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Appellate work in the Scottish civil courts during and after the pandemic

The Rt. Hon Lord Pentland[1]

Introduction

As summer 2021 approaches, the pandemic is not yet over. There may never be a time when some personnel in organisations of any significant size – in governments, the public services and the private sector – do not have responsibility for planning for the contingency of another upsurge in Covid-19 cases, some problematic variant thereof, or a virus of a similarly disruptive effect. A time will come when this virus becomes manageable, however, such that the reasons for swingeing restrictions on basic liberties no longer apply. The "reformist propulsion of sickness and death"[2] will dissipate. In some spheres, it is taken as read that things should revert to the status quo ante. School pupils would always return to the classroom as soon as possible; the question was only when that should be. In time, shops, pubs and gyms will reopen. Some aspects of pandemic culture will remain, however. More meetings will take place by video-conference. Office workers may be allowed (or even encouraged) to work from home more often. Working patterns that are more flexible may well evolve. Commercial organisations may make different choices in this respect.[3]

What of the radical changes to the processes and methods of adjudication in the courts and tribunals of Scotland? The view held by some policy makers is that things

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[2] Engstrom, 'Post-COVID Courts', *UCLA Law Review Discourse* 68, 246, at 249.

[3] Clayton, 'Remote working: Is Big Tech going off work from home?', *BBC*, 6 April 2021.

should not return to the way they were. That will no doubt be the case, and rightly so; but there is quite a distance between the way things were and the way they have been done during Covid-19. The argument does not seem to be that the way things have been done since March 2020 should remain in place in its entirety; but how much should? The answer, or answers, to that question ought to depend on fundamental questions about the nature of a court in a democratic society.

This is inclusive of both first-instance and appellate courts, although the emphasis of this paper will be on the latter. In terms of the format of hearings, the issue is much deeper and broader than the narrow question of whether the optimal means of establishing the truth is to have evidence led in person. In 1997, this was noted in academic commentary on the proposal for remote case management hearings in the Woolf Review of civil justice in England and Wales:

> "But, why stop at case management hearings? What, *other than tradition and cultural conditioning*, ultimately stands in the way of *dematerialising*, say, appeal hearings? As an appeal hearing, other than an appeal by way of a rehearing, takes the form of the presentation of written or spoken argument by lawyers followed by decision, is there any compelling reason why such activities cannot be conducted fairly and efficiently by video conferencing and by email? If, in a few cases, it can be demonstrated that such a hearing *requires the physical presence of all the participants*, is it not sufficient to give the court or tribunal in question a residual power to order an old style, face-to-face hearing of some or all of the submissions?"[4] (emphasis added)

Read closely, this statement is problematically incomplete. By a rhetorical question, the author states that the only obstacles to conducting appeal hearings online are tradition and cultural conditioning. Notwithstanding these iconoclastic epithets, there is a recognition that in some cases of an unspecified nature and number, an in-person appeal hearing should be required. The author has not simply neglected to state prosaic procedural

[4] Widdison, 'Beyond Woolf: The Virtual Court House', *1997 Web J. Current Legal Issues 9*.

rules to be straightforwardly applied in individual cases. Rather, he has alluded to the central question before us: why does law, as an institution, require judges, lawyers, litigants and witnesses, to gather in the same place?

I wish to begin with an illustrative example of what this paper is generally about. The petition for judicial review of the prorogation of Parliament is probably the most high-profile reclaiming motion[5] decided this century, if not ever. The sense of drama and tension around Parliament House in Edinburgh was palpable on the morning the First Division of the Inner House announced its decision. News teams from all over the UK and further afield crowded outside. The specific function the court was carrying out that morning was to inform parties of its decision. The courts of England and Wales had reached a different decision. It came as a surprise to some that there was a court in Edinburgh which also had competence to decide the matter. Something else was going on, albeit without agency. There was a focus on a *place*. This was *where* a *legal* decision was made, with momentous constitutional implications. Many people, perhaps most, including in Scotland, learned for the first time about the functions of the Court of Session as the highest civil court in the land. They could see it. The filming of the Lord President delivering judgment helped in this process[6]. It is difficult to imagine reporters being able to convey to the public this dramatic assertion of the authority of the law, without the reporters themselves being at the *site* of justice, to bear witness to it and *show* it.

In this paper I would like to offer some reflections from the perspective of an appellate judge on how appeals should be conducted in the post-pandemic era. The central question I will address is whether the interests of justice would be best served by conducting

[5] An appeal from the Outer to the Inner House of the Court of Session.
[6] See page 21 *infra* for discussion of the advantages of streaming important hearings to the public.

appellate hearings from a courtroom rather than from another location, such as the judges' chambers or homes[7]? A secondary question is what use of technology should be made in the courtroom.

1. Reclaiming Motions and Appeals During Covid

Reclaiming motions and appeals were the first stage of the civil litigation process to move out of triage in the pandemic. Parties were able to ask that matters be dealt with on the papers. However, within four weeks of the first lockdown, on Tuesday 21 April 2020, the first virtual hearing in Scotland in response to Covid-19 was heard by the First Division of the Inner House of the Court of Session in the remitted appeal from the Sheriff Appeal Court in *Campbell* v *Dugdale*.[8] It was the start of a busy week, with five further hearings in the Inner House.

Procedural hearings have taken place online, but where no complex or contentious issues arise, orders have tended to be made "on the papers"[9]. Initially, the usual format of a summar roll hearing[10] was not replicated precisely online. Roughly-speaking, a day's hearing shrank to one of three hours. There would be a break of 15 minutes in the middle. The reasons for these are discussed in section 3. Although a hearing was not dispensed with, parties were encouraged to lodge fuller written submissions than those that would previously have been contained in their notes of argument. Towards the end of last year,

[7] It should be borne in mind that a substantive appellate hearing will usually involve 3 judges with the result that conducting such a hearing remotely entails internet connections between multiple locations.
[8] 2020 SC 481; see SLT 2020, 13, 79.
[9] As the current administrative judge in the Inner House, I have encouraged this practice.
[10] The substantive hearing on the merits of a reclaiming motion or other appeal.

the usual length of hearings was reinstated. There are still two short breaks either side of lunch.

The purpose of a substantive appellate hearing is to communicate complex legal principles and concepts and establish their precise consequences relative to a specific set of facts. In section 3, I offer an analysis of video-conferencing's ability to fulfil that purpose.

2. Court as a Place

As practitioners ordinarily engaged with evidence and detailed legal rules, it is difficult to step back and analyse the normative significance of the physical environment to which we have long been acclimatised. We do not see our workplace in the same way as lay people.

> "… the everyday sense of place is precognitive – we nearly always take place for granted. So what is it that we take for granted?"[11]

The physical existence of a court, by contrast with the various perceived advantages of remote courts (cost; efficiency; access to justice), seems to have been under-theorised. Its inherent advantages may have been taken for granted. For the reasons given in this section, the point is that there requires to be serious consideration of how the unique concept and function of a court, personified in the judiciary, would be perceived where it and they do not exist in the material world. The perception that matters is not that of litigants in individual cases, but that of the public in general. Central to this perception is the notion of the court's authority and standing in our society.

Importance of place

[11] Dovey, *Becoming Places* (Taylor and Francis; 2009), Ch. 1.

This section is not, in the first place, concerned with the aesthetics, spatial arrangements and architecture of courtrooms and courthouses. It is worth noting, however, that the appellate system within the Court of Session is represented in specifically spatial terms. An aggrieved litigant reclaims an interlocutor delivered in the Outer House to the Inner House. This conveys to the litigant through a spatial metaphor the relative seriousness of the step being taken. One is taking a deeper step into the domain of Scots law. There is an unavoidable visual communication to the appellant or reclaimer of the importance of the matter, by the assemblage of judges in a greater number. This same consideration applies to all appellate hearings. In a video-conference, there may be more faces on the screen, but without the physical environment this set-up cannot have the same impression or impact.

There is an antecedent, even more basic, question, not concerned with a court's physical layout or appearance. How may the material existence of a place or building that litigants or their lawyers and, it has to be emphasised, the judge, are required to attend, support the fulfilment of the court's functions? While this is in principle irrespective of a court's location, appearance or design, there is a mass of academic literature[12] and detailed guidance on court design[13] on the implications of spatial and visual perceptions of the court. In terms of the interior, sight lines and acoustics are seen as significant, as is the message conveyed by the broader architecture. The very premise of this literature serves what seems to be the uncontroversial contention that the characteristics of the building in which the court resides, and particularly courtrooms themselves, matter. By extension, the court as a

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[12] e.g., Resnik and Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms (Yale University Press; 2011); Robson and Rodger, *The Spaces of Justice: the Architecture of the Scottish Court* (Fairleigh Dickinson University Press; 2018).

[13] SCTS Design Guides and Estates Technical Standards (2011 et seq); HMCTS, [Court and tribunal design guide](#) (2019).

physical place must matter. In moving to remote, virtual courts, all the implications deriving from the court's material existence, and almost all deriving from the visual aspects of the court, are dispensed with in one fell swoop. The consequences may not be immediate, but they could become serious over time.

There are two respects in which it is suggested that the court's material existence matters. First, there are the intrinsically material aspects of visiting court which cannot be replicated by video-conference. Second, geography. Neither of these is to recognise that individual judicial decisions directly depend on or are influenced by aesthetic or environmental considerations. The point is a broader one, relating to the rule of law itself. The court as a physical place supports the public's acceptance of the legitimacy and authority of the court, and the law itself.

It is impossible to replicate on a video-conference the physical accoutrements that communicate the court's authority and legitimacy. Perhaps the principal means by which this is done is the idea of being required to be in, or send a lawyer to, a place. This primes the litigant of the court's ability to instruct the imposition by force of whatever decision it makes. They may be practical: the act of standing when the judge enters the courtroom. They may be subliminal: the symbolic authority of the mace; the elevated position of the judge; the equality of comfort and space given to each litigant, conveying procedural fairness and thus legitimacy. It has been put in these terms by one scholar:

> "This is related to a broader theory on the expressive function of justice … applying to both procedural and other aspects. The expressive approach brings out values and feelings by institutionalizing them. … the expressive function of justice inherently endorses certain types of behaviour and rejects others. According to this theory, justice functions by transmitting normative and value-based messages through ceremonies, symbols, declarations, and ambiances. The ceremonial function of justice is one among its many aims. … it may also be required in order to generate an atmosphere where litigants act in an appropriate and desirable manner. The courts act as guardians of certain fundamental concepts – the ethos and tradition of

> society as a whole and the legal system in particular. The ongoing commitment to this ethos is expressed through repetition and reinforcement of symbolic and ceremonial practices. Thus, the legal system attempts to influence the consciousness of the public, by conveying certain messages and through a symbolic atmosphere which acts upon the litigants, even if they encounter the legal system only once in their lifetime."[14]

An immediate reflection on this is that the messages said to be conveyed may not require a person to have encountered the legal system directly to have the desired effect. The idea of a court as a place is rooted in the public's collective knowledge. The idea of a physical courtroom resonates powerfully in a cultural and societal sense. It enters the individual consciousness in a variety of ways, such as word of mouth, literature and film, to the point where it is part of our collective knowledge that courts are in some way unique and legitimately so. They become accepted as the sole *compulsitor* able to give effect to rights and impel compliance with obligations. One cannot, ultimately, opt out of the law as with other public services, such as the NHS, and forms of ADR:

> "courts are not and should not be seen to be providers of a spectrum of consensual and non-consensual dispute resolution services."[15]

Place and the court's unique powers of enforcement are, at present, inextricably linked in the mind's eye.

Geographic location is a significant aspect of a court's legitimacy. The UK Supreme Court has now for a few years "gone on circuit" to Edinburgh, Cardiff and Belfast to hear appeals. This is part of the broader practice of courts, quite reasonably, seeking to entrench their legitimacy by travelling to territory over which they may have legal jurisdiction, but

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[14] Menashe, A Critical Analysis of the Online Court, *University of Pennsylvania Journal of International Law*, 39(4), (Summer 2018), 921, at 947-8.

[15] French CJ, 'Essential and Defining Characteristics of Courts in an Age of Institutional Change' (Supreme and Federal Court Judges Conference, Adelaide, 21 January 2013), at 3.

from which they otherwise could be perceived as distant. This is a phenomenon as ancient as the law itself on these Isles. Sheriffs, sheriffdoms and Burgh courts were introduced in the 12th century seemingly in order to replace local Gaelic forms of government with Norman feudal structures. To be legitimate, this could not be achieved without setting up courts in the locality. Decision-making in a place was significant. In 1154, when Henry II sought to institute a national common law jurisdiction in England, litigants were not required to travel to London. The purpose of the uniform system was to avoid the corruption of local dispute resolution, but its legitimacy, perhaps authority, was, again, thought to require the King's judges to travel to the locality. The Scottish Land Court operates on a similar principle. Its headquarters are in the city of Edinburgh, but in recognition of its subject-matter (for example, crofting law) and the rural way of life of its litigants, there is a clear benefit in terms of legitimacy from it sitting, as it does, across Scotland. Another example of the importance of geography, even in the substantive law, is that matters presumed to be within judicial knowledge may be particular to locality.[16] Finally, if a starker example is needed, one can see well the relationship between location and legitimacy given some currents of opinion on the role of Europe-based courts. The point here is that for a court to be *in* a place, it must *be* a place.

Geography affects the popular concept of law, as well as legitimacy. It was thought necessary not only to separate the House of Lords institutionally from the new UK Supreme Court, in that the Justices were no longer a mere committee of that legislative chamber; but also, to remove the final court of appeal geographically from the Palace of Westminster. The purpose was not to change the substantive law, but better to communicate, in spatial terms,

[16] Walker and Walker, *Law of Evidence in Scotland* (5th ed; 2020), para 11.7.4.

the constitutional order said already to have existed in practice.[17] This was because of the connotations of place, not requirements of space. Similarly, in most Anglo-American and European jurisdictions, the final court of appeal resides in a building separately from the legislature and executive, but within the capital city. This communicates the ultimate independence of the judicial branch, but the general grandeur or historic significance of the building conveys its standing as an organ of roughly equal constitutional power. The CJEU resides in Luxembourg, deliberately distant from the political institutions of the EU, in another example of how place supports institutional ideas. This is not to hold up the straw man of a proposal to demolish Middlesex Guildhall and have the Justices work from home in perpetuity, but it does show the acknowledged implications for the perceived values of a society that arise from courts not just performing a function, but existing, even in the mind's eye only, in a place. In this context, it has constitutional significance. If the courthouse was done away with, 10 Downing Street, the Palace of Westminster, Holyrood, St Andrews House and centrally located local government buildings all over the country would remain. The courts would lose stature in comparison to executives and legislatures at the local and national levels. To the layperson, the court may become less distinguishable from other public bodies with whom they communicate by email, phone or even video-conference. Interacting with the court would be little different from having a meeting by video-conference.

The Judicial Role

> "The work undertaken by a judge in a courtroom is the most publicly visible aspect of their role and helps to create and sustain their cultural image. The judge embodies

[17] See Norton, 'Legislatures and the Courts: The Importance of Place', 4 *Journal of International and Comparative Law* 171 (2017).

> the authority of the court, as an adjudicator and as the authority responsible for managing the court and the other courtroom participants. Any dissonance between the image of the judge and the nature of their role potentially detracts from their effectiveness because courts, unlike other branches of government, essentially rely on public acceptance of their legitimacy."[18]

Place supports the authority and legitimacy of courts as an institution. Those characteristics nevertheless vest in natural persons. This fact has to be accepted by litigants, the public at large and, indeed, the judiciary itself. This is more difficult to achieve away from a physical setting. Arguably, it should not be done from home:

> "authority relies on clear boundaries, identities and practices … the architecture of the courtroom stakes out the territorial boundaries of judicial power."[19]

The courtroom conveys the legitimacy of the judge's authority and its limitations:

> "From early makeshift furnishings in the fifteenth-century courtroom to modernist and post-modern courthouse schemes that tend towards flattening the courtroom interior, the raised dais has prevailed"[20]

The UK Supreme Court is unique in having the Justices sit at the same level as the lawyers and the public, but as we will see, the reasons for this do not amount to an argument in favour of taking their work online.

Through place, the "office of the judge" is established, disavowing the idea of "a citizen randomly imposing their will on others",[21] and distinguishing the judiciary from other public servants who may wield legal power but do not have the authority to enforce it, such as by imprisonment, regulating custody of a child, or freezing a bank account. That

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[18] Rowden and Wallace, 'Remote judging: the impact of video links on the image and the role of the judge', *International Journal of Law in Context* 2018, 14(4), 504 at 505.
[19] Rowden and Wallace, 'Remote judging: the impact of video links on the image and the role of the judge', *International Journal of Law in Context* 2018, 14(4), 504 at 505.
[20] Mulcahy, Legal Architecture: Design, Due Process and the Place of Law (Routledge; 2011).
[21] Rowden and Wallace, 'Remote judging: the impact of video links on the image and the role of the judge', *International Journal of Law in Context* 2018, 14(4), 504 at 506.

idea and that distinction are not as well communicated by video-conference. The unique visual aspect of the judge's authority bears witness to law's claim to legitimacy:[22]

> "Traditionally, this has been hypothesised as requiring that the judge's primary function … is to perform an impartial adjudication, embodying 'impersonal, unemotional detachment' … legitimacy also requires an assurance of procedural fairness, which, in turn, requires a degree of engagement between the judge and other courtroom participants …"

What about the judge's perception of his or her own role? It seems clear that the present Scottish judiciary by and large regret not being in the courtroom along with the parties and their lawyers. In the 2020 Judicial Attitudes Survey, one of the largest increases in concern since 2016 was regarding the reduction in face-to-face hearings, obviously exacerbated in the last year.[23] There are many motivations for seeking appointment to judicial office, but this tends to indicate at least that in-person hearings are on the positive side of the ledger when one weighs up a judicial career. The concerns about attracting the best lawyers to the bench have been well-ventilated. Any further diminution in its attractiveness is to be avoided.

3. Advocacy

> "the experienced judge or arbitrator desires and actively seeks to obtain an adversary presentation of the issues. Only when he has had the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of his decision. Viewed in this light, the role of the lawyer as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs. The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man's capacity for impartial judgment can attain its fullest realization."[24]

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[22] Rowden and Wallace, 'Remote judging: the impact of video links on the image and the role of the judge', *International Journal of Law in Context* 2018, 14(4), 504 at 506.
[23] 2020 UK Judicial Attitude Survey: Report of findings covering salaried judges in Scotland, para 7.3.
[24] Fuller, The Forms and Limits of Adjudication, 92 *Harvard Law Review* 353 (1978), at 384.

Video-conferencing does enable hearings to take place remotely. There is no question of that, but there is a disjunct between can and should. The view in some quarters seems to be that it is of such obvious benefit in terms of cost and efficiency, that had video-conferencing been invented 1,000 years ago, courts would never have been built. It is said that physical courts were just a necessity for justice to be dispensed.[25] This is not clear cut. Pleadings and submissions are, on occasion, tendered in writing. This is reasonably commonplace at appellate level in Europe and the USA.[26] There would have been no reason when the concept of a court emerged, for its functions not to have been delivered by correspondence, were it not for some recognised qualitative benefit of oral argument. The question is whether this requires to be done in person now that video-conferencing is available. The implications for the quality of communication between bench and bar, and by logical extension the quality of the law itself, require to be closely examined.

The qualitative basis for in-person hearings seems to be accepted to apply with more force for hearings featuring oral evidence. In the High Court Chancery Division in England and Wales Marcus Smith J said:

> "14. … many of the "old" rules – that would have pertained by default prior to the pandemic – either do not apply or apply in a radically different way. … By way of very broad summary:
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> > (a) There has been a dramatic shift away from "in person" hearings to "remote" hearings. As a general rule of thumb … interlocutory hearings and other hearings not involving witnesses can, and therefore should, in light of the present prevailing circumstances, be heard remotely.
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> > (b) On the other hand, witness actions (and other hearings involving witnesses) need to be case managed with far greater circumspection and care, because of the importance of hearing witnesses.

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[25] Susskind, *Online Courts and the Future of Justice* (Oxford University Press; 2019), 55.

[26] See, recently, Bergeron, 'COVID-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?' 21 *Journal of Appellate Practice and Process* 193 (2021).

> …
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> As was noted in *R (Dutta)* v *General Medical Council* [2020] EWHC 1974 (Admin) 414 at [39(iii)], "[t]he general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness". It follows from this that any form of artificial intermediation interposed between the questioners of a witness and the judge hearing that witness's evidence must be a derogation from the "gold standard". That does not mean that such a process cannot be fair or proper. But I do consider that I must approach the relative benefits of "in person" versus "remote" hearings in this light in the case of witness actions (and other hearings involving witnesses)."[27]

The "gold standard" argument may be compelling in its own context, namely, the process of establishing primary fact.

Oral argument has been a fixture of appellate arguments since the dawn of appellate courts.[28] The benefits of an in-person hearing may be just as valuable in substantive appellate hearings; only in different ways. These differences mean it is difficult to make a meaningful comparison:

> "Video-conferencing may distort nonverbal cues, such as facial expressions, gazes, postures, and gestures. … laggy streams may obscure facial reactions. Even in a live stream that is working perfectly, a headshot may overemphasize facial expression while leaving gestures partially obscured or out of the shot entirely."[29]

To avoid misleading, this quote is in relation to the examination of witnesses, but the distortion in communication it refers to does encumber dialogue between bench and bar.

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[27] *Bilta (UK) Ltd* & Ors v *SVS Securities Plc & Ors* [2021] EWHC 36 (Ch). See also the judgement in the Court of Appeal [2021] EWCA Civ 221. At para 62 Nugee LJ observed that cases where an individual is accused of dishonesty are paradigm examples where the trial judge will benefit from seeing the witness being cross-examined.

[28] Bergeron, 'COVID-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?' 21 *Journal of Appellate Practice and Process* 193 (2021), 211.

[29] Kostelak, 'Videoconference Technology and the Confrontation Clause', *Cornell Law Library*, 24 April 2014.

The word "dialogue" here has a particular meaning and is more significant than it used to be in appeal hearings. Little has been written on the style of appellate oral advocacy in Scotland, but the broad trend of requirements for permission to appeal, sifts and intermediary appellate courts and tribunals, is towards a system in which the appeal will give rise to a reasonably debatable point in terms of the application of the law to the facts. The appellate judicial culture not so long ago was to engage in little pre-hearing preparation. It is said that Lord Reid felt strongly that it was wrong for a judge to study the written case in an appeal so as to avoid coming to the hearing with preconceived ideas. In more recent times the notion of judicial "preparation" has become a settled tenet. The purpose of this is not, however, to water down the importance of the oral hearing. The reverse is the case. The purpose is to make the oral hearing sharper and more focussed, with all concerned being on the same page from the outset so that an educated and properly informed dialogue between bench and bar can take place. Such oral debate rightly remains central to our system of appellate justice.

The lightening of the load in the Divisions and the Criminal Appeal Court resulting from the procedural changes just mentioned now affords more time for advance reading in by the judges. Where many issues or grounds of appeal have been raised, the judges are likely to come to the hearing with at least a tentative view as to those which matter for the disposal of the case.

There are beneficial consequences of a system giving rise to appeals with more debatable points of law in respect of which the bench is better prepared. Hearings are more accurately described as dialogue, that is, a discourse or conversation between two or more

persons, as opposed to competing monologues.[30] The product of this is, at its root, more coherent law. It has been described thus in the US Supreme Court:

> Oral argument is different: in oral argument the justices actively seek out information that they deem relevant to their decision-making task. The justices use oral argument to resolve factual ambiguities, to explore the merits of grand ideas and specific legal tests, and to ferret out the policy implications of their potential rulings As Justice Harlan put it, "there is no substitute … for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies."[31]

In the UK Supreme Court, the Justices sit on the same level as, and closer to, the bar. What may be lost in terms of symbolic authority is said to be gained by a more conversational style of appellate advocacy.[32] The point is this:

> "… it is somewhat paradoxical that the increased use of video links, associated as they are with more distant or impersonal communication, has occurred at a time when there has also been a strong move towards more engaged styles of judging."[33]

Does video-conferencing inhibit the dialogue between bench and bar? The judiciary is now in a place where concerns about technology, rooted in its own understandings about the fundamental nature of its work, cannot be dismissed as "irrational rejectionism".[34] In section 1, the shortening of Inner House hearings and increasing the number of breaks during them were mentioned. We knew instinctively the reasons for this but may struggle

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[30] Paterson, Final Judgment: the Last Law Lords and the Supreme Court (Hart Publishing; 2013), p 9.
[31] Jacobi, Johnson, Ringsmuth and Sag, 'Oral Argument in the Time of COVID: the Chief Plays Calvinball', 30 *Southern California Interdisciplinary Law Journal* (forthcoming, 2021).
Loyola University Chicago
[32] Paterson, Final Judgment: the Last Law Lords and the Supreme Court (Hart Publishing; 2013), p 32.
[33] Rowden and Wallace, 'Remote judging: the impact of video links on the image and the role of the judge', *International Journal of Law in Context* 2018, 14(4), 504 at 522, citing Wallace Roach Anleu and Mack, 'Judicial work and AV use: perceptions from Australian Courts', 2017 *Onati Socio-Legal Series* 7, 691.
[34] Susskind, *Online Courts and the Future of Justice* (Oxford University Press; 2019), at 3 and 181.

to articulate them. The following, taken from a useful precis of the phenomenon of "Zoom Fatigue",[35] is not an exhaustive list:

1. Attitudes and feelings are communicated non-verbally, such as through facial expressions, the tone and pitch of the voice, gestures, posture, and takes account of distance between the communicators.[36] In person, this is done automatically in the subconscious, meaning we can listen to the speaker at the same time, but we actively search for cues on screen.

2. Meetings in person are attended by rituals which ease the process of exchanging knowledge. Rituals provide meaning, manage anxiety, exemplify and reinforce the social order, communicate important values, enhance group solidarity and signal commitment.[37]

3. Predominantly relying on verbal information to infer emotions is tiring. Effort is expended conveying the appearance of being interested, by an intense focus on words and sustained eye contact. The subconscious works harder to process non-verbal cues, taking up more of the cognitive load, leaving less to devote to intellectual reasoning.

The scope for and inhibition of non-verbal cues stultifies dialogue between bench and bar. The appellate advocate can only look at one judge at a time on the screen. The same is true of in-person hearings, but attention is quickly grabbed by some subtle change in body language, such as where a judge stops taking notes and looks up or gazes pensively to

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[35] '5 reasons why Zoom meetings are so exhausting', *The Conversation*, 5 May 2020.
[36] Mehrabian, *Nonverbal Communication* (Transaction Publishers; 1972).
[37] Smith and Stewart, 'Organizational Rituals: Features, Functions and Mechanisms', *International Journal of Management Reviews* (2011).

the ceiling. The advocate knows or suspects that this will have been induced by some facet of the argument they are in the process of making. It may pre-empt a question or intervention. Statistical evidence from the US Supreme Court does indicate the diminished fluency of dialogue[38]. To be clear, telephonic hearings have been used in that court during the pandemic, but there is no question that non-verbal cues are stultified to a significant degree in video-conferencing. During the pandemic, US Supreme Court hearings have been 40% longer than in-person hearings, with both the Justices and the advocates speaking at a much slower pace. Most significantly, the number of "speaking turns" has drastically reduced to 64% of the pre-pandemic level, with roughly concomitant increases of the number of words spoken per turn (55% for advocates; 23% for Justices). Judicial body language or expression may not even be a harbinger of a question or spoken intervention, but the advocate may take quick cognisance of it and adapt their argument accordingly. This may be to capitalise if the gesture indicates agreement or, conversely, move swiftly to address a possible concern or on to a stronger argument.

4. Appellate hearings during and after the pandemic – some reflections

Over the past year I have sat in many appellate hearings conducted by video-conference, both in civil and criminal cases. I have done so as a member of a panel of 3 (and sometimes 2) judges and as a single judge[39]. None of the hearings has been conducted from a courtroom; the judges have either been in their homes or in their chambers in Parliament

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[38] Jacobi, Johnson, Ringsmuth and Sag, 'Oral Argument in the Time of COVID: the Chief Plays Calvinball', 30 *Southern California Interdisciplinary Law Journal* (forthcoming, 2021) p.26.

[39] The single judge hearings have been case management hearings, motions, and applications for leave to appeal.

House. The case papers have been available only in electronic form. The advocates[40] have been at home or sometimes in offices or in the premises of the Faculty of Advocates.

What follows are my personal reflections. I take the opportunity to pay tribute to the skill and professionalism of the many advocates, court staff and my fellow Senators, who have endeavoured to make these hearings work. However, notwithstanding the best efforts of everyone involved, I consider that in general the hearings have been sub-optimal.

There are five main difficulties. First, the constructive interchange and dialogue between bench and bar that should be at the heart of an appellate hearing cannot be replicated online. This type of debate is the essence of the adversarial system. Over a video link interventions and exchanges between the judges and the advocates become awkward and stilted. The technology introduces a barrier inhibiting free-flowing and spontaneous dialogue. When a judge intervenes there is a delay (technically referred to as a latency) in transmission of the intervention. Quite often the advocate is not able to make out clearly what the judge is saying. Participants often find that they are talking over one another. The interchange becomes strained and difficult. The latencies that are an unavoidable problem in the transmission of data over the internet cannot be eliminated[41]. The internet is not a point to point data transmission system. It was not designed to maximise speed of data transmission, but rather to ensure that data transmission between computers would be protected in the event of a catastrophe[42]. The spectre of transmission latencies and technical

[40] Members of the Faculty of Advocates and solicitor-advocates.

[41] Except theoretically if video conferencing could take place with every link having identical broadband speeds and being at identical distances from each other over the internet. A practical impossibility.

[42] Originally a nuclear catastrophe. See Cade Metz, "*The Link between nuclear war and the internet*" www.wired.co.uk 4 September 2012.

glitches haunts hearings conducted by video conferencing technology[43]. This generates an uneasy atmosphere in which the judges may feel uncomfortable about taking up time with interventions and questions. Over millions of years human beings have evolved so as to maximise the efficacy of face to face personal interactions. This cannot be reproduced in circumstances where the interactions take place over the internet.

The conversational style of advocacy in the UK Supreme Court has been described in terms of an "academic seminar".[44] This alludes to a point made in the introduction. It seems to be recognised that teaching at all levels is best done face-to-face, notwithstanding the economies and efficiencies that are said by some to be provided by video conferences. In my view, substantive appellate hearings, from an institutional point of view, fall into the same category.

Second, there is an absence of the formality and dignity that should characterise a court hearing. There is no sense of the court as a place. The rituals and symbols which reflect the authority and independence of the court are missing. The atmosphere resembles more a business meeting than a court hearing.

Third, there are difficulties in trying to refer to and work with large volumes of electronic documents and other materials during a video hearing. Navigating around electronic files on one screen whilst keeping one's attention on the advocates and other members of the court on another screen is particularly challenging.

Fourth, there are serious concerns about the prolonged use of screens on participants' physical health and mental welfare. Staring at a computer screen for many hours alone in a room is stressful and debilitating. The lack of direct human contact with

[43] In my experience, it is rare for a hearing to take place without technical problems.
[44] Paterson, Final Judgment: the Last Law Lords and the Supreme Court (Hart Publishing; 2013), p 33.

other participants enhances a sense of isolation and detachment. The experience can be dehumanising. One misses the spontaneity of a live hearing and the human dimension it encapsulates.

Fifth, it is problematic for instructing solicitors and their clients to communicate with the advocates in the course of a hearing. A court hearing is a dynamic event. Reacting and responding to points raised by the court is made more difficult over a video link as compared to the physical courtroom.

None of these comments is intended to call into question the potential for creative and flexible uses of technology for certain types of appellate hearings, such as procedural or case management hearings. Substantive hearings involving complex legal debate are, however, more effectively conducted in person in a courtroom. Certainly if the advocates and their clients would prefer the hearing to be conducted in that way; the court service should respect such preferences wherever possible. If the parties wish a live hearing it is difficult to see why this should be denied where, for example, courts 1 and 2[45] in Parliament House would be empty whilst the judges conducted the hearing by video link from their chambers elsewhere in the same building.

Conducting appellate (or any) hearings in or from a courtroom does not mean that modern technology should not be put to far better use in that setting. There is considerable scope for this in the context of appellate hearings. It is clear from what has been achieved during the course of the pandemic that electronic systems are useful for the purposes of lodging and displaying documents and other materials. We should put the days of unwieldy lever arch files behind us. Improved document management systems should also

[45] The traditional courtrooms for the First and Second Divisions of the Inner House of the Court of Session.

be introduced for parties and members of the court. This will mean that everyone will be able to look at and work with the documents in the same format, at the same time and in the same place. Such systems should be installed in the civil courtrooms, starting with the senior appellate courts. Important hearings should be live-streamed to a wider audience, as has successfully been done in the Supreme Court and elsewhere. That will promote greater access to justice. All these improvements can be accommodated without abandoning the courtroom as the best venue for a substantive appellate hearing, in which the members of the court assemble alongside one another and work together in a formal environment. These enhancements will require there to be meaningful investment in the court estate so that in future we all work from modern, properly equipped courtrooms. Such changes extend well beyond short-term solutions, such as providing laptops or tablets to the judges and expecting them to work permanently from their chambers or homes. Our civil courtrooms urgently need to be properly fitted out for the digital age; they should not be depopulated.

Conclusions

The methods by which disputes are decided does not depend on a mere dichotomy of interests, namely, efficiency and fairness. There is, rather, a triangulation of interests between efficiency and fairness, yes, but also *quality*. This is why, for example, it is seen as so important that the best lawyers continue to be attracted to the bench. Why is this? The court has an added dimension. There are some things which a state health service or system of public transport are unable to provide. Some expensive treatments are not available on the NHS. Patients must go privately or abroad. There is no national aviation service. The courts are not in the same position. When a party seeks a legal remedy, the court *must* decide whether the pursuer is entitled to it or not. This is an absolute constitutional right. A

balance between quality, on the one hand, and efficiency and fairness on the other, remains. We do not, for example, let substantive appellate hearings drag on for days and weeks in the way we used to, even though this could increase the chances of achieving the right answer using the correct reasons. There is a baseline of quality in respect of which the court must never fall short, irrespective of efficiency and fairness. This is indeed a reason for having an appellate system in the first place. The question is where that baseline of quality should be drawn. Section 3 above has sought to demonstrate that virtual hearings, while a necessity during the pandemic, inhibit the fluency of discourse between bench and bar. Non-verbal communication that is lost in the virtual arena serves to lubricate and quicken a time-pressured discussion on what may be complex legal principles. In many cases, the right answer will probably be achieved without it. The quote from Fuller points out, however, that intelligent and vigorous advocacy in an adversarial system is indispensable towards achieving an impartial judgment imbued with legitimacy. The idea is that the judge has been able to interrogate the advocate's case as fully as possible in the time allotted. This requires the best means of communication: the in-person hearing.

I return to the prorogation case. At rare moments such as those the authority of the court, and its impartiality, filters through the public consciousness. The image of the court as a place communicates its separateness, legitimacy and standing. The public had been shown inside court 1 in Parliament House the previous week, where they may have been surprised to see that what they believed was an issue of high political drama was in fact being discussed calmly, rationally and fluently with regard to established, if contested, legal principles. They were shown the place where, if they wished, they could go and watch the arguments. The interior of court 1 would have been unfamiliar to most viewers, but its essential features resemble that of courtrooms across Scotland. These are noticeably distinct

from other forms of more visible state power, such as the House of Commons or a lectern outside 10 Downing Street. The image thus helps to imbue all courts with the quality of separate but equal authority. It is doubtful that the same effect would be achieved if the First Division's decision had been delivered from and analysed over a studio-based news desk.

Something fundamental, if intangible, would be lost without this sense of place. This loss would occur over a significant period. A year is not enough. We cannot predict with any certainty the consequences of the replacement over time in the mind's eye of the court as a place by the court as a website or an app. The court's institutional authority is deeply embedded in the psyche of society. Unlike the other two branches of the state, it needs this to be effective. We should be extremely careful before taking any steps which risk undermining it.

Decisions about the future of the civil courts in the post-pandemic era must be based on a detailed and open-minded analysis of all the various possible options for reform; one important measure will undoubtedly be the greater use of technology in some settings and contexts, but it should not be assumed that this is a panacea or a goal in its own right. Full public consultation is vital on issues of such enduring importance. The advantages and disadvantages of using technology in the courts should be objectively evaluated and the views of all stakeholders fully considered. The pool of consultees should extend well beyond the different branches of the legal profession[46]. It is only in the light of thorough consultation followed by close analysis of the views of stakeholders that sustainable policy for the future of civil justice and the civil courts can be developed. Input from wider

[46] The media would be important consultees as would victims' groups.

Scottish civil society is vital as part of Scottish participatory democracy[47]. Change should not be driven by calculations based predominantly on alleged cost savings, perceived efficiencies, or the siren voices of digital ideology. As the Lord President has stated, the court is not just a physical space. It is a public service.[48] The question is how best to ensure that the quality of that service is maintained and enhanced.

I hope that today's conference marks a starting point for such an exercise in public participation and engagement about the future of the civil courts in Scotland.

Paul Cullen
Senator of the College of Justice
10 May 2021

[47] See Robson and Rodger, *The Spaces of Justice: the Architecture of the Scottish Court* (Fairleigh Dickinson University Press; 2018) page 122.
[48] Lord President's Statement on the Future of Courts and Tribunals, 18 June 2020