

Virtual Trials Are A Brave New World For UK Litigation

By Tom Sprange

(May 1, 2020, 7:15 PM EDT) - Courtroom thrillers have long been a staple of Hollywood, reality TV shows and even the news media — certainly the U.S. networks and coverage within the courtroom of show trials, with a narrative that hinges on a guilty/not guilty verdict. This past month, the English courts have contributed a new subgenre: virtual court cases.

Unlike the romanticized portrayal of courts, these are real court cases held virtually over Zoom and streamed on YouTube. In the past witnesses have virtually entered courtrooms by video link, leaving the judge and the advocates in the same room. Now the entire process is fully virtual.

The concept is unique and presents some exciting new dynamics but also creates a number of challenges and a need for innovation in fusing centuries of traditional court convention and related skill with 21st century digital videoconferencing conventions, as well as and limitations. These are two practically diametrically opposed forums.

Picture the courtroom climax from "A Few Good Men" as Jack Nicholson's gritty marine chief, Colonel Nathan Jessup, rather than erupting with his enraged "You can't handle the truth!" monologue, he apologized for being on mute and asked Tom Cruise to repeat the question.

It is not an exaggeration to suggest that the outcome may have been entirely different.

Brave New World

The English High Courts embraced virtual reality following the COVID-19 pandemic, with the judiciary utilizing technology to maintain access to justice while observing social distancing requirements.

Online court hearings were ushered in by the Coronavirus Act 2020, emergency legislation passed on March 25 with the first ever all virtual trial on the merits in the High Court — National Bank of Kazakhstan and the Republic of Kazakhstan v. The Bank of New York Mellon, Anatolie Stati and Ors[1] — starting the next day.

I appeared for several of the defendants in Anatolie Stati and Ors, in a virtual application for injunctive relief the following week in Motorola v. Hytera[2] and have a Court of Appeal hearing on April 28 in Mohamed v. Breish and Ors,[3] which will be proceeding virtually.



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These experiences have been fascinating and occasionally surreal, as highly experienced judges and advocates blend traditional courtroom advocacy skills and techniques with video conferencing technology and the markedly different environment that creates. While technology is already widely utilized by courts and tribunals, from the commercial and family courts to international arbitration, the change to fully virtual trials and hearings represents a seminal change.

I have examined many virtual witnesses, where all of the lawyers and the tribunal are in one room and the witnesses elsewhere, but a fully virtual hearing where everyone is in a different location is unprecedented. Well, at least till now.

Having now experienced a few of these hearings, there are some immediate and brief observations of the some of the differences when advocating virtually as opposed to the traditional way.

Brief Encounter

Anyone who has tuned into a virtual hearing will notice how markedly different it is watching proceedings unfold on screen, either with cameras within a traditional court setting or a fictionalized, exaggerated version. Even so, there is something about the majesty, etiquette and aura of a courtroom.

Its layout — the bench, the gallery and the stand alongside the position of judges, clerks, counsel, parties and onlookers — makes for an important and imposing physical space. It creates an intense and immersive experience, with a sharper focus, a real air of gravitas and tension and, in my view, a natural flow to proceedings.

When multiple parties engage in a virtual trial, that physical space is lost and all that comes with it. Camera angles, lighting, location, sound quality, background items have new prominence. Some would say that these can serve as distractions. For example, an adversary complimented my prized Kookaburra cricket bat and another inquired as to a bottle of Bombay Sapphire, both in shot in the background of my study.

A home or office environment also has plenty of additional factors that never posed an issue a courtroom. Ordinarily, you do not have to worry about your dog barking at a passing cat when you are in a hearing, or your children inadvertently strolling into a virtual court with a (well-intentioned) espresso for you.

The chances of turning up to a court room hearing in a hoodie thinking it was merely a test of the technology is highly unlikely. I managed to do exactly that with a virtual court room technology test discovering that the many other participants, including the judge, were suited and booted.

There is also the lack of physical support in the room — whether by juniors, instructing solicitors, paralegals or other parties. This changes the dynamic as a lead advocate considerably. The immediate support and camaraderie, not to mention the steady flow of smart ideas and physical documents is absent.

The obvious solution, a WhatsApp group, has some advantages such as concise typed messages, rather than difficult to read hand-written notes, but having a few bright colleagues next to you and a clued-up paralegal primed with the relevant physical documents is easier than having to monitor a WhatsApp chat.

The evolving video conferencing etiquette and language — alongside technical issues such as IT gremlins, broadband signal quality, patchy audio — is also a long, long way from that of a traditional courtroom.

It may look bizarre to stand up or start walking around in the middle of a video conference due to the fixed nature of most cameras. The performance aspect of advocacy (both physical and verbal) still has a place in a physical court room, but is largely negated over video conference. Those dramatic pauses, rises in aggression or sharp inclinations that may work in a courtroom can look out of place, overly dramatic or even gauche when sat at a desk gazing into a laptop in a room on your own, with a gallery view of similarly placed lawyers staring back at you

This is where, arguably, the most noticeable differentiator with advocating virtually comes into full view; nonverbal communication, and the almost total absence thereof.

Body of Evidence

Law is a team game but the lack of physical support in the room makes nonverbal communications with your colleagues a much trickier prospect. A quick glance to a junior or instruction solicitor can be a vital — and very simple — tool for either support, endorsement of an approach or the "stop, the judge hates this argument" look.

Without that, advocates must rely more on their wits and intuition, which are already put to the test in complex commercial cases involving tricky legal issues, many forensic battles and overlay thousands of documents. In the heat of a hearing, these moments feel more surreal given the very different surroundings but are no less pressured or important. Suddenly you start to miss good, old-fashioned taps on the shoulder, whispered instructions or hand-scribbled notes.

This is compounded when it comes to nonverbal communications and body language of the other participants. A tight angle shot of a face on a screen does not give much room for seeing their physical posture or reactions. One sign from a judge that is often considered by the parties is the extent to which notes are being taken during a passage of witness examination or submission.

That can be now removed or obscured. There is also the reality that when a participant is acutely self-aware that they are being filmed and can see their own face, all within a home environment rather than, say, in a witness box in a courtroom, it usually results in more self-conscious, reserved and controlled expressions.

In summary, virtual High Court trials are now a reality and many of us are learning the new conventions of applying advocacy and managing cases in a digital courtroom. While a totally remote courtroom may materially alter the ending of "A Few Good Men," the ability to hold a case with multiple parties in different locations — often internationally — is the real game changer. As intended, the show goes on and justice is done.

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[1] National Bank of Kazakhstan & the Republic of Kazakhstan v. The Bank of New York Mellon, Anatolie Stati and Ors [Claim No FL-2018-000007].

[2] Motorola v. Hytera [Claim No CL-2020-000164].

[3] Mohamed v. Breish and Ors [A4/2019/1820 and A4/2019/1833].