It Just takes Practice (Notes)

When the pandemic struck, some people took up breadmaking to while away their extra time at home. I took up Practice Directions; the construction and interpretation thereof. It started quietly and simply enough – the equivalent of purchasing a Brickfields organic bread mix and using a bread maker. The High Court made the first move, with a single announcement that all physical appearances were cancelled forthwith. If one thought this announcement dramatic at the time, in fairness to the High Court, it proved to be prescient. Furthermore, it was mercifully unambiguous. The State jurisdictions soon followed, but due to efforts to keep critical work continuing as much as possible, the moves away from physical appearances were staged, complex, and varied across jurisdictions. In the very early days of the pandemic, for example, it appeared that there was not a lot of change to practice in criminal trials, but for the very pleasing news that the Downing Centre public area toilets were to be cleaned.

Unprecedented times were almost immediately upon us, though. All of a sudden, no measure seemed too extreme. Holidays and parties were cancelled. The Practice Notes began being issued in earnest, with new ones most days of the week. Keeping up now required a religious commitment similar to developing one's own sourdough starter. 'Practice Direction number 12 replaces practice direction numbers 2 and 3 and consolidates 5 and 9, but for bail applications, in which case practice note 8 refers'. An [all-male] Heads of Jurisdiction meeting decided that no wigs would be worn in AVL appearances on the very same day that the Prime Minister announced the closure of hairdressers around the country.

Due to the need to rapidly adapt to the ever changing progress of the pandemic, the Notes were long, and filled with conditional hypotheticals: '*If the accused is on bail, go to clause 4.5; if the accused is on bail and pleading guilty, clause 6 applies; if on a realistic appraisal the accused is more than likely to go to gaol, go to clause 6.5*'. Registrars issued notifications which were meaningless to all but the IT crowd: '*Practitioners are requested to use a SIP address where possible but if using a WebLink please ensure it is supported by a browser with appropriate minimum capability*'. Perhaps reactively, the language of the memoranda became more arcane: '*Clause 5.5 applies only in circumstances whereby the listing necessitates a break in the remand*'.

'*Ok, like, whatever, Boomers*' sighed the millennials, who hadn't read the Practice Notes but were coping just fine appearing in court from their phones at bus stops or in bed, having electronically modified their backgrounds to display Commonwealth Law Reports, and applied the 'touch up your appearance' function on Zoom to its full effect.

The generational divide expanded. It was as though every remote court hearing across the State had a relaxed and well-presented young person with a functional wifi connection appearing for one party; and a close-up camera view of somebody's isolation beard, appearing for the other. After several minutes of miming, the beard owner would finally locate the unmute button, adjust the camera so it displayed the crown of his head, and attend to loudly shuffling papers immediately adjacent to his microphone, before accidentally disconnecting altogether.

Even when the users were competent, if the connection was poor, lists took on a farcical quality. '*Your Honour my client pleads indecipherable*.' '*I beg your pardon Ms D, was that indecipherable or guilty?*' '*Yes, I'm sorry your Honour, indecipherable guilty*'. Eventually, the [20-something] DPP clerk intervenes: '*Your Honour, if it assists, I have contacted Ms D's instructing solicitor via Snapchat and he confirms that the plea is one of Not Guilty.*'

Connectivity issues meant that the virtual courtroom became gloriously non-hierarchical. At a traditional call over, senior counsel can arrive whenever they please, using rumpled silk robes to part the crowd of punctual anxious juniors and have their matter dealt with immediately. The justice department AVL system did not recognise the inner bar, nor seniority of any sort. Only IT competence and – relatedly – the stability of one's internet connection made a difference to one's position at the virtual bar table. Eminent silks would be cut off and ejected from the virtual courtroom mid-pontification because there was 'too much traffic' on the line. Or at least that was the reason given.

As we (hopefully) emerge from the other side, however, there are positives to take with us. Barristers have learnt what hitherto many considered impossible: waiting one's turn to speak. We have finally caught up with the reality that it is not necessary to take the train to Burwood to obtain a consent adjournment. For an appellate advocate, the benefit of being able to mute the microphone and freely discuss one's opponent's submissions in real time, is only surpassed by the discovery that in the Banco Court, the position of the bench microphones means that one judge is unable to whisper to another '*when is she going to finish this unfortunate submission?*' without being heard loud and clear over the AVL. And did I mention the Downing Centre….? BN

We, the Furies, are ever poised to deliver timely advice on manners and morals in this fast paced society but never more so than during this time of unfolding crisis.

One, by one, we watched as each of our courts succumbed to the pandemic. An early casualty was the Federal Court which, on 17 March 2020, swiftly and decisively vacated hearings until 30 June only to have them reinstated, kinda, but remotely, the next day. The Supreme Court held out, perhaps hoping that COVID, like the vengeful angel of Old Testament times, would pass over its anointed doors and take the express lift to level 15 of the Law Courts Building. But within a week, it too had issued its commandment: judges shalt have no litigants before them except by telephone and, if really necessary and assuming it works, the AV link, and then only from Tuesday.

Soon, every court was issuing policies dealing with the pandemic. Then amendments and variations followed thick and fast, sometimes daily, sometimes twice daily. It was then that we noticed that the R_0 or Reproduction Number of Court-initiated COVID announcements was becoming dangerously high.

In an admirable attempt to control the spread, the Bar Association set up a *cordon sanitaire* around the proliferating policies in one compendious guide entitled 'COVID-19 Information for Attending Court', the choice of title demonstrating a masterful use of misdirection since, by that stage, no one was. By issuing the Guide, containment, and not suppression or elimination, has been the Association's overt goal. However, we can also confirm that there is no truth to the rumour that the Association is pursuing herd immunity. Even if such an approach could be justified morally, at 251 pages and counting, there is unlikely to be sufficient exposure to the whole of the Guide from sufficient members of the profession for this to occur.

So it is, with this preamble, that we now answer some of the many vital and significant questions coming from the profession not otherwise addressed by the Guide.

1. **Can you wear your trackies to online court, if the judge and your opponent are only ever going to see the top half of you?**

   This is a real question. From a real person. And it is not unique. Variations of this dilemma have been communicated to the Furies including requests from juniors, who are invariably off camera, as to whether they need robe at all.

   People, get a grip. We have relinquished the court room, that hallowed arena where an awe-struck public watched as we practised our arts. We have relinquished the bar table, that hallowed plank of wood where members of our profession stand. We have relinquished even our corporeal existence in the call over lists. Much of the mystery and the magic that sparked a mass of TV dramas from *Perry Mason* to *Rake* has gone. Now, the only things standing between us and the rest of the virtual rabble are horsehair and reams of black cloth. It only takes one of us, with Ludlows on the top half and Lowes on the bottom, to be revealed mid-address for the whole thing to go viral and the jig to be up. Don't let it be you!

2. **A question on behalf of all socially distant junior barristers: now that we can't tug our leader's gown when he or she says something silly or wrong, what are we to do? Is a frantic WhatsApp message helpful – the modern equivalent of a well-timed post-it note – or just plain annoying?**

   Like Zoom and dogs, conspiracy theorists credit silks with promoting the spread of COVID for their own selfish ends. For too long they have been annoyed by juniors tugging their gown, disrupting their line of thought and destroying their perfectly crafted opening/ cross examination/ closing. Now that they are blessedly free from such interruptions, we wonder whether they will ever allow juniors within 1.5 metres. So, by all means, use email, WhatsApp, sky writing if you must. Silks will ignore that too, but more successfully. If you must message, a real time messaging app is best. Make sure to agree, upfront, a protocol for its use and who can use it. In our experience, a real time feed from the solicitors commenting on the judge's demeanour is unhelpful and obscures the messages which need to get through.

3. **Preparing for online court now seems to involve frantically cleaning the house so that the judge won't see your (literal) dirty laundry on the floor behind you. But if, instead of cleaning the house, you choose to display a background image of someone else's resplendent library – CLRs neatly lined up like a row of ducks – is that a bit like misleading the court?**

   Virtual backgrounds are fraught. They rely on fast processing power from a powerful computer and a program without glitches. A failure in any one of these processes could result in your disembodied head or, worse, you disappearing altogether as you reach for a (real) CLR away from the camera. So, while we are not overly concerned by the appearance of a resplendent library falsely advertising your unearned intellectual capital (you would not be the first and the average judicial consumer is well-versed in *caveat emptor* when it comes to counsel), we are concerned that when you make your appearance, you may not actually, *ahem*, appear. At least not all of you. Or if you do, you will have that weird green-screen effect which looks distinctly B-grade.

So dear readers, despite our efforts, we have not addressed all of your questions. Keep them coming; we suspect the virus will be around for a while to come. And while it does, we exhort you to follow the SCNSW Guiding Principles on personal actions to help protect ourselves and others: http://www.supremecourt.justice.nsw.gov.au/Documents/Home%20Page/Announcements/Protocol_v4_09_June_2020.pdf

Our lives and our livelihoods both depend on it. BN