Judicial Institute for Scotland – Conference on the future of the civil courts, 10 May 2021

Procedural Hearings and Debates in the Scottish civil courts post-pandemic

The Hon. Lady Wise[1]

Introduction

The majority of our lives, both professional and personal, have been played out on screens for over a year now. To some, it may feel as if we have always lived and worked like this; to others, it will still feel strange. At this point in time, we remain somewhat in a state of limbo; still subjected to the restrictions which have been a part of our lives since March 2020, but hopefully, albeit cautiously, looking forward to our post-pandemic lives. With that in mind, this is an appropriate juncture at which to examine how the civil court system might look in the post-pandemic landscape. It would not be overstating matters to say that the efforts made by SCTS to maintain civil court business within a short period after the onset of the pandemic have been extraordinary. But that is not to say that the changes brought as a consequence of the pandemic will be permanent. It is acknowledged that the measures implemented to ensure the continuing functioning of the court system are not perfect, but perfection was not the aim. Indeed, as an expert stated relative to the development of the COVID vaccine: "*If your house is on fire, don't wait until you have the perfect hose*[2]". We must be clear- the changes implemented were not designed to be a means of introducing an ideal system of digital justice and online courts. Their aim was to use existing technology and the resources already available to us as a rapid response to the challenges brought by the pandemic. The initial challenge faced was to maintain a sufficient level of service while our traditional courts were closed. It appears that in broad terms this was achieved in the context of civil business.

The pandemic essentially allowed for real-time testing of remote hearings and the virtual capabilities of the Scottish judicial system. It is now time for us to take stock and to assess which aspects of virtual hearings should remain in the longer term and which should be assessed carefully before decisions about permanence are taken. The lessons learnt during the past year have been invaluable. The aim of today's conference is to analyse the changes brought by the pandemic and to identify the parts and processes that are capable of being usefully incorporated permanently into the Scottish civil courts system, without eroding or threatening its underpinning principles. My own contribution will focus primarily on procedural hearings and debates post-pandemic but with some comments about the wider discussion. As OH administrative

[1] Senator of the College of Justice. I would like to thank Alannah McGinley, Law Clerk to the Inner House, for her assistance in researching and preparing a draft of this paper. All views expressed are my own.
[2] https://www.sciline.org/covid-expert-quotes/vaccine-development

judge my emphasis will inevitably be on the work of the Court of Session but many of the issues of principle will arise in other fora.

Pre-COVID position

Before examining the changes effected by the pandemic, it is first useful to examine the pre-pandemic situation. Prior to March 2020, the default position in terms of court hearings- procedural or substantive-was that they would be conducted in person in the physical courtroom. However, there was an intention to move towards greater use of technology with some remote hearings as early as 2018, when SCTS published their five-year digital strategy[3]. Notwithstanding that aim, the strategy stipulated that 'significant cases will always involve formal hearings in a court'.

In 2019 the "Civil Online" service launched for simple procedure cases in the sheriff court. The first digital simple procedure hearing took place in Aberdeen in August 2019 – with the court able to hear evidence presented by the parties, supported by digital documents and photographs previously submitted online[4]. In Court of Session commercial actions and later in some tribunal settings case management conferences had been conducted over the telephone from time to time. So far as technology in the courtroom was concerned, it was not unusual, pre-pandemic, for witnesses unable to travel to give their evidence via live video link. Since the early part of the 21st century at least the trend has been towards a paperless system, with electronic bundles already being widely utilised in the Commercial Court of the Court of Session and in Inner House business.

March 2020 to present

The carefully-planned transition outlined in the SCTS digital strategy was thrown into turmoil with the onset of the pandemic in March 2021. However, during March and early April 2020 SCTS staff were able to configure new systems and set up remote devices in judges' homes. It was announced on 14 April 2020 that the Inner House, operating as a virtual court, would recommence hearing appeals from 21 April. Thereafter, Outer House and civil Sheriff Court business was gradually recommenced, with the first virtual civil proof hearing in Scotland involving the hearing of evidence from witnesses being heard on 15 June 2020[5]. In terms of continuing progress, from April 2020 to date, more than 42 cases have proceeded to proof or debate in the Outer

[3] http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/scts-digital-strategy---final.pdf?sfvrsn=4

[4] https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/publications/scts-business-plan-2020-21-revised-autumn-version---final-published-16-december-2020.pdf?sfvrsn=4

[5] SLT News; S.L.T. 2020, 20, 128-130, at 128.

House[6] , with only 7[7] of those being conducted in person[8]. In terms of procedural hearings and debates, almost all hearings were conducted remotely.

What next?

That is a brief summary of events to date. What is yet to come is the focus of this conference and of the discussions we will have today and will continue to have in the coming weeks, months and perhaps even years. Before setting out views on what could be the direction of travel for the post-pandemic era, it is first useful to outline the key themes to be examined. These are as follows:

- Access to justice and the concept of open justice;
- The effect of remote hearings on oral advocacy;
- The virtual courtroom;
- The welfare and wellbeing of all court users.

The aim of this paper is to analyse these key areas, primarily in the context of procedural hearings and debates.

So, what do we mean by 'procedural hearings'? This is effectively an umbrella term covering a wide scope of hearings which might arise during the lifecycle of a case: a preliminary hearing in the Commercial Court; a By-Order hearing; a By-Order (Adjustment Roll) hearing; an opposed motion hearing; a hearing concerning a motion which is not opposed but where the court nevertheless requires it to call; a Pre-Proof hearing; Case Management hearings and any hearing to discuss a specific issue or the general progress of a case. They can be a vital stage in the progress of an action. They dictate the course of the case and often take place at an early stage. Procedural hearings will be often be the first public hearing in the dispute. The procedural hearing may represent the point in time when the court designates a time and a place for the determination of the case at a future substantive proof or hearing. It provides the court, parties and their advisors with a finish line to work towards. The procedural hearing may be the solicitor or client's first experience of how the court might look at the case.

Further, actions are not just disposed of by way of substantive hearing. Procedural hearings themselves can be determinative of the outcome of a case; both directly and indirectly. Missed deadlines and non-compliance with the court timetable can be fatal. If a defender fails to enter appearance or to lodge defences, the pursuer can move the court to grant decree in terms of any conclusions of the Summons. A defender may be able to secure decree of dismissal in the event of a pursuer failing to lodge a record timeously. A failure to apply successfully for commission and diligence to recover crucial documents might dictate whether the case can be successfully pursued or

[6] With 16 of those being in Commercial actions. Comparable figures for financial years 2018-2019 and 2019-2020 were 70 and 74 respectively.
[7] Six proofs and one debate.
[8] Even then, only to a certain extent, with some witnesses giving evidence remotely and some in court.

defended. The importance of the procedural hearing is its contribution to the court ensuring that parties comply with its requests and procedures.[9].

It will not come as a surprise that even pre-pandemic, only a small percentage of cases actually proceeded to a substantive hearing. This underscores the importance of procedural hearings and the timetabling and management of cases as a mechanism for facilitating early settlement. [Lord Pentland's talk will focus on appeals. Given that there is a large extent of overlap between the conduct of appeals and debates, the main focus of this paper is on procedural hearings, with occasional signposts to debates where appropriate]

In presenting the case for remote hearings remaining part of the *status quo*, procedural hearings and other debate style hearings might be seen as an easy "win". There is widespread support for remote procedural hearings being appropriate post pandemic in many cases. But I suggest we should be wary of a 'one size fits all' approach and it may be going too far too fast to conclude that all procedural and debate style hearings could and should be conducted remotely.

Access to justice and the concept of open justice[10]

Open justice is the keystone upon which the operation of courts rests and has rested for time immemorial. Lord Neuberger has commented: "The principle of open justice is a long-established and fundamental aspect of our justice system and of any liberal democracy committed to the rule of law[11]". It has been a fundamental principle of the common law since its origins that justice is conducted, and judgments are given, in public. This principle is, as Lord Shaw described it in *Scott v Scott*[12], "a sound and very sacred part of the constitution of the country and the administration of justice".

So what is open justice? Instead of attempting to define this expansive concept, it is perhaps more useful to identify it by its characteristics. Bosland and Townend recognise three key identifiers: first, judicial proceedings must be conducted in open court; second, evidence must not be concealed from members of the public who are present in court; and, third, what happens in court must be able to be communicated to the public outside of the court[13]. They also identify the modern challenges to the principle which include judicial attitudes to open justice in response to digital technologies and technology driven shifts in practice and procedure. Professor Richard Susskind states that in order for open justice to be delivered, "*the operation of the entire court system should be open to scrutiny, as should the conduct and*

[9] Stair Memorial Encyclopaedia, CIVIL PROCEDURE (Reissue), Chapter 3: COURT OF SESSION, (1) PROCEDURE AT FIRST INSTANCE, (c) Incidental Applications, (e) decrees in the course of a defended action, Section 160. Decree by default.
[10] https://thepractice.law.harvard.edu/article/the-future-of-courts/
[11] At 1.2. Available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf
[12] [1913] A.C. 417 at 473 per Lord Atkinson.
[13] Bosland, J and Townend J, Open justice, transparency and the media: representing the public interest in the physical and virtual courtroom, Comms. L. 2018, 23(4), 183-202 at 184.

outcomes of individual cases[14]". This paper will examine two of the key themes which emerge; (i) transparency and (ii) the ability of the public at large to scrutinise the decisions made by courts.

Transparency

When asked to think about open justice and transparency in the courts pre-COVID one would likely think of being able to enter the court and courtrooms to freely observe proceedings. That constituted real time transparency. Observers did not need to identify themselves to court staff or the judge. Members of the public were only prohibited from entering the courtroom in limited circumstances- for example, in sensitive family matters involving children or sexual crimes. But the usefulness of real-time transparency must be assessed. If a person walks into a courtroom and observes the proceedings, they will likely have little concept of what is going on. The general subject matter may become clear over time, but the viewer's knowledge will be restricted to what they can glean from the submissions of solicitors or counsel. The lack of knowledge on the part of the viewer is a result of the public not having access to the written materials. The documents that will inform the casual observer what the case is about are not freely available, either via the SCTS website, or in hard copy. One therefore has to question the value of real-time transparency alone.

Prof Susskind argues that in order for there to be open justice and transparency in the court system, there requires to be visibility over court processes, procedures and data. In respect of individual hearings, the public should have access to advance notice of hearings, to information about the parties and procedure involved, the nature of the dispute, details of case management decisions and the substance of the determination itself[15]. All of the foregoing are examples of information transparency.

Lady Hale made the following observation in *Cape Intermediate Holdings Ltd v Dring*[16]: "*it is now difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material."* In that case, the UK Supreme Court agreed with the Court of Appeal that written materials could be released to third parties according to the demands of each individual case and that the court has an inherent jurisdiction to order release of certain documents[17] to comply with open justice principles.

[14] Susskind,R, Online courts and the future of justice, Chapter 19, page 193.
[15] Ibid. at page 194
[16] [2019] UKSC 38 at para [43]
[17] Including: formal 'records of the court' which any party to the proceedings is entitled to see: for example, written evidence filed in relation to an application, judgments or orders made in a public hearing and notices of appeal; skeleton arguments (i.e. a summary of parties' cases) and other documents written by parties' lawyers and given to the judge; witness statements which court rules require the parties to file at court (but not necessarily documents put in with such statements) and any other material to comply with open justice principles.

It should be noted that the decision in *Cape* comes with the caveat that the person or organisation seeking access is required to explain why he or she requires it and how allowing it would advance the open justice principle.

When physical access to the courts is restricted, for example as a result of lockdown restrictions, the importance of information transparency increases. Although parties can request to be given details to join court hearings, many may be unaware that they are able to do so, or may be prevented from joining as a result of lack of resources, or familiarity with the technology. Magrath comments as follows: "*The problem is not, therefore, being allowed to attend, even when it's a remote hearing. The problem has been finding out about the hearing in order to seek to join it.*[18]"

So what is the current position in terms of real time and information transparency in the context of procedural hearings and debates? A quick check of the Court of Session Rolls on a Thursday will inform the reader of the cases listed to be heard over the following week. No hearings beyond that timeframe are listed. In terms of the information provided, the rolls show the type of hearing, the court reference, parties' names and the names of the firms representing them. No indication is given of the nature of the dispute, nor the specific issue being addressed at the hearing. None of the papers relative to the hearing are made available. If a member of the public wishes to observe the hearing remotely then they must go to another section of the website, identify the relevant court and then send an email to the court requesting joining details. The media are advised to email at least two working days in advance of a case calling. For those wishing to join via telephone only, the website publishes dial-in details for selected upcoming Court of Session hearings. At the post-hearing stage, no information is published as to the outcome of a procedural hearing or debate unless it involves a matter of principle or a particular point of general public importance. The majority of procedural hearings and debates will not fall into one of those three categories and so their outcome is not made available publicly.

Public scrutiny

In modern-day Scotland, very few members of the public attend court hearings. As observed by Lord Neuberger; "The days of courts regularly being filled to the rafters by interested members of the public, as Dickens depicted during Charles Darnay's trial in A Tale of Two Cities, are long gone[19]". Therefore, for many members of the public, the only way they will hear or know about the outcome in a certain case will be by reading the newspaper, or online news articles. Accordingly, the role of the media remains crucial, perhaps more than ever, in ensuring public scrutiny and participation in court processes. As the International Bar Association noted at the beginning of the

[18] Magrath,P, Coronavirus, the courts and case information, L.L.M. 2020, 20(3), 126-132 at 130.
[19] Lord Neuberger, "Open Justice Unbound?" at 20. Available at: http://sro.sussex.ac.uk/id/eprint/67674/1/JWO.pdf

pandemic: *"open justice ensures participation of society in justice being done, which is most often tied to the preservation of the free press[20]".*

It is clear that the media have always played an important part in communicating the outcomes of court cases, so it is perhaps concerning that the reporting of court proceedings is declining. Prof Susskind[21] notes that more than half of England's local newspapers no longer have court reporters. Bosland et al make the following observations on the declining media reporting of cases and open justice:

> *"the fragmentation of media markets due to new communication technologies has significantly undermined the mainstream media's traditional capacity - and inclination - to devote resources to reporting the courts. Crucially, this fragmentation has also resulted in fewer resources for the mainstream media to fulfil their traditional role as courts' observer, reporter and defender of the principle of open justice.[22]."*

It would not be unreasonable to assume that the pandemic has reduced further the reporting of court cases. Even with the advent of the online world and the main means of communication being electronic, the courts were largely resistant to allowing journalists to adopt those systems in their reporting. However, there were some positive developments pre-pandemic. In 2011, for the first time in Scotland, journalists and legal commentators reporting on the sentencing of Tommy Sheridan relative to his conviction for perjury were permitted to send *"live text-based communications*" from court[23]. This step was an important one in modernising court reporting and in supporting court reporters in carrying out their role in this age of electronic communications. At present, journalists registered with SCTS may use such communications without the prior permission of the court, and under certain conditions[24]

At the outset of the pandemic, journalists and court reporters were (rightly) concerned with the difficulties that closing the courts would pose in terms of open justice. One noted: "*we are all very concerned that open justice does not fall by the wayside in the intense and necessary rush to keep as many people as possible out of the courts*[25]". However, the introduction of remote hearings should have allayed some of those concerns, as that allowed proceedings to be broadcast to the public by video or audio. The development was welcomed by the media[26] whose journalists may be hopeful that the remote viewing of proceedings will continue post-pandemic. That capability

[20] International Bar Association, Open justice and remote court hearings under the UK's Coronavirus Act. Available at: https://www.ibanet.org/Document/Default.aspx?DocumentUid=0f6849c8-42d0-499b-8204-c8c38027e803#:~:text=The%20Act%20includes%20provisions%20to,participants%20to%20attend%20in%20person

[21] Susskind,R, "Online courts and the future of justice", Chapter 19, at page 200.

[22] Borland. J and Townend,J, Open justice, transparency and the media: representing the public interest in the physical and virtual courtroom Comms. L. 2018, 23(4), 183-202 at

[23] https://www.bbc.co.uk/news/uk-scotland-glasgow-west-12284396

[24] https://www.scotcourts.gov.uk/docs/default-source/aboutscs/contact-us/media-guide-13-10-2015-website-version

[25] https://www.pressgazette.co.uk/journalists-praise-courts-for-open-justice-via-video-link-during-coronavirus-crisis/

[26] Ibid.

would result in significant cost-savings as journalists would no longer require to travel to courts and spend time waiting there which could otherwise be spent working on other matters.

Access for all

To be successful, the remote hearings must take account of the requirements of all sectors of society. Those who are not computer-literate, or indeed, do not have access to the relevant electronic equipment to allow them to participate in a remote hearing will require to be accommodated in the post-pandemic landscape. Although many of us are now *au fait* with video calls, there will remain a proportion of court users who are not and their ability to access justice cannot be curtailed as a consequence of that. Similarly, special consideration will require to be given, on a case-by-case basis, as to whether cases involving party litigants are suitable for determination by way of remote hearing or lodging of documents in electronic form, which many such litigants find challenging. Hearings conducted via video call may not be suitable for vulnerable persons and those with physical or learning disabilities or visual impairments. This was recognised by the Equality and Human Rights Commission at the onset of the pandemic in its interim report on video hearings and their impact on effective participation, entitled "*Inclusive justice: a system designed for all*"[27]. Although in the context of the criminal justice system, the report emphasises that the use of remote technology has additional implications for persons with a learning disability. Its recommendations include ensuring that all frontline professionals, including judges, give greater consideration to identifying people for whom video hearings would be unsuitable. The use of registered intermediaries to provide remote communications support for defendants (accused) in video hearings is also recommended, and the report suggests that consideration be given to using such registered intermediaries to provide support to any participant with learning disabilities.

The concerns voiced by the EHRC were encapsulated by the Court of Appeal in *S (Vulnerable Parent: Intermediary), Re*[28]. This concerned care proceedings where an application by a parent with a learning disability for the appointment of an intermediary had been refused. It addressed the position of vulnerable individuals taking part in remote or semi-remote ('hybrid') hearings. Jackson LJ noted the following:

> *"The hearing will involve quite complex information being considered through more than one medium of communication. Professionals who are having to adapt to these demands have the advantage of repeated exposure to a range of possible formats. Lay parties do not generally have that advantage, but it is to their needs that the court must adapt. Where a party or a witness has a learning disability, the adaptation needs to be sufficient to ensure that they are*

[27] Available at: https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf
[28] [2020] EWCA Civ 763

genuinely able to participate effectively in the hearing, both in and out of the witness box[29]".

Conclusion on Open Justice

It is suggested that the changes implemented thus far should remain in place in terms of remote viewing of hearings. Consideration will require to be given as to how that can be executed on a when return to physical hearings. It is clear that allowing the media and the public to continue to view hearings remotely would be in the interests of open justice.

It is also clear that if virtual hearings are to continue in the post-COVID era, further steps will require to be taken to ensure open justice in the context of information transparency. Indeed, even in the context of physical hearings the following suggestions may serve to increase such transparency. Ahead of debates, parties' notes of argument, the authorities relied upon and a summary of the factual circumstances could be published. Following the hearing, a summary of the decision could be published; if there is a written decision then that could be made available (unless already published as an Opinion). Publication of the interlocutors would provide a timeline of procedural developments. For procedural hearings, a one-line summary of the nature of the hearing and the outcome could be published. This would allow the public to understand what the case is really about. It would also have the benefit of allowing more efficient and accurate media reporting.
It could be that we see a move towards greater information transparency alongside the real-time transparency of physical courtrooms when these are again open to the public. There is no straightforward answer to the question of how best to balance the concepts of real time transparency and information transparency. The publication of material online and the recording of proceedings would require significant resources and may not be practicable to implement in a short space of time. The approach adopted by the UK Supreme Court might be one to which the Court of Session could aspire. It is, however, accepted that the publication of material and the live streaming of proceedings would not be appropriate or practicable for every hearing. There could be security and privacy implications. Townend notes that proper impact and risk assessments[30] will be vital if remote hearings are to remain. That seems sensible.

While on one view it could be said that remote hearings will improve access to justice, such a proposition is open to challenge. The suitability of remote hearings going forward should be considered having regard to the interests of all members of society. Further, the continuing benefits and risks of virtual hearings, combined with the potential for greater information transparency, should be scrutinised in detail once the urgency imposed by the pandemic has passed.

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[29] Ibid. at paragraph 26.
[30] https://inforrm.org/2020/03/24/covid-19-the-uks-coronavirus-bill-and-emergency-remote-court-hearings-what-does-it-mean-for-open-justice-judith-townend/

Oral Advocacy

In Scotland, oral argument is a fundamental aspect of the resolution of civil disputes. Since the nineteenth century reforms of the Court of Session Act 1815 and Court of Session Act 1825 (as amended) the emphasis has tended to be on oral argument rather than written pleadings. That the means by which cases are progressed and usually disposed of is by a 'hearing' underscores the importance placed on the verbalisation of arguments[31]. Although reforms in the 1990s signified a shift towards fair notice- and therefore more comprehensive written cases and arguments - oral advocacy remains a critical element of the success or demise of a case. As well as being historically important, oral advocacy plays an important part in the context of open justice, which has been examined above. The pleadings and written arguments are seldom available to the public and so oral submissions tend to be the only means for the public and the media to hear about the issues in dispute. Similarly, oral argument is the only public aspect of a court's decision making process prior to the announcement of the decision itself. Also, it plays an important part in development of the judge's reasoning: written argument is dictated and wholly controlled by the parties, while oral argument is shaped by engagement and enquiries from the bench. So, any change to the way in which oral advocacy is conducted must be very carefully considered. As put by one commentator, albeit in relation to the US Supreme Court: *"any change in the form and function of oral argument in response to the coronavirus pandemic has broad institutional significance[32]".*

It is now clear that the discourse which usually occurs between lawyer and judge in a physical hearing is difficult to reproduce in a remote hearing. That is not to say that the standard of advocacy has been poorer. It is that the impact of what is being said can be lost in a virtual hearing. The natural ebb and flow is missing. The usual conversational cues are gone. There is little in the way of body-language. Advocates might find it difficult to gauge the reactions of a judge because they are only visible in miniature. Eye contact, one of the best ways of gauging whether a judge 'is with you', may be lost. One can no longer rely upon that fundamental rule of pausing when the judge's pen is moving or while she types. Conversational back-and-forth between judge and lawyer is difficult to sustain as only one person can speak at a time. One has to - by way of a longer than usual pause- wait until confident that the speaker has stopped before asking a question. One speaker may be on mute by mistake; and will have to repeat their point; sometimes a party will drop out mid-submission. The court will require to adjourn and reconvene. In short, the urgency and riposte of oral argument hitherto present in the psychical courtroom is largely lost.

[31] Stair Memorial Encyclopaedia, Civil Procedure (Reissue), 1. Introduction > (2) Historical And Comparative Context >7. The reform of civil procedure after 1800

[32] Jacobi, Tonja and Johnson, Timothy R. and Ringsmuth, Eve and Sag, Matthew, Oral Argument in the Time of COVID: The Chief Plays Calvinball (January 4, 2021). Southern California Interdisciplinary Law Journal, (2021) at 13, Available at SSRN: https://ssrn.com/abstract=3678316 or http://dx.doi.org/10.2139/ssrn.3678316

The informal setting of a remote hearing may also adversely impact on the delivery of verbal arguments. Lawyers and judges are no longer in the austere setting of the courtroom and the usual cues signalling the parts to be played by various individuals are absent .Lawyers may lose the self-assurance that being physically in a courtroom inspires when delivering oral argument from home. One might be tempted to use causal language or mannerisms which would not be appropriate in the courtroom. Lawyers may even feel that they do not perform as well being seated, rather than 'on their feet'.

The hearing is viewed as a prime opportunity for parties' representatives to persuade the court one way or another. When appearing in court, lawyers' energies are focused in an entirely different way to, say, preparing written pleadings. Their best techniques and turns of phrase will be deployed, along with the careful elucidation of points of law and authorities. In short, all the stops are pulled out. It may be difficult to capture effectively that same concentration of energy in written submissions.

The value of witnessing good oral advocacy in person is also not to be underestimated. Many of us will have learned from seeing other lawyers making submissions in court. Therefore, the question of whether the limits placed on oral advocacy by virtual courts will impoverish the development opportunities for younger members of the profession requires to be addressed

Of course there are a number of positive developments emerging from the use of virtual hearings. We have seen more carefully crafted and comprehensive written submissions lodged in advance of hearings. Those, in turn, are then used as the basis for succinct oral argument, with the lawyer focussing only on the parts of their written work which merit expansion or highlighting. There has been more effective signposting of the issues in the written argument which leads to better-structured oral submissions.

It seems clear that there is a willingness and indeed, a desire, on the part of litigators to return to in person courtroom advocacy. It is undeniable that engagement between bench and lawyer in a face-to-face setting is superior to that in a face-to-screen setting. I suggest it is also self-evident that appearing before a judge to make oral submissions plays a vital role in the development of lawyers. But physical hearings will not always be practicable and it may well be the case that remote hearings will continue to be a feature in our post-pandemic lives. So what lessons are to be taken from the past year or so? First, parties should continue to craft their written submissions with as much care as they have for remote hearings- they will be the judge's first impression of the case and so carefully structured written work will always be welcomed.

As noted above, procedural hearings can dictate the future course of a case. Accordingly, oral advocacy at those hearings is just as important as in evidential or substantive hearings. Parties should prepare fully in advance of the hearing. Attention should be paid to the terms of the interlocutor fixing the hearing (if there is one). Does the judge wish to be addressed on a specific issue? If so, those appearing should

ensure that sufficient thought is given in advance of the hearing as to how the issue might be addressed. The taking of instructions during a remote hearing is likely to cause disruption and delay.

In family actions hearings in particular, many substantive issues such as interim aliment or section 11 orders are addressed at an early stage of proceedings. If a contentious application is being made at the virtual bar during a remote procedural hearing, parties should ensure that the judge has as much information as possible, in order to assist his or her decision making.

The virtual courtroom

It is challenging to replicate the physical courtroom via a Webex link. Before identifying some specific issues arising, it is useful first to consider the pre-pandemic court experience. In chronological order, for many, the journey to court is just as important as attending court itself. The hearing could have been a long time coming for some, and the journey to the court building provides time to be spent on considering what is to come, as acknowledged by Rossner *et al*[33] : "*An important element of the court experience involves the journey from home (or detention) through the court building and into the courtroom. This journey also needs reimagining for a virtual space*".

When people are simply going from one room in their home to another (or indeed, staying in the same room), then the build-up and the anticipation of attending a physical courtroom is lost. That is not to say that one should be anxious awaiting a hearing. But arguably something is lost in not requiring to travel to a physical court. That journey carries a certain significance. The physical act of walking into a court building- passing through security, seeing solicitors, counsel and court staff, all lend themselves to the formality and seriousness of court. The culmination of a litigant's 'day in court' is physical attendance in a courtroom. So is the gravitas of that day replicated in remote hearings, and what challenges are faced in attempting to do so? Lord Pentland will examine the effect of remote hearings on the authority and legitimacy of the court and this paper will summarise the challenges involved in securing the full participation of parties in remote hearings, and discuss whether a departure from the physical courtroom results in the loss of 'humanness'.

Parties and their representatives may face additional distractions when working remotely. Connectivity issues may prevent participation completely. Further, court participants might choose to ignore rules and protocols, and behave disruptively or impolitely towards authority figures such as the judge and clerks. Judges have commented that it is harder via video to manage parties' reactions and have indicated that parties were more likely to talk over one another in a video hearing as a result of the lack of physical cues around speaking order. One English judge commented that

[33] Rossner, M, , Tait, D, and McCurdy, M, Justice reimagined: challenges and opportunities with implementing virtual courts, Current Issues in Criminal Justice, 2021 DOI: 10.1080/10345329.2020.1859968 at 11 . Available at: https://doi.org/10.1080/10345329.2020.1859968

litigants are more likely to go off on a tangent and it was more difficult to get them on track during a video hearing compared to a physical hearing[34]. There have been instances where participants have displayed less inhibited behaviour when participating in remote proceedings. That might be due to the perceived informality of remote hearings. Parties are using the same screens and devices that they use to interact with friends, family and social media, to engage with the court.

The physical courtroom can also send an important message to those involved in proceedings. The public nature of the physical courtroom and the emotions it stirs should not be underestimated. Quite often, attending court to have a matter resolved can bring to an end months or years of turmoil or anxiety for those involved. To attend a physical place for that resolution is a form of catharsis. People have travelled and gathered in one place in order to devote their time and attention to reaching a resolution. People are listened to and looked in the eye by solicitors, counsel and judges. They are given the time and physical space to be heard and that can contribute to the sense of justice being done. All of this culminates in securing parties' engagement and willingness to reach a resolution.

Linked to this is the human element of the physical court room, the loss of which can have a detrimental effect on those engaging in the court process. Lederer[35] provides a helpful commentary on courtrooms and trials as carrying an element of 'humanness':

> *"Courts are pre-eminently human creations. People view the courts as places in which justice is administered by the people's agents……..the ultimate threat to the judicial system from technology-augmented litigation is loss of humanity. Traditional litigation places the lawyer at the focus of the factfinder's attention."*

Bandes and Felguson write about the 'depersonalisation' of proceedings. For some, the absence of the physical courtroom and the physical presence of decision makers can result in them being unable to process that a life-changing event has occurred. They also provide the following account from a party to a divorce which sums up this concept:

> *"My virtual divorce felt dreamlike — weeks later, I sometimes wonder whether it really happened. So much of dreaming feels like you're trying to grab the hem of something that dissipates right in front of you. Videoconferencing has the same effect, inducing an exhausting sense of placelessness. . . . . [Despite the procedure's legal efficacy], I still felt like I missed something[36]."*

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[34] Rossner, M., & McCurdy, M. (2020). Video hearings process evaluation (Phase 2). London: Ministry of Justice at 9.4. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/905603/HMCTS391_Video_hearings_process_evaluation__phase_2__v2.pdf

[35] Lederer, Fredric I., "The Road to the Virtual Courtroom? A Consideration of Today's -- and Tomorrow's -- High Technology Courtrooms" (1999) at 1318 at 835 Available at: https://scholarship.law.wm.edu/facpubs/212

[36] Susan A. Bandes & Neal Feigenson, Virtual Trials: Necessity, Invention, and the Evolution of the Court room, 68 Buff. L. Rev. 1275 (2020) at 1318. Available at:https://digitalcommons.law.buffalo.edu/buffalolawreview/vol68/iss5/1/1

Rowden raises a similar point, and refers to the account of a judicial officer who emphasised the importance of litigants coming together in the one place, as a reminder of the ‘‘human condition’’ and in conveying that the difficult decisions being made are not undertaken lightly or flippantly. Lederer goes on to pose the following question: “*Could it be that as we improve efficiency we risk minimizing the humanness that has characterized our trials?*[37]” This is a troubling question and it was one addressed by Andrew Langdon, then Chairman of the Bar in England and Wales, in 2016:

> *“The humanity of physical presence is, I suggest, an important component in the delivery of justice….Justice delivered in a physical locality brings satisfaction – as near as that can be achieved, to a community. The community comes together in a physical place, a place of note. Grievances are aired and replied to and the communal process of justice begin. People talk to each other. They react together. They leave together. Sometimes they leave dissatisfied at the outcome, but rarely do they leave with any justifiable sense that all that need to see and hear and react and assimilate did not do so[38]”.*

Mr Langdon even went as far as to say, “*Justice has a human face, and it’s not a face on a screen*”. That may be a step too far. Prof Susskind advances a counterargument to the concept that for justice to truly be done, parties must be together in one space. In his view, such notions are representative of the ideal of transcendent justice, preoccupied with identifying a form of perfect justice. He considers that to allow this line of thinking to dominate would “*be to let form triumph over substance. Once again it would be to celebrate the ceremonial vintage Rolls Royce rather than work towards ensuring transport for all*”. Burton, in the context of the Social Security Tribunal, presents the argument that the daunting nature of proceedings forms an emotional barrier to participation, and the less intimidating nature of remote hearings is to be welcomed. However it is acknowledged that improved communication may be facilitated by emotional engagement and that face-to-face contact is likely to foster a stronger connection between lawyer and client, or party and judge. Indeed, it was recognised that many legal advisors made a direct instrumental link between emotional engagement and obtaining full client participation[39]. Burton’s research indicates that the greater emotional strength of face-to-face advice in areas such as personal contact, emotional support, empathy, compassion and adviser commitment has an instrumental role in facilitating parties’ disclosure and co-operation. By handling their cases sensitively, tribunal members, tribunal staff and external advisers were able to increase the ability of tribunal users to participate in proceedings. In addition,

[37] Lederer at 836.

[38] Inaugural address by Andrew Langdon QC Chairman of the Bar 2017 Delivered in Middle Temple Hall, London on 14 December 2016 https://www.barcouncil.org.uk/uploads/assets/21bd42d3-31fc-404e-89a1aed137ed69a9/Incoming-Chairmans-inaugural-speech-to-the-Bar-Council.pdf

[39] Burton, M, “Remote hearings in the Social Security Tribunal: should we be worried?” J.S.S.L. 2021, 28(1), 36-53 at 41.

establishing trust with parties through personal interactions at court was identified as a way to break down the emotional barrier to participation[40].
What can we take from this analysis of the virtual courtroom? How can we take steps to improve participation and humanness in a remote setting? It appears that the crux of the matter is reassuring parties that their case does not lose its significance because it is being heard and decided remotely. The decision maker has to demonstrate that she is taking her role just as seriously as they would be in the physical courtroom. Replication of the visual signifiers of authority and legitimacy in a virtual setting may assist with that. Those topics will be addressed further by Lord Pentland. It can also assist if the judge sets out some ground rules for the hearing at the outset and emphasises to all concerned, particularly to lay witnesses, that while the courtroom may be a virtual one, they should regard themselves as confined within it just as they would be in a physical courtroom. This is the approach I have taken in several web ex proofs.

However, serious thought will require to be given to whether the human connection present in the physical court can be replicated. It appears, at least at this stage, that it is not capable of being simulated on a virtual platform and so face-to-face hearings will always be the optimal forum for resolution of matters requiring that element of humanness. This is a view held by Burton, who notes; "*When decisions that fundamentally affect their lives are being taken, participants may need the formality of a physical hearing in order to be reassured that their situation is being taken seriously*[41]".

The welfare and wellbeing of court users

General themes

The effect of the pandemic and the resultant requirement to work remotely has had a considerable impact on the welfare of each and every one of us. There are of course benefits of working from home and these might improve our work-life balance. But there are also adverse effects. With working from home comes the temptation to work longer hours. We must all be careful not to allow the delineation between our personal lives and working hours to be further dismantled. Longer working hours may also be associated with higher expectations from employers, colleagues or clients.. The working day is no longer confined to usual business hours. This is not something to be accepted unquestioningly. Where the line between our home and working lives has already been blurred, we need to be careful to set boundaries. Although it might be tempting to work on, we should be careful. Longer hours do not necessarily result in a better quality of work or productivity, but they might mean increased stress. A recent survey showed that 45% of lawyers felt that their stress levels were worse now

[40] Ibid.

[41] Burton at 42.

than pre-COVID and 43% felt that their morale was worse[42]. As was recently recognised by the Rt Hon Sir Andrew McFarlane, President of the Family Division in England and Wales, it is not for individuals to attempt to resolve the backlog in the work of the courts:

> *"The pressure of work in the courts, and the backlog of cases, are matters that concern the system as a whole. They will not be resolved by individuals working beyond reasonable capacity, but by increased resources and strategic, system-wide changes in the way cases are dealt with*[43]."

Further, the general consensus appears to be that parties find remote hearings more draining than physical hearings. Studies suggest that increased tiredness, in part, might come from the 'extra layer' of video hearings; one has to keep one eye on being able to hear and see people, on focusing on whether they are muted or not and on hoping that their connection does not drop out, whereas in a physical courtroom people naturally interact and factors such as internet connectivity do not disturb the flow of submissions. As one judge put it, "*dealing remotely you always feel like there is a bit of delay, there is a verbal dance trying to wait for one another, it becomes more disjointed*[44]". Low morale on behalf of practitioners and judges has been reported, with one judge stating: "*My morale as a judge is lower. I didn't sign up to this job because I wanted to spend all day, every day on the phone and in front of a computer screen; quite the reverse. The job is always rather a lonely one—more so than ever now*[45]".

Notwithstanding the challenges of virtual hearings there are understandable concerns around the physical dangers of returning to in-person hearings. A recent study of the bar in England showed that 84% of barristers had safety concerns relative to physical appearances in court, with concerns raised about sanitation, ventilation and enforcement of safety measures[46].

So how does this tie into procedural hearings and debates? It is not unusual for parties to reach an agreement relative to, say, an opposed motion, on the morning of the hearing, or the evening before. This puts pressure on people to work outside of normal working hours. The expectation is that the party making the motion will read the email and will not turn up to court the next day. It is expected that the clerk will read the email early on the morning of the hearing, with enough time to forewarn the judge that the matter will not require to call. In the context of debates, it is not unusual to have

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[42] Bellwether Report 2020: COVID-19: The next chapter. Available at: https://www.lexisnexis.co.uk/pdf/The-Bellwether-Report-Covid-19-and-the-Legal-Industry-Part-2_compressed.pdf

[43] The Family Court and COVID 19. The Road Ahead 2021. Available at: https://www.judiciary.uk/wpcontent/uploads/2021/01/Road-Ahead-2021.pdf

[44] Rossner&McCurdy at 9.4.

[45] Nuffield Family Justice Observatory-Remote hearings in the family justice system: a rapid consultation. Available at: https://www.nuffieldfjo.org.uk/app/nuffield/filesmodule/local/documents/nfjo_remote_hearings_20200507-2-.pdf

[46] Available at: https://www.barcouncil.org.uk/uploads/assets/f9c5bf66-98f1-429d-ad7b94046e1f5213/f343f7f3-cf5f-44d9-8dda60d82a97e517/Bar-Survey-Summary-Findings-December-2020.pdf

additional authorities being emailed to clerks the evening before a hearing with the consequence that the opposing party and judge will require to consider the authorities out of hours. Authorities should be lodged in plenty of time and within normal working hours and efforts should be made to resolve matters within normal working hours where possible. No link between remote working and extended hours should be assumed.

The parties

The impact on the parties is also not to be underestimated. Take the example of a procedural hearing in a family law matter where there has been a history of domestic abuse, and both parties may be required to attend the hearing[47]. One might contend that a virtual hearing would be better, as the abused party will not need to be in the same physical space as her abuser. However, the abused party may feel more vulnerable attending a hearing from home, and it may feel intrusive. The physical court room could represent a place of neutrality, protection and safety. Similarly, on telephone or video calls, the abused and abuser may for a time be the only parties on the line. It is not difficult to understand how that might be intimidating.

The courts deal with issues fundamental to individuals' lives on a daily basis. In the civil context, perhaps the most sensitive of those are family law matters. Taking those decisions remotely, by a judge far away from the parties, could impact adversely on both the parties and the decision makers. A particularly harrowing account from one family law case in April 2020 involved the judge being asked by the mother, a litigant in person: "*Are you going to take my child away from me on an iPad?*[48]" An English Family Law judge has commented: "*There is nothing fair about a remote hearing which requires you to remove a new-born baby from its mother. Remote hearings do not enable you to show empathy*". A barrister noted: "*I was required to represent a mother who was in hospital having given birth where removal was sought. She had no support and she took part by phone*[49]". Those sentiments were echoed in the comments of another English family law judge: "*Direct communication in family cases is extremely important: "If I make an order saying a child is going to be placed for adoption, I want to look at its mother in the eye and tell her my decision and explain why and I want to take the consequences. If she wants to rant at me that's what the job is about and [an] element of that is lost … So I would feel quite negative [about video hearings] because of enhanced difficulty in decision … it becomes not like a court, [I] feel distanced and not part of it*[50] ".

It is clear that the continued use of virtual hearings in certain categories of cases will have an impact on the welfare of all involved. It may be suggested that in those cases the benefits to be derived from a remote hearing will be outweighed by the drawbacks.

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[47] More examples can be found at: https://www.judiciary.uk/wp-content/uploads/2020/05/nfjo_remote_hearings_final.pdf

[48] Magrath at 127

[49] https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/remote_hearings_sept_2020.pdf at 4.2.

[50] RossnerMcCurdy at 9.7.

However, it seems self-evident that some matters will be unsuitable for remote resolution and those could and should return to in-person hearings whenever practicable.

Conclusions

None of the views stated in this paper should be regarded as an objection to the use of technology in the courtroom. On the contrary, the advances made in the use of digital technology should be harnessed further and a return to the courtroom should utilise those. Hearings involving parties who may choose to observe the proceedings through a live link may become the norm. A return to live proceedings should not involve a return to boxes of physical paperwork. Fully remote hearings can and should remain on the list of options available to the decision maker in discussion with the legal professionals involved in the case. When remote hearings do take place, consideration should be given to how it can be clearly demonstrated to parties that their case, although being heard remotely, still carries the same importance and formality and is not being taken any less seriously by the judge. The design elements mentioned above could assist with that. There will also require to be better protections in place where telephone hearings involve vulnerable parties. However, given the wide availability of video conferencing facilities, whether such hearings ever require to take place by telephone in future is questionable. For video hearings it may be that digital screening can be further improved upon so that the risk of someone inadvertently or even deliberately switching their video or unmute function back on during proceedings when they are not actively participating can be eliminated. Finally, thought could be given to setting up dedicated spaces for parties to attend a remote hearing, in order that the hearing and the emotions connected to that do not pervade into a living space. This could be particularly helpful for those living with children or in shared accommodation.

It must be borne in mind that we are very much at the beginning of the use of remote hearings in Scotland. The current constraints imposed by the pandemic are unlikely to remain compulsory, as more of the population is vaccinated and restrictions ease. In shaking off those constraints, we do not necessarily have to press ‘mute’ on remote hearings in the post-COVID era, but much work will be required to determine what kinds of cases are best suited to being heard remotely. Properly utilised, remote hearings will continue to play a useful in the administration of justice but they will no longer require to be the default position going forward. The ‘new normal’ for procedural hearings and debates may well involve a mix of in-person hearings and remote interactions, supported by greater use of electronic documents. The purpose of this conference is to open these points up for discussion, to gather the views of all invested in the future of civil litigation in Scotland and to identify common themes for how that might look going forward. This is an opportunity for the legal profession and other stakeholders to play a practical role in shaping the future of how civil business is conducted.

Morag Wise

Senator of the College of Justice

10 May 2021