferencing software used for the hearing by the parties or, if that is not possible, through a recording of the proceedings;

The Judiciary of England and Wales have released a protocol on remote hearings in civil litigation. It emphasises the flexible nature of the courts and that the courts will consider any appropriate communication method and format, although the decision of whether to proceed with a hearing and in what format is a question for the judge. It states that video hearings will require the cooperation of the parties with the court listing office, court officers and the judge.

These steps have enabled video hearings to happen and be broadcast to the public. The most high-profile of these video hearings in the UK have been those at the Supreme Court, watchable by the general public on the court's website, using rules on video hearings put in place only days before. Similar video hearings have also taken place before other courts, including the Court of Appeal and High Court.

This wholesale move of most hearings to videoconferencing by the court is unprecedented, and the scale of this change can be seen by comparing this to an experimental exercise undertaken by HMCTS in 2018 which involved only eight specially chosen tax appeals being determined by video conference. [\[1\]](#)

The opportunity after the crisis

What will happen after the crisis, and in particular the view the Courts will take towards video hearings then, is unknown. However, these changes during the pandemic will give the judiciary and lawyers much greater experience in managing video hearings and awareness of when they are and are not feasible and appropriate. Those that watched the hearings before the Supreme Court on livestream will have noticed that they were able to proceed despite some minor technical difficulties, and the occasional tendency for some participants accidentally to talk over one another.

It seems likely that hearings will mostly revert to the traditional format after the crisis, albeit with greater use of video conferencing. The belief that witness testimony, cross examination and oral advocacy are best done in person runs deep in the English Court system. In addition, whilst videoconferencing technology has come on leaps and bounds, it does still occasionally go wrong. The low-tech solution of paper files and people in a room remains exceptionally robust. However, there are potentially situations where the court will be more likely to allow video hearings. For example, where it is difficult or expensive for witnesses to attend court as the witnesses are located abroad, or where a

witness has mobility problems.

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The change to the law to allow the proceedings of any court to be broadcast is likely to be one that is not reversed. There is public interest in certain proceedings, as demonstrated by the recent Supreme Court proceedings relating to Brexit and the Prorogation of Parliament, although broadcasting will probably only be relevant to a small number of proceedings such as high profile criminal or constitutional cases. Most barristers can probably therefore rest easy without the need to get themselves ready for TV.

By Owen Waugh

[1]Implementing Video hearings (Party-to-State): A Process Evaluation, Dr. Meredith Rossner & Ms. Martha McCurdy, 2018