



PERSONAL INJURIES BAR ASSOCIATION

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RESPONSE OF THE PERSONAL INJURIES BAR ASSOCIATION TO THE CJC'S RAPID CONSULTATION ON THE IMPACT OF COVID-19 MEASURES ON THE CIVIL JUSTICE SYSTEM

1. PIBA – the Personal Injuries Bar Association – has approximately 1,500 members, all of whom are Barristers practising personal injury law (including clinical negligence and industrial disease work). Our members undertake work in every level of Court across England and Wales. They undertake advisory, drafting, interlocutory and trial work in cases ranging from the simplest of damage-only car crashes in small claims before District Judges in the County Court, to the liability and quantum aspects of multi million pound actions concerning injuries of maximum severity in front of High Court Judges, together with work in the Court of Appeal and the Supreme Court. We believe therefore that we are well placed to summarise and relay our members' experiences of the impact of Covid-19 on litigation, across the board, in our specialist area of work.
2. This response has been compiled by members of PIBA's executive committee. It is based on their experience, that of all the committee, feedback from the members of the association and feedback from other PI practitioners in our various chambers. These comments are reflective of the views and experiences of most members.
3. We have encouraged individual members to respond to the survey.
4. We attended the open meeting on Monday 11th May. This document is intended to respond to the 13 bullet point questions set out in the announcement of this consultation made on 1st May.

5. We would be delighted to engage in ongoing dialogue after this rapid consultation.

Preamble

6. As mentioned above, PIBA provides this response from the perspective of our collective experience, as legal professionals, of the impact of Covid-19 on the civil justice system and of the Court's response to the crisis. We recognise that the experience of *all* Court users is important and that the experience of litigants in person, lay clients and witnesses will all be different. Save where expressly identified, we do not feel able to speak on behalf of this important wider constituency. For similar reasons we do not attempt within this response to address the impact of current working arrangements on the important principle of open justice.
7. At the time of drafting this response it remains unclear how long it will be before Courts can re-open for business in the 'normal' way. We agree that the appropriate use of remote or hybrid hearings is necessary to keeping the civil justice system operational during this exceptional time, without exposing participants and Court staff to unnecessary risks. Without the use of such hearings, it is obvious the civil justice system would grind to a complete halt. There would then be an immense backlog of cases when current restrictions are eventually lifted. The effect on litigants of their cases being prolonged and the effect on individuals of not being paid damages to which they are entitled is obvious. But the appropriate use of remote hearings is also critical to the livelihood of our members. The reduction in Court hearings since lockdown began has had a very profound impact, in particular on the most junior members of the Bar whose practices tend to consist predominantly of Court hearings and who are already carrying the burden of substantial debt from university and professional education. All our members are self-employed. No work means no pay.
8. Our intention in providing this response is:
 - (a) To identify and highlight our experience of best practice in those Courts which have reacted with the greatest degree of efficiency to the current crisis;
 - (b) To identify areas where in our view there is room for improvement in the current situation;
 - (c) To highlight those areas where, despite our understandable desire to keep things moving, we have concerns about the practicality / appropriateness / fairness of remote hearings, now and in the medium term.
9. In providing this response we are commenting upon the measures that have necessarily been put in place in response to the current crisis. We do not seek to express any concluded view as to the appropriate use of technology / remote hearings in the longer term. The comments set out below should be read in this context.

10. PIBA notes the significant problems caused by staff absences as a result of COV19. Years of underfunding have meant that the County Courts in particular were already operating with limited staff, resources, technology and equipment. Unlike the Queen's Bench Masters running specialist asbestos, clinical negligence and personal injury lists – where direct and effective communication by email with counsel and solicitors was already common – no such facility exists across the board for District Judges or County Court Judges. Communication with those courts often fell into an administrative black hole. COV19 has highlighted and exacerbated all of these problems. PIBA wishes to put on record its gratitude to the staff and judges who have made great efforts to keep the courts running at this difficult time. We also recognise that this is an evolving picture. It is certainly our experience that over the last couple of weeks the trend has been towards an increase in the number (and type) of remote hearings that are taking place. Some courts have set up working groups with solicitors and counsel to develop pragmatic solutions to the current crisis. Some have issued workable guidelines and directions to ensure that hearings continue. This is very much to be welcomed. But in our view, there is still more that can be done.
11. It is also worth highlighting that there is a difference in the views of senior and junior practitioners as to how the Courts have coped. Senior practitioners will have developed advisory, drafting and conference practices, are not in court as regularly, and are in the High Court when they are. Many junior practitioners by contrast have almost exclusively court-based practices and have not been in Court **at all** for the duration of lockdown.

Question 1 - What is working well about the current arrangements?

12. As a result of the failure of many Courts to list cases, we would have to say sadly, very little. Notable exceptions to our knowledge include the Queen's Bench Masters and a pool of Courts in the North (Manchester, Liverpool and Leeds) who have been proactive, have developed systems to work with solicitors and the Bar in respect of listing and hearings, and who have therefore managed to keep the number of effective hearings as close to normal as possible.
13. However where cases *have* been able to take place remotely, there are far more positive reports. PIBA members often attended telephone hearings on interlocutory matters prior to COV19 and their experience remains positive. Many are pleased that CCMCs are now being dealt with by phone in some Courts and the use of technology has meant an end to 'block listing' (with the wasted time caused by waiting at court or by late adjournments) although that of course has in turn led to fewer hearings being listed.
14. The use of BTMeetMe (when BT Connect became over-subscribed) has been successful as it appears to allow Courts to hear more cases.

15. There have been reports of a successful virtual PTSH (pre-trial settlement hearing) scheme in County Courts in Sussex.
16. Where things are working well, it has generally involved court staff and judges being in the same location; or judges being completely computer-literate and equipped with appropriate technology; and benefitted from a well-planned protocol or preliminary hearing / exchanges of correspondence.

Question 2 - What is not working well about current arrangements?

17. The greatest problem has been the failure to keep even a reasonable proportion of hearings in the County Courts happening. Some junior members report that they have not been in court once during the whole of lockdown, whereas historically they would have been in Court 4-5 times per week. The Civil Court Listing Priorities have probably played a part in this by omitting certain types of hearings completely, and suggesting that others should take place only if urgent.
18. Lack of communication is a fundamental problem. First, in the Courts not communicating their listing practices / protocols clearly so that parties can realistically assess whether hearings can proceed. Second, the difficulty in making contact with Courts / Court staff and the lack of information as to whether hearings are going to proceed or not.
19. Many hearings are pulled from the list the night before without explanation when they would be eminently capable of being done by phone or video.
20. There is huge variability across the regions, with little evidence thus far (eight weeks in) of the struggling courts learning lessons from those that are performing well. It is not at all apparent that there is any system of sharing learning about effective practice.
21. When cases do proceed remotely:
 - (a) Many Judges have too few screens to allow them to view the various documents needed, and see the participants in a video hearing, and type.
 - (b) There are multiple different telephone and video platforms in use, although this simply requires the lawyer to know which platform is being used on any given day.
 - (c) That said, each video platform has to be trialled in advance of the hearing to ensure that the parties, including lay participants, can use it properly and effectively.
 - (d) There is insufficient communication and exchange of contact details between the lawyers and the Court to ensure the smooth functioning of the hearing. This is compounded by a general inability to contact the Court on an urgent basis (which predates COV19).

- (e) Hearings take considerably longer to complete virtually and are more tiring. That could be resolved by better (realistic) listing and taking breaks.
- (f) Some trials are aborted once started for technical reasons.

Question 3 - Which types of cases are most suited to which type of hearings and why?

22. A distinction needs to be drawn between those hearings which are suitable to be dealt with remotely, rather than in person, in a time of crisis when the wheels of justice need to keep turning to some extent, and those which may be suitable on an ongoing basis.

Suitable for remote hearing generally

23. Interlocutory hearings involving three (as a general maximum) lawyers are generally eminently suitable for hearing remotely. All parties are professionally represented. More than three lawyers can become unwieldy. The ideal is two.
24. These can and should include:
- (a) Stage 3 hearings (contested quantum disputes in low-value claims)
 - (b) Fast track disposal hearings, with no live evidence
 - (c) Applications listed for less than half a day
 - (d) CCMCs and CMCs
 - (e) PTSHs and PTRs
 - (f) Pre action disclosure applications
 - (g) “Show cause” hearings in asbestos cases
25. Where hearings are to take place remotely, most are better by video platform than by telephone although there is a divergence of views about this.

Suitable for remote hearing during COV19

26. As a general rule we would suggest that most small claims track trials (where the parties are both represented) and most fast track trials could be dealt with remotely. There may need to be an exception however for cases where fundamental dishonesty may be an issue. As there is no requirement for this to be pleaded, the Court will need to ascertain and consider the parties’ views about this, before listing for remote hearing. Similarly, cases where the credibility of a factual witness is vital and is in issue.
27. Judges will need to give careful consideration on a case by case basis as to whether hearings involving witnesses and/or experts are practicable or viable to be dealt with remotely. Considerations will include the technology, the number of witnesses, their IT literacy, etc.

28. Remote trials are however a short term fix only for the purposes of COV19, and should not be seen as a long term solution.
29. Most approval hearings can also be dealt with remotely. The need for the birth certificate to be produced makes it more difficult than other short applications, coupled with the fact that a lay client will always need to be present.
30. Interim payment applications could also be dealt with remotely for now because of their significance for the injured party. Otherwise, they will not happen.
31. The reasons why we consider remote hearings to be less suitable for these types of hearings in the longer term are:
 - (a) Justice must be seen to be done. It must also be heard to be done and it must be felt to be done. No party is likely to feel that justice has been done following a remote hearing they have watched on their mobile phone where they have had to communicate with their lawyer by text message.
 - (b) There is obvious potential for witness tampering or assistance to occur. The Judge can have no idea who is in the background mouthing answers to a witness. Experience of members shows that during pre trial conferences many client/witnesses' partners are in fact the driving force behind the evidence – that is likely to be continuing unseen by the lawyers/Court, whatever warnings are given.
 - (c) Any lay individual or expert witness giving evidence needs a minimum of two working screens (assuming that the trial bundle is digital). One for the bundle, and one for giving evidence. Many individuals may not own two screens and a mobile phone is really not good enough.
 - (d) A lawyer needs a minimum of two screens and realistically three. One for the bundle, one for the video connection, and one for notes / textbooks / authorities / the Civil Procedure Rules.
 - (e) It is very difficult to exchange messages with lay clients during a remote trial.
 - (f) Everyone attending needs a faultless and fast wifi connection.
32. With the general caveats given above, it is recognised that some sacrifices need to be made in the short term.

Question 4 - How does the experience of remote hearings vary depending on the platform that is used?

33. Generally video seems to be better than telephone, although there are mixed views about this. Telephone is certainly fine for shorter hearings between two parties where submissions are made in an orderly manner. Skype for Business is an outdated platform which Mac Users can have particular problems with. Most people like Teams. CVP has had limited use but reports have been positive so far.

34. The phone systems have been in place pre COVID19 and there are no problems with those. Most barristers and judges are familiar with having previously undertaken at least some hearings by telephone. There are good reports of BTMeetMe because it allows the Court to carry out more hearings. There is no need to move all remote hearings to video when telephone has historically worked well for some types of hearings.

Question 5 - What technology is needed to make remote hearings successful?

35. As set out above, lawyers need a minimum of two screens, ideally three. Judges need to be better equipped with more screens. Witnesses need two screens unless they have a hard copy bundle. A fast and stable wifi connection is essential for video hearings.
36. Dedicated means of communication between court and lawyers before the hearing, between lawyers, and between lawyers and client during the hearing, are essential, both for the planning and in the background during the hearing.
37. Systems, and the participants' ability to use the technology and have good wifi, all need to be tested before each hearing.

Question 6 - What difference does party location make to the experience of the hearing?

38. We envisage that litigants may not feel justice has been done if they are not in Court but PIBA currently has no direct evidence about this.

Question 7 - How do remote hearings impact on the ability of representatives to communicate with their clients?

39. It is very difficult. You need to set up a conference the day before (meeting at 9am on the morning simply doesn't work when it is done remotely because of the varying forms of technology used). If your client needs to communicate with you during the hearing, they need to send you a text or an email. This involves divulging personal mobile numbers and email addresses, which many feel uncomfortable about and which might lead to additional cost (for a "work-only" telephone number/account).
40. This requires greater planning and gives rise to an increase in cost which might not prove recoverable, especially where there are late cancellations of hearings.

41. Emails and text messages during hearings are more distracting than notes being passed.

Question 8 - How do professional court users and litigants feel about remote hearings?

42. For certain interlocutory and other short hearings (see above), greater use of well-resourced and properly-prepared remote hearings brings a benefit to all.
43. Generally trials are not suitable for remote hearings (see above) but they are a necessity to be borne in the current circumstances.

Question 9 - How do litigants in person experience hearings that are conducted remotely?

44. PIBA is unable to answer this.

Question 10 - How do remote hearings impact on perceptions of the justice system by those who are users of it?

45. We can do no better than refer you to Lucy Reed's excellent blog of 9 May on this subject at <http://www.pinktape.co.uk>. PIBA presently has no direct evidence of its own to be able to offer, as we are not in a position to survey our lay clients, and can only speculate.

Question 11 - How is practice varying across different geographical regions?

46. The variation is enormous. QB Masters are managing mostly successfully to keep their lists running largely as usual. They use a variety of platforms, but have managed to make it work, usually by direct interaction by email with the solicitors and counsel involved in the cases in their lists.
47. Some Courts have worked admirably with local solicitors and chambers to ensure hearings are able to proceed. In Birkenhead/St Helens/Liverpool we understand there are block Stage 3 lists, and the Court communicates with a WhatsApp group of some 175 solicitors and barristers to make it work. Whilst improved communication is to be welcomed (and will hopefully continue for now), once out of crisis we are sure that the Court Service will not want this to continue, not least because it discriminates against both litigants in person, and those legal representatives who are not 'local'.
48. Generally the Northern Circuit has shown the benefits of close co-operation with court users, combined with a determination to make the best use possible of its

resources. The Manchester Civil Justice Centre has today (15th May) issued definitive, clear and helpful guidance for work during the pandemic after consultation with local solicitors and barristers. Many of the court centres on the Northern and North Eastern circuits have taken similar steps. We know that great efforts have been made in the Thames Valley area to keep hearings going.

49. Our members report that the Midland circuit has not fared so well and that Central London County Court has had very few effective hearings. We are not of course aware of the particular details of underfunding, resources and staff access which many courts face and which may explain the differences. In many courts the judges themselves may be unwilling or unable to take on some of the admin and communication necessary to keep hearings happening. Some courts have a more cohesive group of regular users who can work with the judges to arrive at practical solutions.
50. The courts in which progress has been made are those in which Judges have set up working parties with representatives of regular court users, solicitors and the Bar (“stakeholders” in business language) to arrive at workable systems to make listing effective and keep hearings going. We strongly encourage that approach.

Question 12 - What has been the impact of current arrangements on open justice?

51. There has been very little open justice.
52. Whether the ability to watch remote video hearings is something the public wishes to do is unclear.
53. Further, whilst the “success stories” have highlighted the requirements for (and benefits of) close co-operation between professional court users and the courts, the inability of litigants in person to benefit from those connections is a telling counterpoint.

Question 13 - What other observations would you make about the impact of COVID-19 on the operation of the civil justice system?

54. With a few significant exceptions, PI work (save for actions in the QB Division) across the country has largely ground to a halt, acutely so in the lower value claims.
55. It is noteworthy that the better funded Courts – the High Court and above, in particular – have functioned far better than the lower courts, where previous problems have merely been exacerbated.

56. The disparity in approach among courts in different regions is, in itself, unhelpful.
57. In the current circumstances, a presumption towards hearing cases (where practicable) rather than adjourning them, would be helpful.
58. The difference between areas in which civil justice is continuing to work and areas where it is not depends to a large degree on whether communication between representatives and the Court can continue without the support of a significant “court office” function. Courts where lawyers and judges can exchange emails and send and receive documents are those where hearings are continuing. This suggests that a significant re-think of technological capacity and approach is needed.
59. There is a backlog of hearings which will require careful management as and when the Courts’ capacity for hearings increases again. Practitioners’ bad experience of the “Blitz listing” in Central London suggests that this will not be the way to manage this backlog.

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on behalf of PIBA. 15.5.20