

Speech on the Pandemic

Middle Temple, London

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On Tuesday 21 January 2020, I was sitting in the chambers of Lord Justice Haddon-Cave on the Strand. We were having a cup of tea and discussing all manner of things including his Australian connections and as it happens technology in the courtroom and how the UK Courts were looking to upgrade facilities.

Little did either of us suspect that the world was sitting on the edge of a precipice.

Within a month or so we would all be facing a once in a century crisis. The common law world's courts, already plagued by existing backlogs, would be dealt a further significant blow.

There was an immediate closure of all borders in Australia and for a time, all courts simply stopped operating.

Each Australian state and territory government would, in turn, behave idiosyncratically. That led to what appeared to be insurmountable problems, especially where interstate movement was necessary.

But what was about to unfold was not the first time in their various histories', our courts have faced such problems.

May I, perhaps at the risk of tedium, digress with a little history. History of course can be instructive, but it can also provide solace.

The most obvious analogy but on an entirely different scale was the Spanish flu in 1918 – 1920.

That pandemic killed tens of millions of people globally, coming as it did off the back of the Great War. In the UK alone it has been estimated 228,000 persons lost their lives because of the Spanish flu in 1918. In Australia, the total number was approximately 15,000

From contemporary accounts however, many, if not most courts in the UK and Australia carried on uninterrupted. There were no centrally imposed lockdowns, but masks were compulsory, certainly in Australia.

In Australia, 3 February 1919 was officially declared Mask Day and police were out in force in the cities and country towns to make sure the law was obeyed. However, social distancing was neither appreciated nor implemented.

Judges, lawyers, and parties alike in Australia were however expected to wear masks in court.

On the other hand, in the UK, it was an offence for example, to stockpile food and the Marylebone Police Court was kept busy with the prosecution of hoarders, many of whom were prosecuted for hoarding things like jam.

Unlike today, with the genius of modern medicine, scientists and doctors in 1918 were largely powerless to blunt the devastating impact of the Spanish flu. As a chilling example, the Spanish flu killed 14 percent of the entire population of the Fiji Islands in 16 days when it finally reached there.

There is little doubt the current pandemic has significantly impacted all aspects of the administration of justice.

The vast difference between 1918 and now are the existence of at least two obvious factors: technology and vaccines. It is hard to imagine any person, in any form of employment, who could have worked from home in 1918. In the current pandemic it has become the norm for many to do so and perhaps that will continue in part, or in whole in some industries.

Judges and practitioners alike have experienced the huge inconvenience of adjourned hearings, connectivity issues, embarrassing moments (in my case when conducting a hearing from home, my dog audibly snoring loudly from under the desk), and the gradual return to the courtroom to discover a crucial witness has tested positive and, worse, is too ill to continue from home, or even worse, the aged litigant who perished from Covid before his or her case could be determined.

More alarmingly, the accused person waiting trial with or without bail who was left in limbo.

Most courts around the common world are now only slowly able to function at somewhere near pre-pandemic levels. That situation is, I think, improving, at least in Australia.

Resorting to available technology was, prior to the pandemic, somewhat exceptional and only used when for some reason the witness or relevant participant was not available within the jurisdiction. It was certainly not utilised generally in trials.

However, it must be acknowledged that the pandemic has itself spawned some interesting legal issues. The validity of mandatory vaccine laws, lockdowns and other temporary health ordinances were, from time to time, challenged in the court. Different Australian states adopted different regimes and some kept state borders closed, while others opened them up. That in turn led to further litigation involving Federal constitutional issues about interstate trade and commerce.

One fascinating by-product which, I think, has assisted the standing of the courts and in particular, the concept of open justice, is that many of these hearings were live streamed. An anti-vaccination case which challenged the validity of a New South Wales Health Ordinance when heard in the Court of Appeal had 100,000 people watching. The Novak Djokovic visa case on the other hand in the Full Federal Court of Australia did a little better at 1.2 million viewers.

And the pandemic has fortuitously provided legal futurist, Professor Richard Susskind with fertile territory in which to proliferate his concept of online courts and all manner of innovation to improve the court system as he sees it, from an efficiency perspective.

To superimpose technology in a time of crisis on an experienced group of professionals is one thing. However, for the fledgling lawyer, more to the point junior barrister, learning the requisite skills, in my view, is only enhanced by proximity and physical interaction with clients, other barristers, witnesses and judges.

While there obviously are some procedural matters which could, and should for the future, be dealt with remotely, there is no better way in my view, for all concerned than to run a trial in person. It is not just the preservation of a cherished way of life. In my opinion, the very art of persuasion (which is at the heart of the trial lawyers craft) depends not just upon words on a page, delivered faithfully via zoom or MS Teams. The ability to influence through non-verbal channels should not be underestimated.

Gestures, eye contact, facial expressions, and the mode of delivery of submissions all play a crucial role in the art of persuasion. These skills are far better learned as it were at the operating table, and not remotely from chambers or the living room. Watching senior experienced practitioners engage in the art of advocacy is both vital and instructive for the junior professional.

Even in an appellate context the same would hold true. The interaction between counsel and the court is always of great importance.

I had an interesting application at one stage in 2021. New South Wales had opened its borders to some extent and Victoria had not. The case involved counsel from New South Wales who could come into court masked, where the Victorians could not travel outside their state. New South Wales counsel said they were happy to come to court and had no objection to the Victorians participating via MS Teams. The Victorians objected on the basis that a face-

to-face hearing would give New South Wales a forensic advantage and they quoted academic literature in support. In the end, I agreed and gave an adjournment until all could appear be face to face.

So has the pandemic been a positive experience for the administration of Justice?

There are yeses and nos.

'Yes' – in that it has accelerated the improvement of the necessary technology. This will allow courts to respond not just to crises, but also to create efficiencies. On the other hand, it has clearly caused backlogs, especially in criminal matters which may take years to address.

However, I believe the pandemic has been a positive experience for the administration of justice. It has highlighted the need to ensure interaction and proximity between judges, litigants, the lawyers in order to properly maintain the rule of law.

We lawyers, as a group, are resilient and resourceful. We will certainly have to be because I suspect the pandemic is not over yet. We have shown that we can adapt when the need arises. There is much to do but I am confident we are up to the challenge.

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