

The Court of Appeal and the Coronavirus

By Justice AS Bell, President, NSW Court of Appeal

The Court of Appeal and the Coronavirus is perhaps not as enticing a title as *Love in the Time of Cholera* and it is not expected that this short article will attract the same following as Gabriel García Márquez's novel. Comparisons both as to the plot lines and quality of literary style are strongly discouraged. Those whose cultural memories reach to the 1970s might unfairly suggest that the screenshots below from a recent hearing in the Court of Appeal invite closer comparison with the opening credits of *The Brady Bunch* or *Blankety Blanks*.

Bar News' initiative to capture and record the perceptions and observations of both barristers and judges of the last extraordinary five months is strongly to be applauded. Hopefully, the last five months will not be replicated in any of our lifetimes although whether that is a wildly optimistic aspiration is unclear and may well be doubtful.

The last three months have struck deeply at the foundations of many lawyers' assumptions about both professional and

personal life. It has undoubtedly been an extremely challenging time, more keenly felt no doubt in some areas of practice than in others and varying with seniority and levels of practice but, as has historically often been the case, challenging times both present opportunities and reveal character.

At a professional level, it is a matter of pride to report that the Court of Appeal has continued to sit, uninterrupted, throughout the whole of the COVID-19 crisis. In that period, it has heard all 130 cases which were scheduled prior to the emergence of the pandemic, has vacated no cases and has continued to list appeals and applications for leave or judicial review for the balance of the year. It delivered 142 judgments (from 1 March to 6 August 2020). In addition, as has been my practice, a number of Court of Appeal judges have sat at first instance, both in the Common Law Division and the Equity Division, during the pandemic.

Members of the Court of Appeal have also continued to participate in the hearings

of the Court of Criminal Appeal which in fact increased its sittings during the crisis in anticipation of the need to free up experienced judges for dealing with the inevitable backlog of trials which were not able to be conducted because of practical and logistical constraints associated with the assembly of juries, with the CCA delivering some 170 judgments in the same period.

It is important to emphasise that this approach has not only been adopted by the Court of Appeal and the Court of Criminal Appeal but also judges in the Equity and Common Law Divisions throughout the pandemic period. While it is true that some trials (and most jury trials) have had to be vacated or deferred, most judges of the Supreme Court have continued to conduct civil and judge alone trials throughout the period of the pandemic. They have had to cope with the additional challenges of taking evidence by audiovisual link including, in a number of cases, with the added complexity of the need for interpreters.





The judiciary has appreciated the goodwill and the participation of the Bar and solicitors in these endeavours. *Esprit de corps* among the judges of the Supreme Court has been very good. With the strong but consultative leadership of the Chief Justice (including regular contact with the Bar Association), the Supreme Court took the view from the outset that it was extremely important that it continued to sit as much as possible whilst at the same time responsibly adhering to physical limitations dictated by health requirements. In my assessment, that was the correct and appropriate stance to take. It is important for the rule of law that justice does not stand still and, as a central component of a functioning democracy, it was essential that the Supreme Court stayed open, hearing cases and dispensing justice at a time when many other aspects of civil society were either 'on hold' or under challenge.

There were, unsurprisingly, initial challenges with technology at the beginning of the pandemic. Some of the technological challenges rested with the Court and server capacity; others rested with those participating from remote locations. The goodwill and professionalism of all involved saw that these challenges were dealt with and ultimately largely overcome.

Turning from a consideration of the Court of Appeal's public experience with the pandemic, I would like to take the opportunity to make a few observations, more generally, about the pandemic's influence on the profession and continuing potential consequences of it.

Many commentators have observed that, perhaps surprisingly, one upside of the pandemic has been a 'rebalancing' of

individuals' priorities and considerations of work-life balance. Many, including myself, have in fact enjoyed both the opportunity to spend more time with immediate family and a little more personal time for quiet reflection, recharging. Furthermore, the pandemic has demonstrated to many, perhaps previously sceptical, that some at least of the burdens of professional life may be carried out remotely with tools such as audiovisual conferencing and remote communication and hearings. It must be candidly accepted that one of the reasons that the Court of Appeal has been able to continue to function as efficiently as it has is because the technology has, by and large, facilitated the hearing of all appeals and, while, as I have indicated, there have been some hiccups along the way, neither the judges nor, so far as I am aware, practitioners have suggested or perceived that the ability to conduct a fair hearing has in any way been compromised.

Having said all of that, it is important to make the point that collegiality and direct interpersonal interaction by members of the profession is vital and should not be devalued. I would be extremely disappointed if, as a result of the pandemic, more practitioners thought that they could *regularly* work remotely rather than in the environment of a dynamic set of chambers, leaving many rooms effectively or at least frequently unoccupied.

In many respects, the value of being physically 'in chambers' is intangible and difficult to quantify. On the other hand, a set of chambers which is half full because half of its members elect to work remotely from home will quickly lose the value that being in chambers represents. Like a shopping precinct with a series of empty shops (think

parts of Oxford Street), a previously thriving area can fast lose its identity, character and appeal.

In our profession, personal interaction is extremely important, both between barristers and between barristers and solicitors. From the barristerial perspective, as a junior working with silks or as a silk working with juniors, personal relationships are of acute importance, as is a good personal relationship with a barrister's clerk. I am sceptical that such relationships can be forged and developed remotely. They develop and flourish through quotidian interactions around chambers, in the corridors, at drinks, in the photocopy room, and through the opportunity just to physically drop into a room to ask a question, be it technical or tactical. A casual mention by a junior to a silk that a case a junior is in has settled or that the junior has capacity might result in immediate work or a recommendation. Or a corridor inquiry as to how a new barrister is going may lead to more work or unsolicited but valuable guidance by a colleague whilst, all the while, personal and professional relationships are forged and develop.

Much the same may also be said for the development of personal relationships with solicitors which are built on trust and the development of confidence on the solicitor's part that he or she can work productively (and enjoyably) with the barrister.

In short, my point is not to let the benefits and opportunities of remote participation in the profession lead to its depersonalisation. 'Remote' carries with it not just a literal sense but also a negative connotation which should not be overlooked. **BN**