

## Family Practice During COVID and Access to Justice

**Mavis Maclean**, Senior Research Fellow, St Hilda's College, University of Oxford

**Rob George**, Associate Professor, University College London, and Barrister, Harcourt Chambers

As the pandemic took hold in the UK in March 2020, the Family Justice System and those working within it faced the same profound problem as every other individual, institution and organisation – what to do. The response, at a systemic level, appeared to follow the five stages of grief.

Stage 1 was 'denial'. On 9 March 2020, for example, HMCTS guidance said simply, 'You should continue to use courts and tribunals as usual,' though there was a minor acknowledgement of the pandemic with a reform to court rules such that 'you can now bring hand sanitiser into our buildings'. The clear message was 'business as usual'.

'Anger' was apparent more at the practitioner level, though mostly expressed behind the scenes. One family Q.C. noted on 18 March, in a widely-circulated email, that there had been at that point no formal communication from the senior family judiciary: "the vacuum is astonishing".

The 'bargaining' that followed was, in the President's words issued later on 18 March, about trying to 'plot a realistic course through this uncharted territory' where 'our aim should be to "keep business going safely" where this is possible'. Judges were instructed to 'examine' cases of 5 days or longer that were listed 'during the next two months' and consider whether to adjourn them. Formal guidance from the President the next day noted that government guidance was 'primarily aimed at the social setting' and therefore suggested that 'there may be the need, and no harm involved, in having a number of people present in court for an oral hearing'.

By 23 March, the position had moved on, such that the Bar Council was able to state that 'the default position is to stay away [from court] unless yours is one of those rare hearings that must be in person and the court tells you to go in'. The 'depression' stage was already apparent from an FLBA message of 31 March 2020, which included the telling understatement that 'we have no doubt all experienced low points'.

Many working in the family justice system may remain at this point. Perhaps some have reached 'acceptance', or at least are on the way. For example, on 16 July, Mrs Justice Judd said at an FLBA seminar that it was 'crucial to accept that this situation has changed our lives like nothing else, and may continue [in some respects] for many years to come' (quoted with permission).

In numerical terms, the number of new cases starting was surprisingly stable: from April to June 2020, the number of new family cases issued fell by only 13% compared to the same period in the previous year to 56,867. Finance cases fell by 30%, DV cases rose by 24%, and children cases fell by only 6% in private law and 4% in public law matters.<sup>1</sup> With physical courts closing, remote hearings increased rapidly, from 10 to 1850 audio and from 150 to 1100 video hearings between 19 March and 6 April 2020.<sup>2</sup>

---

<sup>1</sup> See *Family Courts Statistics Quarterly, England and Wales, January to March 2020*, Ministry of Justice, June and September 2020

<sup>2</sup> GOV.UK Courts and tribunals data on audio and video technology use, 14 April 2020

The formal guidance issued from the President and others was quickly supplemented by judgments from the senior judiciary addressing key issues, in particular the circumstances where remote evidence would not be adequate (*Re P* [2020] EWHC 1109 Fam, 16 April). While short hearings, particularly those not requiring evidence, largely continued, contested hearings were routinely adjourned, particularly for finance and private children matters. The timetable for such adjournments varied, but listings in July and August 2020 were typical in many courts (a return to 'denial'?). No one expected that in late 2020 the country would be entering a second national lockdown, with little clarity about the timing or nature of any 'new normal', and only the glimpse of a vaccine on the horizon.

But even though the stance taken by the senior judiciary and higher courts in March, April and May 2020 had been courageously positive (with some dissenting voices), by June it had become clear that the number of cases being completed had fallen dramatically. Public law children cases completed had fallen by 30% to 2,916 in April-June 2020 compared with the same period in 2019, and private children cases by 38% to 13,210. So while cases continued to be issued at about the same rate, the number that were actually concluded fell dramatically.

The family justice system continued to operate – but was it *working*? Could this be described as 'business as usual' (albeit on remote and, at the time, unfamiliar platforms)? Was this the best that could be done, or even 'good enough justice', and what might be the benefits and concerns of a remote family justice system?

As empirical researchers, we wanted to look more closely at the day-to-day experience of those working at the coalface. We therefore carried out a small qualitative investigation based on telephone interviews with a purposive sample of 10 junior family barristers (up to about 10 years' call) and 10 solicitors between May and September, contacted through professional networks in London and the Home Counties. In addition, we were able to talk to a small group of circuit and district judges and family magistrates in the same area about their views and expectations. All the information has been treated in confidence, and anonymised. We used a structured unstandardized schedule, asking about work experience during the week before interview as compared with a week shortly before the crisis began, and about their expectations for the future. In our writing below, we refer to the barristers as B1, etc; the solicitors as S1, etc; and the judges and magistrates together as J1, etc.

### **The barristers**

The members of the bar we spoke to had been shocked during the first weeks of the crisis by the fall in the number of their days in court. B8 said, "there was one week when I was dead, dead, dead", ie with no work at all. But within two months he was doing 2 to 3 days a week in court, billing half his former income. Other barristers, eg B2 and B3, shortly after lockdown described public law children work as 'picking up' with an increasingly steady flow of work including remote hearings.

Difficulties with using remote technology were widespread in these early days. B8's first experience of remote working had been a phone hearing, where it had taken the court 30 minutes to patch everyone in for a 30-minute hearing. This barrister noted, though, that 'disruption is part of the court experience ... like late trains or waiting for the judge'.

A particular challenge in the early period came from the various platforms being used and a lack of clarity about who was responsible for setting up the process. B1 reported finding, just before a hearing in the High Court, that he was expected to make the arrangements for the hearing, and found himself left to purchase extra software and then set up and check the connections before the

short hearing, as well as then record it securely. It seemed generally to be the barristers, including those working for local authorities in care cases, who were expected to carry out this function, rather than solicitors.

At this time, early spring and summer 2020, various video platforms were already in use, with Zoom the most popular for ease of use, though not accepted by the MoJ because of poor security. Other courts were using Kinly, or Microsoft Teams, and HMCTS was piloting GCPB. There seemed to be a general pattern reported by the barristers, that High Court and Circuit Judges tended to be on video platforms, whereas District Judges tended to be conducting telephone hearings. Phones were thought to be easier for remote witnesses though there were stories of problems with crossed wires, and a popular anecdote was repeated about asking a witness whether she was alone, and hearing a strange male voice answer "yes".

As well as technical IT developments, a number of practical ways of improving effective working were also emerging, such as using multiple channels of communication (phone, ipad and laptop) with zoom, teams, email and whatsapp to enable a lawyer to address the court, speak to the client, or to communicate with their solicitor privately.

Several of the barristers we spoke to had been anxious at first about remote working, but were to be pleasantly surprised. We heard about vulnerable clients who had been better able to give their evidence remotely, away from the formal atmosphere of the courtroom. This effect was also reported by Sir Ernest Ryder at a Civil Justice Council seminar in May 2020, where both parents and children were described as being more comfortable and more effective when giving evidence remotely at Special Educational Needs Tribunal hearings. But barristers doing public law children work were anxious about important decisions, particularly Interim Care Orders, being made online when a parent was alone without support, and some were unhappy about important decisions being made without the party seeing the judge, or vice versa. There were also various comments concerning the judiciary, with reports of appreciation of a more informal atmosphere, though as B2 said 'having a judge cross with you in our own sitting room is not pleasant'.

The new technology not only affected the working practices of the bar but also the way in which they worked with other members of the profession. Several barristers told us that they thought that solicitors were becoming more proactive, joining phone conferences and hearings more frequently. Some welcomed this support, especially as they were unable to meet clients in person. Others were anxious for their own position: for example, B2 said 'with case management online, solicitors will be saying "this is easy... we will do it" ...' and speculating that in a few years' time there might be more work for solicitors rather than the junior bar. At 7 years call, B2 felt worried about the future. When we asked about what the special contribution a barrister rather than a solicitor can make, the answer was 'trial experience', which meant starting at the beginning with strategic case management followed by interim decision making, in order to 'maximise client chances'.

### **The solicitors**

The 10 solicitors in our study were mostly in early to mid-career, with 3 exercising a degree of managerial responsibility. Their firms ranged in size from 500 solicitors to 3, and from large central London offices to small practices in country towns. All had experienced a fall in demand for their work, similar to that of the Bar at the beginning of the crisis, followed by a similar period of recovery. By the time of our interviews in June and July, some firms were thinking about extending home working, and reducing their expenditure on central city office premises. Others like S3 were experiencing tighter managerial control whereby staff were being urged to go back to office working

even when reluctant to do so. Solicitors doing international work had missed the office support and equipment, and several like S6 mentioned feeling isolated, missing day-to-day contact with colleagues. But others doing more general work had enjoyed being at home and available to clients over a larger part of the day on a less formal basis. 'It's more human ... they've got kids, I've got kids', said S1, and 'You can be half watching TV taking instructions in pyjamas.'

Some solicitors who had young children, however, had struggled with childcare and keeping workspace free. Specialists in finance found themselves doing more general work, and demand for private family work remained patchy. There were cases where the covid crisis had caused loss of jobs and a need to move house, which led to conflict over contact and residence arrangements, while in other families the covid crisis led to arguments about contact being postponed even if not resolved. But demand for public law children work, funded by legal aid, remained steady. The restrictions on local authority work to support vulnerable families was thought to be leading to an increased readiness to seek care orders.

Several solicitors, as we had heard from some barristers, had noticed change in the division of work within the legal profession, reporting that they were taking on work for which they would formerly have instructed members of the junior bar. It was now financially viable for a solicitor to do phone hearings, and also 'doing small directions ourselves without travel is quicker and cost effective' because the hearing could be fitted around other work and all done from home.

But there were also concerns about remote working, a feeling that online hearings were taking longer with fewer visual clues, and that while the phone equalises things, making the judge feel more accessible, it also 'downplays the seriousness if you're not seeing justice being done' (S1). S5 had enjoyed taking on more of her own remote advocacy, and described how it was different in 'lacking the performance element of speaking in court...the artistry'.

Almost all the solicitors spoke of regretting the loss of contact with their clients. In particular, they missed the possibility of speaking to the children in a case, and feared missing the nuances of a situation especially as the CAFCASS officers and local authority social workers were also having limited direct contact with the families. There was anxiety about whether CAFCASS safeguarding calls were sufficiently robust, and about children becoming invisible, not seen by social workers, teachers or even GPs. All the solicitors spoke about their limited ability to provide support, and several said how extremely difficult remote working was where there were language issues or cognitive or mental health concerns. Some were taking clients into their offices for the hearing, 'like an old-fashioned solicitor' (S3).

The barristers had given the overall impression of becoming accustomed to remote working, and largely finding it acceptable, if not ideal. There was talk of how the decisions being made were like the decisions of the pre-covid era, and not 'wrong' in the sense of appealable, even though they felt different. They referred to the more intangible aspects of the work of the court and the judiciary which we will turn to below. The solicitors were more focused on their limited interaction with clients, in effect saying 'hang on... parents are being bypassed' (S5): 'a vulnerable client having the final decision on a child on evidence from a small screen, likely to have poor tech at home, is not acceptable. But we have to make the best of what we've got' (S3).

### **The decision makers**

Finally, we heard from a small group of circuit and district judges, and magistrates (6 in total). There were issues about IT, about the difficulty of listing, which they said was much more time consuming and difficult than before, dealing with interpreters who need to be in the same space as the witness,

and the organisation of hybrid hearings. The judges acknowledged the distress of parents, especially litigants in person, in having decisions made by a remote figure, but they also described their own distress at being unable to be sure that a parent understood how seriously the evidence had been considered, and how carefully the decision had been made in the best interests of the child. The strict time limits on hearings meant there was no place for a parent to speak except when giving evidence, even to ask a question about what was happening nor any way of adding to what had been said in an aside to their representative. The magistrates were even more concerned about the lack of parental understanding, and their own lack of IT training and skill.

There was also concern that the important space outside the courtroom around each hearing had been lost. Contact negotiations did not take place and there was no scope for finding creative solutions. We were told that when people are physically present it is much easier for the judge to address people directly, make a comment, read the situation and encourage settlement. As one judge put it when explaining what was lost by not being physically present in the court building, 'I know if we'd been there I could have told the guardian to go and knock some sense into the social worker, or get the guardian to get the grandmother in and see if she's worth talking to' (J1).

These judges felt they had done the best they could but were afraid that senior judiciary were not aware of how 'disastrous' the changes had been for the dynamic of family justice (J5). As one judge told us, 'It's all well and good to say remote trials are working brilliantly, but the reality is very different' (J2); another judge described the 'big disconnect between the pronouncements and the reality' (J3).

Judges commented on changes to the way that their time was used. While some were trying to work from the court building as much as possible, they noted that 'advocates send documents all through the night', which left judges and the other advocates in the case feeling that 'there's no turning off from the emails' (J1).

Some of our decision-makers commented on the pressures they felt themselves. One spoke about the difficulty of 'seeing a mother on her own in her flat, of watching her hear me say I'm making a placement order or removing the child to local authority care' when there was no one there to provide the mother with support (J1). Judges were also concerned for themselves about 'the intrusion of work into home' (J3); as another explained: 'if I was doing an ICO, I didn't want to be at home – I didn't want to take people's children away while my children are playing in the garden' (J2). For these judges, the formal, professional court surroundings were important for them as well as for the litigants.

We also heard, indirectly, about the pressures on court support staff. Some of the decision-makers we spoke to were worried that court staff – many of whom had been required to continue working in the office throughout because of the nature of their jobs – were 'overwhelmed' (J1). This judge worried that her administrative colleagues were 'on the verge of tears or resignation'.

## **Discussion and analysis**

This paper reports a small exploratory study carried out in haste at a time of crisis, and we are wary of drawing conclusions. But a crisis, though painful and damaging, can also be a time to reflect and learn. We clearly saw that a justice system can change rapidly in a time of crisis with the aim of maintaining access to justice in disputed family matters, with particular regard to children at risk. A great many people, both high-profile and all-but invisible, have worked so hard to make this

effective continuation of the family justice system possible. But what have we learned that might be helpful in the existing circumstances and in moving forward, whether to a version of the 'old normal' with the help of vaccination, or in seeking a 'new normal' with better use of resources and understanding of what is important and effective about a court hearing?

The covid crisis has highlighted the impact of inequalities of resources in the old system, as the access to IT and to administrative help in the higher courts far outstripped what was available in the lower courts. This could be addressed, hopefully with levelling up as the goal, but not without investment. However, we also saw more clearly the importance of what has been called the 'Magic of the Court'. Government policy for many years has focused on directing people with family problems resulting from a range of circumstances away from courts, which are seen as inflammatory and costly. But for individuals who have not been able to resolve their difficulties in any other way, and for those concerned with child protection or domestic abuse, the court remains a crucial vehicle for those seeking a fair and informed decision.

The current crisis may have highlighted some of the ways in which the court can work better, raising questions about how new online procedures offer value for money in uncontested short hearings eg directions or case management; how they may help some groups of vulnerable clients to participate; and how they may help to make the court room less daunting and more flexible and accessible. But we have also learned more about the value of communication through interaction in and around court that can improve understanding and facilitate the negotiation necessary to reach agreement or accept a decision. Martha Cover of the Association of Lawyers for Children told us that 'a huge part of the magic and value we family lawyers do is to be in a room with a person to listen and understand, and give advice on human matters, the family, while looking them in the eye. This empathy is not only therapeutic, it leads to practical results, to better understanding between lawyers and clients, and between lawyer and lawyer. It facilitates better sharing of information and offers the opportunity to learn more about the clients and the other side which can enable on the spot sharing of information to take place at what used to be known as the door of the court' (personal communication, quoted with permission). The majority of the practitioners we spoke to greatly regretted the loss of these conversations, which they described as helping in preparing for the hearing and negotiation. They were an important part of the job, a productive social interaction which both offered support and yielded information of immediate value.

A hearing is a social event which comprises a group of people wanting different things, not working as a team with a common goal like a football team, but people of different backgrounds, different levels of education and skill and different objectives; the high levels of emotional arousal and anxiety make it difficult to interact constructively face to face, and even harder and more exhausting to discover and respond to each other's arguments, weaknesses, strengths and priorities if meeting remotely. Some of our barristers thought a certain laziness (or exhaustion) had begun to creep into remote hearings: 'we are short-circuiting Interim Care Hearings... I asked for an adjournment in two cases [and would have got it in the past], but the judge said he was satisfied [at this remote hearing] and would make an order' (B7). The quality of remote hearings is further affected by the reduction in the face to face contact of families with Cafcass officers in preparing their evidence. B7 added: 'we are losing flexibility, and I am anxious about decisions being made when parents have not been assessed directly by social work teams.'

These concerns are supported by evidence from research in psychology on the effect of remote communication, describing how searching for cues and clues can lead to cognitive overload and

stereotyping of the other party.<sup>3</sup>This has clear implications for remote working in criminal cases, but just as much so in public law decision making where there is a need to see a witness, understand their view and assess their credibility, and also the need for a party especially in a care case to see the person making the decision in order to understand and eventually accept and comply. There are still many small ways in which remote working can be helped to work better, such as less time pressure, better preparation for all, especially the parties, devising ways for parties to participate and contribute.

We have seen that remote hearings are of great value in maintaining access to ‘good enough’ (not appealable) decision-making in times of crisis, and offer advantages in certain defined circumstances. However, this cannot be the long-term answer to most cases. As one of our judges put it, ‘I would be concerned if it was felt that this, where we are now, is okay in terms of a way of working and a way of the family justice system working’ (J3). If we are to benefit from the contribution of remote working to reduce costs and stress in the long term but wish combine with face to face hearings to keep the “magic” impact of empathy and understanding, then hybrid hearings may be beneficial in some cases, and the participants in our study generally felt more comfortable with directions and case management hearings proceeding remotely.

But if we want to maintain access to justice, unqualified by adjectives like ‘good enough’ or ‘acceptable’, we may turn to Lady Hale. In June 2020,<sup>4</sup> she spoke of the feasibility of routing uncontested and routine short cases to remote hearings, but she also spoke of the need for the seriousness and impartiality of the court to be visible. Court users need to experience the gravitas of the court where the judge is able to see them, listen intently, and assess the merits of the case face-to-face with a party, in order to avoid any feeling that there is a conspiracy of lawyers against the laity. Justice must be seen to be done.

---

<sup>3</sup> See Carlos Ferran and Stephanie Watts “Videoconferencing in the field” in *Management Science* 54(9) 565-78, September 2008, “Is video conferencing a good substitute for face to face meetings ? Surinder Kahai May 6 2010 at <http://www.leadingvirtually.com/is-video-conferencing-a-good-substitute-for-face-to-face-meetings>

<sup>4</sup> Rethinking the Courts June 2020 Lady Hale podcast BBC Sounds