Judicial Institute for Scotland

Report on the Civil Justice Conference of 10 May 2021

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Introduction

In early 2021, the Lord President asked the Judicial Institute to organise a Civil Justice Conference to provide a forum for discussion amongst interested parties about how Court of Session and sheriff court civil business might be conducted once the pandemic is over or manageable and a return to in person hearings is feasible.

The conference took place on 10 May 2021 and was the first to be held remotely by the Judicial Institute. Members of the public, the legal profession and judiciary were invited to attend. Those who spoke were the Lord President and Lord Justice Clerk; The Right Hon Lord Justice Flaux, Chancellor of the High Court of England and Wales; The Right Hon Lord Pentland; The Hon Lady Wise; The Hon Lord Tyre; Sheriff Principal Aisha Anwar; Sheriff Wendy Sheehan; Professor Richard Susskind OBE; the Dean of Faculty, Roddy Dunlop QC, Dean of Faculty; Amanda Millar, President of Law Society of Scotland; Vikki Melville, Managing Partner of Clyde & Co (Scotland); John MacGregor QC; Ruth Innes QC and Gordon Dalyell, Partner, Digby Brown, and Past President of the Association of Personal Injury Lawyers. All of the speakers provided papers in advance of the conference and there was also available the results of three surveys of the judiciary and the professions carried out by the Judicial Institute, the Faculty of Advocates and the Law Society.

The conference was chaired by Sheriff Alistair Duff, Director of the Judicial Institute and Sheriff Susan Craig, Deputy Director of the Judicial Institute. A number of attendees submitted questions in advance of the conference by email and on the day, participants made full use of the chat function on Cisco WebEx Events by posing a large number of questions. Sheriff Susan Craig posed a selection of these questions to speakers throughout the day.

This report provides a record of what the speakers said on the day. The programme and all pre-conference papers, including the film of Professor Susskind, can be found on the Civil Business Post COVID 19 page of the scotcourts.gov.uk website.

For those speakers who in essence delivered their pre-conference papers, the text of these papers has been included within the body of report as representing their contribution. Some speakers delivered unique presentations and have subsequently provided the text, so that that text has been included in the paper as their contribution. For those speakers who delivered a unique presentation but have not provided the text, we have included a hopefully verbatim note of what was said by them at the conference, being over- rather than under-inclusive at this stage.

Finally, we have sought to include an indication of the free discussion which took place during the sessions.

The Conference began with a short introduction by the Chair, Sheriff Duff.

Keynote: The Right Hon Lord Carloway, Lord President

Thank you Alistair, and to all at the Judicial Institute, for organising this conference. I hope it will be obvious, at least by the end of the day, that the conference has not been set up to achieve a particular object or to satisfy what some have referred to as my own agenda. I do have some ideas, but this is not the time to express them; even if they were in anything resembling concrete form, which they are not.

The subject matter is civil justice after the pandemic. The purpose of the conference is a broad one. Comment on the impact of the remote hearing, whether by Webex or telephone, from professional bodies and court users has been regular and helpful, but sometimes anecdotal. Proceeding according to perceptions of mood music is inherently unreliable in our current circumstances. Open discourse has been largely stymied by the absence of in-person gatherings, whether in Parliament House, the sheriff courts, at lectures, seminars and even social receptions and dinners, where ideas and experiences have traditionally been shared in person. This virtual conference cannot remedy that, but it can be a focal point for beginning to consider the central question of what Covid-instigated methods of working should be retained and/or improved and which pre-Covid procedures, notably the in person hearing, should be reinstated.

The conference starts from what I hoped is an uncontroversial premise; that in certain situations, the use of technology, which has been adopted because of the urgency brought about by Covid, is so advantageous that it should be maintained as the default system. The discussion should be about its scope and extent. A preliminary delineation may be suggested by the titles of the three sessions, but even that is not the intention. Those general distinctions are far from clear cut. Different practice areas will also have their individual characteristics which will need separate consideration.

Reasonable people from inside and outside of the legal system will disagree on the direction and distance of travel. There are opinions to be expressed and challenged, and facts to be ascertained. What are the opportunities, in respect of access to, and the openness of, justice? What has been lost, in terms of in person courtroom deliberation, professional and personal collegiality and visibility? What problems are inherent in the use of virtual courts? What were the consequence of their rapidly

accelerated rollout? What considerations are universal and which are context-specific? Should the working methods of solicitors and advocates mirror the permanent adaptations made by other professional services providers? These are all intended to be open questions. There has been no time, until now, for broad collective reflection and deliberation in an organised form that will guide the decisions that have to be made for the future.

The conference is a forum in which the judges, sheriffs, members of the professions and other interested parties can be listened to by those who will ultimately have to take those decisions. None of us has a panoramic view of post-pandemic justice, not least because of the diminished opportunity to share our experiences while stuck at home. This conference will allow decision makers to grasp the central elements of others' perspectives.

We do have an increased understanding, that we would not otherwise have had, on what can be achieved in the virtual or remote world. Trial and error has been imposed upon the court administration and the professions. This is then an opportunity. There are already some statistical measures against which experience can be tested. More are needed. Any significant change to Court of Session or sheriff court rules will be the subject of consultation through the Civil Justice Council, users groups, and national and local bar associations. Today's conference, in combination with other material, including the surveys carried out by the Judicial Institute, the Faculty and the Law Society, will allow us to extract a detailed framework of the perceived and actual advantages and disadvantages of digital justice.

Against the various perceptions held by the judiciary and the professions, a range of other imperatives will have to be balanced. The justice system, like the political system, cannot be the claim only of its direct participants. The legal system is not our preserve. Few sane citizens, administrations or corporations wish to litigate. When they do, they want the dispute to be resolved as quickly, fairly and effectively as possible. The transparency of the court process, which is generally achieved through media coverage, is vital. If there is an opportunity to advance those interests, with the use of remote or virtual systems, it has to be given serious consideration.

I have had sight of some the questions and comments which some of you have submitted in advance, so I can provide a few preliminary comments in advance of further discussion. First, online broadcasting is something which has been allowed, at the discretion of the court, for some time. Media outlets have been allowed to do so, generally for high profile cases. Making it more widespread has cost implications and there are differing views on whether it is always a good thing. It should feature in any wider consideration of moving hearings online, as a possible extension of the open justice principle.

Secondly, several of the questions touch on the monitoring and review of the changes adopted during the pandemic and ask how, were these to continue, the impact on outcomes could be measured. The conference is part of the information gathering exercise. A need for reviews, and how regularly they would take place, would be determined by the nature of any change. We are at a stage beyond where we would otherwise have been. Today is a chance to hear views on what has been a success and what has not, or at least what should not be retained.

Thirdly, the mass of technology, which the SCTS digital teams have so ably provided and mastered since March 2020, has been obtained and deployed at a considerable cost; a large proportion being on the criminal side in setting up the remote jury centres. If savings are accrued in the long term, and the use of remote systems is not about cost, they will be deployed elsewhere in the court system. For those seeking a reduction in court fees, that is not in my or SCTS' gift but in that of the Government.

We have nearly 300 attendees. I am extremely grateful to you all for taking the time to participate. This is indeed a unique collaborative moment. I thank in advance all of our speakers for their energy and effort in presenting and preparing their papers. I extend a particular welcome to the jurisdiction to Lord Justice Flaux, whose insights, from a court operating at the heart of global commerce during the pandemic, will be invaluable. I always enjoy listening to the innovative and constructive views of Professor Richard Susskind. I am sorry that we will not be able to quiz him as we might otherwise have done.

We are going to hear from a wide range of speakers, some with markedly different views. Thank you and enjoy.

The Future of Courts (recorded presentation): Professor Richard Susskind OBE

Good morning. My purpose today is to speak to about the future of courts. I will do so under six headings. First, I will summarise the problems we face. Second, I will suggest a mind-set for thinking about the future of courts. Third, I will discuss Covid-19, and the extent to which it has accelerated the acceptance of technology. Fourth, I want to say a little bit more about technology by giving a flavour of how it is developing in society. That will set up what I believe are the five future trends we should be looking for in the future of our courts. Finally, and most important, I want to say something about justice.

There are three problems. First, because of Covid, many hearing rooms around the world are sadly closed. Second, and relatedly, large backlogs are building up across court systems. The third problem is not, in fact, new. It is the problem of access to justice, whereby even in our most advanced legal systems civil disputes cost too much and take too long. The process is excessively combative and intelligible unless you are a lawyer or a judge. The justice system is in my view increasingly out of step with our digital society. There are staggering backlogs, such as 80 million in Brazil and 30 million in India, but the most alarming statistic of all, from the OECD, is that only 46% of human beings on the planet live under the protection of the law. Less than half of the people in the world have realistic access to legal guidance and to dispute resolution.

What mind-set should we have in thinking about how we might improve this? Since the 1990s, I have been asking: is the court really a place, or in fact a service; do we really need to physically assemble in the same location to resolve our differences or does digital society offer different ways of resolving legal disputes? I suggest there are different ways. Another mind-set exercise is rooted in the story of Black and Decker, the world's leading manufacturer of power tools. Apparently when they recruit new executives, they sit them down in a room and show them a slide of a gleaming power drill and say, "*this is what we sell isn't it*?" The executives are surprised and say, "*of course that's what we sell*"; we're Black and Decker, the world's leading manufacturer of power tools. The trainers with a flourish put up a new slide saying this is actually what our customers want. The new slide shows a hole neatly drilled in a piece of wood.

The executives' task is to find new, imaginative, creative ways of giving customers what they want. This is a lesson; we have to move away, metaphorically speaking, from the power drill mentality; of thinking how can we make things a bit cheaper, quicker, lighter or better. Instead, take a step back and ask: what is the fundamental value we bring to those we serve? What is the hole in wood in the world of corporate services? The big issue is whether might we deliver that hole in the wood the in a new way in the digital society. My final observation about mind-set is that it is absolutely vital to distinguish between two different conceptions of technology. I call these automation and innovation. Automation is what most people think of when they think of computer technology. You take some kind of task or system or process, and systematise it, streamline it, optimise it or turbo charge it. We are not, however, changing what's going on fundamentally; we are taking current ways of working and grafting technology on top. This has been the dominant approach for court technology and legal technology over the last 60 years; we've automated past practice. The real opportunity of technology lies not in automating what we have always done, but in using the power of technology, the reach of the internet and mobile devices, to allow us to deliver court services in ways that are not possible without technology. Many will say Covid-19 has resulted in transformative technology. It is certainly true there has been the emergence of what I and others call remote courts. I've been involved in the running of a service called remote courts worldwide: https://remotecourts.org/. We have been providing a facility to help you understand what progress has been made across the world, in moving under emergency conditions from physical courtrooms to remote alternatives, to keep access to justice alive. It would not be melodramatic to say remote courts have kept the rule of law alive, by keeping courts functioning and using technology to do so. As of today, we have 168 different countries represented, each to a greater or lesser extent using technology. Some audio, i.e. telephone conferencing. Others use video conferencing, like the technology used at this event. Finally, there is the hearing, where evidence and arguments are submitted in electronic form followed by some kind of online discussion, and the judge delivers his or her decision in electronic form.

The dominant technology has been the video hearing. I want to make five observations about this, because some people believe that the transition to video hearings is the

endgame for the technological transformation of courts, whereas we are in fact still warming up.

First, video hearings are working. Not in all cases, but in those where they are regarded as appropriate, they are working rather well; far better than any lawyer or judge would have anticipated 14 or 15 months ago.

Second, the old trope that judges and lawyers are conservative and never adapt has not proved to be true. When the platform was burning, the iceberg melting, the reality is that judges and lawyers adapted very quickly to new working methods.

Third, we are in an interesting time psychologically. Some minds at least are open to new ways of delivering court services. Some minds have been changed. This is a good springboard to develop more advanced uses of technology.

Fourth, but more difficult, I have seen a polarised reaction to video hearings. Some say we should never go back; some say they cannot wait to go back. There are not many in between. It is not clear what post-Covid legal life will look like, so there needs to be more public debate and discussion about the advantages and disadvantages of what we have seen.

Fifth, Covid-19 accelerated some technologies, but decelerated others. The common observation that Covid has accelerated technologies over-simplifies things. It has accelerated technologies used to communicate, collaborate and cooperate online, but more advanced technologies like artificial intelligence in most organisations, and certainly in the legal and court system, have been put on the back burner. Understandably the focus has been on keeping the service alive, rather than doing anything fancier. This is an acceleration in automation, but a deceleration in innovation.

People write to me to say "*your future has arrived*", suggesting it is time for me to step aside and retire. I don't actually think that this move to video hearings is the long-term future. Home working is not a full transformation of the operation of courts. Dropping hearings into Zoom is not a shift in paradigm. The people, the rules, the processes and the problems remain much the same. It's best to regard Covid as some kind of experiment. We need to gather data about what's gone well and what we need to

industrialise, and identify areas that are not susceptible to technology. Covid, therefore, is a springboard event for more advanced uses of technology in our court system.

What does the future look like? In my book “Online Courts and the Future of Justice”, I suggest is that technology is moving at a fearful pace in wider society. Barely a day goes by that we don’t hear of some system, app, technology or breakthrough; and there is no finishing line. No one in Silicon Valley, China or South Korea is settling. Quite the reverse: the pace of technological change is actually accelerating. It is remarkable that more people today have access to the internet (59% of the world) than access to justice according to the OECD (46%). In that context I want to suggest a way ahead. I’m not suggesting that we eliminate the current court system, but we are going to see five important developments.

First, asynchronous hearings or online judging. Communication is synchronous when people need to be available at the same time, such as in a phone call, a meeting or a video call. These are all forms of synchronous communication for which you need to be available at the same time. Asynchronous communication is the text message, email or WhatsApp, where you send and receive messages at your convenience. It turns out that asynchronous communication is often considerably more convenient than synchronous communication. The idea of asynchronous hearings is one we want to pursue. It is a little like the paper hearing I mentioned earlier. The idea that we developed originally in the Civil Justice Council in 2014/15, when we first recommended online courts, is that particularly for large volumes of low value civil cases, it would be more convenient if evidence and arguments could be submitted in electronic form. There would be some kind of online discussion, and the judge delivers the decision in like form. No one would have to take a day off work and we could have a far more diverse judiciary because judges would not need to be available during normal working hours. It would be quicker, lower cost and more convenient.

Second, extended court services. I don’t believe in a digital society, where there is very little public legal funding, that the court should stop at what is its undoubtedly primary function of delivering binding, authoritative decisions. Court users need more help trying to understand the legal position and their entitlements, in identifying what options are available to them, and in organising evidence and arguments. They need

facilities to encourage them to a non-judicial settlement. All of these forms of support and ADR are not a private sector alternative to the court system, but are actually baked into tomorrow's court system. I call this extended court services, encouraging dispute containment dispute as well as dispute resolution. This is not a pipe dream, if you look at the Civil Resolution Tribunal in British Columbia, for example. On eBay, every year 60 million disputes arise between traders. Almost none are sorted out by courts and lawyers, but by a variety of forms of online dispute resolution. I accept, however, that post-Covid the idea of extending the court function with budgets are already limited is a rather naïve one. I have refined my thinking in a paper published by Harvard Law School, supporting the idea, explored in England and Wales, of a front-end where the extended functions are embedded in a kind of public-private partnership model. You may have ombudsmen, charitable organisations or educational bodies creating online dispute resolution mechanisms that help people understand their entitlements and options, to help them prepare their case. This would not be part of the court system, but somehow linked to it. If a dispute is not resolved, there would be an automatic transfer of the documentation into the court system. Perhaps these front-ends or plug-ins can be regulated and authorised, and approved by the court system. It is a new form of relationship, but the key point is to divert some cases away from the court system and, indeed, to dissolve some cases altogether where they do not merit judicial attention.

Third, artificial intelligence. I wrote my PhD in Oxford in the 1980s on AI in law. I started my working life thinking about AI in law in my dissertation as an undergraduate at Glasgow. I have been thinking about this for 40 years, but it is only now for the first time that I can say that this decade will be when technology, in the form of AI, plays an increasingly important role. Systems providing online legal guidance will use a form of AI. The technical details are for another time. Another form of AI which gets people nervous is the idea of systems that can predict the outcome of decisions. People were doing this in the 1950s under the heading of judicial behaviourism, but there is concern about the gathering of data enabling people to predict the outcome of disputes. These systems prove to be very useful. I believe they will become part of the armoury of the online dispute resolution package, whereby people will be able to understand the likelihood of their dispute being decided for or against them. There is often discussed, almost science fictionally, the idea of computers replacing judges. I would like you all

to relax about this. I first raised this in the early 1980s. If the proposition is that machines can somehow reason and think like judges, and provide explanations in the way they do, we are many years or decades, if not longer, away from that. There is a model being pursued, for example in Brazil and Singapore, which I have put forward as a thought experiment, namely the idea of a prediction as a determination. You can imagine that in Brazil, with its backlog of 80 million cases, where with all the will in the world none will be sorted traditionally in the short term, you could propose to parties a decision by a prediction based on the past behaviour of the court as to the likelihood of the outcome. Would parties accept that prediction as a binding determination if the degree of certainly was, say, 95% or higher? I am not suggesting or advocating this in the near future, but if we do use AI that is the kind technology that will be deployed. The issues raised by this are discussed in my book. The worry with machine learning and AI is that the system relies on data or software engineers that may be biased. These systems often don't offer explanations of their lines of reasoning because they don't have them in the way we understand. The opacity of the data troubles people. AI need not be of concern in the short term, but it is only fair to highlight it is as a possibility.

The fourth additional feature is a re-emphasis on dispute avoidance; from legal problem solving to legal risk management - putting a fence at the top of the cliff rather than an ambulance at the bottom. I've never met a client who preferred a dispute well-resolved by judges and lawyers to not having a dispute at all. We need to take dispute avoidance seriously, as with public health. We supplement clinical health with the idea of health promotion with the idea of preventive medicine. This same idea needs to be baked into the justice system.

What about justice; justice without lawyers and courtrooms? I understand the criticism but it is interesting both proponents and opponents of online justice invoke concepts of justice. I identify seven conceptions of justice that all systems should meet, whether physical or virtual.

1. First, decisions that are fair; that is substantive justice.

2. Second, the process needs to be fair; that's procedural justice.

3. Third, transparency; that's open justice.

4. Fourth, accessibility; that's distributive justice.

5. Fifth, the service needs to be at an appropriate cost relative to the issue; that's proportionate justice.

6. Sixth, the service needs to be backed by the state; that's enforceable justice.

7. Seventh, sufficiently resourced; that's sustainable justice.

The key issue, if the concern is genuinely access to justice, is not whether online courts will replace physical courts or are superior to them, but whether they can take on some of the work traditional courts do not or cannot do. My main issue is distributive justice. In the name of justice, I am afraid many critics are missing the chance to reduce that manifest injustice of inaccess.

I often conclude presentations with a slide of the rear view of a person sitting in a comfy deck chair at the seafront wearing a hat. It has two possible messages. Some see it as a judge hoping to hold out to retirement before any of this engulfs us. The other is a judge sitting on a deck chair sitting during an asynchronous hearing with a laptop, delivering justice in an entirely new way.

Apologies I could not be with you in person to answer your questions but I wish you well for the rest of the conference. Thank you for listening.

The future shape of business and property litigation after the pandemic: The Right Hon Lord Justice Flaux, Chancellor of the High Court of England and Wales

Presentation

Introduction

Good morning everyone and thank you for inviting me to speak at today's virtual conference. Some of you I know already, but it is good to meet you all and to exchange ideas about the important challenges which litigation in our respective jurisdictions faces. Of course, I speak to you as an English judge and so that is the experience that I will share. I look forward to hearing the perspective of Scottish judges and lawyers.

As the Chancellor of the High Court, I am the head of the Chancery Division which deals with the resolution of many different types of dispute ranging from business, intellectual property and competition disputes to insolvency and company law, partnerships, mortgages, land and trusts. I am also responsible, in consultation with the President of the Queen's Bench Division for the day to day running of the Business and Property Courts ("B&PCs") which include the Commercial Court and the Technology and Construction Court.

Today, I would like to share my thoughts about the challenges which face us in litigation in the B&PCs in the context of the global pandemic that has not recognised any land border! The future course for the resolution of disputes in the B&PCs has been irrevocably affected by our experiences over the last year or so and the rapid changes forced by the pandemic. So, before I look forward, I am briefly going to look back.

The past 15 months

New ways of working have developed. By necessity, we saw a rapid adaptation of the B&PCs to the changes required by lockdown. In the early weeks of the pandemic, 85% of B&PC work continued without any need for adjournment. And as we have developed different ways of hearing cases with a live element – or hybrid hearings – cases requiring adjournment have become increasingly rare with, waiting times for listing some hearings in the Rolls Building actually decreasing.

In fact, there was a unity of approach from the start across the B&PCs in England and Wales, with work in London and in the regions continuing largely unimpeded and with a generally smooth adaptation to remote, and later hybrid, hearings guided by the early adoption of a remote hearing protocol and practice directions. It is difficult to understate the seismic change that occurred, over a year ago, when almost overnight we moved from in-person hearings to remote hearings and from predominantly paper bundles to electronic files. Our experience – and I am sure yours too – has been that practitioners have played a large and important part in that and in helping to maintain the provision of the highest quality of legal services in the most difficult and uncertain of circumstances. Likewise court staff who have to adapt to these changes, often at short notice.

A new etiquette has quickly emerged in hearings with a remote element. Within a few weeks, judges adapted their introductions. We acknowledged that video conferencing felt informal, but emphasised that a virtual court was still a court and that all those present should behave accordingly. Some judges continued to wear robes for the same reason. Sometimes referring to the principle of open justice, we have explained that links to the open hearing had been provided to members of the public and press but on the basis that they still comply with the rules applicable to hearings in court. Attendees are reminded that recording or taking photographs of the proceedings is prohibited. That introduction has also often become the place to ask for tolerance when faced with inevitable technical hitches.

As it has turned out, the main change in the judicial approach to B&PC hearings since those first weeks has been in our confidence that the system will work properly. In the early days, we were in uncharted territory and did not know to what extent the technology and format would work or prove sufficient. There is a higher degree of confidence now that it will. Technical glitches occur, but are relatively uncommon. And the frustrations that one encounters during a remote hearing are often similar to or the same as would have emerged in court.

However it is clear that even if a remote hearing is a more efficient way of justly and fairly resolving a dispute, it has its price. The infrastructure – screens, bandwidth, and cameras – needs to be in place, and even if it is, conducting remote hearings is more tiring for all concerned. We have, in the past, done it, and done it well, but at some

personal cost. These impacts have been felt far beyond the judiciary, and I am sure we all have a story to tell of the difficulties of working remotely. I think many of us, judges and lawyers alike, have been working at a pace and intensity greater than before. I have been struck by the experience of our district and circuit judges during conversations I have had with the regional B&PC centres. The impact of the transition to remote hearings has not been felt evenly across all levels of the judiciary in England and Wales, and has further compounded the heavy workload of our district judges who are often having to manage a full day's list of hearings in family and lower-value civil work with minimal administrative support. To continue to work in that manner is unsustainable and raises important questions about well-being.

Trials in future

During the pandemic trials have continued in the B&PCs, albeit to a large extent remotely or on a hybrid basis, with some advocates or witnesses in Court and others via video link or a virtual platform. As restrictions are hopefully lifted and courtrooms can return to something resembling normality, an issue which will undoubtedly arise is the extent to which we as judges should permit evidence to be given remotely using these methods. In the B&PCs for some years, we have adopted a flexible approach and, using the powers in CPR 32.3, allowing witnesses from abroad, who could not for some good reason come to London to give evidence, to give their evidence over video link. However, during the pandemic, this has obviously expanded to many, if not most, witnesses giving evidence remotely, not just from abroad but from within the UK. When restrictions have been lifted, it seems likely that there will continue to be pressure from parties for some witnesses to give evidence remotely, even when the witness in question is within the jurisdiction.

The extent to which a judge accedes to such an application will be a matter of judicial discretion, but it might be helpful to devise some criteria which judges can use to assess such applications. One possible criterion concerns the assessment of witness credibility. Before the pandemic, I would say that the generally held view and belief was that it was not easy to assess the credibility of a witness remotely, but a number of recent decisions suggest that the position may be more nuanced.

A recent example of a (five week) fully remote trial that worked well from the perspective of the judge, is found in *Re One Blackfriars Ltd* [2021] EWHC 684 (Ch) where it was said that the judge's ability to assess the reliability or credibility of the evidence was not in any way diminished during a fully remote trial. The judge (a Deputy High Court Judge) noted that his view of most of the witnesses was confined to their head and shoulders. This meant he was less able to see their full body language and demeanour. However, he found that this was not a significant disadvantage. It is worth quoting what he said about this:

> *"I did not feel in any way disadvantaged in my ability to assess the reliability or credibility of the oral witness evidence. If anything, the opposite was the case. The engineer host provided by Sparq not only ensured that the internet connection was sufficiently good and stable to enable remote cross-examination (well before the witness appeared) but also helped to ensure that the witness was generally positioned at a reasonable distance from the camera and in optimal light conditions. The result was in most cases as if I were sitting about 1.5 metres directly opposite both the witness and the cross-examining advocate with the trial bundle open in front of me. This permitted me to follow the ebb and flow of a cross-examination very well. If anything, I was in a better position to observe the witness's reaction to the questions and documents being put to them than if the trial had taken place in a traditional court room. In a typical Rolls Building court room, I would have been positioned behind a bench looking for the most part at the side of the witness's head from a distance of three or four metres while her or she either looked down into a paper trial bundle or at cross-examining counsel."*

In *A Local Authority v Mother & Ors* [2020] EWHC 1086 (Fam) Lieven J considered whether to hold a fact-finding hearing remotely or not in light of the Covid pandemic. She said that *"having considered the matter closely, my own view is that it is not possible to say as a generality whether it is easier to tell whether a witness is telling the truth in court rather than remotely."*

I read with interest the Outer House decision of *YI v AAW* 2020 Fam. L.R. 126, where the judge said:

> *"It was submitted on behalf of the defender that it would be particularly difficult to assess credibility of the parties and their witnesses in this case because the proof had been conducted remotely on video screens. While there were some technical difficulties from time to time with witnesses' wireless connectivity and/or sound quality, I have no hesitation in rejecting that submission."*

These are examples in each of our jurisdictions of judges who are clear that their ability to assess the credibility of a witness giving evidence remotely is not impeded. However, my own view is that this is only part of the picture. Particularly in cases which involve what is sometimes called hard swearing, acute conflicts of oral evidence, or cases of fraud, it seems to me that attendance of witnesses at court remains an important aspect of the administration of justice. There is an issue here of what might be called, I hope not pompously, the authority or solemnity of the court, which also corresponds with what Lord Pentland describes in his talk as the court as "place".

This view, that there are certain categories of case where an in-person hearing with witnesses giving evidence in court is what the interests of justice require, is borne out by the recent decision of the Court of Appeal in *Bilta v TFS* [2021] EWCA Civ 221, which ruled that the key factor in deciding whether to adjourn a case because a party or major witness would not be available was whether a refusal to do so would lead to an unfair trial. The judgment described hearings concerning allegations of dishonesty as 'paradigm examples' of cases where live cross examination would assist the trial judge. The first instance decision in that case also includes helpful guidance by Marcus Smith J on the factors to be taken into account by parties seeking to agree directions for trial while social-distancing measures remain in place. They include the importance and nature of the issue (whether interim or final), whether there is a need for urgency, whether the parties are legally represented and a lay party's ability to engage with the remote process and the source of evidence such as whether it is written or oral, expert or lay and the extent to which it is contested. Those all seem to me to be important factors or criteria to be considered by a judge in determining in future whether a hearing should be remote or in person.

One view which I have heard from certain judges is that enabling witnesses to give evidence remotely from home means that they are more relaxed and at ease giving their evidence, which in turn improves the quality of the evidence. That is all very well,

but in a sense, it overlooks that the purpose of live evidence with cross-examination is not to make the witness feel more at ease, but, so far as possible, to arrive at the truth about the particular dispute. It also overlooks that not all witnesses come from homes where they can feel at ease. Surely the future should not involve the repetition of one instance of which I was informed, of a witness giving his evidence over his mobile phone from the street, although no doubt that problem could be addressed by ensuring that evidence was given from a solicitors' office. It is important to have in mind that, although in one sense, a witness may find giving evidence in court somewhat daunting, the courtroom does provide a neutral location where the dispute can be heard and resolved.

Another dimension to what will undoubtedly be a continuing debate about whether witnesses should give evidence remotely is provided by what I have been told by counsel are greater difficulties in cross-examining witnesses effectively, particularly in document-heavy cases.

Other hearings

As well as cases that do not suit a remote hearing, it has become apparent that there are hearings that suit them well, and where a speedier, less expensive format seems more proportionate. Generally speaking, these are the shorter preparatory and interim hearings that are often to an extent a collaborative exercise between parties, like directions hearings. It does seem distinctly possible that, going forward, the default position in short interlocutory hearings of, say, two hours or less, will be that they should be dealt with remotely, but I have been at pains to emphasise when discussing these matters with the judges for whom I am responsible that ultimately, the decision as to what form any hearing should take is one for the judge, albeit taking proper account of the representations of the parties and their lawyers. In other words it is a matter of judicial discretion.

The use of technology to conduct remote hearings has undoubtedly provided the B&PCs with some additional flexibility. It has opened the possibility of specialist judges 'sitting' outside London more easily and more swiftly, being able to deal with short applications and hearings that require a High Court Judge in circumstances where those High Court Judges who are out on circuit are not free.

One area where that is now being put to good effect is the extension of Intellectual Property Enterprise Court (IPEC) multi-track hearings to the seven B&PC centres outside London. The speedy resolution of disputes before that court relies on firm case management by one of a small pool of expert judges and a short timeframe between CMC and trial by a docketed judge. The ability to conduct even just the CMC remotely will mean that those often London-based judges are more likely to be able to hear cases that have been issued in one of the regional centres – probably Manchester or Newcastle – with the same level of service whilst allowing parties to have their dispute heard in a local court.

This ability to hear certain cases remotely supports the move away from London-centric business and property litigation which really began with the reforms to civil justice recommended by the report by the then Lord Justice Briggs some five years ago.

Taking stock

Now that the end of restrictions is possibly in sight, we have breathing space in which to take stock of what has worked and what has not worked in the last year or so, which should inform what we want from our court system in the future. My own view is that we must seize the good things that have come out of this terrible crisis – the efficiencies and the things that we have learnt to do better – and jettison the bad, including the erosion that working from home has caused to our perception of the work/life balance. There is no doubt that we have been offered an opportunity to do things differently, and we should grasp that firmly.

It is clear that we will not be returning to the position as it was in early 2020. For example, if the relevant provisions of the Police, Crime, Sentencing and Courts Bill, pass into law in England and Wales, there will be power for the temporary provisions in the Coronavirus Act that enabled the observation of remote hearings to be made permanent. I think this could only benefit the B&PCs and make them more competitive, as it would maintain the ability of clients and witnesses to participate in hearings remotely and enable the press and members of the public to observe hearings remotely. This would give the B&PCs an opportunity to build on the better elements of this method of resolving some disputes.

In looking at how we move forward, the experiences and opinions of all B&PC practitioners and regular court users should be actively sought and taken into account as part of this process, as we know that success relies upon cooperation.

The authority of the court

Returning to the point I was making a moment ago about the authority or solemnity of the court, in considering those parts of the new way of working we have used during the pandemic, that we wish to retain, we must not lose sight of the benefits of many of the formalities attached to the system based on hearings in courtrooms that has existed for so many years.

We have all experienced the informality that can creep in when we are conducting cases from our kitchen tables or studies. We have had to become tolerant of those interruptions: bad Wi-Fi connections, rings on the doorbell, noises from others in our family or in my case the barking dog. Counsel taking instructions via WhatsApp and parties speaking more freely among themselves or litigants in person, perhaps feeling disinhibited and behaving less appropriately, or even on a more mundane level having to remind those who are not speaking to put themselves on mute to avoid feedback, can be distracting for the judge and participants.

Those informalities have been a small price to pay as we worked to keep the justice system operational and judges have been able to work with the assistance of practitioners who have an accrued sense of what is proper in a courtroom. However, as we start to think about the longer-term use of remote hearings, we need to guard against the unintended consequences of informality.

It seems to me that an element of formality in court proceedings is important, and serves to demonstrate the seriousness of the decisions being taken. Particularly in cases involving individuals and the economically disadvantaged, the outcome of a hearing can, and frequently does, have life changing consequences. When the court is making a compulsory order, it is compelling someone to do something that they do not want to do, and the person who is subject to the order needs to understand the consequences of not complying with that order. I believe that the authority of the court needs to be maintained whilst ensuring that courts are neither inaccessible nor hostile to those who are infrequent users. Indeed, that authority is the way of ensuring fairness

and justice, so that in hearings that are inevitably stressful with much at stake, all can be assured of courtesy, respect and, above all, a fair hearing – and the perception of a fair hearing - of their case.

How do we maintain formality and thus the authority of the court in a more flexible future system which will undoubtedly involve an element of remote or hybrid hearings? One important aspect of this as I see it is ensuring that we have robust and efficient technology. Advocates need to know that judges have access to enough screens to allow them to have the video and audio link and multiple documents open at the same time (a point made by the judge in *In re One Blackfriars*) and that judges will have access to sufficient bandwidth to be able to access the e-bundles with which we are provided. This is only one example of the way proper formality within remote or hybrid hearings might be achieved. What is clear is that, as we start to consider how to incorporate remote and hybrid hearings more permanently, the purpose and benefits of a degree of formality should be part of the discussion.

Other unintended consequences

We must be sensitive to the fact that technology has an exclusionary angle, particularly for litigants in person. Respondents to a Civil Justice Council Report on the impact of COVID-19 measures in May 2020 cautioned against the use of remote hearings involving litigants in person as it risked undermining trust in the justice system, especially for those who still want their 'day in court'. It would be interesting to know if their views have changed, a year later, with the wider use of remote hearings.

Speaking to B&PC judges who do conduct cases involving litigants in person, they often describe how litigants in person can struggle with the technology and are sometimes faced with a combination of inadequate technology and the daunting prospect of a court hearing which is unfamiliar territory. In such cases, the only fair way of proceeding may well be to have an in-person hearing.

One possible consequence of remote hearings which concerned both judges and practitioners at the outset of the pandemic when we embarked on remote hearings was the potential impact on the junior Bar who practice in the business and property field. The concern was that a solicitor who could conduct the advocacy remotely from the office would be much less likely to instruct a junior barrister than they would be if

the hearing were in a court room, possibly in another city. From the feedback I have had recently from both the Chancery Bar Association and the Commercial Bar Association, it appears that the concern may have been unwarranted. Early indications have been that there has not been a downturn in work at the junior bar as a result of the pandemic.

However, there does remain a concern, not specifically pandemic-related about how much advocacy junior barristers at the Chancery and Commercial bars are getting. It has become very much the norm, even in relatively straightforward case management conferences, to instruct leading counsel, so that junior counsel do not get the advocacy experience from interlocutory hearings which was available thirty years ago. If, like me, you consider that oral advocacy is an essential bulwark of our justice system, it is important to encourage the junior Bar, as they are the advocates of the future and thus an integral part of the justice system of the future.

Whilst there can be no question of judges dictating how parties wish to present their cases or by whom, in the Commercial Court at least the judges are encouraging parties and solicitors to use junior counsel more to do the advocacy in interlocutory hearings. Another way in which the B&PCs are able to help junior barristers, albeit not financially, and at the same time provide legal assistance to litigants in person is through the so-called CLIPS scheme under which in the Chancery Division interim applications court, junior barristers act pro bono for litigants in person. This gives the barristers advocacy experience, helps the litigants in person to present their case and also helps the judges to deal with matters more efficiently and fairly through having arguments presented cogently and clearly.

Open justice

Looking forward, an important factor in relation to remote hearings is how to achieve open justice. This is an issue on which opinions differ. The judge in *Re One Blackfriars* recorded that the remote hearing proved to be "*more than a second-best work around in the face of the Covid 19 pandemic*". His overall assessment was that not only were the inevitable challenges overcome by appropriate and mutually agreed adjustments on the part of counsel, the parties and court but that the trial was conducted more efficiently and far more conveniently as a fully remote trial. It was also more accessible

to the public than it would have been had it taken place in a traditional court room in the Rolls Building.

On the other hand, the provision of access to remote hearings to members of the public from the comfort of their own homes can present challenges if that access is abused. It is important that access is only given on the same basis as would be the case if the persons in question were sitting in court. Thus, at the outset of every remote hearing the judge or the judge's clerk states expressly that unauthorised recording of the proceedings is a contempt of court. However there have been cases where abuse has arisen, with access to proceedings being given to persons abroad who have not complied with limitations imposed by the Court. We are all concerned that, whilst open justice is essential, remote and hybrid hearings should not lead to the court losing control over the proper conduct of its process.

Conclusion

We cannot know what the immediate future or the medium term will bring. Departure from the EU and the continuing impact of Covid are both bound to have an impact on our work, with an increase in work in some areas. As the times change, so too must the legal system adapt to remain fit for purpose. This cannot be achieved by simply returning to where we were before the pandemic but requires fresh thinking on flexible ways of working.

Thank you for inviting me to speak and for your attention. I look forward to hearing more about the challenges you have faced and how we might solve problems which I am sure we share.

Questions and Discussion

Q. You spoke about jettisoning the negative points which have arisen as a result of remote working, including the erosion that working from home has caused to our perception of the work/life balance. Will working from home (perhaps on a hybrid basis) continue to be an option for judges post-pandemic?

A. LJF: Yes, that comment arose from an interesting point that Richard Susskind ['RS'] made. There is an amount of polarisation amongst the judiciary on this issue. Some judges can't wait to get back to court and others are happy to do everything from home. Some judges I know haven't been in the court building for months. My own view is in an effort to maintain a good work-life balance, a mix of working from home and from court is probably a good thing. The Chancery court sit on Tuesdays, Wednesdays and Thursdays. Historically I would go up on the very early train on a Monday morning and take the late train home on a Friday night. I'm not going to do that again, and instead will go up on a Monday evening and come back on a Thursday evening. That is assuming my hearings are in-person. It may be that some hearings continue remotely. Interestingly, the Lord Chief Justice's view is that judges should conduct remote hearings from a courtroom or offices in court building rather than from home.

Q. You made a comment about an evidential hearing where a witness was attending the hearing from the street. Would a potential solution be for the witness to attend from their solicitor's office? Linked to that question is the challenge of engaging unrepresented parties or those who have poor or inadequate access to technology. Is there a risk that such parties might be excluded in the remote court model and how do the courts address that?

A. LJF: It is a genuine problem. I gave that example, but another is a person giving evidence from McDonald's because it had better Wi-Fi than where he was living. That is totally unsatisfactory. If possible, unrepresented parties should be giving evidence from a formal location and this is an issue that judges will need to be acutely aware of. Arguably, if there is any issue about a witness' access to technology, hearings should be conducted in court and not remotely. It should be said that while there are litigants in person who have access to great technology, they are in the minority. From

my own point of view, the judges I'm responsible for are always watching out for litigants in person.

Q. A related question is this: if an in person hearing had been arranged but a party or witness tests positive for COVID-19, what happens then and how can a judge prepare for that?

A. That situation has in fact come up in a Chancery matter where the judge had ordered an in person hearing to accommodate a chaotic witness. The witness then tested positive for COVID-19 and the hearing had to be adjourned until it could be heard in person, because it couldn't be dealt with over the internet. The witness apparently tested positive two or three time and then turned up at the eventual hearing wearing a gas mask and so there might have been a certain amount of game-playing going on. The only way of dealing with the situation would be to adjourn. Fortunately, that is a relatively unusual situation. My background is commercial law and I was presiding over an inheritance case in which we managed two days in court with witnesses giving evidence in person. One of the witnesses then tested positive so we had to switch to a remote hearing.

Q. Some judges take the view that a witness giving evidence out with the court environment can be more relaxed which can improve the quality of evidence. You said that overlooks the fact that the purpose of cross examination is not to make witness at ease but to get to the truth of the matter. Equally, giving evidence not supposed to be torture. For years in Scotland, crucial witnesses have been giving evidence remotely. There has been very little said about that reducing the quality of evidence. Is there a mistaken notion that remote cross examination is not good cross examination?

A. LJF: There is quite a sharp division of opinion on this topic in England and Wales. Perhaps a more important point is about the seriousness of the exercise of cross-examination and the taking of evidence. The witnesses require to appreciate that they are in a court environment, a solemn place where justice is resolved. Cross examination does emphasise from a witness' perspective the importance of what is going on. The jury is out on whether remote cross examination makes a difference to

the credibility of witness. There is also the related debate about demeanour. One judgement of Lord Justice Leggatt says that one should not try and assess credibility by reference to demeanour, because of, for example, cultural differences and diverse social backgrounds. I would say that this is all part of the same debate.

SSC: Interestingly, I note one comment made by an attendee to the effect that their client thought cross-examination conducted remotely was more intimidating as counsel was closer to them on the screen.

Q. The final question was one around the solemnity of court and the unintended consequence of remote courts in making the court environment more informal. I think you already dealt with that in your previous answer.

A. All I would say, is that there is a case I had in mind where attendees on a remote hearing started interrupting, shouting and swearing and flashed up pornographic images onscreen. The judge said, "*either behave yourselves or you will be taken out of the hearing*", as he would have in a hearing in court. The important point is emphasising that the remote hearing is just as formal as an in-person hearing.

Session 1: Procedural Hearings and First Instance Debates

The Hon Lady Wise

Good morning everyone. It is perhaps trite to remark that from disaster, opportunity can emerge but in a real sense that is why we are here. We are all aiming I think to look at civil justice from the perspective of its having survived the crisis and to look ahead at what we must all hope will be a better and successful future. Where we may differ during the course of these discussions is in how that bright future may be achieved. What I will be suggesting is that the opportunity we now have should not be characterised as exploring which aspects of the progress made to keep the civil courts operating over the last year we should retain. Rather we should ask what image of a modern civil justice system would we draw if we had a blank sheet of paper – or, I suppose, a blank screen?

I have been asked to consider the options for the future in two areas of court hearings, procedural and substantive hearings or debates in first instance work. But I am not convinced that we can compartmentalise civil court hearings into neat boxes and those of you who have read my paper will have seen that I consider there are significant issues that straddle all types of business about what we do when we convene a court for a hearing. So while I will focus on hearings without evidence, I hope that my remarks may feed into some of the ideas that will emerge in the later sessions.

First instance civil work in the Court of Session is, I am pleased to report, in a healthy state at present. We are operating very much on a "business as usual" model in terms of the amount of business and our ability to dispose of it. The manner in which we are disposing of Procedural Hearings and Substantive Hearings is that currently when matters call in court they do so using WebEx Meetings and WebEx Events respectively. Whether that should continue absent a public health imperative raises a number of core issues. These include:-

(i) Access to Justice and the principle of Open Justice

(ii) The effect of remote hearings on oral advocacy

(iii) The essential differences between virtual and physical courtrooms

(iv) Welfare issues for all court users

The principle of open justice is very dear to all of us with an interest in court work. It demands that the work of the courts be open to scrutiny, both during and subsequent to the determination of disputes. In my paper I discuss how our understanding of concepts of transparency and public scrutiny have necessarily evolved and adapted for current times. Whether virtual hearings increase or reduce access to the courts is debatable. Those who benefit from significant technological resources enjoy the ability to view and participate in hearings remotely where appropriate. Reducing the need to travel has obvious environmental advantages if it does not impede access to the courts. But some others, those with inadequate access to suitable software systems may struggle. What will be important as we move forward is to ensure that public access to court hearings is undiminished. That should be possible regardless of whether the dramatis personae convene in the courtroom with suitable technological support or are joining a hearing from remote locations.

One of the central issues raised by practitioners in commenting on the debate about virtual hearings is the impact on the role of oral advocacy. From the judicial perspective this is a real challenge. Where hearings are relatively uncontentious and short, no difficulty arises with this; one doesn't expect a jury style speech when discussing case management issues about the scope of a dispute! But as I explain in my paper, hearings that might be regarded as procedural can involve contentious and important issues. In my experience this is particularly so in family actions where the outcome of opposed interim orders can be effectively determinative of the substantive dispute. And this can also be the case in general civil work where decisions in a contested hearing for and interdict ad interim or perhaps suspension of a decree will influence whether a litigation proceeds any further. I think the nadir of my experiences over the last year was a three hour telephone hearing to dispose of the post-opinion issues in a case where there was argument about the terms of the orders to be made, timescale for payment and expenses. While thankfully we have we have moved from telephone to WebEx meetings as the appropriate method for such hearings in the Court of Session, it seems to me that the impact of oral argument can still be hampered by a hearing of such length and complexity being heard remotely. So if we are looking for an optimal method rather than one that just gets the business done, I would suggest

that features such as the length of the hearing, the extent to which there is likely to be interaction between the bench and the pleader and the importance of the outcome should all be factors in determining whether a hearing should be in a physical or virtual space.

That said, as I have observed in my paper, there are positive developments that have emerged or been developed through the use of virtual hearings. I have benefited from receiving far more written submissions or speaking notes in advance and these have been more focused and helpful than any I tended to receive before a physical hearing. The value of oral advocacy tends to be enhanced rather than diminished by having a framework for the discussion in advance. Similarly, the use of electronic pleadings and bundles of documents is usually the most efficient way to access the relevant material and maintaining that benefit will be essential going forward. My personal view is that there is no particular tension between harnessing the immense technological capabilities we now have and maintaining our centuries old tradition of oral advocacy. The courtroom must modernise and evolve, but the face to face engagement between bench and oral pleader need not be seen as in contradiction to digitisation. The use of live link in civil court rooms is but one example of how we have already combined the traditional physical space and the use of technology. There are and will be others.

Much of today's discussion will focus on the virtual court room as a concept. This is the third issue raised in my paper. When we no longer require to create a virtual court room, will we continue to do so anyway or will we choose to convene physically? Convening in public for important events is what humans do and being present physically for a significant life event is regarded by most of us as critical. What will litigants think if they are never physically present when their case is litigated? This problem would be particularly acute in family cases. As one party put it to a judge in a virtual hearing "*Are you going to take my child away from me on an iPad"*?, a searching question that has led some judges dealing with sensitive family cases to doubt the viability of remote hearings.

Of course we must not allow considerations of form to triumph over substance. Richard Susskind sometimes uses the analogy of celebrating the ceremonial Rolls Royce rather than working towards ensuring transport for all. Where a virtual hearing can replicate a physical hearing in all material respects it may do the job just as well. But I

reiterate my view that we must caution against an acceptance of just 'getting the job done'. In my view we should aim for hearings that convey the standing and legitimacy of the court and impart to the litigant the sense that their case is being dealt with seriously and appropriately. In many cases it will be easier to do that by being in a physical space. In others, where parties agree and the matter is a low rather than high octane dispute, virtual hearings may meet the requirement of justice being seen to be done perfectly well. At this early stage in our evaluation of remote hearings, it seems unlikely that a one size fits all approach will be appropriate.

Of course a completely ad hoc approach to the method of hearings would be unworkable from an administrative perspective and a middle ground between there being no default rule on the mode of hearings and an absolute requirement for virtual courts will I hope emerge. This could take the form of a Practice Note or similar highlighting the considerations that must be taken into account when a hearing is being fixed in relation to whether it will be held in the courtroom or not. Views may differ on whether that is practicable and if so how and when such a decision would be made and I hope that this will be included in discussions today. It was interesting to hear Lord Justice Flaux's view on this and I agree that that the adoption of criteria in terms of which applications for physical hearings may be determined is one possible way forward. What seems clear to me is that the ultimate decision on mode of hearing should always rest with the individual presiding judge.

Which leads neatly into the last of my topics, that of welfare of all court users, even the judiciary. It seem to me that even if one accepted that a default position that hearings be virtual would satisfy the requirements of open justice, preserve the tradition of oral advocacy and replicate the gravity of the court setting, early reports suggest that there are welfare concerns arising from the radical change in work methods required during the course of the last 14 months. The pressure on practitioners, judges and particular court staff has been considerable. Just as many judges have reported the strain caused by constant work looking at a screen rather than at the personnel in the court room, so too have court staff felt under greater pressure from the intensity of the workload involved in the administrative aspects of preparing virtual hearings. The teamwork and personal interactions that have always been a feature of court hearings could be undermined if these issues are not

addressed. Many of these difficulties have arisen because of the unavoidably unplanned way in which we were all thrust into remote working. But our blank sheet will remain empty if morale is so low that it impedes the improvements in efficiency of the court system that we all desire.

In conclusion, I express a hope that all those with an interest will engage in the debate about the future of civil justice with the aim of achieving all round excellence and not merely efficiency. As the Lord President has emphasised, today is an information gathering exercise, a unique and collaborative one. In my view much more evaluative work requires to be carried out before anything approaching a final decision can be made. For my part I have an intuitive inclination in favour of face to face interactions, but I can and do embrace enthusiastically the positive aspects of digitisation and I would never commend a return to the inefficient paper based methods of old. So I propose that we fill in the blank sheet with the best of the old and the new. Virtual hearings will be one part of that but I suggest that they are not a panacea in the search for efficiency and they should complement rather than replace our established ways of determining disputes in the interests of justice. Thank you for listening.

John MacGregor QC

The pandemic has had a dramatic effect on the courts and tribunals system. Today's conference should be an important step in reflecting what has worked well, and in addressing what has been less effective. Fundamental questions have to be asked. Is the court a place or a service? What type of court system do we want? How do we assess the quality of a court hearing? How do we harness technology to promote interests of justice? The Faculty of Advocates welcomes the opportunity to contribute to that debate. I would propose to begin by making some general observations, then to address procedural business and, finally, first instance debates. Faculty does not see debates as similar to procedural business. Debates require a quality of discussion that is undoubtedly lost when dealing with a remote hearing.

Technology clearly has a role to play in modernising the civil justice system. Some of the debate is not intrinsically linked to remote courts. Electronic documents are an excellent example. Ensuring efficient and effective participation requires everyone to have the same versions of documents. A central platform allowing all judges, counsel,

solicitors and participants to be confident that the document they have is exactly the same as everyone else's.

What, then, about remote courts themselves? This is not a binary choice. Pre-pandemic, the system was not perfect. There were problems and inefficiencies, such as time spent travelling for short hearings. Technology can address a number of these issues, particularly with regard to procedural hearings. It is not a panacea, however. If one contrasts a preliminary hearing in the Commercial Court with what is currently happening with the Mental Health Tribunal for Scotland (MHTS), there is a balance to be achieved. The former lasts around 30 minutes, statements of issues are lodged in advance, there are specialist counsel and judges dealing with procedural matters in a collaborative way, such as fixing a timetable. This is a focused hearing well-suited to a virtual court. It is difficult to see any loss where such a hearing is held remotely. If that is contrasted with the MHTS, whereby vulnerable individuals routinely appear without representation from solicitors or counsel, expert evidence will be led, such as from psychiatrists. The individual can be detained for up to six months with compulsory treatment against their will. Currently, these hearings are taking place exclusively by way of telephone hearing. This is not appropriate other than in a pandemic situation.

The general view of Faculty's membership is that remote hearings do not work as well qualitatively. Only 7% considered a remote hearing was superior. One of the questions going forward is what is required in terms the quality of hearings, and what is proportionate in a given setting? There are clear benefits to remote hearings. Travel time and expenses are reduced for solicitors and counsel based outside Edinburgh attending the Court of Session for short hearings. Similarly, in sheriffdoms, particularly those covering large geographical area, travel time is cut to nil. Waiting time for a case to call is cut to nil, so that other business can be undertaken. For certain hearings there is real benefit or disadvantage to a remote hearing, particularly for short and uncontroversial hearings. There may well be an increase in access to justice in view of the expenses of instructing counsel in a remote sheriffdom. Counsel may not be instructed because of significant travel costs.

There are difficulties and disadvantages associated with the remote hearings. At a practical level, taking instructions is a very good example. WhatsApp seems to have fast become the default position in terms of how instructions are given. That is

unsatisfactory, where a response requires to be given beyond a yes or no answer. That can result in multiple rounds of calls from counsel to solicitor, solicitor to client, and back-and-forth, in order that a proper and informed submission can be made to the court. There is also the issue of open justice. One cannot simply walk in to an online courtroom. One must know ahead of time, and make a formal request to dial in. There is a loss of formality. There is a debate whether this is a good or bad thing, depending possibly on whether the court is a place or a service. The perception amongst many clients is that remote hearings are more akin to any other business meeting, rather than having the solemnity normally attaching to courtroom hearings. There are intangibles. Short hearings can be more than the sum of their parts. They are often the first time clients on both sides, with entrenched positions, realise they are part of a very formal process. They see that even at the procedural stage there will be a winner and a loser. The five minutes before and after court can be critical moments in cases in building bridges between even the most entrenched of parties. I would suggest that this is particularly important in a small jurisdiction, where strong bonds of trust exist between a relatively small pool of solicitors and counsel. It can be the start of a process that leads to wider dialogue, to resolve either aspects of the case or the entire case. This can be the grease that the oils the machine; it is undoubtedly lost in remote courts. Those types of discussions and dialogue have simply not taken place during the pandemic.

There are potential health issues associated with remote working. It is long-established that long periods spent looking at computer screens can have an impact in terms of tired eyes, headaches and associated issues. Some of the literature, including that submitted by SCTS, acknowledges that there must be regular breaks in virtual hearings. This has not been my experience as a user of the court, such as in a substantive hearing in a judicial review, where the court sat straight through until lunch, or in a sheriff court proof, where we heard three days of evidence only with the lunch break. If we move forward with remote substantive hearings, there simply must be standardised guidance. It is also important to reflect on the potential mental health issues: the sense of isolation; camaraderie at the bar is simply not built up in the same way. A good example is this year's crop of devils, who have lived a remote existence whereby links traditionally formed have simply not come forth. We also need to reflect on how remote justice would impact on those at the start of their careers. It is perhaps

acceptable for judges with chambers and more established practitioners, who enjoy a home with the benefit of study. More junior members may live in a shared flat, having to work from a bedroom or kitchen table.

The issue of infrastructure will be absolutely the critical; most counsel, solicitors and judges enjoy access to computers and broadband, but this is not universal for service users. This was my own experience in the Upper Tribunal, when acting for the government in a social security case. The appellant had neither a computer nor a telephone, and could not participate in the appeal hearing. It is very important that the debate today does not take place among lawyers or from a position of privilege. What we need to do is work out what has worked well and take that forward. There could think be curious examples, with counsel sat in Parliament House and judges in chambers, and they do not meet up to discuss the case itself.

Regarding procedural business, there will be certain types of hearings, particularly short and uncontroversial hearings, where there is no significant impact associated with having a remote hearing. With such hearings there may be a question of whether a hearing is required at all. If one thinks of reclaiming motions which would traditionally have a procedural hearing, where there is nothing that requires to be discussed of substance. There have been many procedural judges over the past 12 months who have simply dealt with matters without a hearing. For opposed motions, it is difficult to see, if there are simple issues to be dealt with, that there is any significant issue with moving to remote hearings. The devil will be in the detail as to which specific issues are regarded as routine or uncontroversial. If one takes a motion for specification of documents, that is a hearing always requiring a dialogue between the parties, often a dialogue with the bench. Instructions need to be taken in a dynamic way. These are difficult to achieve in a remote setting for the reasons set out.

There is also the issue of the commission itself. The experience I have had over the last 12 months is that they are not viewed by havers with the same degree of intensity. There are also issues associated with doing simple things, such as taking objections over a remote platform, where often to ensure it is taken timeously one needs to take it at an earlier stage than one would ordinarily do so. There are obviously areas in which technology must be harnessed. Interim interdict and interim suspension may be paradigm examples. An out-of-hours application, such as a plane-stopper judicial

review to suspend removal directions, the days of convening a Lord Ordinary, counsel, the clerk and solicitors for a short hearing late at night should be a thing of the past. However, what of situations where the interdict could take all day; where there are complicated arguments on whether there is a prima facie case? Where there requires to be complex submissions and a real dialogue between bench and bar, this is not well-suited to a remote hearing. Equally, consider an application for breach of interdict or contempt of court; that would be a challenge to the authority of the court itself. When we talk of the authority and solemnity of the court, such issues are important. That is part of the debate; that if the court loses its sense of place, will there be more hearings of that nature? The courts exist in a delicate equilibrium. If we seek to remove certain aspects, one needs to be sure of what those consequences will be.

I will finish up by saying that in relation to debates, I have already covered the qualitative requirements of the hearing. Thank you.

Amanda Millar, President of Law Society of Scotland

Good morning everyone. I'm very pleased to be joining you this morning and want to thank the Judicial Institute for organising today's conference. For more than a year the Covid-19 pandemic has affected everything we do and, even as we cautiously re-enter what might be deemed normal life, we know the effects of the pandemic will have a long shelf-life.

The set-up of LawscotTech initiative by the Law Society in 2018 to stimulate legal tech innovation in Scotland and to deliver practical benefits for those working in the justice and legal sectors and their clients, showed foresight given the world change that commenced 14 months ago. In dealing with the many challenges thrown at us over the past year, the profession has had to adapt and in short, has done so very well. In a few short months we have changed our working practices, where in the normal course of events it might have taken years.

Among my colleagues here today, there will be a mix of experience and opinions. But by and large, there is agreement that remote hearings work for some aspects of civil court business and could offer more efficient ways of working in the longer term.

However, we need to be clear that virtual hearings are not a like-for-like replacement and we should not disregard the drawbacks simply because it may seem expedient to conduct civil court business online. We do not, after all, want to create any new crises in our justice system.

Examining what has and has not worked well is essential to guide our choices going forward and today's discussions will help shape the future of medium-to-long-term practices.

You will know from the papers submitted in advance, the Society carried out a survey of our members earlier this year. The respondents were broadly representative of the wider profession undertaking civil court business, and from the findings we can draw useful insights on what has worked for solicitors and their clients and consider what aspects, if any, of remote hearings could or should be incorporated into the civil justice system.

You will see from today's agenda that I'm here to talk specifically about procedural hearings and first instance debates.

Let me start with procedural hearings. The findings from the Society's survey have indicated that remote hearings work well for procedural and non-contentious matters.

A sizeable majority of our survey respondents [78.5%] said they would like remote court hearings to continue after the pandemic, with the vast majority [91%] saying they thought procedural hearings worked particularly well, with almost all [99%] saying they would like to see them continue remotely.

Given the right technology and a broadband connection, they can work well, and feedback has generally been positive. The hearings are carried out on platforms such as WebEx and also by telephone - WebEx had the edge over telephone hearings, although it is accepted these could have a place, for example if there are broadband or connection issues.

Remote procedural hearings are usually over in about 15 minutes. The reduction in waiting and travel time makes them cost-effective and time-efficient - we can log on, and even if waiting for a case to call, can deal with other matters, with WebEx running

in the background. But is it the right option for every case? Feedback we have received would suggest that there should be a distinction drawn between ordinary and family actions for procedural hearings. This seems appropriate given the subject matter of family disputes, and also the fact that separate court rules, specialist family judges and accreditation exist. Views from our members suggest that most family procedural hearings could be dealt with remotely, especially those relating to financial disputes or case management hearings, motions for commission and diligence and such like. However, there should be provision in the court rules for applications to be made for in-person procedural hearings on cause shown.

Are there benefits for clients? Remote hearings could help improve access to justice. It is much easier for clients to attend a hearing as there is no need to travel and taking time out of work is reduced. It also means they hear directly how the matter has been dealt with, rather than relying on a report from their solicitor afterwards. There are potential cost savings too, due to less waiting time for the solicitor. However this depends on the sheriff court, as some (e.g. Edinburgh) expect the solicitor to dial in at 10am and wait for the case to be called, as with an in-person hearing, while other courts give a nominated time for the hearing. Most courts still require written submissions for procedural hearings in advance - especially when the hearing is not disposed of based on written submissions alone - so any potential savings may be minimal.

We must also consider potential downsides of remote hearings. A client may not have access to a device or broadband – and issues with technology can affect the smooth operation of hearings. Feedback suggests that some clients do not regard an online hearing to be as serious as they would, if attending court in person - there is a danger that an online hearing is viewed as just another Zoom call. There's also a risk of there being potentially less scope for settlement. With clients and agents not in the same vicinity, the constructive conversations to narrow disputes and/or reach settlement that happen in person, are lost in a remote setting.

Issues have also been raised on how agents and counsel communicate effectively during a procedural hearing. Agents often agree on how they will communicate with one another prior to a hearing but, while there is a chat function on WebEx, there is a concern that an agent or counsel could, in the heat of the moment, send a message

to the wrong person during a hearing. This could be extremely detrimental to the client's case and care needs to be taken - this obviously wouldn't occur at an in-person hearing where the solicitor can tug on counsel's gown to pass on information. If remote procedural hearings are to become the preferred method, it is important that issues around communication during hearings are considered and a solution sought. Meanwhile solicitors and counsel must be alert to this.

The feedback we have had presents a different picture for first instance debates. In our survey just a quarter of solicitors [25%] said that first instance debates worked well remotely, and fewer than half [43%] wanted to see them continue remotely. Again, these types of hearings have been held by WebEx or telephone. While the dates are fixed in a similar way to procedural hearings, the parties involved normally make written submissions in advance, along with any additional documents that may be used during the debate.

Members of the Society's Civil Justice Committee have suggested there should be an amendment to the court rules to specify which written documents must be provided by agents for first instance debates to run smoothly - remotely or in person. For example, the sheriff could set out what written submissions must contain, how the joint bundle of authorities should be marked and highlighted, and the time allowed per submission.

Other suggestions include regular training opportunities and for judges and sheriffs to have the same standard equipment – a laptop with WebEx for the purpose of hearings.

While not exclusive to first instance debates, our survey respondents, highlighted drawbacks which include:

- client interests being at a disadvantage;
- credibility being harder to ascertain;
- difficulties with the examination and cross-examination of witnesses;
- technological issues; and
- clients being less able to understand remote procedure.

And as I have mentioned previously, the limited ability to discuss and negotiate with other parties prior to a hearing, and a lack of formality.

Consistency has been another issue. Solicitors appearing in more than one sheriffdom have found approaches vary - in our survey just 10% said there had been consistency. Since the survey, new guidance for court users has come into effect on 1 April. It was prepared in consultation with the Sheriffs Principal to provide nationwide guidance, although further guidance may be issued locally in any sheriffdom. This is extremely welcome, and we hope future guidance can continue to be applied nationally where possible.

Concerns have also been raised around trainees and newly qualified solicitors not having opportunities to see their senior colleagues appear in court. Ordinarily, trainee solicitors would be taken to court to gain practical experience - from procedural hearings through to proofs. While we understand it is possible for new solicitors to observe an online hearing, it is not well publicised. In our view, there should be a clear method made available to allow this important aspect of learning to take place.

So, to conclude, Covid-19 has presented significant operational difficulties but has also brought a unique learning experience. It is important that we assess where there has been genuine progress and focus on improving our civil justice system. Remote hearings do offer benefits, and many solicitors think they should continue in some form. However we don't believe they should be the default, and think there should be provision in court rules for applications to be made for in-person procedural hearings on cause shown, such as in family cases. Given the relatively low numbers in favour of first instance debates being carried out remotely, we would suggest that while some may be held remotely, a hybrid model may be the best approach, depending on circumstances of each case.

I hope this brief outline will help to inform our discussions today and look forward to taking questions. Thank you.

Questions and Discussion

Q. LW mentioned the seriousness of some family matters. How important is it for parties to be able to experience human interaction when life changing decisions are being made?

A. LW: The first thing I would say, and this was alluded to by the Lord President in his opening speech, is that a court determination, in any case, is really a last resort. In family cases it is important that parties know they have a range of options. In particular, I support the use of other forms of ADR, such as mediation and arbitration. However, I am assuming that the question posed is premised upon there being a court action raised. I think it is important to set the context. Much depends on the type of case. In my speech I gave the graphic example of a child being taken away from a mother via an iPad. At one extreme there is a duty on the part of the judicial office holder to actually eyeball the parties about whom they might be taking a fundamental decision in a physical courtroom. State interference in the form of depriving someone of parental responsibility is perhaps the most extreme example of where it is important that the parties to convene in the same room, at least at some stage in the process. While in some cases the ultimate outcome might be a written option, at the stage of the contentious hearing, it is important for participants to see the person making the life-changing decisions. In financial provision upon divorce cases, there are arguments both ways. Often there are very contentious procedural hearings for interim orders at which the parties, pre-COVID, would attend court to see how judges deal with that even though there was no requirement upon them to do so. I don't see any reason why that shouldn't happen in future. There are also international child abduction cases where, on the face of it, remote hearings are favourable, but if parties are all able to convene in court then they should. Where the decisions being made are so fundamental, the parties seem to gain something from seeing the decision makers in the flesh.

Q. There are a couple of questions directed towards the solicitor profession. Might increased use of remote technology be an avenue towards enhanced sustainability? To what extent is there a duty on the profession to promote climate change issues?

A. AM: There is an argument to say we all have a responsibility to promote climate change, as long as it does not undermine the principles of what we do for a living, such as access to justice and that being seen to be done, either virtually or in courtroom. There are some climate change advantages arising from the restriction on travel as well as wellbeing advantages. Insofar as clients, online hearings may well benefit many clients and particularly those in rural areas. Prior to the pandemic, there were discussions relative to courts being closed and there being sheriffdoms where people need to travel quite a bit as their local court had closed. The virtual sphere opens up an opportunity for those individuals to participate. But the technology needs to be fit for purpose and we need to be conscious of the digital divide and ensuring people aren't excluded because of a lack of access to technology.

Q. It has been said that junior lawyers and students have found the ability to dial into hearings useful, that listening to more experienced lawyers is the best ways to develop advocacy and that remote hearings have been a boost to open justice and legal education. If that is correct, then is it a good idea for cameras and microphones to be installed in all courts? There was also an observation that young lawyers have been disproportionately affected by the changes arising as a result of Covid-19. We heard the example of devils managing from a shared kitchen table and concerns over young lawyers being impeded from building relationships with court staff, lawyers and counsel. Could that lead to a potential reduced interest in litigation?

A. JMQC: There are a few issues to unpick here. With regards more cameras in court, the gold standard is the UKSC with its live streaming, which allows observers to see the very best of advocacy in action. The reality is that if that is to be introduced in every court then there is a clear cost/benefit analysis to be carried out. Live streaming could perhaps be introduced for high profile hearings. For some individuals the ability to dial into remote hearings can be a welcome training opportunity. However, that comes back to what observers are seeing in terms of the quality of the hearing. There will be an impact on young lawyers and there has been a significant impact on the current crop of devils. This year's crop are the first I haven't met - I wouldn't know any of them. The structures by which junior lawyers would ask those more senior for advice haven't been fostered as they would have been pre-pandemic. The challenge solicitors and

advocates face is how to assist junior individuals and how we address that in the context of a move towards remote hearings.

Question posed by Sheriff Duff ['SD']: A further question in the chat raised the question of whether the Law Society of Scotland and the Faculty of Advocates will provide training to their members in terms of private communications during hearings and the use of technology. The Judicial Institute has already provided training to judges on this issue.

A. AM: The reality is, if you're having private communications, you need to look at the technological capabilities available to you in doing so. In terms of the concerns for trainees and more junior solicitors, there are in fact some trainees who will have had greater access in terms of advocacy skills as they're able to log in and view the hearings. The scope for learning by that method is potentially more than that would occur through osmosis in the office, as they are able to see counsel, solicitors and judges interacting. The ability to remotely view or listen to hearings is something that could be more readily publicised. While the Law Society has already issued guidance, that may need to be expanded relative to remote hearings.

A. JMQC: All that I would say is that a standardised approach to private communications during hearings would be welcome. The judiciary have a role to play in that in creating a dialogue with the individuals conducting remote hearings. There is not the same volume of 'tugging of the gown' in remote hearings. It is not that one option is right and one wrong but there should be a discussion about best private communications should be conducted.

Session 2: Appeals

The Right Hon Lord Pentland

Good morning everybody.

I am speaking from my chambers upstairs in Parliament House, Edinburgh. Downstairs Parliament Hall is deserted. The courtrooms are empty and locked. There are few people in the Advocates Library. In the weeks and months ahead, this will all change for the better. People will flow back into the building – to the libraries, to work in the court offices, to meet counsel. And I very much hope to take part in hearings in our courtrooms. I was reflecting that the original idea was to hold this conference in Parliament Hall, but unfortunately the lockdown of late December made that no longer possible. No doubt attendance in person would have been inconvenient for some. On the other hand, there would have been the attraction of meeting colleagues and exchanging views in person. There would also have been the familiar conference rituals. Registration and scanning the attendance list. Deciding where to sit – too near the front, best avoided. A squint at the programme – good, only 90 minutes till the coffee break. Then a chance to chat to friends, trash (I mean discuss) the speeches, share the latest gossip, and for the more serious-minded pursue business development and networking opportunities. Well, I could go on, but you take the point.

A video conference is fine – gets the job done. And you can tune in and out – so, in that way at least, not unlike a real conference. But there is something important and valuable missing. There are parallels here with court hearings.

In my paper I have set out why I consider that the court as a physical place is fundamentally important for the proper administration of justice.

The court as a physical place supports the public's acceptance of the legitimacy and authority of the court, and of the rule of law.

This is because the idea of a court as a place is rooted in society's collective knowledge. The idea of a physical courtroom resonates powerfully in a cultural and societal sense.

Geographic location is also an important aspect of a court's legitimacy. This is especially important for a small legal system such as ours.

If the courthouse is 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 still be there. The courts, however, would in time lose stature. To the layperson, the court would become less distinguishable from other public bodies with whom they communicate by email, phone or even video-conference. Interacting with the court would in time become little different from having a meeting by video-conference. This could have serious implications for the rule of law and for the authority and standing of the courts. Place and the court's unique powers of enforcement are inextricably linked in the mind's eye.

Over the past year I have sat in many appellate hearings conducted by video-conference. None of the hearings has been conducted from a courtroom; the judges have either been in their homes or in their chambers in Parliament House. The lawyers have been at home or sometimes in offices or in the premises of the Faculty of Advocates.

Notwithstanding the best efforts of everyone involved, my view is that the experience raises serious doubts as to whether online hearings are good enough for substantive hearings.

I think that there are five main difficulties.

First, the constructive dialogue and engagement between bench and bar that should be the pulsating heart of an appellate hearing cannot be replicated online. This type of debate is the essence of the adversarial system at any level; it is just as important for appeals as for first instance work. It is only when the judge has had the benefit of intelligent and vigorous advocacy on both sides that he or she can feel fully confident of his or her decision. Over a video link interventions and exchanges between the judges and the advocates are awkward and stilted. The technology acts as a barrier, inhibiting free-flowing and spontaneous dialogue. The interchange becomes strained and difficult. As a result the quality of the hearing is diminished. And if the quality of hearings (particularly appellate hearings) is reduced in this way, ultimately the quality of our law will suffer.

Second, there is a lack of the formality that is vital for any court hearing. There is no real sense of the court as a place because the court is no longer a place. The rituals and symbols which reflect the authority and independence of the court are missing.

Third, there are difficulties in trying to refer to and work with large volumes of electronic documents 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 concerns about the prolonged use of screens on participants' physical 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 other participants enhances a sense of isolation and detachment. The experience can be dehumanising. I have spoken to so many colleagues on the bench and in the profession who have yearned for the spontaneity of an in-person hearing and the human element that such a hearing encapsulates.

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

It is also difficult for the members of the court to interact with one another during the hearing. None of these comments is intended to undermine 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 in my view.

If the advocates, on the instructions of 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 an in-person substantive hearing in an appeal it is difficult to see why this should be denied. What sense would it make for courts 1 and 2 in Parliament House to stand empty whilst the judges were beamed in by video link from their chambers elsewhere in the building?

Conducting appellate (or any) hearings in 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 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 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 all our civil courtrooms.

Substantive appeal hearings in the Court of Session 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. Like others, I would be concerned about any system which required the public, including the media, to apply to the court to watch or listen to a hearing. That seems wrong in principle.

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, the parties and their lawyers assemble and work together in a formal environment.

There must 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 banishing 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. These improvements will also bring substantial environmental benefits.

I conclude in the paper that the methods by which disputes are decided should 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. When writing the paper, I thought back to the prorogation case in 2019. It seemed to me that at that time the authority of the Court of Session was powerfully conveyed; it filtered through the public consciousness. The image of the court as a place communicated the court's separateness, legitimacy and standing. I doubt that

the same effect would have been achieved if the judgment of the First Division had been delivered from and analysed over a studio-based news desk.

In planning ahead, we should keep a sense of perspective and proportion. The notion that after 14 months of enforced isolation we should lock up the civil courtrooms, never to return, is one that at least requires careful examination.

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 (the legislature and the executive), it needs this to be effective. We should be extremely careful before taking any steps which risk undermining it.

Long-term decisions about the future of the civil courts must be based on a detailed and open-minded examination of all the various possible options for reform; one is the greater use of technology in some settings and contexts, but it should not be assumed that this is a panacea. 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. That should extend well beyond the different branches of the legal profession. This should not just be about lawyers talking to lawyers. It is only in the light of thorough public consultation followed by close analysis of the views of stakeholders that sustainable long-term policy for the future of civil justice and the civil courts can be developed. Input from wider Scottish civil society is vital as part of Scottish participatory democracy.

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 said, the court is not just a physical space. It is a public service. 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.

Sheriff Principal Aisha Anwar

Good morning. Well, I don't join you in my t-shirt from my living room sofa with my dog barking in the background. I am not expecting the gas engineer. I hopefully will not drop in and out of this conference because of difficulties with my internet connection. You, I hope, will not speak over me. I do not have others present in my chambers assisting with my responses to any questions. You, I hope, will not take a screenshot of me and post it on social media; and, no, I'm not a cat. These issues have all arisen in remote hearings; everyone will have their own stories to tell. Once we are able to meet again, these will make for entertaining dinner party conversation.

I was invited by the Lord President to set out my experience and my personal view of remote hearings in the Sheriff Appeal Court, and to address how these hearings are being managed now in the sheriff court, and how they might be managed in future. I will touch upon some important matters affecting civil business in the sheriff court. Before doing do, I will make some general observations.

First, like courts all over the world, the Scottish judicial system has responded to a pandemic. There has been no managed, researched piloted project, but an immediate response to a pressing need. What has become clear is that the technology exists and that hearings can be conducted remotely. That is quite different from the question of whether they should be conducted remotely.

Secondly, remotely hearings are not a new phenomenon. Witnesses have been able to give evidence by live link for some time in civil and criminal courts. Assessing credibility and reliability in a remote setting is not a fresh challenge. For well over a decade, the commercial court in Glasgow has conducted case management conference by telephone conference call. Case management hearings in family actions in Glasgow followed suit.

Thirdly, discussions on the future of remote hearings should not be defined by a nostalgic desire to return to the way things were.

Equally, however, we cannot engage in what Professor Richard Susskind describes as vision-based thinking, where there are no sacred cows. Vision-based thinking, which involves rewriting on how we manage civil justice in Scotland must be based on

a number of sacred principles which cannot be sacrificed in a rush to embrace technology. To do so would risk undermining the supremacy of the law itself. Those sacred principles include the need to maintain access to justice, the need for transparency and the need to maintain the authority, dignity and legitimacy of the courts, each of which are addressed in the papers by Lord Pentland and Lady Wise. However, we require to separate sacred principles from what may be described as lesser concerns. The former are non-negotiable; the latter require closer scrutiny. One lesser concern relates to non-verbal cues from the bench. These include the dreaded raising of the judicial eyebrow, the judicial frown or the dramatic placing down of the judicial pen, many of which traditionally and subtly indicate to a pleader that it is time to move on. Could we pause to reflect with honesty on how effective those subtle indicators really are? Are we in danger of exaggerating the effectiveness of non-verbal cues and holding more nostalgically to a bygone era? Did they ever cause a pleader to instantly give up a line of argument? In my experience, many of my non-verbal cues require to be followed with a polite question interrogating the pleader, pointing out the weakness of the submission advanced, or letting him or her know that I have his or her point, and that he or she may wish to move on. Perhaps I did not raise my eyebrows high enough, frown with sufficient menace or place down my pen with enough drama.

Another concern is that parties may not have the means to participate effectively in remote hearings. According to the Office of National Statistics, 90% of adults in the UK in 2018 were internet users. That figure is likely to have increased since then. The pandemic will have accelerated the use of the internet and video-conferencing. We should be mindful that generations to come will be more IT-savvy. Perhaps the problem of access to digital technology is not as acute as we might imagine, and over time will become less so. Meantime, where there is a lack of access to technology, that will be an argument in favour of an in person hearing. An honest debate requires that we separate sacred principles from such lesser concerns. Finally, to be successful and to command the confidence of all court users, including the judiciary, a shift to remote hearings must be suitably resourced by trained and qualified staff, supported by proper digital infrastructure and underpinned by clear court rules.

Turning to the Sheriff Appeal Court, it is worthy of note that there appears to be a general consensus among members of the judiciary, the profession and the Faculty of Advocates, that remote procedural hearings have worked well, and have much to commend them. That has certainly been my experience, and that of my fellow Sheriffs Principal. Lord Pentland has set out the main difficulties with remote substantive appeal hearings. I will not rehearse those. An interesting question arises as to who should decide whether a hearing should be remote or in person. A survey of the Faculty highlighted that 72% of members who responded considered that remote hearings should only be conducted with the consent of parties. What of the situation when one party, for good reason, wishes to have a remote hearing, and the other for tactical reasons chooses to resist? Is it appropriate that one party should have a right of veto? When considering whether an appeal should be heard by single or triple bench, the procedural appeal sheriff must have regard to the matters and the presumptions in SAC rule 6.6. The question of whether an appeal is suitable for a single or triple bench is not determined by the parties. Similarly, the question of whether an appeal should be in person or remote should be informed by the position of the parties, but those should not be determinative. The procedural appeal sheriff should retain a discretion to be applied by reference to any matters or presumptions set out in court rules. Single bench appeals are not dissimilar to first instance debates in form. Perhaps unlike many first instance debates in the sheriff court, however, the issues in an appeal are well-defined with focused written submissions and notes of argument, and counsel and agents who are well-prepared. The appeal sheriff will have considered the issues in advance. The hearing itself is generally confined to the matters each party may wish to emphasise or which the appeal sheriff wishes to be addressed. Frequently, single bench appeals involve party litigants, some of whom can feel more at ease joining remotely from the comfort of their home. Party litigants tend to produce lengthy written submissions, and can feel better having done so. Their oral submissions are normally more limited, and questions from the bench can be focused on the pertinent issues. On the other hand, it can be more challenging to control the environment from which a party litigant joins a remote hearing. Difficulties can arise when they either seek to refer to documents which have not been lodged or cannot be easily identified in those that have been. In person, these issues are easily managed. Single bench appeals also provide a Sheriff Principal the opportunity to sit in their local court. That can be a valuable exercise. Were remote hearings to become

the only form of single bench appeals, there would be a risk that justice may no longer be seen to be administered in the local jurisdiction.

In triple bench appeals, conducting a substantive appeal hearing by Webex has advantages. Oral submissions tend to be briefer and more focused, with a greater emphasis on written submissions and notes of argument. That leads to a more informed discussion between the judiciary and those appearing, and can lead to shorter hearings. Court accommodation in Edinburgh is not required. Appeal sheriffs from across Scotland do not require to convene in one place and it is thus easier to manage diaries. On the other hand, as Lord Pentland has pointed out, the spontaneous nature of the discussion between the judiciary and those appearing can often have the effect of clarifying a submission or producing a concession. This can be somewhat stilted in a virtual environment. The benefits of meeting face-to-face with colleagues, and the shared learning gleaned from such interactions can be lost. If during a hearing a matter requires to be clarified between counsel and an instructing agent, this can lead to delays. There is no satisfactory equivalent to the tugging of counsel's gown.

Remote substantive appeal hearings have a place, and will in time prove to be a useful tool in the box. In my view, the Sheriff Appeal Court should retain a discretion as to whether to convene a remote or physical substantive hearing, by reference to well-defined criteria. This would allow a degree of flexibility which can take account of the views of parties, issues of convenience, the complexity of the issues raised and any particular issues which may arise in relation to party litigants.

I would like to very briefly return to the business of the sheriff court to draw attention to matters which should inform any discussion of the future of remote hearings in there.

First, as a court of first instance with a wide and varied jurisdiction, the sheriff court deals with matters which may have a profound impact upon the lives of litigants, such as actions for eviction or those seeking orders for the removal of children. While the problem of digital exclusion for the reasons given is not as acute as one might assume, the issue of social exclusion remains. Those who lead chaotic lifestyles may struggle to meaningfully participate in remote hearings or provide instructions to agents. Often instructions are received by agents in the court building on the morning of a hearing.

These problems manifest themselves regularly in proceedings for adoption, permanence orders, proceedings under the Children's Hearings (Scotland) Act 2011 and, indeed, in family cases where emotions run high. In my view, very careful consideration is required before any decision is taken to retain to remote hearings for such proceedings.

Secondly, it must be acknowledged that sheriffs do not have access to individual folders containing electronic copies for the papers, unlike in the Sheriff Appeal Court. Instead, sheriffs have access to integrated case management system (ICMS), which existed pre-Covid. ICMS has not yet been adapted to facilitate easy, intuitive access by sheriffs to electronic documents. Valuable time is lost during hearings while sheriffs search for documents. Difficulties are created when documents are lodged late, and are not uploaded. At times, this is onerous for sheriffs, such as in the ordinary courts; similarly to the experience of district judges in England and Wales described by Flaux LJ. If procedural hearings, opposed motions and debates are to be conducted remotely and efficiently in future, digital infrastructure and document management systems must be improved. A civil online system allowing solicitors to submit documents relating to ordinary actions directly on to ICMS is being piloted. It is important too that ICMS has a function for an electronic inventory of process, with hyperlinks to each item of process. That too is under consideration.

Thirdly, problem solving courts are challenging in a virtual environment. Many child welfare hearings benefit from a frank exchange between the sheriff and parties. There is the ability of the sheriff to have a stern word with parents regarding their conduct, or to persuade them to work together to focus on the child. That personal engagement between the sheriff and the parties is not easily replicated in remote setting.

Finally, the current ordinary court rules do not lend themselves well to remote hearings. Ordinary civil proceedings rarely involve an early focus upon an evidential hearing. A national approach to ensure consistency of well-ordered, correctly paginated and timeously lodged productions, joint lists of productions with hyperlinks to the authorities, strict timetables on the lodging and exchange of affidavits and joint minutes of admission, and recording, storage and transcription of remote, in-person or hybrid evidential hearings, would be much welcomed developments. From what Amanda Miller has said, the profession too would welcome these.

If, as Professor Richard Susskind suggests, we are at the foothills of the transformation of court services, the discussions at this conference may help to provide a compass and a route map as we embark upon the ascent. I am grateful for the opportunity to contribute to this conference, and I look forward to listening to the discussions it generates. Thank you.

Roddy Dunlop QC, Dean of Faculty

When lockdowns were first imposed in Scotland, the Scottish Courts and Tribunals Services – despite what might fairly be said to be years of under-funding – moved swiftly to build on the existing technology infrastructure and ensure processes were put in place so that the justice system could continue to operate.

And so the business of reaching verdicts through remote hearings began, with all the stakeholders, including the Faculty of Advocates, working together to facilitate the best possible outcomes. After all, Faculty's primary focus is to ensure that the people of Scotland, regardless of wealth, background or location, have access to the very best independent, objective legal advice.

I am no Luddite. The switch to a different way of doing things to minimise the impact of the pandemic wherever possible has delivered certain advantages. A simple example here is that many legal practitioners have been able to cut the expense and time attached to travelling, as remote hearings alleviated the need to catch a train from say Glasgow to Edinburgh to attend a 20-minute hearing. Likewise, the move to electronic papers – a forced 'revolution' that may otherwise have taken the better part of the current decade – has in many instances streamlined the processes involved in preparing for remote hearings.

But with the lockdown restrictions continuing to ease and Scotland's society slowly opening up again, serious consideration must continue to be given to how best to conduct court business post-COVID.

Organised by the Judicial Institute for Scotland and convened at the behest of the Lord President, The Right Hon Lord Carloway, this conference has provided a platform specifically to address the way forward for civil justice. While remote hearings have proved a useful addition to the options available for court business while social

distancing measures have been in force, they should not enjoy recognition as a one-size-fits-all approach in the future.

Faculty, along with the other Bars of Ireland, Northern Ireland, and England and Wales, issued a joint statement before the conference to this same effect. The Four Bars are in agreement that while the continued use of technology in court is to be supported, the future default position for court hearings – other than procedural business - should be in-person hearings.

The views of practising Advocates in Scotland on remote hearings have twice been surveyed by Faculty – once in August last year and again in April this year. While most Advocates agree that these are a useful addition to the options available for court hearings where procedural matters are concerned, the majority also believe that reverting to physical in-court appearances for more complicated matters – particularly but not solely where witness evidence is required – is crucial. Those views were shared by respondents to a survey conducted by the Law Society of Scotland.

The argument for a return to in-person hearings is, of course, vulnerable to accusations of "self-pleading", or to the response that just because Advocates and solicitors would prefer to conduct litigation in that way does not mean that this is what should happen. In that regard, it was illuminating to hear the forthright views of Lord Pentland, a senior appellate judge, who was clear that for a number of reasons the administration of justice is impaired by virtual hearings. The fact that we have managed to cope in the last year does not mean that we should continue merely to cope in the years to come.

Then we have the well-being issues created by the current mode of working. 'Zoom fatigue', combined with the difficulties of working from home and trying to manage personal and professional obligations in the same space, no doubt contributed to roughly one in every three advocates that responded to the Faculty's survey reporting that continued use of remote working would worsen their mental health. As has been remarked, there is a real difficulty that 'working from home' is morphing into 'living at work'.

These concerns were echoed in the results of a survey of judges and sheriffs carried out by the Judicial Institute for Scotland in April this year, which were referenced at

the conference. Respondents here expressed the impact that virtual courts had had on their health and wellbeing, citing eyestrain, increased fatigue, low morale, isolation and other negative factors. They also reported an increased need for preparation time for court hearings, difficulty in adapting the discipline they previously exercised during in-person hearings, and an increased administrative burden on themselves and their clerks. One memorable response indicated that if the current mode of working continues, the judge in question would be looking to retire as quickly as was feasible. That is not in anyone's interests.

Another real concern is the impact that the current situation has had on the training experience of junior members, of both trainee solicitors and of Devils. If we allow the training of new practitioners to remain impaired in the way that the current situation entails, the legal profession and the society it serves will ultimately suffer as a result.

The Right Hon Lord Justice Flaux, Chancellor of the High Court of England and Wales, remarked at the beginning of this conference that his view was that:

> "*we must seize the good things that have come out of this terrible crisis – the efficiencies and the things that we have learnt to do better – and jettison the bad, including the erosion that working from home has caused to our perception of the work/life balance*."

I could not agree more. Access to and the provision of a robust, healthy justice system in which all stakeholders can fully participate as effectively as possible is a cornerstone of any democratic society. While remote hearings have and will continue to play a valuable role in the courts, they cannot and should not become the default method of working in the future. As I have said before, virtual justice is just that: virtual – as in "nearly", or "almost". Scots law should not content itself with "almost".

Vikki Melville, Managing Partner of Clyde & Co (Scotland)

First, I'd like to thank the Judicial Institute and the Law Society for inviting me to take part in today's conference. I have been listening with great interest to the speakers this morning. I am conscious of the possibility reinventing the wheel because a lot of the views that have been shared this morning are very much in line with my own. I would like to talk about some of the Law Society's findings from surveys of a wide range of members recently. In those responses, there was a commonality with our responses to our internal UK-wide surveys at Clyde & Co in August last year. It would be interesting to see whether views have since changed.

The findings were inconclusive regarding appeal hearings, probably because only a small number of practitioners have been involved in appeal hearings over the last year. 15% stated that remote appeals worked particularly well, but 16% said that they did not work at all well remotely. I was surprised how close these numbers were; success of outcome may have an influence on one's overall view. However, I do think it is testament to the effort, investment and the time and energy behind the scenes in SCTS, whether in the Inner House or the Sheriff Appeal Court, that hearings have been able to continue virtually. It is fair to say that appeals have been less affected by the potential for confusion through different forms of remote hearings in different courts. The courts' response times in relation to all business, including non-urgent business, have been as maintained at pre-Covid levels. This shows how well technology has held up the system, and how well practitioners and all involved in the court system have managed to adapt to a very challenging year. It is fantastic that the Sheriff Appeal Court has managed to work at the same level as it was prior to lockdown. They now have three substantive appeal hearings per fortnight conducted by WebEx. One procedural court is held per fortnight. Any urgent hearings are heard by telephone conference call. The very nature of appellate hearings means that the transition to remote hearings has been consistent across the Sheriff Appeal Court and the Inner House. This can be compared with the feedback received from members of the Law Society, and my own colleagues, relating to first instance work in the sheriff courts, where there has been a variation in practice across the sheriffdoms.

I would like to share with you one recent personal experience, close to my heart, in the context of a remote appeal hearing. This was in the UK Supreme Court, heard in

February this year. It was in the case of *Burnett or Grant v International Insurance Company of Hanover Ltd* [2021] UKSC 12. This was an insurance case, in which my client was the insurer. The central issue on appeal was whether the insurer entitled to rely on an exclusion under the policy of liability arising out of the deliberate acts of an employee. This was a career first for me and my team at Clyde & Co to have a case proceed all the way to the UK Supreme Court. Permission to appeal was granted in 2019. The appeal was lodged in January 2020, long before any utterance of a pandemic, Covid, lockdown or working from home. At that point there was still an expectation that the hearing would proceed in the usual way in the court in London. Once the appeal was listed to be heard in February 2021, that was not going to be possible. Throughout the year, case preparation was not affected by the case being heard remotely, primarily because the UK Supreme Court has required electronic bundles for a couple of years now.

This allows me to share some of my own personal views about moving to full electronic working, in particular dealing with electronic papers rather than a paper dependent administrative system. It is clear that in order for full electronic working to be successful, you have to invest in technology. There have been difficulties posed by the speed of transition. I was wedded to paper files, and sometimes I do miss them, particularly when I get a large instruction coming in from an insurer whose own systems perhaps haven't been invested in or upgraded sufficiently. They send through hundreds of emails and attachments. It is very time-consuming to go into each item, open them up and try to work out what papers are relevant for review for the first record, as compared to the old fashioned method of printing everything off, having a quick thumb through the papers to disregard anything that is not relevant to the case. I do accept that electronic working by-and-large is much more efficient. I think it's obviously much more in the interest of the environment going forward, by reducing our carbon footprint and storage space, both in terms of filing cabinets in the office, papers in the general department or those lever arch files building up on the floor of Roddy Dunlop's study. However, we have to caution against the assumption that working with electronic papers is necessarily more efficient. It can be harder to pull together than traditional paper bundles from a practitioner's point of view. Thankfully, that's a task I can now delegate to juniors in my team, but I am told that it can be very time consuming to put these together in the correct format, particularly with the requirement

for hyperlinks. However, I do think it's quite clear that when working properly, the use of electronic papers will reduce the length of time spent by the court and counsel looking for pages during the submissions, or ensuring that there are standardised reference points when passing papers on to witnesses to refer to.

It does still cause me to break into a cold sweat when I think back to the day before my UK Supreme Court hearing in February. We had lodged everything electronically by the court deadline. Papers had been accepted in the correct format by the court registry, but first thing on Friday morning I received an email from my senior counsel advising that he received an email from the registry saying that one of the Justices was unable to view the electronic documents on screen. We were being asked to rescan and submit the entire joint bundle. The difficulty was that half of the hard copy papers were sitting in the respondents' agents offices up in Aberdeen. The other half were in my office. My trainee, in charge of dealing with the creation of the bundle, was working from her parents' home in Lanark. So you can imagine just what then ensued over the course of that Friday, trying to engather all the hard copies, have them scanned again and resubmitted in time for 5pm that day - only to then be told that after all the first version of the bundle could in fact be seen on a different screen. This is a small anecdote I accept, but we do have to caution whether electronic working can always be the panacea and be much more efficient, compared to our traditional paper-based system. A lot of that depends on investing in the technology of the future and the training and education of users.

The UK Supreme Court hearing itself ran very smoothly on WebEx, with only the Justices and senior counsel having access to it. Aside from minor Wi-Fi connection issues, requiring repetition of questions, it was a very easy hearing to follow. Discussions before the appeal included whether the remote platform would make the Justices less inclined to interject, but I found this was not the case. Both sides received challenging interventions throughout the submissions. As a viewer, I found it fascinating to watch that level of judicial intervention, at a level that I had never witnessed before. Indeed, in terms of how both senior counsel dealt with the questions, it was very much an example of advocacy in its finest moment. Only the President and counsel speaking at the time would have their microphones on. If Justices wished to interject, they would raise their hands, their microphones would be switched on, and

we found this avoided speakers cutting off each other and it did work very well. It was easier for the UK Supreme Court to arrange for all parties to view proceedings because they have had their live stream process and procedures in place through the link on their website for a long time now. It does work very well. One of the benefits was that some members of my team who would not necessarily have been able to come down to London to watch in person, were able to watch the whole event.

Equally, there was a lot missing. I would turn to a couple of paragraphs in Lord Pentland's paper, which resonated with my own experience, and that of my colleagues and clients. Lord Pentland refers to the absence of formality and dignity that should characterise a court hearing, there being no sense of the court as a place, the rituals and symbols which reflect the authority and independence of the court are missing, and the atmosphere, which resembles a mere business meeting rather than a court hearing. That absolutely sums up my experience of going to the UK Supreme Court for the first time. I wasn't able to meet my client, who happened to be London-based anyway, outside the door of the court with the rest of my legal team, and wasn't able to experience the atmosphere and the vibe inside the courtroom. Importantly, we weren't able to share the post-match experience, as we stepped out on to a busy street in London, and perhaps onto a more convivial setting such as a pub or restaurant.

These may be small, minor points to consider in the great scheme of all of the challenges of the last year but they are still ones we have to consider. How do we build relationships if we don't have those shared experiences in person? Much of that has been covered by Roddy [Dunlop] in his paper and in his presentation this morning. This is one of my biggest concerns about moving to more remote hearings and less in person. I am all for a hybrid system because there are efficiencies and savings, particularly from a client perspective, and at the procedural end of the spectrum, where there can be a lot of time saved through not having to travel or wait outside the court in a motion roll hearing, for example. But how do you replicate that relationship-building during that so-called dead time? My real concern is the lack of human engagement that's been built up over generations, hundreds of years arguably, within a very small, close-knit legal community, is at risk of being lost if we don't go back to in-person advocacy and hearings.

I include as part of that the pre-trial meetings with counsel as a part of the civil litigation process. Yes, they are all done very well on Zoom, but you don't get to build your relationship with counsel. I have a duty at this stage of my career to ensure the next generation of lawyers, whether a trainee, newly-qualified solicitor or a junior associate, has the same experience I have had over the past two decades. If we don't move back to a situation here we can see each other in person, how will the new generation of lawyers know who to instruct in the future, or be aware the identity or personality of sheriff or judge in their case which will have come across in previous hearings? They may get to watch fine examples of advocacy on video, but what about all the less fine examples they might pick up on if they are sitting in the physical environment of a courtroom? I have had the fortune on instructing the likes of Roddy Dunlop QC many times in my career, and I hope I will do so in the future. I do so because he's a brilliant advocate, one of the finest in the country; but I also do so because I know him very well from time outside the courtroom, a pre-trial meeting or on a train travelling to a hearing. The next generation would not have that opportunity; to be able to advise their clients on who is their preferred counsel if they have not had the benefit of that relationship-building. They may not be able to build a relationship or rapport with their opposite number, if they have less opportunity to see people in person as well. It has worked because it has had to, but that does not mean it should continue in the future. My concern is that if we do not move to a more blended, hybrid format, then it is the next generation that misses out. Thank you.

Questions and Discussion

Q. On the issue of who should decide whether a hearing is remote or otherwise, is it appropriate that parties' representatives should seek to agree whether any hearing should be heard in person? To what extent is proportionality an important factor in whether a hearing should be conducted remotely and if it is accepted that remote hearings are cheaper, will access to justice be served by a system where one party can refuse that option and force a more expensive in person hearing? Finally, why should the decision of whether to conduct a hearing remotely be directed to the bench and not to parties?

A. LP: Insofar as the first question, the court should have regards to parties' views, particularly where they have an agreed stance. Where the parties agree on the form

of hearing, then that should be an important but perhaps not determinative factor for the court in reaching its decision. My own view, is that if parties say that a dispositive hearing would be more appropriately conducted in person then the court should normally give credit to that. It is the responsibility of the court to provide that and in person hearings should not be denied to parties whom we ultimately have to serve. With regards to proportionality, on one view, that might imply that considerations of cost and efficiency could outweigh the best interests of justice. I have serious reservations about that.

A. VM: Every case has to turn on its own merits. It is not the case that the question of cost should be determinative of whether a case should be heard in person. That might be different if there is a particular issue the court has to consider in terms of costs, and where a hybrid system may be fairer. We have got to be careful of situations where parties have disproportionate resources. The answer would be that it turns on each individual case and a hybrid format may be the answer.

A. RDQC: The proposition I was advancing was that it would be odd that where both parties wanted an in person hearing, the court might decide otherwise. If both parties come to court asking for the same thing then the starting point should be that the court should provide that. That is a different issue to parties vetoing remote hearings. One consideration would be where one party was economically riding roughshod over the needs of other parties.

A. SPA: I raised this in my talk to address exactly this situation. Clearly where parties are in agreement, that will impact upon the decision making process, but there must be retained a discretion the judge or sheriff.

Q. Another question is which type of hearing should take place with vulnerable witnesses/children and what safeguards should be put in place for party litigants? For example, should equality and human rights assessments be carried out prior to hearings?

A. LP: My own view is that I would seriously question whether cases involving party litigants should ever be conducted remotely. They will only be appropriate where it is

entirely clear that the party litigant won't be disadvantaged. It is usually preferable that they come to court and address the judge wherever possible. That allows party litigants a greater extent of involvement in the hearing and in-person hearings allow judges to engage more meaningfully and in a more human sense. The Inner House has dealt with a significant number of party litigants in a variety of appeals. It is often exceptionally difficult for them to their present case effectively in a remote environment, especially where they do not have access to the technology or encounter issues using it. That can put them at a disadvantage compared to professional lawyers. The court and judges do our best to address those issues but it is difficult. With regards vulnerable witnesses, one of the great attractions of remote technology is the greater flexibility it confers on the court to allow it to do whatever is appropriate in specific cases.

A. SPA: My experience in the Sheriff Appeal Court insofar as party litigants is that there are some who feel more comfortable in a remote setting. They will produce a great deal of written material ahead of the hearing as that is their comfort blanket. I am not sure there is one size fits all. There needs to be an assessment by the judiciary as to whether that individual litigant is able to engage. You can get a sense of that from the written material. With regards vulnerable witnesses, there are certain categories of proceedings which are unsuitable for remote hearings, such as adoption, children's hearings and even section 11 orders. A measured approach is to look at how remote hearings work in other types of proceedings first and then assess them in the context of the more difficult categories which might involve dealing with individuals who have a whole array of issues which might prevent them from participating meaningfully.

Q. Has the fact that Scotland is a small jurisdiction assisted in making virtual courts work?

A. SPA: That would be an unqualified 'yes'. We have seen the very best of the profession during the pandemic. Everyone rolled up their sleeves and got on with it. That was partly because of the strong trust between solicitors, advocates and the bench. I presided over the first remotely conducted civil proof heard in Scotland, which

involved two family solicitors working collaboratively together. The proof had been part-heard and was subsequently reconvened remotely. Had the solicitors not worked together it would have been impossible for me to have reconvened that proof at such a time.

A. RDQC: I agree wholeheartedly with that. Mutual relationships of trust have allowed progress. This feeds into a concern I have going forward which was evocatively discussed by VM. The real concern is that if we allow too much of our lives to be conducted remotely those relationships will be lost. Trainees aren't forming relationships with colleagues never mind their opponents. It is not healthy from a viewpoint of common humanity, never mind civil litigation and we can't let it endure much longer.

A. VM: For my own experience, I have had new starts join my team who, for six to seven months hadn't met any of their colleagues in person. In that context, it is a lot more challenging to build up a rapport. If you multiply that forward to five or ten years' time, I can't see how those relationships will be replicated in the longer term.

A. LP: I agree - one of our greatest strengths is the sense of community which binds together all participants in Scotland. We must be very careful that this is passed on to future generations. We cannot allow those advantages to slip away.

Q. This is perhaps a related point: are 'door of the court' settlements more difficult to replicate in the virtual world?

A. RDQC: I have to agree with the question. I've found myself running innumerable cases in the last 12 months which, had they been heard in court, would likely have been agreed prior to the hearing. You cannot replicate the door of court discussions in a virtual existence. There are two reasons for that. The first is fear. There is a sudden realisation on the part of the client: "this is happening, I am about to be cross-examined before a Senator of the College of Justice". It is real and it is happening. That realisation can sweep away snagging aspects of a settlement. The second is that being there in real life facilitates discussion. You are speaking to your colleagues, you're having a coffee or walking up and down Parliament Hall and you have that

discussion. The wheels are oiled and settlements happen. You could force people to come on screen 15 minutes before hearing but is that really going to work? Humans being put in a room together are far more likely to come eye to eye than on a screen.

A. SPA: I wonder whether we need to look at that question in a different way. Should the question be "*why do door of court settlements happen*"? Where that happens, parties are delaying justice for other litigants. What can we do to prevent those type of settlements? Perhaps by way of a pre-diet meeting. I appreciate that even with that there will be some who nonetheless wait until they are on the steps of court to close the deal. We do need to be a little more creative to ensure we are not discharging proof diets as a result of late settlements.

A. SD: The same issue is true of criminal cases. We are talking about human behaviour and failing to resolve matters before the day of the trial. The introduction of section 196 gave parties the incentive to sort things out in advance. Maybe a similar inceptive or punishment should be introduced in civil matters.

A. RDQC: That is a well-made point and the very point which prompted Lord Coulsfield's reforms which resulted in a mandatory pre-trial meeting. Similarly, it is not mandated in the rules but there is an almost universal practice of commercial judges requiring the parties to have a pre-proof meeting. It is just human nature to put off that decision until your hand is absolutely forced by the door of the court.

A. LP: For as long as I can remember, judges have deprecated late settlements. No doubt in theory they are undesirable, but aren't they just another inherent and inevitable feature of the human-driven process of resolution of disputes? The conversation is part of a wider one of the fundamental importance that court carries a sense of place and the effect that has on parties. We have to be extremely careful to preserve and maintain that level of formality and dignity in remote proceedings

A. VM: We also shouldn't simply be focusing on settlement when thinking about the impact of the door of the court. The point also arises with the discussions parties have subsequent to certain procedural hearings, for example. You don't get that after switching off your camera.

A. SC: My view from a judicial perspective is that judges will require to reflex their judicial case management powers and pay close attention to these issues once hearings are up and running. We will require to use those powers in a proactive and constructive way.

A. LP: And undoubtedly we're going to have more tools in the box now.

Q. (directed to VM) There has been discussed the creation of a hybrid model for appeal hearings - could you unpack that?

A. VM: I think this is a much more difficult nut to crack. I think that my comment in relation to hybrid hearings was in the context of anything other than appeal hearings. The nature of an appeal hearing lends itself to be either or. Evidential hearings are where I see hybrid hearings working.

Session 3: Proofs

The Hon Lord Tyre

Good afternoon. We turn now to the remote conduct of proofs. In relation to returning to in-court hearings generally, my ultra-sensitive antennae have picked up a wind blowing in a particular direction, or at the very least a fresh breeze. When we turn the conduct of remote proofs, even over WebEx with microphones muted I can already hear the sound of barricades being erected. You have a written paper narrating experience in the commercial court where we have been conducted proofs remotely for a year now. I will take that as read and focus on how things may progress from here. At the outset, I should say my experience is based on commercial litigation. Very different considerations may arise in family law and child law cases. There may be less difference between commercial cases and other types of case. One should not assume that issues of credibility never arise in commercial litigation. Whatever I do say is a personal opinion.

The theme of this conference is to consider what aspects of remote hearings should be retained in future. As an introduction I want to highlight some of the aspects of the remote hearings that in my experience have proved problematic; in other words, all the things which are not good. To my mind, the major issue is not one of assessment of evidence, but simply of problems with technology. During the last year we have all got better at doing things remotely. I'm disappointed that the technology generally has not improved at the same rate we have. Most irritations and disadvantages of conducting proofs remotely arise out of technological issues. Many of these are outwith SCTS's control, but some of the statements in the SCTS paper remain aspirational. Almost every day, there will be an interruption in someone's internet connection or a problem with their bandwidth. That is not confined to witnesses giving evidence from their own homes. It is just as likely to happen when a witness appears from a solicitors' office or, indeed, with counsel from the Advocates' Library. We are at the mercy of automated systems which cannot be controlled locally. I expect some will have experienced that exciting feeling when your VPN announces in the middle of a hearing that due to inactivity it will switch itself off and restart in 60 seconds. Another a continual bugbear is the electronic numbering of documents. We seem to have managed to import into the era of electronic documents the familiar principle from

paper days that everyone in the room has different paginations. That is a problem which hasn't been solved yet. I'm not suggesting any of these problems are insoluble, but that after a year we haven't got there yet.

Some other technological irritations cannot properly be described as flaws. They are inevitable features of taking evidence from witnesses on a screen. One is the variable appearance of witnesses on screen because one has no control over the witness in contrast to where they appear in person in the witness box. There will be variations in lighting. A particular witness' face may be in shadow. They may be further from the camera than you would want or may not be even looking at the camera, but instead looking at the image of the person asking them questions which may be off in another direction. Then there is the background against which they are sitting when giving evidence. Another aspect which particularly affects proofs which tend to last all day is that they are more tiring than in person hearings. We have heard today about the effects of communicating through a computer screen, but I do want to make clear that in commercial proofs we do have morning and afternoon breaks. We do not go on for two or three hours in a row. Our personal layout of screens, keyboards and so on may be less than ideal. Some of this may have come about because we have forced to adapt more rapidly than we had wanted. I have not given proper consideration to the layout in my study here at home because I've regarded it as temporary, but if it becomes clear what will retained indefinitely it will require more thought. The point is that instead of abandoning an aspect of remote hearings because it does not work as we want, we should consider whether we can rectify the problem identified. I hope going forward SCTS will be able to assist with whatever further hardware etc. we need to move to an indefinite situation.

The technological aspects have been the least satisfactory aspects of remote proofs, but I accept others have more substantive issues. That is the focus of this afternoon's conference, which I now turn to. One of these is that opportunities for oral advocacy have been diminished. I shall defer giving views until the questions section. Looming above all is the assessment of credibility. On this, the judges' perspective may be different from the advocates'. I can only to speak to that of the judges. In my view it has not been significantly more difficult to assess the credibility of a witness on screen than in person. It can be done; it is done all the time. In the commercial court, all of

the judges have issued opinions including assessments of credibility. Our experience is in accordance with the quotations from judgments mentioned by Flaux LJ. None of the factors identified by Hazel Genn making it harder to detect a lie or how to improve our detection abilities are affected by the witness and the questioner being remote from one another. There has also been discussion about a loss of formality, and the potential impact of that on the pressure on the witness to tell the truth. I would readily accept that absence from a courtroom may be advantageous, for example if a witness is to be warned for prevarication. They may conclude rightly or wrongly that there is not much a judge can do about it from the other end of the country. In less extreme cases, it has not made much difference to the willingness of witnesses to tell the truth. It is still a stressful experience. When it comes to assessing reliability, the removal of unnecessary formality may actually assist a witness in giving reliable evidence. It has not been my experience that the ability of counsel to cross examine witnesses effectively and in the way they want to do has been diminished. There have been some excellent cross examinations which provided me as a judge with every bit as good an opportunity to assess credibility. I acknowledge this is not necessarily applicable to every kind of case.

Overall, my experience of conducting remote proofs has been positive. I am not arguing for their retention as the norm post-Covid. The degree of success we have had in running remote proofs does not imply that it is the preferred way to do it. There has been an enormous shared effort by court staff, solicitors, counsel, judges and the parties and witnesses themselves to enable remote proofs to run successfully. I suspect there may be a big difference between cooperation in difficult circumstances to make the best of it and voluntarily deciding to continue to do it that way when it is no longer necessary. If remote hearings were retained in a way that departed from the consensus desire, I suspect that goodwill may evaporate.

One of those differences may be in our attitude to the tolerance of informalities. So long as there is the feeling of everyone pulling together, informality may be part of the process which we put up with. I do not mind hearing conversations between counsel who have forgotten that, because my name and face is not on screen, I can still hear and see what they are saying. That tolerance would need to be tightened if WebEx became normal practice, as mentioned by Flaux LJ. Looking forward, for my part I do

not propose to imagine a world in which Parliament House is sold for redevelopment as a Scottish Enlightenment theme park, and the whole of the Court of Session moving online. I agree with the Dean of Faculty's point that it is difficult to see why the court should refuse an in-person proof if both parties want one. I assume therefore that most proofs will return to being conducted with at least the principal players - the judge, the clerk, counsel and solicitors - in the courtroom together. I consider instead what benefits can be retained in that situation.

One point already mentioned by Vikki Melville is climate change. Some of the practical developments of the last year have been very good for the environment. It may not be a reason in itself for adopting remote hearings indefinitely, but it is an important factor, and it is relevant to at least three of the potential permanent benefits that ought to be retained.

First, expert evidence. We were becoming more accustomed in the commercial court to hearing concurrent expert evidence, sometimes loosely referred to as hot-tubbing; where you have the experts on a particular issue for each side giving evidence simultaneously. In some respects, this can actually work better when conducted remotely with both experts on screen, rather than finding somewhere for them both to sit in a court. Each can see the other. The set up encourages dialogue and debate between them. That may not sit well with the traditional notion of cross-examination closely controlled by counsel on each side, but it is very helpful from the point of view of the fact finder. Here, there could be big savings in travel. Experts are often located a long way from Edinburgh; often on the other side of the world. There is a saving in time and cost in taking their evidence remotely, with very little lost. The same goes for non-expert witnesses who live a long way from court. I see no reason why we shouldn't continue to take their evidence remotely even if everybody else is in the courtroom. There is, however, room for improvement of the layout of cameras and screens, so that eye contact can be maintained.

That links into the subject of hybrid or blended proofs, where some evidence is taken in court and some remotely. Again, this can be retained as a possibility so long as deployed with due regard to fairness to both sides. Electronic documents prevent enormous wasted paper. We ought not to go back to the bad old days of collapsing

lever arch folders with systems in place for electronic lodging. The systems are not ideal yet, but they are getting there.

It is not just of benefit to the environment: use of electronic documents is generally speedier than using paper. If a case is document heavy, there can be a dedicated operator whose job it is bring the documents on screen. If the paperwork is lighter that can be handled by junior counsel or a solicitor. If the judge has a second screen, you can be looking at the documents on one screen and the witnesses on another. I find this a perfectly satisfactory way of conducting the hearing. It is, as ever, for the court to retain control of the total amount of documents uploaded. It's too easy to shove it all up there. It is up to the court to ensure the volume of documentation doesn't get out of hand. A valid point made at a recent meeting of the Commercial Court Users' Group is that there is a lot of paddling under the surface by the agents to produce what seems like a seamless presentation of electronic documentation. That doesn't come without a price in cost and additional time. I accept that would be the case, but I hope as the technology improves that these issues can be addressed, so I don't see this is as a reason to go back to paper.

I would like finally to mention open justice. The availability of hearings on WebEx has made them easier to attend for the media and the public alike. For a proof I heard in April of this year, I never had less than 50 attendees a day, in addition to those directly involved. When my colleague, Lord Clark, heard the judicial review by Hearts and Partick Thistle football clubs, I understand he had 950 attendees. This is an important consideration. The advantage of WebEx is that speakers are automatically shown on screen. It is difficult to see how that could be achieved in a courtroom without the sort of investment that has been necessary for the broadcasting of UK Supreme Court proceedings. Perhaps there is another category of proofs that should remain remotely conducted, namely those with significant public interest.

I will finish on that controversial question. I hope what I have said has given you something to think about. Thank you all for your attention.

Sheriff Wendy Sheehan, President of Sheriffs' Association

I am grateful for the opportunity to speak on behalf of the Sheriffs' Association this afternoon. There has been a high level of shrieval engagement on a broad range of issues covered in today's programme. I will focus on the key points given the time constraints and will try to avoid labouring points already mentioned by other speakers.

Sheriffs are eager to engage with new technology, to learn and adapt to change. We have done so to a huge extent over the last year. We have had to develop skills not only in utilising technology but in effectively engaging with parties on digital platforms in a wide range of contexts.

We appreciate the rapid development of the technology for virtual hearings which has kept the civil courts running over the last year against the background of Covid-19. WebEx is a vast improvement on telephone conferencing. It works well as platform for many types of civil court business – in particular, as has been touched on by other speakers, in the Sheriff Appeal Court, the ASPIC - which is now a fully digitised court - and in relation to commercial cases. We accept that WebEx is likely to remain the default platform for civil/ordinary court business - where hearings are either procedural, based on written submissions or legal argument by agents/counsel.

The convenience offered to agents and litigants, particularly in sheriffdoms where travel to court may be significant, is acknowledged as is the fact that virtual hearings can offer increased access to justice for some litigants.

However, these positive observations come with significant caveats:

- There is a much greater administrative burden involved in setting up hearings, document sharing, upward delegation from clerks to the judiciary and the time spent in both preparing and tidying up courts;

- The efficient conduct of hearings is dependent on appropriate digital connectivity, speed and familiarisation with technology - we are still at the bottom of a very substantial curve in this regard;

- We appreciate the work being undertaken by the Civil Lab to upgrade ICMS, to devise digital processes and better document management systems. I am

delighted that both Lady Wise and Sheriff Principal Anwar are on the Civil Lab board. The importance of this work to sheriffs and the current levels of frustration encountered must be emphasised. We are keen to be closely involved in the development of ICMS. If we are given that opportunity, then it is more likely that user friendly tools will be developed which sheriffs will deploy with confidence;

- We have found dealing with high levels of business virtually to be challenging: 76% of shrieval responses to the survey reported that virtual courts have made their job more difficult. Many colleagues report occupational health issues – fatigue, isolation, orthopaedic and ophthalmic issues, low morale and loss of job satisfaction. Issues of judicial welfare should not be overlooked, nor can it be assumed that as we adapt to new ways of working that these will simply resolve.

Evidential hearings/proofs

Responses to the survey of judicial attitudes demonstrate that sheriffs care deeply about the integrity of the civil courts. Some concerns have been expressed about potential diminution in the quality of evidence

The direction of travel in the sheriff court has tended to involve an increased reliance on affidavit evidence in virtual hearings. Affidavits are filtered through the lens of the agent drafting them and may be a product of the circumstances in which they are produced. Sheriffs are cautious about placing as much weight on them as oral evidence.

Insofar as parole evidence is concerned, there is an increasing movement towards evidence by live link in the Scottish courts. The benefits to expert witnesses, other professionals and vulnerable witnesses are obvious. Remote evidence works well in many cases. Whist we are at an early stage in evaluating experiences of assessing evidence remotely in more contentious matters, in cases where there are sharp issues of reliability and credibility, most sheriffs remain of the view that the environment offered by a court room, where the flow of questioning and engagement with the witness is unchallenged by the sometimes stilted and flat experience encountered on a screen, is preferable.

Many so-called live proofs are in fact a hybrid of affidavit evidence, video link evidence from expert and skilled witnesses and in-person evidence from witnesses speaking to contentious matters of fact.

Sheriffs are at the sharp end of the judicial system. We hear a greater volume of cases conducted by party litigants who at best, are harder to corral and focus and who at worst, can present a real challenge to manage remotely where issues of contempt or prevarication may arise.

Cases with multiple parties also present greater challenges to conduct remotely as do those involving interpreters.

My most challenging experience of a WebEx proof involved a child being cross-examined following the joint investigative interview which comprised her evidence-in-chief and in which she made allegations of paternal sexual abuse. Her parents required an interpreter to follow the evidence. The interpreter joined us on a live link from a cloakroom on a connection with terrible feedback and time delay, as a result of which she continually interrupted the child's evidence to shout over her in a foreign language. After multiple stops and starts and an acutely distressed child, we convened in a courtroom before her evidence was lost entirely.

It is our hope, that sheriffs will be trusted to manage cases effectively – focusing the issues in dispute and identifying the hearings where an in-person hearing is necessary in order to most effectively make findings in fact in a particular case.

I'd like to say a few words about some types of case which are less suited to virtual hearings:

Sheriffs often preside over problem-solving courts. This involves skilled interaction with agents and parties, the use of mediation skills and emotionally intelligent, well-timed interventions. This is very challenging on a digital platform. This type of hearing is most prevalent in family courts - in particular, child welfare hearings, which account for the bulk of private family law cases and a substantial part of the civil court programme in most sheriff courts. Well-managed child welfare hearings resolve cases prior to proof. The most effective child-centred decisions are made when the parties engage meaningfully in the process. The increased emphasis on involving children in

these hearings and the requirement to explain our decisions to them will further exacerbate these challenges.

Similar issues have been encountered by sheriffs hearing cases dealing with adults with incapacity.

Our summary sheriff colleagues who undertake simple procedure cases also report difficulties in engaging with parties and attempting to resolve cases at an early stage, referring parties to in-court mediators or adopting a problem-solving approach to resolving cases prior to evidential hearings digitally can be very challenging.

As other speakers have observed - agents and parties settle cases by attending court and speaking to one another at hearings.

Whilst some of these challenges may be ameliorated by training and the development of judicial skills in conducting such hearings digitally, there is sometimes undoubtedly, a benefit in litigants attending court.

Multiple concerns arise in relation to adoption, permanence and children's referral cases. The birth parents of children involved in such proceedings often encounter digital poverty, learning difficulties and other adverse life experiences which make it virtually impossible for them to effectively participate in virtual proceedings, which at the best of times are difficult for them to understand. They are often acutely stressed, anxious and angry. They require to be supported by their agent in-person throughout the process.

Granting a child protection order or permanence order where the parent is on a screen, participating alone from home or worst still, as a disembodied voice down a phone due to their lack of digital connectivity, precludes their effective participation in what is a crucial decision about their family life. Having undertaken such hearings personally, I have real concerns, not only about fairness to the parties but also, even where the right decision for the child is made, about the depersonalisation and loss of humanity involved in the process. This is suboptimal at best and the view of many sheriffs simply inappropriate. Those concerns are not unique to the Scottish family courts.

The factors which are likely to underline the decision about whether a virtual hearing is appropriate in a particular case will vary but where life changing decisions about families' lives are concerned, the means by which a fair hearing is ensured should be a matter for discretion by the judge or sheriff conducting the case.

Ruth Innes QC

Good afternoon. From the various surveys of the judiciary and the legal profession, it appears that there is little support for evidential hearings continuing to take place remotely after the pandemic. Many of us have now have the experience of conducting such hearings, so views expressed are on an informed basis. Various issues are raised as to why evidential hearings are particularly problematic. They are of course the key determinative hearing in the litigation, and therefore bear close and careful consideration.

However, the focus of the discussion often seems to be on the perspective of the lawyers, rather than of the litigant. In my view there is a deep sense of unreality as people watch their lives play out on a screen. Their family life, health and work. They are spectators rather than participants. In an evidential hearing, they appear for a time on a screen; and then they are gone, relegated to a name on an attendee list, if even that. The only constants on screen are the lawyers. People appear from disparate home and office environments. The hearings end at the click of a button. In a courtroom, the litigant is present, engaged and visible. Agents and counsel can address questions, and as the case progresses provide reassurance or perhaps a much-needed reality check. Distress can be seen and alleviated. There is time to process, reflect and digest.

The importance of gathering together in a neutral venue, the purpose and focus of which is the resolution of the litigant's dispute cannot be underestimated. In recognition of these issues, judges and sheriffs have developed strategies of ensuring that the virtual court hearing has a sense of formality and seriousness, and is not a glorified Zoom call. Solicitors and counsel have tried to ensure parties feel engaged and supported through the process. In practical terms this will mean that, if possible, a proof will be conducted from agents' offices or from 142 High Street. This can lead to the rather bizarre situation that both sides are at 142 and the judge is in chambers in

Parliament House. Absent the pandemic, that would be nonsensical. Even if it is not possible for one side to be together, there is a proliferation of online communication: WhatsApp groups, Teams and Zoom meetings in breaks, before and after court. Why do we do all this? Because a litigation is not about lawyers, but about the resolution about the litigant's dispute. That resolution will affect a person's life, whether it is home, family, health, work or business. If the pandemic has taught us nothing else, surely it has reminded us the importance of human relationships and interaction; why else have there been rules about extended households and the early easing of restrictions so we can see each other in person? Because we all know that meeting in real life is better than a phone or video call. Whilst we try to replicate face-to-face interaction virtually, it is but a pale imitation.

Turning to some of the issues raised in the Faculty survey in relation to the taking of evidence from witnesses. These present a number of a challenges.

First, technical issues. Not all witnesses have sufficient access to internet speed and bandwidth, suitable devices and operating systems. When connections are tested, they can work but circumstances can change depending on where the witnesses is sitting in the building or who else is using the Wi-Fi connection. Even slight delays affect the ebb and flow of cross examination. Witnesses may not be comfortable using technology for an important court hearing without support on hand. They may not have devices on which they can properly view documents or a private space from which to give evidence. There are evidential issues, practical issues about how to put documents to witnesses. Screen-sharing can be used but usually a witness will have their own affidavit, report or productions to hand. Overall, it is not entirely clear what documents they have in front of them. Are they marked up or annotated? What are they looking at on their screens? Do they have WhatsApp open? Are they communicating with others during their evidence? Inevitably, witnesses, even professional witnesses, who are in their own homes or studies, will have access to other documents not before the court. Quite often they suggest that they might refer to notes during the course of their evidence. Then there is making objections. This can be difficult because it may not be apparent that you are about to, in the same way that standing up in court is obvious. The witness may answer the question before the

objection can be made, or because the technology doesn't cope with people speaking over one another. Short of a Britain's Got Talent style buzzer, it is difficult to object.

We have already heard about the effect on the witness of giving evidence remotely. Are they more comfortable, less stressed or more casual? Does the technology cause additional stress? Do they have any time to acclimatise to the virtual courtroom or are they simply catapulted into a situation in their own living room where they are subjected to a barrage of cross examination, and then it is over? There are well-documented concerns about assessing credibility and reliability, or perhaps more broadly to form an impression of a witness. As far as cost is concerned, it is not clear that a remote proof will result in savings for the litigant. Whilst lawyers will not have to travel to court, it seems more fee earners are involved in the conduct of the hearing, such as taking notes, screen sharing and taking instructions from the client. The practical preparation for the hearing itself seems to be more extensive. Anecdotally, and from the Faculty survey, hearings may take longer. Why is this? Is it because of breaks, time lost because of technical issues, difficulty managing documents or that evidence is more stilted?

The other matter not to be forgotten is the burden on clerks of managing a virtual hearing. Now they have to perform the role of clerk, macer, IT support; as well as liaising with agents directly in respect of other cases, and continuing with their other work.

All of this is not to say that evidential hearings haven't worked. As has already been acknowledged, with a great deal of cooperation on all sides, in a context with no alternative, they are as good they could have been. Of course, there are matters to be preserved and regulated post-Covid.

First, electronic documents; gone are the days of dragging a heavy case along to court. Hopefully suitcases will be used in future for holidays, once again. The system for the use of electronic documents does have to be standardised and improved. We need proper electronic processes. In terms of the management of papers during court, particularly during proofs, we need to think about how those are dealt with. Who is responsible for showing documents on screen in court? Could this role still be performed by the macer?

Secondly, there should be greater ease in taking evidence remotely and greater flexibility in permitting it. However, if it is thought that remote hearings should take the place of in person hearings - certainly evidential hearings - there must be careful, appraisal, research and full consultation.

Why do we try to replicate what we do in real court, virtually? Because what we have been doing works, and we know it works. Absent the justification of a global pandemic, virtual proofs could only be justified on the basis that it would improve access to justice, as compared to an in-person hearing. Experience to date suggests that is not generally the case. Thank you.

Gordon Dalyell, Partner, Digby Brown, and Past President of the Association of Personal Injury Lawyers

Thank you Sheriff Duff and thanks to the Judicial Institute for organising this conference

I fully appreciate that I am number 11 of 11 panellists, and I apologise in advance for any repetition of what has gone before, but many of the themes emerging today are consistent across the various types of hearing that we have been discussing. In addition, the thoughtful contributions by my fellow panel members highlight many of the pertinent issues specific to proofs or other evidential hearings.

My principal remit today is to summarise the position of the Law Society of Scotland, following a survey of its members. As with the Faculty of Advocates, the Law Society reached out to its membership and the findings are broadly similar. Whilst there is widespread recognition of the advantages of the remote hearing facility, the broad consensus amongst the solicitor branch of the profession is that these represent an excellent means to conduct procedural hearings but not for all evidential hearings.

The technology is, in itself, generally, not seen as a significant issue with almost 60% of those surveyed identifying no difficulties in its use. However, as others have alluded to, there are always challenges with technology.

There are issues with the experience of clients, with 45% of those surveyed saying they had difficulty in obtaining instructions, and 41% indicating that clients had difficulty in understanding or participating in the proceedings.

Moving on to the particular topic of proofs or other evidential hearings, around two thirds of those surveyed confirmed that in their view these did not work well. There are also wider concerns about some of the consequences of these remote hearings.

It seems to me that these concerns can be broadly grouped in to the following main areas:

(i) The hearing and assessment of evidence, with particular reference to reliability and credibility;

(ii) Communication within a legal team;

(iii) The ability of members of the profession to learn and gain experience of all aspects of court craft;

(iv) Consistency across the Scottish courts;

(v) Access by the public, including journalists, to proceedings; and

(vi) The wider effect on wellbeing and collegiality.

Hearing and Assessment of Evidence

A number of concerns in relation to the effect of remote hearings on assessing witnesses have already been covered in some detail. The Law Society survey found that 70% of respondents found examination and cross-examination to be more difficult, and 74% felt it was harder for judges and sheriffs to assess reliability and credibility.

Many of the concerns expressed did centre on the ability to interact face-to-face with witnesses.

78.5% of respondents were in favour of remote hearings continuing. When asked which hearings should do so, almost all, 99% indicated procedural hearings should operate remotely, but only 13% felt proofs should go ahead remotely and 12% other evidential hearings. A clear distinction.

Of those that were not in favour of continuing with remote hearings, 78% of respondents felt their clients' interests were disadvantaged by having a virtual hearing,

and 89% cited difficulties with examination and cross-examination of witnesses as preventing effective participation.

I fully accept that it may depend largely on the particular case, particular participants, and particular decision-maker. We have already heard from Lord Tyre and Lady Wise about their experiences. In the passing, I was struck by the passage in her judgment in the "*YI v AAW*" case where Lady Wise was able to comment on a particular piece of evidence by the defender, and which clearly had some significant bearing on her assessment of him. Equally, she identified certain issues with evidence being taken from witnesses via the use of mobile phones.

As mentioned by others there have been examples of cases where the natural flow of cross-examination has been interrupted - whether by technology issues, or witness issues - and perhaps to the detriment of the cross-examiner's case. In certain cases, the demeanour of a witness may be less crucial in cross than perhaps documentation or other evidence. It is however an aspect that needs to be considered carefully.

This perhaps just illustrates that in certain cases, heard virtually, of course it is possible for a view to be reached, and which may be little different from that which would have been arrived at in the setting of a physical courtroom. However, we rarely find ourselves in a one size fits all environment.

We do need to consider the technology. It is clear that generally speaking the WebEx offering works reasonably well. There can be occasional glitches, and delays in connectivity but delays and issues with witnesses are not unknown in any court setting.

The testing provisions in the guidance issued, e.g. by the All Scotland Personal Injury Court, are detailed, thorough, and of great assistance to practitioners. Generally these seem to have worked reasonably well. There have however been instances of where there have been difficulties, and where testing has not been able to have been carried out satisfactorily, or if there are concerns, then the default position of evidence in person should be adopted.

Use of devices is varied, and some regard ought to be had as to how effectively a witness can be assessed if he or she is giving their evidence by use of a mobile phone, with perhaps connectivity issues in the background. Using a good laptop with good

broadband can make matters proceed very easily. However not everyone has access to these. Take for example a witness sitting at home who is being referred to voluminous documentation, or footage of some kind, and using a less than state of the art mobile device.

There will be cases where the option of taking evidence remotely may enhance justice. There may be certain expert, or other witnesses, away from Scotland whose evidence can be of great assistance and who otherwise might not have been able to contribute to the case.

Formality is an issue. The prospect of having to step into a witness box carries some significance. For many “a day in court” has some resonance. Others have mentioned the importance of access to and transparency of justice, for all, particularly litigants. That ought to be at the forefront of our thinking.

In essence, whilst there will be witnesses whose evidence can and perhaps should be taken remotely, the clear view of this branch of the profession is that in-person evidential hearings should be the norm, and for those that do give evidence remotely, sufficient safeguards ought to be in place to ensure fairness.

Communication within a legal team

Communication during the course of a hearing is crucial. Different approaches undertaken during the current time have included WhatsApp groups, separate email or text communication, and various other methods, but there are potential issues with the ability to communicate quickly enough, and for anyone who happens to be ‘on their feet’ to be able to respond to any such message. I am aware that in a recent proof heard by Lord Tyre, at least one of the parties’ representatives was grouped together in a room at 142 High Street, allowing them the ability for discussion safe in the knowledge any conversations would remain private, assuming the mute buttons were on! That may also represent the best way to involve the client in the group, whether in person, or contactable by the team. That may or may not be possible in each case.

Learning

The wider issues are equally as important. Improving one’s advocacy skills is reliant on appearing on a regular basis and that it is clear that for many doing so in a physical

setting is far preferable to a virtual setting. That relationship with the bench consisting of, not just the facial expressions of the decision-maker but also the body language, and other sometimes subtle, sometimes not, signs, which convey the message that your questioning or submissions ought to take a different tack.

The ability for younger, less experienced members of the profession, whether solicitors or advocates, to sit in a court room, listening to a case in which they have no direct involvement, should also not be discounted. There are many factors at play, not just observing the way in which questions are put, and answered, but also the behaviour of those presenting the cases, and importantly the decision-maker. The knowledge gained through this type of experience should not be underestimated.

Consistency of approach

The initial volume of practice notes, directions and guidance produced by the different sheriffdoms were of course helpful, but for anyone practising in different parts of the country, created certain challenges. Since February this year, updated guidance has been issued on a national basis, which is welcome and should be the norm, allowing of course for certain variances to take account of local requirements. That level of coordination of rules to enhance the conduct of remote business, as set out by Sheriff Principal Anwar, is crucial.

This may also be the moment to suggest that whilst the focus of today has been on civil business, we ought not to forget that there should be consultation and discussion with those in the profession who conduct criminal business. The medium to long term effects of the pandemic affect all of us, and whilst most of us who conduct civil business have been able to do so without crossing the threshold of a court in the last 15 months or so, that has not been the case for our criminal colleagues. Whatever measures are taken in relation to the future, it will impact on everyone.

Public Access

The ability of the public, including the media, to have access to court hearings is important. To be fair to the SCTS, they have devised a mechanism for members of the public, and journalists to contact the relevant court to seek access to the virtual hearing. This involves the provision of a specific passcode.

Any access should be monitored and feedback sought as to how well it is working. As with younger members of the profession whom I mentioned earlier, there is an obvious benefit to allowing, for example students, as well as other interested people, the ability to observe proceedings in as accessible a way as possible.

Wellbeing and Collegiality

Equally, the importance of social interaction between colleagues should not be forgotten. Relationships with all court personnel, whether that be counsel, agents, clerks, macers and bar officers, are forged through direct human contact. These are the relationships which assist in the delivery of justice. The ability to have that conversation "at the door of the court" with one's opponent, or the informal word provided by the clerk, which has a bearing on the approach taken at a hearing, are vital in enabling all of us to progress the court's business.

Related to this aspect is what I would describe, and Roddy Dunlop also referred to, as collegiality. This pandemic has had a significant effect, and in far too many cases, a devastating impact on people's lives. The psychological consequences will require to be addressed for a long time to come. The ability to interact is not simply confined to the particular case. Day-to-day contact, for all of us, is hugely important. Of course, this applies to members of Faculty, and also the judiciary equally. The opportunity to speak with colleagues face-to-face is an important part of what, we as litigators do.

It is no surprise that many firms, now considering how to organise a return to working in offices, are looking at a hybrid model, usually a minimum of 2-3 days a week, and perhaps more for those less experienced, such as trainees. That will have consequences.

Within wider society there are likely to be significant changes to the way we work. The Law Society has pointed to surveys anticipating differently structured working weeks, and a wider variety of places of work. We should not forget, that whilst many of us have the advantage of being able to work from home in a space which is quiet, and efficient, for a large number of people, working from home means being located in a bedroom, a kitchen or on a sofa, and with little privacy. There are of course ways to ensure that appropriate arrangements are in place to allow a court appearance to proceed, but there will require to be flexibility and understanding.

There is no doubt that virtual or remote hearings are here to stay. That procedural or similar hearings should be dealt with this way, seems to be a generally agreed way forward. For proofs and evidential hearings, it is different. How and when they take place needs to be carefully considered by all concerned.

The Law Society survey is quite clear, and accords with that of Faculty, in that the default position ought to remain that a proof or other evidential hearing take place in person. As Lord Tyre has pointed out, there will be an increasing responsibility on parties to actively consider what evidence is truly required and how best that evidence should be presented. The potential use of a virtual resource should not be discounted.

In many cases, it will simply not be necessary for a witness to travel to Edinburgh, Glasgow or wherever the court is located, whether that is from another part of Scotland, or further afield, to give evidence lasting a relatively short period of time.

How we achieve this may vary according to the type of case. Lord Tyre has pointed to the advantages of the commercial court practice. That of course is a case-management model and is viable for the number of cases that go through that court. In different areas e.g. personal injury where the numbers are higher, and the case-flow model is utilised, a different approach may be necessary.

One of the key innovations of the Coulsfield reforms was to effectively bring forward the crucial decision time, i.e. the door of the court settlement discussion, to the pre-trial meeting. One of the requirements of the pre-trial meeting, and perhaps one which is less onerously observed, is to consider what evidence may be agreed prior to any diet of proof or trial. It would not be too much more to ask parties to assess, in the event that evidence cannot be agreed, to consider which areas of evidence a witness will speak to and whether that can be dealt with remotely. That could be set out in the pre-trial minute. The decision will depend on each case and circumstances, but it may assist in focusing minds as to whether a witness is truly required.

As a profession, we have always required to adapt, and undoubtedly that will continue in dealing with the consequences of this pandemic. We have a number of principles to reconcile, access to justice, justice being seen to be done, and ensuring that clients' interests are able to be represented as effectively as possible.

I emphasise the importance of engagement with all involved and welcome this conference as an initial step.

Questions and Discussion

Kay McCorquodale ['KM'] joined at commencement of Q&A. KM was invited by SC to make some comments on issues raised by previous speakers.

KM: Collaboration is key. Having everybody here today is really important. I can assure Lord Tyre that as far as I am aware, the Court of Session is not going to be turned into a theme park. Insofar as the comments made by RDQC relative to the backlog of criminal cases, in our paper we say that backlogs in the High Court and Sheriff Court will take some three or four years to work through. That is a simple fact. SCTS's physical accommodation is under some pressure and where available, will be used for criminal rather than civil business. The vast majority of civil business constitutes procedural hearings and remote hearings will be appropriate forum for many of those. The reality is very different to the situation envisaged by LP of three judges sitting in their chambers in Parliament House, with counsel in consulting rooms at 142 High Street. I don't see why that situation would arise if accommodation was available. Both LT and LP made the point that we need to have meaningful investment in hardware and that it is really important for courtrooms to be fitted out for the digital age. That is absolutely agreed - we need to make sure that courtrooms are properly equipped for use of electronic documents and that judges and court staff are properly trained in dealing with electronic documents. SCTS's Civil Lab will also look at standardisation of electronic documents and bundles and that will form part of the ongoing process of how to make ICMS more user-friendly.

Q. It has been suggested that increased use of virtual courts may produce a saving to public purse. Could any savings be used to mitigate court fees and to improve access to justice? Further, if the coronavirus legislation is repealed, will the positive changes it effected (such as electronic lodging of documents and electronic signatures) remain if the legislation is repealed? How agile will courts and court rules be in adapting to future changes?

A. KM: In his speech, the Lord President made it clear that the setting of court fees is a matter for the government. SCTS works closely with them in developing those that but that is a matter for them. The coronavirus legislation and any potential extensions is also a matter for them, although we are working closely with the government on that and will provide them with evidence assisting their decision. In fact, we have some justice officials attending today. Agile development is the focus of the civil lab and has been prioritised with members of the judiciary. Undoubtedly there will require to be rule changes and SCTS is working closely with the Scottish Civil Justice Council on that. Again IT will feed into that and will be addressed in our civil lab.

A. GD: On court fees, it is clear that court fees are going up and I wouldn't anticipate any reduction at all in that regard.

Q. Will a move towards cases proceeding to virtual hearings based on written submissions, result in the decline of oral advocacy skills?

A. LT: If that was the sum total of it then yes. Clearly the use of only written submissions would have detrimental effect on oral advocacy. Remote hearings have had the indirect effect more evidence is agreed than before and written submissions are used. But it doesn't have to go all the way. I have had written submissions in many cases but I have never heard a case where oral submissions have been dispensed with. It is no loss to oral advocacy to get uncontroversial stuff out of the way in the written submissions and then use oral submissions to focus on the issues really in dispute. I am not any more enthusiastic than anyone else in terms of moving towards the continental system of everything being in writing and nothing orally. I don't think remote hearings take us in that direction.

Q. In the panel's experience are some parties/representatives prepared to do or say things they wouldn't in person? Does more need to be done to educate witnesses of what is expected of them in giving evidence remotely? Is dealing with issues of contempt of court and prevarication more difficult to deal with in a remote setting?

A. SS: I think that written submissions often focus the issues. In terms of submissions made by representatives, a more strident approach might be taken virtually but that

largely isn't problematic. In creating the solemnity of the court on screen there is work to do. There should be an SCTS crest in the sheriff's background and setting rules at the start of the hearing is very important. Even where you do that it is difficult to control who else is in the room. My own experience is that it is harder to deal with a witness not answering questions or being obstructive through a screen. I would be happy to be trained on how to do that better. For me the behaviour of witnesses and parties is a factor in considering which matters are suitable for remote hearings.

A. RIQC: I have certainly had witnesses consulting notes and not thinking there was a problem with that. I saw a witness recently, when completing his evidence, wishing the judge good luck which he wouldn't have done in real life. The nervousness of people in a remote setting seems to give rise to such behaviour. In terms of the arguments being made, they are exactly the same as in real life. I haven't experienced anyone thinking they could make arguments on a remote hearing which they wouldn't in real life.

A. GD: I would echo that. Equally as far as witnesses, I am not aware of any bad behaviour. I have experienced witnesses having difficulty in viewing documents on a rudimentary mobile phone. That's where we need to be satisfied that the remote conditions are just as good as they would be in court.

A. LT: While I have had no misbehaving witnesses, I don't doubt what SS was saying in relation to family law cases. Those seem to be situations in which remote hearings must be more difficult. I have a stock phrase to go through with witnesses - checking that they are alone in the room, with mobiles off for example. At the point of giving the oath, most witnesses will understand they are in a courtroom. I have had almost no instances of phones ringing. I did, however, have one witness interrupting evidence, after confirming that devices were off, to advise me that Prince Philip had died. In terms of another person being in room with witnesses, you would need to have some suspicion before asking them. If it turned out that they had lied, then you would have to consider contempt proceedings. That would involve adjournment of the hearing and an investigation. In remote hearings it is much more difficult to take immediate action.

Q. Does SCTS agree there should be full public consultation with regards further changes to civil litigation? Will there be collaboration and not just consultation between SCTS IT and the judiciary?

A. KM: Absolutely, there will have to be a full public consultation. Today's conference is the first stage, which is rightly focused on the profession although there are a number of delegates from third parties as well as journalists etc. We need to reach out to the public at large and anything permanent will have to be effected through legislation. Collaboration is the most fundamental thing between SCTS and court users. In the Civil Lab we have public owners who are people working within courts and who know how it works. The judiciary, court staff and IT will all have to work together. In addition, common issues are raised during SCJC meetings and the Law Society's Civil Working Group.

Q. Will there be consultation with practitioner groups?

A. KM: Absolutely - the work of the Civil Lab takes this into account. For example, we are currently working on a rule change to make Civil Online compulsory and we are liaising with practitioners in that process.

Q. How will remote procedural hearings take place where the individuals involved are to be in physical court straight after?

A. RIQC: That is a practical issue in family law cases but I imagine this will arise in other areas such as commercial actions. I know that the Faculty of Advocates has been looking at improving IT systems so that people have somewhere other than PH or the Library to go to conduct procedural hearings. But that still involves going from one building to another.

A. LT: This is an excellent question and relevant to judges as well. It is not too difficult to conduct a procedural hearing from chambers but that requires the transfer of technology. The equipment I use (a Surface Pro) doesn't work in PH, so there are

improvements which will need to be made there. It can't just be for judge to decide what happens as that could create all sorts of issues.

A. SS: It is not unusual for sheriffs to deal with a variety of hearings and it is now incumbent upon us to keep diaries in a way we haven't before. The requirement to get all the protagonists in the same place at the same time is becoming a real challenge. That also applies to clerks too and is one of the areas we will need to work on.

A. SC: I echo SS's comments on that. I sit for half my time, and regularly hear child welfare hearings which can be close in form to evidential hearings. They are fixed for half hour slots. That can be difficult to deal with from the clerk's point of view and working out which cases should be taken first and asking agents to hang around virtually. It is not unusual for me to be told that agents are on a remote hearing in a different court. If everyone is having to juggle diaries then that is exceptionally tricky.

A. GD: I think at one point there was an issue with WebEx licenses. Some courts only had a license to operate one virtual court at a time, I don't know if that is still the case.

A. KM: As far as I'm concerned that is not an issue. The issue is for sheriffs to consider what hearings are best conducted via Webex. It was an issue when licenses were originally rolled out, but it is not an issue now.

Q. Recognising that all panellists think that where both parties want in-person hearings they should be allowed, when will this happen?

A. KM: SCTS follows Scottish Government guidance and as long as social distancing is in place, we will not be able to get back to the way things used to be.

Q. Might there be scope to give special consideration to continue using remote hearings relative to emergency or interim applications?

A. SS: Sheriffs are used to dealing with out of hour applications, predominately dealt with via telephone and email. I am sure sheriffs would be very happy to continue dealing with those and interim interdicts via Webex.

A. SD: There has been improvement with the granting of warrants with the introduction of electronic signatures and it allows a significantly easier process for granting warrants. Matters can be dealt with straightaway and from a shrieval perspective I wouldn't want to see a winding back of that.

Q. We spoke about public access to open justice in the context of the importance of journalists being able to access the written pleadings. How do journalists get access to documents referred to in a remote hearing?

A. RI: The general point is that if documents are referred to in a hearing, in order for the journalist to properly understand what is going on they require sight of those. The UKSC dealt with this in *Dring* and it was addressed in *Cherry* too. The general principle is one of open justice and there should be access to documents subject to any orders which may be in place.

A. LT: I think it is very important that the responsible media have access to any documents enabling them to report properly. The problem is how the content of those documents is reported. Pleadings contain lots of material which may never be proved at all. I am very much in favour of documents being made available to the responsible media. Things have been better since doing remote hearings as the documents are brought up on screen for everyone to see. If the parties are using electronic documents in court, then that is just as good. In the past presumably journalists didn't see documents being shown to witnesses, so that must be an improvement to open justice.

A. KM: The point is that our staff will provide information discussed in open court. We are working on a platform which will allow us to upload closed records to journalists upon request. We are working to ensure that the correct information is made available to responsible journalists.

Q. Could increased use of phone and video hearings be used to establish specialist family sheriffs in all Scottish courts? Could that ensure that the most difficult family cases are handled in a similar fashion across Scotland?

A. SS: At this point in time Scotland has no formal family law structure, and family law is not seen as specialist area of civil litigation. There are judges experienced in family law in Edinburgh and Glasgow Sheriff Courts. I accept that virtual hearings might improve deployment of those specialised right across Scotland but that will only work if a specialist family law structure is put in place.

SPA rejoined the panel.

A. SPA: That question presupposes that virtual courts are appropriate for family cases. We need to resolve that question first. If family hearings are to be in-person, then that flies in the face of a virtual specialised court. As a specialised family sheriff in Glasgow, my experience was that the system worked very well and there was consistency on the bench. The difficulty with specialist judges in smaller courts is that it is difficult to identify one sheriff where the sheriffs have to work across a very wide subject area.

Q. It might be thought that family matters should be hived off from the discussion around virtual hearing, given the barriers to digital access that many parties involved in those cases experience.

A. SS: I touched on this. I think that parents going through children's referral cases are the most likely to face challenges that make it difficult for them to instruct and participate in proceedings. Equally there is an increased focus on children's participation in hearings. I don't think these cases readily lend themselves to a digital platform. The challenge for a small jurisdiction like Scotland is balancing the objectives of specialist family law judges with the fact that the subject matter of cases involving sensitive issues have to be dealt with in a human way, ideally in an in-person court. That is the dichotomy.

A. SPA: We need to learn a lot more about how remote courts operate and the type of case in which you can have virtual hearings. Prior to COVID-19 it was suggested that parents join the hearings from social work offices. Many of them have a distrust of social work department and so that location would not be conducive to them meaningfully participating in hearings. We need to be careful when considering the virtual court model and family law matters.

Q. Have the panellists found a satisfactory way to deal with objections during a proof?

A. SS: Some form of buzzer. It is difficult and often using the waiting room function can be used to take witness out. The harder issue is being able to interrupt the question.

A. LT: I had an objection to a question timeously made. I said to the witness, “you’ll have to leave the room”, meaning the virtual room. He left the physical room he was in which worked just as well. Someone called him on his mobile to tell him to come back in. A more structured way would be to demote the witness temporarily from Webex. Physically walking out of the room might not work where the witness can’t be trusted to do as they’re told.

A. RIQC: I think that if someone is demoted to attendee they can still hear what the panellists are saying so physically leaving room might be preferable. The difficulty is trying to shout over your opponent to make the objection. It can be technically challenging. A buzzer and the option to mute the witness might be helpful.

Q. Does anyone know of bespoke video conferencing which may be more appropriate than adapting WebEx or Zoom?

Mike Milligan, SCTS IT joined the discussion.

A. MM: There are international experimental trials being conducted looking at the appropriate technology. We are part of that experiment.

A. SC: I have had a little experience of this. When virtual hearings started, England and Wales were using a range of platforms and those were somewhat bespoke to the particular requirements of the case and type of court. It was a bit of a hodgepodge and had a mixed response. In Ireland, a single platform (not WebEx) was used. That platform allowed for breakout rules. Canada uses a different system again.

SD suggested that MM note a query in relation to whether anything can be done with feedback occurring when a clerk and sheriff are in the same room.

Q. Should the suitability or otherwise of a remote hearing be dealt with the PTM stage?

A. GD: I think that is something which can usefully be discussed at the PTM stage and if there is a dispute over its appropriateness, that can be brought before a judge.

A. SPA: In the Sheriff Appeal Court, parties are asked to note whether there should be accelerated or standard procedure, and so they could indicate at that juncture whether a remote hearing is appropriate.

Closing: The Right Hon Lady Dorrian, Lord Justice Clerk

Last year, in the space of a few months, we were catapulted, suddenly and urgently, into a world of virtual hearings, digital documents, and remote working, and, perhaps to the surprise of some, the heavens have not fallen. As Professor Richard Susskind and others have observed, virtual hearings have actually worked better than anticipated, and have certainly been more than an adequate response to the problems raised by the pandemic.

This pattern of working was essentially forced on us by circumstance, with no time for anticipation, and minimal opportunity for preparation, and whilst there has been some opportunity to refine things with experience, we have just had to get on with the system as developed for use.

I think that this is an important factor to bear in mind: that as we look at what the future might hold, we should not assume that any less satisfactory aspects of the way we currently do such hearings are a necessary or in-built feature of them. We need to make sure that we do not extrapolate, from one bad or unsatisfactory experience, a conclusion that this is a consequence of remote hearings themselves rather than a chance combination of other factors, or indeed our own lack of expertise with the technology.

Flaux, LJ said we should seize the good and jettison the bad, and I suppose no one would disagree with that proposition, which others have echoed, but we need to identify what we mean by “bad” - we should also consider that there may be means of improving any poor or inadequate aspects of how we are doing things, rather than simply categorising them as bad and jettisoning them, a point already noted by Lord Tyre this afternoon.

Professor Susskind in his paper said that there should be no sacred cows. Sheriff Principal Anwar rightly drew a distinction between what are “sacred cows”, essentially those practices made sacrosanct only by tradition and usage; and sacred principles, the basic features which are essential to a judicial system. We can easily lose the former, but the latter are the fundamental building blocks of the system. However, whilst it is very easy to say that there should be no sacred cows, and to assert a belief in this proposition, it is much harder, for all of us, honestly and fairly, to identify when

we may be defending a practice not because it has inherent benefits above another approach, but because we personally like doing things that way, or are used to doing so.

The experience we have had over the last year gives us a major chance to consider ways in which we could improve our system in the interests of those it most concerns, the litigants. That's not to say that remote hearings should be adopted wholesale regardless of the circumstances of the case and parties. Of course, there will be cases which are unsuited to remote hearings; on the other hand there will be cases where the convenience of a remote hearing suits both the litigants and their witnesses. I agree with Lady Wise that there are no "neat boxes", and with Flaux, LJ that there are factors which need to be addressed to determine the suitability of proceedings for a virtual hearing, and we should be open to the possibility that the future may consist of a mixture of virtual and live hearings, and even hybrid hearings.

Cases such as *Re One Blackfriars* [2021] EWHC 684 (Ch) and others mentioned this morning, along with comments in the conference papers about the limitations of traditional means of assessing credibility, together with judicial experience as a whole, suggest that anxieties about assessing credibility, and even more so, reliability, through a virtual medium, are much exaggerated. As Flaux, LJ said, these cases suggest that the ability to make such assessments is not impeded. Thus the fact that a cases involves witnesses whose credibility may be in issue is not obviously a sound basis to reject the possibility of a remote hearing.

What we need to do is distinguish between factors which really impinge on the quality of justice and those which do not. A protocol could be developed to identify factors which make a case unsuitable, or suitable, for a virtual hearing, and some of the criteria suggested by Flaux, LJ, as well as others, could be utilised.

One topic of discussion today has been the risk of distractions and the diminution of formality, and the concern that we should not lose the formalities which have benefitted our judicial system well over the years. Again, most would agree with that, although again we need to distinguish between those formalities which add value and those which do not – for example, jettisoning wigs and gowns for civil appeals has not had an adverse effect on the solemnity or formality of proceedings.

We should recall that the system we are using has been developed on an unplanned and urgent basis: within any future development it should not be beyond us to address concerns about solemnity and formality, as well as many other things.

Several people have raised the issue of important decisions and orders being made virtually; but I am puzzled to understand why this should be more problematic in a civil case than say, in an appeal against sentence, where it has long been the position that decisions about whether someone continues to serve a potentially substantial period of imprisonment, are made in this way. I'm excluding from this comment certain child centred cases which have been mentioned, but that is really more to do with concerns about effective engagement rather than the difficulty in making important issues in a remote format.

I agree that our oral tradition of advocacy is a long and valuable one, and remains important. However, for my own part, I have found the quality of oral advocacy has sometimes improved, with oral submissions being used more often – though still not often enough – as a springboard to highlight the primary arguments, to supplement, not repeat, the written material, and to answer points made in the opponent's submissions or raised by the court. The interaction between the bench and counsel may be more stilted, but as Vikki Melville has noted, challenging interventions can still be made. Maybe we just need to get better at using the technology. I also agree that there are issues to be addressed regarding communication between counsel and solicitors; solicitors and client; and between counsel.

And I do not dismiss the arguments about the importance of place as a factor in the authority of the court. These are all things which need to form the underpinnings of progress. Electronic bundles seem to have many more advantages than disadvantages, and although I hear the cautionary note sounded by Vikki Melville, I think it would be very interesting to identify the proportion of papers lodged which are actually referred to in any given appeal, a matter alluded to by Lord Tyre.

There are three areas which I think raise issues of particular concern. These are open justice; access to justice; and welfare and morale.

Views seem to be divided on the issue of the effect of remote hearings on open justice. On the one hand, many more people can dial in to the hearings; and the press may

be able to cover more hearings than otherwise. On the other hand, at present only the press tend to be given video access; and the possibility of dropping by the courts to see what's going on is lost, although I question whether many people other than tourists or students really do that. Nevertheless, there is a serious discussion to be had about open justice, amongst ourselves and with the media.

There are clear access to justice issues in relation to remote hearings, including what Flaux, LJ described as the "exclusionary" potential of technology, especially for party litigants. This is a critical issue which must be acknowledged at the heart of any post-pandemic changes. At the same time, though, let's not pretend that there are no access to justice issues within the system operating in its traditional fashion, particularly in a geographically diverse country like Scotland. An important element, highlighted by Sheriff Sheehan and Ruth Innes, QC is that of enabling and ensuring effective participation by litigants. I've already mentioned this in relation to child centred cases, and some of Sheriff Principal Anwar's observations on this have a striking resonance. This can be an area of weakness in our system generally, and is something to be guarded against even more strongly in the utilisation of remote hearings.

Finally, there is the issue of welfare and morale, another vitally important issue. As we have heard, some people have welcomed the opportunity to spend more time working from home; others have hated the experience. During lockdown, when both leisure time and work time had to be spent at home, these feelings will have intensified greatly. There will be a real desire to resume the human aspects of going to work, of the kind referred to by both Lord Pentland and Vikki Melville, in heartfelt contributions. The benefits which come with what may be called the social or human aspects of traditional working should not be underestimated: humans are social beings and will suffer from the loss of personal interactions with colleagues, staff and counsel.

Not all individuals will have a home environment suitable for conducting virtual hearings, and one can understand the argument "*if I need to go into the library why can't I just go into court*".

The work/life balance is another issue: working from home so much over the last year has for many had the undesirable effect of eliminating the work/home divide, and

"*working from home*", to quote today's Times, has become more like "*living at work*". The lack of a clear boundary between home and work is certainly a downside for many people, myself included.

The daily interaction with colleagues, and others, is something which brings value in intangible ways. A throwaway comment by a colleague may actually turn out to be a serendipitous remark that leads to a new project, innovation, and improvement. Those serendipitous conversations just don't happen in a virtual context. The relationships of trust and confidence which create comity and collegiality, made it possible for us quickly to find a successful way of pandemic working, and they have also been central to the success of reforming projects in other areas of the law, developed through collaborative working. There is no doubt that we would lose those at our peril; but a post-pandemic way of working which involves an element of virtual or remote working should not necessarily have that result. They say you can't have the best of both worlds, but that's no reason not to try.