

MANAGING INJURY LITIGATION IN A PANDEMIC

Susan Rodway QC
Sadie Crapper

The pandemic – the world caught napping?

22nd January 2020:

“...we have it totally under control. It’s one person coming in from China, and we have it under control. It’s – going to be fine.”

17th March 2020:

“I’ve always known this is a real, this is a pandemic. I’ve felt it was a pandemic long before it was called a pandemic.”

The pandemic – the UK caught napping?

- Early March: limited self-isolation
- 12 March: new advice - self-isolate for 7 days with fever, or a new, continuous cough, later extended to 14 days
- 19 March: LCJ guidance to civil and family courts, “*one or more parties participate remotely*”
- 23 March: lockdown

The current state of the market

- We remain in a significant state of flux
- Increase in policy claims involving coverage issues
- Looking at work over the longer term, one insurer reports motor claims were down 50% at end of March
- Anticipate a downturn in volume motor/EL/PL claims which may hit lawyers in 1-2 years
- Solicitors we speak to remain busy at the moment – question is how long with lockdown last and whether there will be a reduction if it continues for more than 6 weeks

The current state of the market

- Anticipate spate of COVID related litigation:
 - Clinical negligence claims associated with delayed diagnosis/111 service and inadequate triage/prioritisation of treatment or care/use of student and retired medical practitioners
 - EL claims related to COVID exposure e.g. bus drivers, paramedics, those still required to travel to work unnecessarily
 - EL claims associated with home working/temporary workers
 - PL claims related to prevention measures e.g. allergic reactions to antibacterial sprays used in shops etc
 - Increased household claims given number of people now at home
- Plus significant backlog to clear in the Courts when the lockdown eases

Medico-legal work

- The real hinge in injury litigation
- Initially MedCo refused to permit any video examinations but quickly reversed their decision (23 March 2020)
- Since then, significant restrictions on medico-legal work for NHS front line clinicians
- Exclusive medico-legal practitioners have clear vested interest in continuing with examinations
- Some areas of expertise lend themselves to this work e.g. psychiatric, pain but even orthopaedic experts are performing video examinations

Medico-legal work

- View from the front line - Dr Jon Valentine, Consultant in Pain Medicine, Director of Pain Expert
 - His business 'Pain Expert' still receiving good stream of new instructions
 - Personally he has conducted a similar number of examinations this month as in a non-lockdown month.
 - 4 of the examinations concerned new cases
 - Plan is to produce provisional report with a follow up short physical examination after lockdown either to finalise report or address in addendum report
 - COVID-19 has resolved a "*long-standing bugbear*" by necessitating the provision of electronic files of papers
 - Believes could produce long-term change for ml examinations

Medico-legal work

- Real opportunities to change the landscape moving forward
- Reduced travel costs/arguments over venue
- Easy means of recording examinations (which may improve the quality and reduce the number of *ad hominem* attacks against experts)
- Force medico-legal experts into digital world through provision of soft copies of documents relevant to their examinations

Court work

For those cases which will still require an oral hearing, we should embrace technologies which render the proceedings more accessible and allow court users to participate more flexibly. For a number of years, the Supreme Court's proceedings have been live streamed. As well as making our work more transparent for the public, video-streaming technology permits those involved in proceedings, whether legal advisors or lay clients, to stay abreast of developments whilst working remotely. In fact, when one of my fellow Justices was taken ill during a recent, multi-day hearing, and was unable to continue to sit in court, he was able to follow the proceedings from home and take part in the determination of the appeal. We now conduct some appeal hearings in the Judicial Committee of the Privy Council by video link with counsel addressing us in London from a room in their home jurisdiction. Perhaps, in future, we might all be contributing remotely to hearings by means of such technology.

Lord Hodge “Technology and the Law”,
The Dover House Lecture, London, 10 March 2020

Court work

- 19 March 2020 – Judicial Office published a message from the Lord Chief Justice to judges of the Civil and Family Courts

"The rules in both the civil and family courts are flexible enough to enable telephone and video hearings of almost everything. Any legal impediments will be dealt with. HMCTS are working urgently on expanding the availability of technology but in the meantime we have phones, some video facilities and Skype...

The default position now in all jurisdictions must be that hearings should be conducted with one, or more than one, or all participants attending remotely. That will not always be possible. Sensible precautions must be taken when people attend a hearing."

It continued:

"This pandemic will not be a phenomenon that continues only for a few weeks; at best it will suppress the normal functioning of society for many months. For that reason, we all need to recognise that we will be using technology to conduct business which, even a month ago, would have been unthinkable. Final hearings and hearings with contested evidence very shortly will inevitably be conducted using technology, otherwise there will be no hearings and access to justice will become a mirage."

Court work

As regards trials and Hearings involving live evidence:

"It may be difficult to maintain trials and final hearings in the short term, not least because of the inability of people to participate at all. As events develop individual decisions on priorities and practicalities will have to be made. The message is to do what can be done safely." (emphasis added)

- 20 March 2020 – the Remote Hearing Protocol was published (revised on 26 March 2020)

"The current pandemic necessitates the use of remote hearings whenever possible. This protocol applies to hearings of all kinds, including trials. It should be applied flexibly."

- Started off slowly with a 3 day COP trial before Mostyn J and 5 day commercial court trial before Teare J

Court work

In the Matter of One Blackfriars Ltd [2020] EWHC

845(Ch), John Kimbell QC sitting as Deputy HCJ on 6 April 2020

- Jt liquidators claim £250m+ for alleged mishandling of the administration of OBLtd
- 5 week trial in June
- 4 live factual witnesses and 13 expert witnesses
- Jt liquidators applied at PTR for adjournment of the trial in response to COVID-19 restrictions
- Application refused by reference to the Health Protection (Coronavirus, Restrictions) England Regulations 2020

Court work

In the Matter of One Blackfriars Ltd [2020] EWHC 845(Ch) cont.

Para 23 *“It seems to me very clear that by making specific exemptions [in the Coronavirus Regulations to allow the fulfilment of a legal obligation or participation in legal proceeding] to the two major restrictions on gatherings and on movement, for the benefit of court proceedings, the legislature is sending a very clear message that it expects the courts to continue to function so far as they are able to do safely by means of the increased use of technology to facilitate remote trials.”*

Court work

Lord Chief Justice, Master of the Rolls and President of the Family Division message to CJs and DJs on 9 April 2020

<https://www.judiciary.uk/wp-content/uploads/2020/04/Message-to-CJJ-and-DJJ-9-April-2020.pdf>

- Business is not as usual and cannot be until this emergency subsides
- Remote hearings are more fatiguing
- JJs should not feel under any pressure to list a certain number of remote hearings every day
- 40% of all hearings have continued (as of 11 April 2020 up to 3,000 a day)

Court work

LCJ, Master of the Rolls, PFD message:

- COVID crisis does not mean that remote final hearings are likely to be appropriate for many cases
- Must be balanced against the risk and effect of delay, particularly in the family context
- *“Present restrictions mean that it is likely case management hearings, or hearings that can be conducted by submissions only can probably be undertaken remotely”*
- Decision on whether to conduct hearing remotely is for the individual judge on a case by case basis

Court work

Parameters for decisions on remote hearings:

- a) Parties opposition to a remote hearing is a powerful factor, but agreement is not necessarily a green light;
- b) If the final hearing is submissions only, it could be conducted remotely;
- c) Video/Skype hearings are likely more effective than telephone and should be set up by court staff;
- d) Parties need to be told at the start of the hearing that it is a court hearing and they must behave accordingly;
- e) Best guide is set out in the Civil Listing Priorities

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880309/Civil_court_listing_priorities_21_April_2020.pdf

Court work

Re P (A Child: Remote hearing) [2020] EWFC 32, Sir Andrew McFarlane (16 April 2020)

- 15 day full final care hearing concerning allegations that child has been harmed by fabricated or induced illness by her mother
- Child under short term interim care placement
- Fact finding with 18 witnesses including detailed expert evidence
- Judge to fix a final care plan
- Parties had agreed directions to a remote hearing at PTR on 3 April 2020
- Plan for mum to give evidence alone at home via videolink

Court work

Re P (A Child: Remote hearing) [2020] EWFC 32, Sir Andrew McFarlane

Para 12:

“These are particularly unusual cases and, from a judge's perspective and, from experience of having undertaken a number of these cases over a number of years, it is a crucial element in the judge's analysis for the judge to be able to experience the behaviour of the parent who is the focus of the allegations throughout the oral court process; not only when they are in the witness box being examined in-chief and cross-examined, but equally when they are sitting in the well of the court and reacting, as they may or may not do, to the factual and expert evidence as it unfolds during the course of the hearing.”

Court work

- Now authority to support both the argument that a trial should be retained and that it should be adjourned
- Most recent guidance from senior judiciary is, however, powerful steer to litigants that trials should not be pushed on at full speed
- Problem of inconsistency of decision-making is rife
- Are more difficulties with remote trials which need to be overcome:
 - How to prevent crib notes/aids being used during witness evidence
 - No real means of ensuring witness does not consult others during the course of their evidence

Court work

Meanwhile, appeals continue:

- **Henderson v Dorset Healthcare University NHS Foundation Trust** involving Katie Scott and Judith Ayling of 39 EC will be heard via remote platforms on 11-12 May 2020. Concerns the test to be applied for the operation of the illegality defence.
- **Swift v Carpenter** accommodation appeal to be relisted w/c 22 June 2020 and to be heard remotely (according to D's Solicitor).

Tips from the front line

- Early preparation is the key to success
- Make sure you deal with procedure in your pre-hearing conference with your client
 - Emphasise the need to maintain formality during the hearing
 - Check how they wish to swear or affirm
 - Give the witness warning and make sure it is understood
 - Ensure they are familiar with the electronic bundles or provide a hard copy in the alternative
- Test, test and test your set up again, including e-bundles
- Plan breaks and means by which you will communicate with your team, and with the other lawyers (what's app)
- Consider how to deal with connection issues should they arise

Tips from the front line

- Have one screen dedicated to the remote hearing (preferably on a different operating system to bundles etc) and pin those people you will need to see
- But, make sure you can see the Judge when you're making submissions
- Mute at all times when not speaking
- Avoid screen clutter by turning off your video if there is no need for you to be seen (even if only your "Zoom suit")
- Remember your court etiquette – no interrupting, maintain your poker face

ADR

- Virtual JSMs are working well
- 39 Essex Chambers JSM Protocol:

<https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/03/39-Essex-Chambers-Remote-JSM-Protocol-2.pdf>

- Traditional mediation offering:
 - Sir David Foskett
 - Sir Wyn Williams
 - Peter Hurst

ADR

- Two exciting new ADR schemes:
 - Coming soon - fixed-fee arbitration and advisory adjudication schemes. 5 year+ Call Barristers through to Silks offering binding arbitration or advisory adjudication in lower value claims which may struggle to find judicial time. Scheme mentored by top international arbitrators and former Judges.
 - Costs ADR offering provisional assessments and detailed assessments from costs team, including Peter Hurst, former Senior Costs Judge of England and Wales: <https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/39-Costs-ADR.pdf>

How can 39 EC help?

- We are open for business as usual even if Courts are not
- Civil liability newsletter:
<https://www.39essex.com/39-essex-chambers-civil-liability-newsletter-april-2020/>
- Insurance insights newsletter:
https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/Covid-19InsuranceInsights-Newsletter_April2020.pdf
- **Quarantine queries**
 - Team of Silks and juniors who are available for a free ‘virtual surgery’ to take any legal queries you have
 - Raise your query by contacting clg@39essex.com and book a slot between 10 and 10:30am Monday to Friday to discuss the issue

QUESTIONS AND DISCUSSION



Zoom suit: <https://www.youtube.com/watch?v=qsQ5h2zpPbw>

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.