

**Gertie's Law
Court in a Pandemic**

Greg Muller

Welcome back to Gertie's Law. I'm Greg Muller.

And to kick off season two, we're taking a look at what happened at the Supreme Court during the COVID-19 pandemic. A lot's changed, in a very short time.

How could the court safely empanel a jury whilst adhering to the public health concerns of social distancing?

Many matters now happen online, so how does a judge keep control of a courtroom, and ensure a fair hearing when all the parties are appearing remotely. And then there's the dilemma of what to wear in court, when you're actually in your bedroom.

And why is Coronavirus raised regularly in bail applications?

This episode comes to you from living rooms, spare rooms, home studies across the suburbs of Melbourne. Most of the people we spoke to are working from home, as are we.

When COVID-19 hit Australia, everything changed. Schools, pubs and restaurants closed. The AFL season stopped after only one round, and then started up again in other states, and for Victoria that's a pretty big deal.

It's been a roller-coaster ride to say the least. We've had to re-write this episode so many times - we'd write it - record it, and then things would change. For example, juries were suspended, then plans were drawn up to bring them back - and then Melbourne had to lockdown for the second time, and jury trials were again suspended.

As all Melbournians know, this pandemic has been a moving story. But while the way things were done had to change, the courts couldn't shut down completely because crime didn't stop.

And people remain in custody, unconvicted, for longer periods than they would have before. Also, family violence continues unabated. Disputes need settling, appeals need to be heard, and trials need to continue to provide justice for both accused and victims.

So, as an essential service, the courts had to move quickly.

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Chief Justice Anne Ferguson

The main thing at the start for me was the work that the court does affects so many people in the community and is really important to keep going.

Greg Muller

Chief Justice, Anne Ferguson. As you can probably tell by the quality of the recording, we conducted most of this episode's interviews over Zoom and other video-conferencing software.

Chief Justice Anne Ferguson

So we had to get the work of the court going but at the same time the health and wellbeing of everybody who works at the courts and comes into the courts a real priority. So, how do you balance those two things and we had to be guided basically by our government and the health advice and keep a really close eye on that.

Greg Muller

But putting the work of the court on hold wasn't possible.

Chief Justice Anne Ferguson

Essentially people wouldn't have been able to get justice and that's just not an option. We had to do whatever we could to keep it operating.

You just can't have people who can't get to a court to get justice. There's all sorts of examples of that. If somebody's coming to knock down your house illegally, you've got to be able to get a court order to prevent them from doing that.

Greg Muller

One of the first things which had to go was juries.

Chief Justice Anne Ferguson

You know, I can remember clearly when I made the decision that we couldn't have the juries. I was standing in the car park, thinking and I was about to make a call to say, "we've got to suspend this".

And it's interesting because people think a jury is 12 people. That's right. But the 12 people come from a much larger pool. So, for example in Melbourne on any given day the jury pool will be about 200 people all gathering in the one place, and then the 12 come from that 200.

So, it wasn't just about keeping 12 people safe. It was about what you do about the 200 people. And that was really challenging.

We did what everybody else in the community did and businesses did with all the extra cleaning and all the extra disinfecting. We've got all the signs up. And when

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you go in now, there's stickers on the floor, a bit like playing twister, you feel like you're in a twister game - your left foot here and your right foot there. Which is going to be the same with any office building.

Greg Muller

Head of the criminal division, Justice Hollingworth

Justice Hollingworth

Now, obviously, once that process couldn't proceed, we couldn't go through the selection process for juries. That meant that no future jury trials could start for the time being. We only had two or three trials that were underway at the time the pandemic struck, so those juries were able to continue sitting. But the primary thing was we couldn't start new trials.

Greg Muller

That's because, in Victoria, all trials for serious criminal matters in both the Supreme and the County Court are dealt with as trial-by-jury.

In April 2020 the Government brought in temporary legislation allowing trial by judge-alone in certain circumstances

Justice Hollingworth

One of the things that had to happen is the parties need to apply for a trial by judge-alone, and in particular, if the accused doesn't consent, then there won't be a trial by judge-alone.

Greg Muller

So far, a small number of applications have been made in Victoria for a judge only trial, mostly in the County Court. The Supreme Court held its first one in September, a murder trial where a man was accused of killing his sister. But most people have chosen to wait until juries return.

Justice Hollingworth

And I think one of the reasons for that is that most litigants and most lawyers are very happy with the jury system, believe that it's fair, believe that juries generally get the right results.

Greg Muller

Due to the smaller number of trials in the Supreme Court, the backlog in crime cases has mostly felt in the County and Magistrates court. But a judge-alone trial might not necessarily speed things up.

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Justice Hollingworth

I think one of the things is people sometimes think that a judge-alone is going to be more efficient. But when you have a judge-alone trial, the judge is going to have to write reasons for decisions at the end of it. You see, a jury doesn't have to give reasons for their decision.

They might go out and deliberate for a number of days, but at the end of it they just announce their verdict, and that's it.

Whereas a judge is required to give reasons for decision, and they might run, for the sort of three-to-four-week trial that we would have in our court, reasons for decision might run to hundreds of pages.

So, actually in the long run, they won't be more efficient than us getting back to jury trials as and when we can safely do so.

Greg Muller

There is however, one area where there's been increased interest in judge alone trials.

Justice Hollingworth

The mental impairment area. One of them's what we call a fitness hearing, and that's where we have to decide whether someone is in fact fit to stand trial or to plead.

Now, traditionally those issues have been decided by juries. The legislation that was brought in allowed that to be done by a judge alone, which has always seemed to me a sensible thing to do, because it mostly involves considering expert psychiatric evidence about the person's mental state.

Secondly, if somebody has been found unfit to stand trial, they don't then just go home and get set free. They still go through a process that we call a special hearing. It's a bit like a trial, except that the verdict's are different. So, there's still a public hearing as to what happened and whether the accused performed the acts, and in particular whether they performed the acts while they were acting under some mental impairment.

Greg Muller

And it's not just criminal trials which were affected by the cancelation of juries. Juries of six or twelve are used in the Common law division.

Head of Common Law at the Supreme Court, Justice Dixon.

Justice Dixon

When the prospect of the pandemic became serious, we weren't sure it was going to affect us then all of a sudden we couldn't have juries.

This was a big problem for the criminal jurisdiction but from my perspective in the Common law jurisdiction, parties ask for juries but they're not as of right an absolute entitlement.

Judges are able to say, "no, you can have a trial in front of a judge and that's just as fair as a trial in front of a judge and jury," so we said that's what happened.

Greg Muller

There's still discretion to adjourn the matter if having a jury is considered the most appropriate option.

President Maxwell

I'm Chis Maxwell. I'm the president of the Court of Appeal.

Greg Muller

The Court of Appeal also had to move its operations essentially offsite.

Did it affect the number of matters that you were able to deal with?

President Maxwell

No, in fact, and this surprised us. Our figures to the end of 30 June 2020 show that we actually disposed of more appeals - criminal and civil - than we did in the 2018/2019 year, and that was a complete surprise because I think we thought this is more cumbersome and there may be problems with the technology, we'll just do our best.

I suppose the other thing to say immediately is the COVID transition was easier for the Court of Appeal than I think any other jurisdiction either in the Supreme Court or in the other courts because we have such a homogenous type of work.

Although the content varies, the essential moving parts don't change and of course we don't have witnesses, we don't have juries. We really have a set of appeal papers either in physical form or more and more electronically, and we have the barristers arguing for the two sides to the appeal.

Greg Muller: Based on those numbers, is it a stretch to say then that working online was more efficient?

President Maxwell: I don't think it's stretching. That's a fair description. The increase in output was a bit under 10 per cent but it's statistically significant.

We went up from something like 370 the previous year to 400 disposals in this year just gone.

Initiations, that is the workflow in, dropped a bit in the financial year to 30 June and that's not surprising given that two thirds of what we do in the Court of Appeal is criminal matters and with no jury trials from April we unsurprisingly had a fall off in appeals against conviction.

On the other hand because judges weren't presiding in trials they were able to do more sentencing hearings and since 30 June we've had a real upsurge in the numbers coming in. A big spike in the first quarter of this financial year.

Greg Muller

This year was the 25th anniversary of the Victorian Court of Appeal, but didn't turn out to be the celebratory year President Maxwell was expecting.

President Maxwell

No, well that's really interesting. Yes it was the 25th anniversary, the Court of Appeal being established in June 1995. First time Victoria had a stand alone court of appeal.

What we had planned to do was to go to regional Victoria six times in the year. Normally we go a couple of times, so we had six country circuits lined up. In the end we haven't been able to do them.

Greg Muller

The first plan to reinstate criminal jury trials was to start them in July, but the rise in community transmissions at the end of June through to August saw tougher restrictions brought in.

So, three and a half weeks after the courts announced that jury trials were to resume, they were delayed again. Then from November 18, following more than two weeks of what's affectionately known as double doughnut days, that is zero new cases and zero deaths, criminal jury trials began to return, but with changes.

Centuries-old seating arrangements in the courtroom have been altered in the face of coronavirus restrictions to allow for social distancing. Jurors are now seated throughout the courtroom rather than next to each other in the jury box.

The accused and security officers are in the media seats, and reporters and other onlookers in the public gallery. Jury pools are being formed virtually and masks are worn in line with public health advice.

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While the lack of jury trials has had the most obvious impact, another topic which has attracted some media attention is the way COVID-19 has been consistently raised in bail hearings.

Justice Hollingworth again.

Justice Hollingworth

Well, there's been a substantial increase in the number of bail applications, but there hasn't been a substantial increase in the success rate for bail applications. There's perhaps a popular misconception, that the COVID pandemic's been a get-out-of-jail-free card on bail applications. Certainly, our experience in this court is that is not the case.

On the contrary, the sort of rates of success and failure for bail applications have been pretty consistent with the same time last year and the year before.

Greg Muller

Criminal judge, Justice Tinney has been hearing a large number of bail applications at the Supreme Court.

Justice Tinney

Bail's always, a weighing up of competing considerations.

The guiding principles of the Act are that the Parliament recognises the importance of maximising the safety of the community and persons affected by crime, but also the next one in the list of considerations is taking account of the presumption of innocence and the right to liberty.

And then the Bail Act, in bail applications, there is a presumption in favour of bail being granted when all of the considerations are taken into account, but most of the things that come to this court - in fact, a lot of courts too - are ones where that presumption has been displaced by a rule that the applicant for bail has got to prove exceptional circumstances in favour of bail, or a compelling reason why bail should be granted.

So, the COVID-19 stuff has been another important surrounding circumstance to consider, and in some cases, it's one that's going to weigh the balance or tip the balance in favour of finding that there are exceptional circumstances or that there's not an unacceptable risk.

Greg Muller

And there's a number of arguments being put forward for bail in relation to COVID-19.

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Justice Tinney

If you've got a case where someone is charged, let's say with murder, and if it's a strong case of murder, then even if the period of time that the person is likely to spend on remand before the trial is heard, even if it blows out to two and a half years or even three years, the fact is the sentence, should the person be found guilty of murder, vastly exceeds that. So, the issue of delay is going to be a much less significant thing in a case such as that.

Greg Muller

This changes for less serious offences, crimes where a one or two year sentence is likely.

Justice Tinney

So, even if there's an additional delay of something like six months in a case like that, you may well get to the stage of thinking that the person's going to spend longer on remand than they're going to get a sentence for even if they're found guilty.

So, in that sort of situation, delay is going to be very significant and may be the determining factor in bail being granted.

Greg Muller

Another issue which has come up in bail applications is the fact that the pandemic can make somebody's time in prison more difficult.

Justice Tinney

There are a few aspects of that. There's the fact that since, I think, the 21st of March, visits to people held in custody are not permitted. So, family members and others are not allowed to go into the prison.

The prisons have been very good in trying to increase the availability of phone calls and video calls and what have you to loved ones by prisoners being held, but the fact is it's a significant thing that they can no longer receive, for now, personal visits.

Professional visits are still permitted, but they're sort of in a cubicle thing.

Then there's the restriction on movement in the prison. I mean, it's already a restrictive environment, obviously, but that's been greatly increased in the time since the pandemic has become an issue. And there's a restriction on the hours that people are spending out of their cells.

So, in many prisons, or in the case of many prisoners, they are usually permitted to spend about 11 hours or so per day out of their cell. And in some cases, that's been reduced very substantially, and it's almost a lockdown situation. Not in every case, but in some cases.

So, that's been a very significant thing too, because there's a big difference between being held in your cell for 23 hours out of 24 or being able to spend the bulk of the day actually out having contact with other prisoners.

Then there's sort of the anxiety that's considered people in custody would feel. Maybe even over and above the anxiety that people in the broader community would feel, because there is the concern about transmission of the virus into prison, and what would then happen.

So, that's another thing that is said to sort of increase the burden on people who are in custody.

Greg Muller

One case involving COVID was that of Mark Rowden. He applied for an early release because he claimed existing health conditions made him more vulnerable to coronavirus.

The court rejected his bid to go get out of jail, but did order that corrections do COVID-19 related risk assessment to prisoners at Port Philip Prison.

Justice Hollingworth

Another area where bail applications may be strengthened relates to child-accused. There are some specific provisions in the Bail Act that require any court to have regard to things like the need for a child to maintain family relationships, the need for them to continue to be actively involved in education and training and things of that sort.

And the situation has been that because of the lockdown in the Parkville and Malmsbury youth justice facilities, and because of some of the restrictions on education and training, there has been some strengthening of some bail applications where those important goals for children, of continuing education, training, and continuing family relationships have been affected by the pandemic.

Premier Daniel Andrews (Press Conference)

So first and foremost, I'm joined by chief commissioner Graham Ashton, Police and Emergency Services Minister.....The National cabinet took some unprecedented steps. Huge steps yesterday to keep Victorians and indeed all Australian safe. Never before have we seen venues ...It's appropriate - it's painful but it's appropriate.

Greg Muller

The Supreme Court's a very quiet place now. Quieter than normal. Most staff are able to work from home, even judges.

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Court audio:

Thanks Greg Muller for joining. You can see us here in the courtroom. You've done the hardest bit by joining.....

Greg Muller

While some criminal hearings are taking place, physically, inside the court, the vast majority of the court's work is now happening online.

Court audio:

... We'll ask that if you're not having a speaking role today if you can turn your camera off and just while you're not talking you can have yourself on mute that will help with any feedback in the courtroom....

Chief Justice Anne Ferguson

There's always going to be technical glitches. As soon as you introduce something that has technology involved there's going to be some glitches.

Greg Muller

Chief Justice Anne Ferguson.

Chief Justice Anne Ferguson.

But when you think about what a court hearing was like in person before the pandemic - they didn't run perfectly either all of the time. So you can't get it out of proportion. So, my observation is that overall the virtual hearings have been running pretty well and when there has been a glitch we've been able to address it pretty quickly.

The quality of the work that we're doing the justice we're delivering hasn't been diminished by doing it in a different way.

Justice Forbes

I'm Jacinta Forbes. I joined the court in April 2019, and in December 2019 I was asked by the Chief Justice to take over the role as the IT judge.

Greg Muller

We spoke to Justice Forbes via zoom. An image of the courtyard in the Supreme Court was her chosen background.

Justice Forbes

The IT judge is the person who, there are a number of portfolios where a judge is responsible. So there's a judge who's responsible for buildings.

Greg Muller

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A quick aside here, the building judge is also known around here as the heating judge - the person who decides when to turn the boilers for the heating on, and off. Choosing that one day where the season changes, in Melbourne - an impossible task.

The Heating judge is often cursed as people walk along the corridors in puffer jackets and gloves. Back to the IT judge.

Justice Forbes

...and so my role really is to be the link between judges and all of the IT departments.

Greg Muller

And Justice Forbes had just taken on this role when...

Justice Forbes

It was just before Christmas last year so I went on holiday over January and I came back and I was still finding my feet in the IT structure of the court when this happened.

Greg Muller

A global pandemic.

Justice Forbes

.. so it was a bit of a baptism of fire. The judge who had it before me had done a phenomenal job of about five years overseeing a six or seven year project trying to upgrade the digital and IT capacity of the court.

And I inherited it at a part where it was probably about half way through, maybe a bit more in terms of the court conversion and we had a lovely draft plan for the next five years of what was going to happen and within about six weeks that plan went out the window and we just had to revisit everything in the face of Covid.

Well, a short time before the lockdown was announced it became increasingly obvious that something like that was going to happen and so we pulled together a taskforce to look at what that might mean for the court, both in terms of how we might run hearings when you couldn't get people into courtrooms.

So, then the challenge was to make that conversion in the space of about 10 days.

And the way we did that was we looked at what we had to tell the profession about how this was going to work and train those people up and get them to understand what they would need to do.

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And we had to train the judges. So, there was an incredible amount of work done in a very short space of time and then we crossed our fingers and jumped into the unknown and started doing it.

Greg Muller

Video-conferencing software has become customary for much of the world over the last few months, and it was no different for the court. Short cases with only two parties, no witnesses and documents prepared earlier are well suited to remote hearings.

These tended to go well. But the real test came with more complex trials.

Justice Forbes

I've just finished a five day hearing that had four parties, five barristers, some of who were appearing in chambers, some of who were appearing from home. We had four witnesses. They all gave their evidence remotely.

We finished in the time that had been estimated for it to be dealt with in the real world. And that accommodated some glitches in the technology but ultimately people had access to timely justice.

Justice Riordan

That is a fake background.

Greg Muller

I spoke to the head of the commercial court, Justice Riordan via zoom.

Justice Riordan

... the real background is not very impressive.

Greg Muller

His background was the coat of arms of England, the Royal Arms, the one with the lion and unicorn, the same one behind the bench in the courtrooms. He looks like a judge.

Justice Riordan

...very important thing for us to have.

Greg Muller

One concern is that virtual court hearings remove the incidental interactions which happen when people are in the same room, or indeed in the corridor, and therefore limit the possibility to resolve matters 'at the door of the court'.

Justice Riordan

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Yes, that's undoubtedly been challenging for negotiations. The Associate Judges and Judicial Registrars have done a marvelous job by continuing mediations and that's being done in circumstances where they have had to be done through Zoom.

Speaking from my own experience, before appointment, being a mediator normally requires you to exert your influence by your presence in the room and communicating with people.

But having said that, they are continuing to do them and I know of one that went until two o'clock in the morning the week before last.

We still have the capacity to put them off in separate rooms to enable them to have discussion about issues. But I don't think the 'door of the court' settlement is such a significant feature in commercial cases, but it could be.

Greg Muller

Associate Professor, Genevieve Grant is Director of the Australian Centre for Justice Innovation in the Law Faculty at Monash University.

She's started a research project based on COVID-19 and the courts called Remote Justice Stories.

Genevieve Grant

With the Remote Justice Stories project we were hoping to capture the experiences of a range of different court users and observers of remote hearings.

It's an unparalleled opportunity to try and capture what the people who have actually experienced a remote hearing whether as a lawyer or as a litigant or court staff or media or other observer have perceived while these remote hearings have been happening.

Greg Muller

The pressure associated with coming to court, to reach a settlement is something which has come up.

Genevieve Grant

Yeah, so people have made the observation that the physical courtroom does provide a space for practitioners and their clients on occasion to have the sorts of informal interactions that can lead to proceedings being settled, or the parties coming closer together on issues in dispute.

The absence of that and that informal opportunity for exchange is a significant change to the way the parties are interacting on these matters.

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I have observed some hearings where the practitioners do still have the opportunity to check in with each other and chat while they're waiting for the judge to appear in a virtual courtroom. But it's a different atmosphere than if you're face to face with someone you're regularly litigating against. There is an extent to which the technology does create another barrier in that respect.

Greg Muller

And being in your home as opposed to a witness box in a 19th century building has in some cases changed the sense of formality.

Common Law Judge and the Technology Judge, Justice Forbes.

Justice Forbes

We had an elderly man who gave evidence from his lounge room in country Victoria and he'd been told - as we always tell witnesses in cases that if you need a break you just need to ask for it, and if he was in the physical court he'd be in the witness box and he'd just say, could I have a break and I'd leave the bench and we'd take a break, and then we'd come back again, but when he was in his living room he just suddenly said, "I need a break, I'll be back in a few minutes".

And he walked out of his room and I'm trying to remind him that he's not allowed to talk to anyone about his evidence as we would normally do when someone leaves the witness box. He turns around and says, "yeah, yeah right Love, that's fine." Then the barristers and I are left sitting there watching each other on the videos thinking, will we adjourn, will we wait, what will we do? So, the dynamic is completely different.

Greg Muller

And then there's cases where virtual hearings may actually save time.

Justice Riordan.

Justice Riordan

When I've had for example a problem with an advocate being difficult I could simply say, "Madam Associate, please mute Mr So-and-so." and Mr So-and-so can be muted. If Mr So-and-so wants to make bad faces I can say, "put him in the waiting room." and it'll happen automatically. So these things make it very efficient.

More practically, when there's an objection taken to a question to a witness and it's said that the objections should be made in the absence of the witness my associate will just immediately put the witness, on my instruction into the waiting room and we proceed.

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So you save the time of the witness having to walk out and then somebody having to go and get the witness and the witness walk back in. They're gone, and then they're back again immediately.

Greg Muller

Another thing which needed to be considered, normally, anyone can walk in off the street into any courtroom to see what's going on.

And judging from your feedback, more people are taking this up since this podcast started. But what happens when that courtroom is now a virtual one.

Justice Dixon again.

Justice Dixon

Part of the problem that the pandemic has required of us is that we regard it as essential and a fundamental value that everything we do is done out in the open where it is transparent and can be independently observed and reported on.

Well, having hearings over video on these platforms prima-facie doesn't meet that requirement so court's have had to adjust to continue to be out in the open.

Now unlike 100 years ago when the public used to flock in the galleries just to be amused by watching what's happening for the day - that doesn't happen anymore but it's mainly the media and we made it clear that the media or any individual who wanted to watch a particular trial can contact and they will get an invitation to attend the remote hearing.

Sharnelle Vella

...hold on one second. I'm just on a Zoom meeting. Oh oh - all good...

Greg Muller

Sharnelle Vella covers the courts for Channel Seven.

Sharnelle Vella

Sorry, car park attendant.

We were worried at the start that we were going to be shut out and that we'd be the last people to be thought of in the chain of events of things that had to happen, but pretty much across the board we've been given access to information and kept up to date and told how WebEx hearings would work. And it felt like we were there.

Greg Muller

Adam Cooper covers the courts for *The Age* newspaper and online.

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Adam Cooper

I've spent the past three months at home. Traditionally that would be very difficult for a court reporter given that we need to be in court when cases are happening.

When it came to covering court cases I was effectively doing it from afar which meant gaining access to what was happening in court through Webex links and watching sentences and bail application rulings via livestream.

Sharnelle Vella

It's always odd to listen to a Supreme Court hearing in your lounge room, and you always want to stand even though you're at home. When the judge walks in you want to stand and you want to bow and do all those things when you walk away from your laptop. It's a different feeling but it seems to be working.

Adam Cooper

I must admit I'm keen to get back to court to be there when sentences and when big cases are on. It feels tricky and a bit difficult at times watching from afar and it doesn't feel like you're really capturing the full story by sitting in the backroom at home.

There's obviously no substitute for being in court because you can see people's reactions, you can hear everything loud and live and then you can importantly check details afterwards.

I think now that the courts have had a taste for the technology and seen that it's been effective at times that there might be a temptation to do it differently.

Our big concern will be so long as we can be a part of that, and can get access to that, those judgements or those decisions then that would be fine.

Matthew Albert

Yes lovely, what do you want?

Child: I want to put my helmet on top of...

Greg Muller

What's this pandemic been like for those usually sitting at the bar table, after all they're the ones doing most of the talking in court.

I spoke to civil barrister Matthew Albert.

Matthew Albert

The headphones won't fit over the top.

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Child

WHAT!!

Matthew Albert

The headphones won't fit over the top

Greg Muller

Via zoom.

Matthew Albert

...you need to take the headphones off to put the helmet on.

Child

I can't. I have to leave it on!

Greg Muller

And encountered one of the issues those of us who are working from home, online, while also homeschooling found ourselves dealing with.

Matthew Albert: having a major meltdown because he's got earmuffs on and he can't fit his helmet on over his ear muffs (laughing) to go riding. So that's the end of the world.

Greg Muller

So, parenting aside, what's it like being a barrister as well?

Matthew Albert

It's been variable. There's a couple of things that have been disconcerting about it and slightly amusing.

Greg Muller

Matthew has appeared in various courts during this pandemic.

Matthew Albert

I have to say, appearing by phone is a nightmare from a barrister point-of-view, and the reason for that is we do rely on visual queues and we do rely on body language from the judge to our submissions.

When you're on the phone, the sound of a judge listening very intently and the sound of a judge falling off the line or you falling off the line is exactly the same sound. So, you actually don't know whether the judge is there.

The video hearings have gone really well, for the most part. It's amazing how quickly we've all adapted by necessity.

The glitches in the video hearings have been routinely fairly amusing. We had a hearing a couple of weeks into lockdown, and the hearing was going along all very smoothly, and I was in the middle of my submissions, and I could see everyone, and they could see me and the sound was good, and all was well.

And it got to 10.30 exactly. Exactly 10.30am, and all of a sudden the picture became grainy, the sound became terrible. I couldn't fully see them, they couldn't see me, and the judge said, "Look, this is really too bad. I'm going to stand the matter down and we'll see what the problem is and we'll try and resolve it."

Anyway, as the judge walked off the bench, it occurred to me that the problem could very well be at my end, so I went to our living room and realised that my son, my three-year-old son's online music class started at 10.30am, and his online music class was using the very wedge of bandwidth that I needed to have my court hearing.

So, I negotiated as one must with a three-year-old, but he unfortunately had to miss the music class that day because I was appearing in the Supreme Court. He was ultimately obliging. Not immediately obliging, but ultimately obliging.

So, I came back and the judge came back on the bench, and I said to Her Honour, "Look, I think we've just made legal history, because I'm fairly confident the court has never had to adjourn to accommodate a three-year-old's music class before, but we just did."

And Her Honour asked, "Did I pull rank?"

And I said I did.

Greg Muller

Elizabeth Bennett is a barrister - who was also thrown into this new world of virtual hearings.

Elizabeth Bennett

They always say, you know, when you first become a barrister, they say, "make sure you speak slowly, and be careful of your posture, and think about how you use your words," and I think that there's a different skill doing it virtually.

You lack a lot of the physical queues from the bench. You do still get some, but they're slower and harder to read, so you need to concentrate in a different way, and you can't engage in the same way with the bench that you used to.

Matthew Albert

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So, in the first week of lockdown, I had a hearing in the Federal Court, and the case, relevantly, was about the power to detain, and the judge was listening very intently and then halfway through a passage, as she's listening, I noticed her eyes sort of darting off the screen where she'd been looking, and looking increasingly concerned as time went by.

After a minute or so, she interrupted the other barrister and said, "Look, I'm really sorry to interrupt, but I've noticed that there are police walking down my driveway and they've just knocked on the door. So, can you excuse me for a moment?"

And she left her camera on and walked off, and of course, us barristers are sitting there thinking, 'Okay, this is a bit strange, but you know, it'll be over soon.' And we sat there, and we sat there, and we sat there for an uncomfortably long period of time, wondering to ourselves what the protocol was if a judge gets arrested in the middle of a hearing.

After a long period of time, the judge came back on the screen looking quite bemused, and said, "I can assure all of you that Victoria Police are doing an excellent job of following up on those in quarantine. I was in New Zealand. I'm on 14 days quarantine right now, and they were checking to see if I was in fact at home quarantining. I didn't tell them what I do, but it did occur to me that it would be slightly problematic if they wanted to take me away."

And then my leader very cleverly said, "Well, Your Honour, this is an important case about the power to detain, and I'm sure Your Honour understands that importance now."

And the hearing went on as normal, but it's a sign, a perfect sign, of what this new abnormal is like.

Greg Muller

Sharnelle Vella from Channel Seven.

Sharnelle Vella

It's interesting, you see barristers appearing via WebEx in their lounge-rooms and you're looking - kind of want to zoom in - to see how these people live. It's like seeing them in their natural habitat for once.

You can see barristers with guitars in the background and you want to see what books they're reading. There's also been times where the link hasn't been cut off right at the end of the hearing and I heard a barrister suggest to a judge that beef carpaccio is quite good if you use shallots in it.

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I heard another guy being sentenced. He was given quite a hefty sentence - well over ten years - and as he was being taken away I heard a prison guard say down the WebEx, "Oh, mate are you going home today?" No he just got ten years, definitely not going home.

Greg Muller

Those incidental conversations that you would normally never be privy to?

Sharnelle Vella

Correct, correct. I guess it's one thing journalists have been taught our whole careers is to always treat a microphone like it's on. Our managers and bosses tell us that all the time but this is something that barristers and judges are just working out.

Greg Muller

One thing we talked about last season, in episode five was the influence of the Supreme Court's architecture.

This imposing building immediately conveys that what's going on is important and you better take it seriously. So, how do you maintain this pressure when people might be appearing from their kitchen, or indeed anywhere.

Genevieve Grant.

Genevieve Grant

I think it's a really interesting question to think about how people who have had their matters resolved in this time of remote justice feel about that experience and how it might differ having had that experience online as opposed to being in a physical building at the Supreme Court.

Sharnelle Vella

The Supreme Court building commands that people adhere to certain procedures. It just has that feeling about it from the moment you walk in. You almost want to hush your voice when you walk around those halls because it feels so prestigious. So now, all of a sudden we're beaming into people's lounge-rooms and studies, it is a little bit less formal.

Greg Muller

Justice Riordan.

Justice Riordan

It must have some influence Greg, and the fact the parties aren't there, and without the atmosphere of the court, I'm not necessarily convinced it makes it harder to cross examine for example, certainly in the commercial environment the cross examination is normally based on taking witnesses to documents and pointing out inconsistencies

or other reasons why their recollections or their evidence is not reliable but I think that that still happens very effectively by this technology.

Greg Muller

Justice Forbes again.

Justice Forbes

It's an interesting challenge to try and keep a sense of the formality that goes with a court hearing. It can be intimidating and that's a bad thing but it also keeps a rigour and a respect from everybody and that's difficult.

The other thing I think is that in a physical courtroom the cues that you have are quite clear. Everybody stands up when the judge enters. That doesn't work when you're all sitting in front of a screen because all of a sudden you get a view of everybody's midribs and you lose their heads.

Greg Muller

The other consideration is someone's lounge room is not a controlled environment. So, how does a judge ensure a fair trial when a witness is giving evidence remotely. Does it increase the chances of someone breaking the rules of the witness box?

Justice Forbes

It does and it's something we've given a lot of thought to about the integrity of where people are giving their evidence from. To give you an example, there was a situation where we had an expert who in answering said, "Oh yes, one of the things I could do is I can find information from this source, and because he was on a screen with internet access, started to do that in real time, and we all had to say, "no, no, no stop, we don't want you to supplement your answers by research on the run."

And as a result of that experience I've started making sure that everybody, before they start giving their evidence understands quite clearly that they're in a position where they're in a witness box without being able to access screens or whatever to supplement their answers.

But it is a concern and the degree of control you have is certainly less.

Greg Muller

Justice Dixon.

Justice Dixon

If the judge gets a notion that there is some impact on the notion of fairness of the trial then we just say to the parties "we have to adjourn this," and we'll hear it again when things have eased.

But mostly with civil cases that hasn't been a problem.

Greg Muller

Justice Riordan.

Justice Riordan

I think if you look at someone carefully I think you can tell if they're looking at somebody else and getting prompted. That would be a very serious thing for someone to do when there's been a direction that no-one else should be in the room. And if it was being done, somebody would raise the alarm.

Preferably they are attending in rooms often next door to where counsel are and the solicitors might be. If counsel and solicitors are involved in that sort of conduct they're going to have very short careers.

Justice Dixon

We rely on the profession to ensure that appropriate standards are maintained but then ultimately the obligation is upon the judge to make sure that a fair trial is conducted.

The opposing barrister will be right onto it if they think that somebody's doing something they shouldn't do, they can ask questions about that, and you often see that.

Like a witness who's being cross examined is not supposed to discuss their evidence with anybody. If they go out over lunch and discuss it with somebody, after lunch the barrister says to them, "did you discuss your evidence with anybody over lunch"? And then there's an investigation about it. It is something where judges have got to be careful to ensure that the standard of a fair process is maintained.

Greg Muller

Virtual hearings have disrupted hundreds of years of courtroom tradition, and one of the biggest impacts might be on how barristers deliver their advocacy.

Matthew Albert.

Matthew Albert

And the reason that's relevant to the older members of the profession is that, and of course this is not a universal comment, but as a broad observation, the significantly older members of the bar are not as comfortable talking to a computer as the younger members of the bar, just because of experience.

But what's interesting about that is that the very senior silks come to a courtroom with a bag of tricks. I don't mean sneaky, but they've just got a lot of experience and

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they know how to engage a courtroom, they know how to fill a courtroom with their presence, they know how to use their voice and project themselves to a bench in a way that is very impressive when you're there in person.

But when you put them in front of a computer and they're not entirely sure how to do it and their voice projection doesn't work in quite the same way, and the technology's not as smooth, and they're not entirely clear how to get the documents to the judge, there's just this slight anxiety and level of a lack of assurance that they wouldn't have if they were in court, then some of their magical powers disappear.

Greg Muller

Another thing the legal profession is famous for is their dress code in the courtroom.

Are people still robing up?

Justice Dixon

Robing's interesting...

Greg Muller

Justice Dixon.

Justice Dixon

...It's funny, people working from home - their office might be their bedroom and it feels a bit strange to have their robes on.

But when we've got witness actions in full trials it's actually quite helpful to have the robes on because it enables people looking at the screen to know who the judge is. So, it's useful to be robed so that people can see who you are and the respect and authority of the court can be maintained.

Greg Muller

Justice Riordan.

Justice Riordan

Not in my court. I've left that to the individual judges in the commercial court. I don't robe. And I don't expect the parties to robe.

Greg Muller

But that doesn't mean there's no rules.

Justice Riordan

I've had one instance at least, where a lawyer didn't think it was appropriate that he should have to wear business attire for a zoom meeting.

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That's just a matter where he had to ultimately accept that he did need to go to the effort of properly dressing. It is still a courtroom.

Greg Muller

Barrister, Matthew Albert has been doing virtual hearings across multiple courts during the lockdown.

Matthew Albert

One judge wanted the jabot and the bar jacket, but not the gown. I've had suits with ties, I've had suits without ties and I've had smart casual. So, the whole range has been requested, and of course I oblige every time, but provided you don't tell anyone, I can confide in you that every one of those outfits comes with black tracksuit pants and slippers.

Justice Dixon

Oh yeah, I think a lot of things about doing trials remotely are better and will stay and everybody will say, "this is very sensible."

Greg Muller

What will COVID 19 mean for the future running of the court? So many changes were forced but it looks like at least some of them are here to stay.

Justice Dixon

We already had half of our courts converted into electronic courts that were able to straight away go to these new virtual courtroom platforms. So, that will continue to be used.

Lot's of applications that are just the lawyers getting together to discuss how the case is going to be got ready for trial, those kinds of things will continue to be much more efficiently dealt with over video so I can see that continuing.

There is concern that it is easier to have franker discussions, to have interactive discussions in person. There's a practicality in in-person hearings with body language and interpersonal communications that enables things to be more clearly explained and to work out what real issues are and to more efficiently move through material and information so I think there will be a desire to return to that kind of thing.

The barristers will certainly say that advocacy works better in the difficult situations through in-person work and I think from the judge's perspective that's true as well.

Greg Muller

Do you think this will then bring in a change of the way things will happen once we're through this pandemic.

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President Maxwell

I think as long as oral advocacy is at the centre of what we do, despite the fact that we rely heavily on written material...

Greg Muller

President of the Court of Appeal, Chris Maxwell.

President Maxwell

I'm of the view, and I know my colleagues are, that having the dialogue in court is easier and has a more obviously collaborative feel about it because the exchange can be more dynamic.

The other thing is that for a court like the Court of Appeal where we don't sit alone, we do sit in twos and threes all the time, the informal exchanges out of court, dropping in to talk about this case or that with another judge or judges are vital to the work we do.

Greg Muller

Chief Justice, Ann Ferguson again.

Chief Justice Anne Ferguson

With every change in circumstance you get a change in operation so this has given us a real opportunity to try a lot in a very short time and to see what could be done more effectively the way we're operating now and what can't be.

So, yes it will definitely change the way that we operate in the future and for me, one of the real advantages has been that we've been able to break down those barriers that have been there in some quarters that we have to keep doing things the way we've always done them. We don't.

We should be questioning everything we do, how we do it and saying, "is that still the right way to do it or should we alter it?"

And this has been a great opportunity. Not to say that I would have wanted or wished for any pandemic anywhere, but we're in that circumstance so you make the best of it.

Greg Muller

And if you've ever been into the office of a solicitor or the chambers of a barrister, or judge, more often than not they're filled with piles and piles of paperwork.

Shelves stacked with past cases and legislation. It's like they're never heard of a USB stick or a hard drive. This might change.

Justice Dixon

So many cases turn on the documents, documents produced by the parties, documents that are produced on subpoena, and the use of a virtual courtroom has forced a faster conversion to documents being presented electronically in court.

One hundred and fifty years ago the case would have revolved around one hand written document and the party in possession of it, that person's solicitor would show it to the other solicitor and they would both examine it and make notes about it and inspect it and so on, and then often the case would turn on whether the judge would permit that document to go into evidence.

Then they invented carbon paper, then they invented the fax machine and they invented the photocopier and they invented the lever arch file and they invented those steel trolleys that enable you to transport 20 lever arch folders around at once. Then we had email, and email has the 10 previous emails all in a chain and everyone who got it produces the copy and there's an enormous amount of duplication and before you know it, what's gone from being one document is thousands and thousands of documents.

So, document management has become, over the years, a big problem, and the conversion to electronic document management that has come with virtual trials since the pandemic is definitely something I think that will stay and I think will be a good development for everybody.

Matthew Albert

I feel like a lot of forests have been saved within the legal profession, because we're exchanging documents electronically a lot more.

At a court hearing, parties always turn up with a Folder of Authority. So, the case law that's relevant to that case. And one turns up with a folder for oneself, a folder for the other side and a folder for the judges.

Now, if you're doing an appeal, that's three judges. So, you're turning up with five folders of the same material. and of course, that's a shocking waste of paper. It's how we've always done business, but we're not doing business like that at the moment, and I for one hope we don't go back to it.

It's a radical change, I think, for the better.

Elizabeth Bennett

Look, I think that we have all learned to work more flexibly, and I don't think we would have put ourselves through this as a collective profession. It's all very well to say, "Oh, we could have always worked from home." I don't think that's right. I think there was actually a very painful transition that had to be gone through for us to be

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able to work from home in a really effective way, and it took something like this pandemic to force us to go through that,

Justice Riordan

I think it's been very promising. I think there's been a great deal of cooperation between the courts and the profession. We have all worked on the basis that we had to find ways around what was a unique situation with unique problems and I think everyone's been focused on doing that.

President Maxwell

I think we all feel pleased that we've made that leap and those of us who have been in the law a while have surprised ourselves by learning a few new technological skills.

We've made a virtue of necessity in becoming individually a bit more self sufficient in our use of technology. We've recommitted to the promise of the Court of Appeal of delivering high quality appellate justice to all Victorians at a time when the threat of the pandemic might have challenged our ability to do that.

Justice Hollingworth

There've been a lot of challenges moving to hearing things by video link and virtual hearings. Some of them are technological, some of them are practitioners and judges and court staff and everyone getting used to the new technology.

Speaking personally, I'm very grateful for the fact that everyone has been so willing to see what we can do to get through this together.

Greg Muller

Gertie's Law is brought to you by the Supreme Court of Victoria.

Also, a reminder that season two is on its way.

In it, we'll look at the most controversial issues which come to the Supreme Court like:

When does murder get downgraded to manslaughter? Go behind the scenes of the usually long and complicated terrorism trials, as well as high profile defamation cases.

And most Victorians are familiar with the name Sir Redmond Barry, not least because there's so many things named after him. But spoiler alert, he did a lot more than sentence Ned Kelly to the gallows, from defending Aboriginal resistance fighters to getting into a duel with Mr Snodgrass.

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But we start the season by looking at the one part of the courtroom we haven't focussed on yet, the bar table. Who sits there and what do they do?

Feel to get in touch. You can email us at: gertie@supcourt.vic.gov.au

And don't forget, please rate and review us, it helps others to find this podcast.

I'm Greg Muller, Thanks for listening.

End.