



1 CROWN OFFICE ROW

The 1COR Quarterly Medical Law Review

Updates and analysis of the latest legal developments

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Welcome to another special issue of the Quarterly Medical Law Review, brought to you by the barristers at 1 Crown Office Row. Given the fast moving nature of this situation, we will likely produce a number of special issues, which will be emailed to subscribers and posted on the 1COR website, as per usual. This is the second version of our special edition, updating the March issue.

The first piece is by **Jeremy Hyam QC** and considers the recent calls for **legal immunity** for clinicians, particularly for volunteers.

We have two pieces on **coronavirus and custody**. The first is by **Gideon Barth** and looks at inquests and deaths in custody. The second is by **Suzanne Lambert** and considers immigration detention and coronavirus.

Dominic Ruck Keene considers **causation** and deaths from COVID-19. He then goes on to look at legal issues for employers arising from potentially **inadequate PPE provision**.

Darragh Coffey provides an analysis of the new **Coronavirus Act**. It is split into two parts – the first considers why the Act was necessary and some more general aspects, whilst the second looks at more specific parts of the Act.

Rajkiran Barhey then looks at two decisions arising out of COVID-19. The first concerns an **order seeking possession of a hospital bed** from a patient who did not wish to be discharged. The second relates to an application by a care home resident's daughter for his discharge, on the basis that a decision to ban all visitors breached his ECHR rights. She also considers an **application for adjournment** due to coronavirus.

Richard Mumford and **Caroline Cross** talk us through changes to **coroners' investigations**, updated to reflect the most recent Coroner's guidance..

Matthew Flinn has written a fitting tribute to **Sir John Laws**, who recently passed away due to coronavirus.

Towards the end, readers will find **links and extracts of new practice directions, protocols and guidance** relevant to the civil courts. There is a large amount of material which we have tried to collate in one place for readers. We have also highlighted recent interesting **news**.

Send us your questions, queries or concerns as well as feedback and remote training session enquiries to medlaw@1cor.com.

Previous issues can be found on our [website](#) under 'Newsletters' and remember to follow us on Twitter [@1corQMLR](#) for the latest commentary.

LEGAL IMMUNITY IN THE COVID-19 PANDEMIC?

Jeremy Hyam QC

It was reported over the weekend of 18-19 April 2020 that the Medical Defence Union (“MDU”), which provides legal support to around 200,000 doctors, was calling for a debate on the need for emergency legislation to protect doctors from negligence claims arising from the COVID-19 emergency.

The particular concerns raised by the MDU were that retired doctors have been called back to the wards and medical students sent out before they have finished training. Even though the UK government has promised to cover the cost of any future legal actions by providing indemnities [see [ss.11-13 Coronavirus Act 2020](#) and Darragh Coffey’s article [below](#)], this will, as the MDU says, cost the country vast sums and expose those who have volunteered to “extremely distressing” and potentially career damaging hearings.

It is worth for a moment pausing to reflect on this justifiable concern and the extent to which the courts and or the legislature may be required to remedy it.

The default common law position is that there is currently one objective standard of care that looks at the activity being carried out rather than the specific actor – see *inter alia*, *Nettleship v Weston* [1971] EWCA Civ 6 where it was held that a learner driver should be judged by the standard of an ordinarily competent driver. This single standard applies - for policy reasons - across the professions to avoid the risk of complicated shifting standards. Thus the standard of a reasonably competent doctor carrying out e.g. “heart surgery” will be judged by the standards of the ordinarily competent heart surgeon, not some special standard altered for the specific circumstances.

One recent case which looked at the possible blurred lines between the roles performed and the persons who perform them was the Supreme Court’s judgment in *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50. *Darnley* was a case involving the negligence of hospital receptionist, where Lord Lloyd-Jones focussed on the role performed by the individual in question:

“The particular role performed by the individual concerned will be likely to have an important bearing on the question of breach of the duty of care. As Mustill LJ explained in [Wilsher v Essex Area Health Authority \[1987\] QB 730](#), 750-751, the legitimate expectation of the patient is that he will receive from each person concerned with his care a degree of skill appropriate to the task which he or she undertakes. A receptionist in an A & E department cannot, of course, be expected to give medical advice or information but he or she can be expected to take reasonable care not to provide misleading advice as to the availability of medical assistance. The standard required is that of an averagely competent and well-informed person performing the function of a receptionist at a department providing emergency medical care.”

That is not to say that the circumstances of an emergency may not affect the standard of care.

In *Wilsher v Essex AHA* in the Court of Appeal Mustill LJ explained at 749: *“...full allowance must be made for the fact that certain aspects of treatment may have to be carried out in what one witness (dealing with the use of a machine to analyse the sample) called “battle conditions.” An emergency may overburden the available resources, and, if an individual is forced by circumstances to do too many things at once, the fact that he does one of them incorrectly should not lightly be taken as negligence. Here again, however, the present case is in a different category, for none of those accused of negligence who were called to give evidence on their own behalf suggested that, if mistakes were made, this happened because their attention was distracted by having to do something else at the same time, or because they had to take a difficult decision on the spur of the moment.”*

However, as the authors of Clerk and Lindsell 22nd Edition point out: *“ some emergencies can be anticipated and planned for, especially in a professional context, and it may be negligent to fail to make appropriate arrangements to deal with an emergency”*

In support of that proposition the authors cite *Bull v Devon Area Health Authority* [1993] 4 Med LR 117, a case in which there was a prolonged delay in providing medical assistance at the birth of a child. There the court

rejected the “resources” argument of the Defendant who said they were trying to do the best job possible with the limited resources available.

Thus while some leeway may be given to health bodies, it is possible that the “full allowance” mentioned by Lord Justice Mustill may in fact be watered down to not very much allowance at all, since it can be argued that the COVID-19 emergency could have been (at least in some key respects PPE, provision of ventilators etc.) planned for and anticipated by healthcare bodies in proper planning.

Volunteers/Rescuers?

Insofar as the MDU raise the question of volunteers and whether a different standard should apply to them, the current state of the law is that the English courts have rejected the arguments that a different standard of care should apply to the volunteer helper. For example, a householder repairing a door has been required to conform to the standards of a reasonable carpenter see *Wells v Cooper* [1958] 2 QB 265 and the same applies in the medical or first-aider field, thus in *Cattley v St John Ambulance Brigade* (1999) (unreported) the judge held that:

‘[The volunteer rescuer in question] or any other person holding himself out as a first-aider trained in accordance with [the First Aid Manual] would be negligent if he failed to act in accordance with the standards of the ordinary skilled first-aider exercising and professing to have that special skill of first-aider’ and went on to say *‘the true test for establishing negligence in a first-aider is whether he has been proved to be guilty of such failure as no first-aider of ordinary skill would be guilty of, if acting with ordinary care.’*

The position in England is in contrast to many other jurisdictions, where the concern that potential good Samaritans might refrain from helping others for fear of liability, has led to the replacement of the standard of reasonable care with a lesser standard i.e. of gross negligence or recklessness. German law, for example, employs a standard of gross negligence (and Australia and US laws have rules to similar effect). Closer to home, the Irish Law Reform Commission proposed (in 2014) that a gross negligence standard for good Samaritans be incorporated into the Irish Civil Liability Act 1961. This document is illuminating because it sketches out what a piece of domestic legislation might look like if the Government were to make amendments to existing legislation to cater specifically for the COVID-19 emergency:-

“Protection of good Samaritans from liability for negligence.

51D. — (1) A good Samaritan shall not be personally liable in negligence for any act done in an emergency when providing—

(a) assistance, advice or care to a person who is—

(i) in serious and imminent danger, or apparently in serious and imminent danger, of being injured or further injured,

(ii) injured or apparently injured, or

(iii) suffering, or apparently suffering, from an illness,

or

(b) advice by telephone or by another means of communication to a person (whether or not the person is a person referred to in paragraph (a)) who is at the scene of the emergency.

(2) The protection from personal liability conferred on a good Samaritan by subsection (1) applies even if the emergency is caused by an act of the good Samaritan.

(3) The protection from personal liability conferred on a good Samaritan by subsection (1) shall not apply to—

(a) any act done by the good Samaritan in bad faith or with gross negligence, or

(b) any act done by the good Samaritan when providing assistance, advice or care in circumstances where the good Samaritan has a duty (whether imposed by or under any enactment or any other rule of law) to provide such assistance, advice or care.”

Overall

The call for legislation creating complete immunity from suit to volunteer healthcare workers is probably a step too far. If amendment to protect volunteering retired healthcare professionals assisting with the COVID-19 emergency is contemplated, then the Irish Law Commission’s draft provides a clear blueprint for setting a gross negligence or recklessness test for the establishment of liability. In the absence of such legislative change, it is likely that, while some allowance will be made by the courts for the emergency situation brought on by COVID-19, the allowance will be tempered by the consideration that the state is responsible (under its target duties under ss.1 and 3 of the NHS Act 2006) to provide a comprehensive system of healthcare and, that if that system fails and results in injury to patients or staff (even in the current emergency situation), then, absent cogent mitigating circumstances explaining the failure, liability is likely to follow.

More generally, the courts and Parliament have historically resisted attempts to move to shifting standards of care in the field of negligence, and the Government’s provision of indemnity (see ss.11-13 Coronavirus Act 2020) would seem to suggest it is not currently part of the Government’s plans to change tack now. For Claimant and Defendant solicitors considering the extent to which “*emergency*” will provide a defence to claims in negligence the answer for the time being would seem to be that, while “*full allowance*” may be given to “*battle conditions*”, that allowance will be tempered by considerations of the degree to which the COVID-19 emergency was in fact relevant to the breach of duty alleged, and the degree to which any lack of resources (e.g. PPE, ventilators etc.) could be anticipated or guarded against in the overall provision of the healthcare system. Absent legislative change, it is unlikely that the fact that the person or “*actor*” carrying out the impugned task is a volunteer or rescuer, will be of any relevance to the standard of care.

INQUESTS INTO DEATHS IN CUSTODY DURING THE COVID-19 PANDEMIC

Gideon Barth

Following the sad news of the first death in custody from COVID-19, one question arises: what are likely to be the issues at inquests into the deaths in custody from COVID-19?

Article 2 and the central issues

Not all deaths in custody mandate an Article 2 inquest (see *R (Tainton) v HM Senior Coroner for Preston and West Lancashire* [2016] EWHC 1396 (Admin); *R (Tyrell) v HM Senior Coroner for County Durham and Darlington* [2016] EWHC 1892 (Admin)). An Article 2-compliant inquest must be undertaken when there has been an arguable breach of the substantive obligation to protect life. When a death occurs in custody, Article 2 will be engaged if there have been any arguable failings in the care provided.

The new Coronavirus Act 2020 will not change this. The real questions will be whether the Deceased died as a result of failings on the part of the prison. There will undoubtedly be questions asked about the steps taken by the prison to protect prisoners, especially those identified to be at risk, whether because of an underlying health conditions or their age.

The Government recently issued [guidance](#) on the steps being taken in prisons and other state detention centres to isolate prisoners and staff who develop symptoms. For example, any prisoner or detainee with a new, continuous cough or high temperature should be placed in protective isolation for 7 days. Where necessary, if there are multiple cases, ‘cohorting’ or gathering a number of potentially infected cases together may be appropriate. Staff who become unwell with the symptoms are to go home. A prima facie failure to comply properly with this medical guidance is likely to lead to an Article 2 inquest. For example, if an individual is not

isolated after showing symptoms, and another prisoner or detainee develops symptoms having come into close contact with them, this may represent a failing by the prison.

One interesting question is how far Coroners will be willing to go in Article 2 inquests in considering whether the steps taken in prisons and detention centres were sufficient to protect prisoners and detainees. There has been a wealth of criticism about the sluggishness of the Government's response to the crisis, and there remain questions about the discrepancy between the World Health Organisation ("WHO") recommendation of 14 days self-isolation compared to the Government's advice of only 7 days. It seems unlikely that any coroners would be willing to call evidence looking at the timing of the Government's decisions or the appropriateness of this advice. The Government has also responded to calls for prisons to release some prisoners early, or release remand prisoners, to combat overcrowding, by releasing up to 4,000 'low-risk offenders' on licence. If a death occurs as a result of prisoners being required to share cells with those who have tested positive for the virus, serious questions may be asked at an inquest.

Nevertheless, establishing any causative link between any decision/care and the death is likely to be incredibly difficult. It might be necessary to rely on the power to leave to the jury *potentially causative* factors (per *R (Lewis) v HM Coroner for the Mid and North Division of Shropshire* [2009] EWCA Civ 1403).

Jury

Section 30 of the Coronavirus Act 2020 provides that, for the purposes of an inquest, COVID-19 is not a notifiable disease so that a jury is not mandatory for a COVID-19 related death under section 7(2)(c) of the Coroners and Justice Act 2009.

This should not make a difference to deaths in custody. An inquest into a death from COVID-19 in prison will not, of itself, require a jury. However, if there are concerns that there were failures which resulted in the individual dying from COVID-19, such that the death could not be considered a 'natural death', then the obligation to empanel a jury will still arise under section 7(2)(a).

Delay

Inquests into deaths in custody normally take some time before the hearing is listed. This is because investigations by the Prisons and Probation Ombudsman ("PPO") and other organisations normally take place in advance. The article by Richard Mumford and Caroline Cross deals with how long hearings will be adjourned for. It is likely that this pandemic will delay these cases even further.

This article also appears on the UK Human Rights Blog.

COVID-19 AND IMMIGRATION DETENTION CENTRES

Suzanne Lambert

At the start of the year, some 1,200 immigrants were being held in immigration detention in the UK. The power to detain immigrants is separate from detention of individuals as part of a criminal sentence. There is a presumption against detention of immigrants, and immigration detention can only be in accordance with one of the statutory powers (the majority of which are contained in the Immigration Act 1971 and the Immigration and Asylum Act 2002), and where it is in the interests of maintaining effective immigration control, for example, to effect removal; to establish a person's identity or the basis of their immigration claim; or where there is reason to believe that the person will fail to comply with any conditions attached to a grant of immigration bail.

In order to be lawful, not only must immigration detention be in accordance with one of the statutory powers, but it must also be in accordance with the limitations implied by the domestic common law and Strasbourg case law (ECHR Article 5), as well as with stated Home Office policy.

Under the common law and ECHR Article 5, the statutory powers to detain are to be strictly and narrowly construed, i.e. if detention is not for a statutory purpose (or is no longer for that purpose) it will become unlawful. Additionally, the power to detain is impliedly limited to a period that is reasonably necessary for the statutory purpose to be carried out and must be justified in all the circumstances of the individual case, requiring an assessment of individual factors such as the risk of absconding, the likelihood of imminent removal, and the impact on the detainee.

Since news of the first immigration detainee testing positive for COVID-19, there has been increasing concern about the risk of COVID-19 deaths in immigration detention and about the legality of continued detention of immigrants. Detention Action Group sought to challenge the continued detention of some 736 immigrants in a judicial review advanced on two main bases: first in relation to vulnerable detainees such as those who are suffering from serious medical conditions or who are aged 70 and over; and secondly in relation to those whose removal is not reasonably imminent as a result of the global pandemic and the consequential travel bans and restrictions around the world.

Vulnerable detainees

The Home Office's *Adults at risk in immigration detention* policy confirms the presumption against the detention of those adults who are particularly vulnerable to harm in detention except in very exceptional circumstances.

Adults at risk include those who have serious physical health conditions or illnesses and those aged 70 or over. Age disputes are not uncommon in the immigration context, particularly if formal documentation (such as passports and birth certificates) are not available or not accepted as genuine. However, there is even greater scope for dispute in relation to the question of whether someone with a health condition such as asthma, diabetes, or a heart condition is considered to have a serious physical health condition severe enough so that they should not be detained. Given that those with asthma and heart conditions are considered to be vulnerable in the context of COVID-19 in open conditions within the wider community, it seems to follow that immigrant detainees with those same conditions would also be deemed vulnerable, particularly in conditions where social distancing may be difficult or impractical, or where access to appropriate medical care may be more limited.

Detention Action Group commissioned a scientific report from Professor Richard Coker, Professor of Public Health, which indicated that prisons and detention centres provide ideal incubation conditions for the rapid spread of the coronavirus, and it was "credible and plausible that 60% of immigration detainees will soon become infected with COVID-19". The continued detention of such vulnerable immigrants is therefore subject to challenge on the grounds that it would be in breach of the *Adults at risk* policy.

Detainees with physical conditions or illnesses that place them at high risk if they contract COVID-19 will need to be identified and Rule 35 of the Detention Centre Rules, which requires medical practitioners in detention centres to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention, will need to rigorously applied to ensure that such vulnerable immigrants are released from detention.

Detainees liable to removal to countries with travel restrictions

A separate consideration is the likelihood that removal of those in immigration detention will no longer be reasonably imminent with no realistic prospect of removal or the likelihood of an unreasonable delay in effecting removal to those countries where there is a travel ban in place.

The question of how long it is reasonable for an immigrant to be detained pending deportation or removal is one that has been given detailed consideration in case-law, most notably in *R(ota I v SSHD)*, and *R v Governor of Durham Prison ex parte Hardial Singh*. The fact that travel restrictions and bans are in place in several countries throughout the world is likely to pose an insurmountable obstacle to the removal or deportation to those countries, so challenges to detention by those facing removal to such countries can be pursued successfully if decisions to release are not made following review of detention in those cases.

The need for case-by-case reviews of continued detention

Although Detention Action Group's recent [application for urgent interim](#) relief for the release of the 736 immigrants in detention was rejected by the High Court last week, in the week leading up to the hearing 350 detainees were released, and the Home Office provided an undertaking to review proactively the detention of all those held under immigration powers in accordance with updated Public Health England guidance.

Although the Home Office has not been compelled to empty the immigration detention centres, like in [other European countries](#), continued detention will now be reviewed carefully on a case-by-case basis and it is also likely that bail applications, Habeas Corpus applications and individual judicial review claims will be brought where the detainee is deemed vulnerable in accordance with the guidance from Public Health England, or where the detainee is liable to removal to a country where travel restrictions are in place. It remains to be seen whether detainees considered at risk or vulnerable on the grounds of COVID-19 will be subject to "shielding" measures in solitary confinement rather than be released, however, [as suggested in a leaked G4S letter](#).

In the unfortunate event that there is a death in immigration detention as a result of COVID-19, the adequacy of any detention review and the application of Rule 35 in such a case are likely to attract significant attention in the inquiry into the death in custody and the decision to continue to detain.

This article will also appear on the UK Human Rights Blog.

COVID-19 AND CAUSATION

Dominic Ruck Keene

One key factor that is driving the Government's response to COVID-19 is the number of deaths. Those are deaths 'from' COVID-19, the number of deaths 'with' COVID-19, and the number of those who have died with or from COVID-19 who are 'likely' to have died within a certain period of time in any event. That information is clearly critical to determining whether the drastic current interventions in social and economic life are necessary and proportionate to the risk, and whether the current restrictions on social interaction are proving effective and sufficient.

The Public Health England ("PHE") [dashboard](#) states (as at 21 April) that there have been 124,743 'laboratory confirmed' cases of COVID-19 and 16,509 deaths. The number of deaths comprises those where the deceased had tested positive from COVID-19 and died in hospital, without any distinction being made between deaths 'from' vs. deaths 'with' COVID-19 i.e. deaths where COVID-19 caused or contributed to death, or where COVID-19 was merely present.

The Office of National Statistics ("ONS") separately compiles [statistics](#) of the number of deaths where COVID-19 has been 'mentioned' on the death certificates, which includes deaths in the community (including hospices and care homes). The ONS statistics distinguish between deaths where the 'underlying cause' was respiratory disease from those where COVID-19 is mentioned. The ONS has stated that, in the most recent week for which statistics were available, 33.6% of all deaths mentioned COVID-19. The ONS notes that 44.4% of all deaths mentioned influenza and pneumonia, COVID-19, or both. In comparison, for the five-year average, 19.7% of deaths mentioned influenza and pneumonia. A death can be registered with both COVID-19 and influenza and pneumonia mentioned on the death certificate. Because pneumonia may be a consequence of COVID-19, deaths where both were mentioned have been counted only in the COVID-19 category. The current [guidance](#) on completing medical certificates of death has been updated in light of COVID-19.

It notes *"Information from death certificates is used to measure the relative contributions of different diseases to mortality. Statistical information on deaths **by underlying cause** is important for monitoring the health of the population, designing and evaluating public health interventions, recognising priorities for medical research and*

health services, planning health services, and assessing the effectiveness of those services.” [Emphasis in the original]

The guidance further states:

“COVID-19 is an acceptable direct or underlying cause of death for the purposes of completing the Medical Certificate of Cause of Death...

*Medical practitioners are required to certify causes of death “to the best of their knowledge and belief”. Without diagnostic proof, if appropriate and to avoid delay, medical practitioners can circle ‘2’ in the MCCD (“information from post-mortem may be available later”) or tick Box B on the reverse of the MCCD for ante-mortem investigations. For example, if before death the patient had symptoms typical of COVID19 infection, but the test result has not been received, it would be satisfactory to give ‘COVID-19’ as the cause of death, tick Box B and then share the test result when it becomes available. **In the circumstances of there being no swab, it is satisfactory to apply clinical judgement...***

*You are asked to start with the immediate, direct cause of death on line 1a, then to go back through the sequence of events or conditions that led to death on subsequent lines, until you reach the one that started the fatal sequence. If the certificate has been completed properly, the condition on the lowest completed line of part I will have caused all of the conditions on the lines above it. This initiating condition, on the lowest line of part I will usually be selected as the **underlying cause of death, following the ICD coding rules. WHO defines the underlying cause of death as “a) the disease or injury which initiated the train of morbid events leading directly to death, or b) the circumstances of the accident or violence which produced the fatal injury”.** From a public health point of view, preventing this first disease or injury will result in the greatest health gain....*

You should also enter any other diseases, injuries, conditions, or events that contributed to the death, but were not part of the direct sequence, in part two of the certificate. The conditions mentioned in part two must be known or suspected to have contributed to the death, not merely be other conditions which were present at the time.” [Emphasis in the original]

There is therefore a clear and unsurprising parallel between the circumstances in which COVID-19 will be ‘mentioned’ on a death certificate (and therefore tracked by the ONS) as either being the underlying cause of death or another contributory disease or condition, and the test of contribution in the context of coronial conclusions – whether an event or omission more than minimally, negligibly or trivially contributed to death.

On the face of it, the ONS data may therefore be more accurate than the PHE numbers as a way of distinguishing between deaths from vs. deaths with COVID-19 (as well as also capturing deaths in the community as well). It would perhaps be helpful if the ONS data made the further break down of deaths where COVID-19 was a Part 1 underlying cause, as opposed to a Part 2 contributory condition. However, what cannot currently be known accurately from either set of data is the number of deaths where the deceased was infected but asymptomatic for COVID-19. It appears that hospital patients are only being tested for COVID-19 if they are symptomatic, and there is of course very limited community testing. Of particular concern has been the lack of reporting of deaths in care homes.

Neither set of data is therefore accurate as to the true mortality rate (even if only on a contributory basis) of those who are infected with COVID-19. Further, without an in-depth investigation (for example including post-mortem, which is unlikely to be performed for the vast majority of COVID-19 related deaths) it cannot be known how many deaths would have occurred in any event. I.e. the number of deaths that would not have occurred on the balance of probabilities but for infection of COVID-19 - applying the conventional test of causation in clinical negligence outside of circumstances where the material contribution exception applies. Arguably, that continues to be a key information gap when assessing the requirement for the continuation of the present ‘lockdown’ and one that is unlikely to be filled by either the PHE or ONS statistics, or indeed by such inquests as do take place under the current restrictions on the coronial system.

One final issue is that it is not clear whether the statistics we have would be sufficiently reliable as to mortality rates to satisfy the tests for the use of statistical information as evidence of the cause of death at an inquest. As explained in *R (Chidlow) v HM Senior Coroner for Blackpool and Fylde* [2019] EWHC 581 (Admin), general statistical evidence alone is unlikely to be sufficient, because being a figure in a statistic did not of itself prove causation. In most cases there would be other evidence as to whether the deceased probably would have fallen within the statistical group of survivors or not. Where there was apparently credible additional causation evidence which, if accepted, together with general statistical evidence could properly lead the jury to find on the balance of probabilities that the event or omission more than minimally, negligibly or trivially contributed to the death, it would usually be proper and safe to leave causation to the jury.

PPE PROVISION

Dominic Ruck Keene

One of the totemic issues that has emerged over recent weeks as part of the COVID-19 pandemic is the provision of 'appropriate' and 'sufficient' Personal Protective Equipment ("PPE"), above all to those providing hands-on care to patients in hospital and to residents in care homes.

Leaving aside criminal liability for any breach of Health and Safety Regulations (in particular, the Personal Protective Equipment at Work Regulations 1992), all employers have common law duties towards their employees. The tortious liability of an employer to an employee is a duty, which is personal to the employer, to "*exercise due care and skill to provide a competent staff of men, adequate plant and materials, a proper system of work and effective supervision*": *A(a Child) v MOD* [2003] PIQR P33 at [27] citing *Wilsons and Clyde Coal Co v English* [1938] AC 57 and particularly Lord Wright at p.78 where the duty was stated to be "*to take reasonable care for the safety of his workmen.*"

In *Smith v The National Farmers Union Mutual Insurance Society* [2019] NICA 63, the Court of Appeal in Northern Ireland held at [25] that:

"As we have indicated a feature of the employer's duty of care to his employee is its non-delegable nature. That is an aspect of the special responsibility of an employer to its employee which provides a policy reason for the employer to retain responsibility. As a result the employer can delegate the performance of the duty to others, such as an independent contractor, but not responsibility for its negligent performance. The duty of care is not fulfilled simply by entrusting its performance to another even if reasonable care is taken in selecting that other."

In *Kennedy v Cordia Services LLP* [2016] 1 WLR 597, the Supreme Court noted at [110-112] that:

"...in more recent times it has become generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees. In many circumstances, as in those of the present case, a statutory duty to conduct such an assessment has been imposed. The requirement to carry out such an assessment, whether statutory or not, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees..."

...It follows that the employer's duty is no longer confined to taking such precautions as are commonly taken or, as Lord Dunedin put it, such other precautions as are so obviously wanted that it would be folly in anyone to neglect to provide them. A negligent omission can result from a failure to seek out knowledge of risks which are not in themselves obvious..."

In the present case, Cordia were aware of a history of accidents each year due to their home carers slipping on snow and ice, and they were aware that the consequences of such accidents were potentially serious. Quite apart from the duty to carry out a risk assessment, those circumstances were themselves sufficient to lead an employer taking reasonable care for the safety of its employees to inquire into possible means of reducing that risk."

Each and every NHS Trust and care home has, therefore, a duty to assess the relevant risk to its employees from COVID-19 and to provide adequate materials, including PPE, in order to ensure a safe system and place of work. It should be noted that the test is not one of strict liability, but of the usual tortious duty to take reasonable steps. Nevertheless, as the Supreme Court noted in *Kennedy* in respect of the PPE Regulations, as to whether there had been a breach of the common law duties of an employer:

“The expansion of the statutory duties imposed on employers in the field of health and safety has given rise to a body of knowledge and experience in this field, which, as we explain later in this judgment, creates the context in which the court has to assess an employer’s performance of its common law duty of care.”

Possible issues that might be relevant to any claim where an employee argued that they were not given adequate protection leading to infection with COVID-19 include:

1. The extent to which employers were or ought to have been aware as a result of prior planning for possible pandemics that a very large quantity of specialised PPE would be required across the country.
2. The extent to which employers have been following external guidance from NHS England, Public Health England or indeed the World Health Organisation, and the extent to which it was reasonable for them to rely on such guidance rather than their own individualised risk assessments taking into consideration the local aspects of the general threat from COVID-19 particular to their own place and systems of work.
3. Whether reasonable measures have been taken in recent weeks to acquire, distribute, and manage supplies of PPE.

One potentially difficult area will be the tension between the fact that each NHS Trust (rather than ‘the NHS’ generally) is likely to be seen as the relevant ‘employer’ for the purpose of employment law (and other aspects of tort such as vicarious liability) but might not be deemed to be the relevant (or the only) employer for the purpose of employer’s liability in the context of COVID-19. When it comes to the assessment of risk for PPE and the consequent provision of PPE either pre-pandemic or during the pandemic (i.e. who has had responsibility for assessing and responding to the particular risk of infection from an infectious disease such as COVID-19) there does appear to be an extent to which there has been national level input into what is currently happening within individual NHS trusts. For example, the most recent [detailed revised guidance from Public Health England and NHS England](#) has set out the PPE requirements deemed necessary in healthcare contexts. Further, the distribution of PPE has become a national effort, assisted by the MOD. As noted by the Court of Appeal in *Lane v The Shire Roofing Company* [1995] PIQR 417, 421, the fundamental issue in employer’s liability claims is that they must be considered in *“the context of who is responsible for the overall safety of the men doing the work in question.”*

Finally, it should also be noted that where an employer is a public authority under Article 2 ECHR, the State can be required to take reasonable preventative operational measures to safeguard lives of those within its jurisdiction against real and immediate risks to life. Breaches of that duty can be a result of ‘systemic’ or ‘operational’ failings. In the context of environmental disasters over which States have no control, the obligation of the State to take preventive operational measures comes down to adopting measures to reinforce the State’s capacity to deal with the unexpected and violent nature of natural phenomena in order to reduce their catastrophic impact to a minimum: *M. Özel and Others v Turkey* (Application no 14350/05).

The relevance of Article 2 in the context of COVID-19 potentially lies in two areas in particular:

- (1) in general whether prior to 2020 the State took appropriate measures in light of its actual or constructive knowledge to deal with the potentially catastrophic impact of a pandemic such as COVID-19; and
- (2) specifically whether appropriate planning and procurement was implemented prior to the onset of the pandemic with respect to the provision of PPE to NHS and other ‘frontline’ key workers (see the reference in *Smith v MOD* [2013] UKSC 41 to both the systemic and operational duties potentially applying to the procurement of protective military equipment).

THE CORONAVIRUS ACT 2020: WHEN LEGISLATION GOES VIRAL (PART ONE)

Darragh Coffey

Introduction

At this point, it is almost trite to say that we are living through unprecedented events. The global spread of the coronavirus pandemic poses serious challenges to society. So far, the global death-toll has exceeded 21,000 and life as we know it in the UK has changed dramatically. In response to this crisis the Government has announced drastic measures in order to curb the spread of the virus and to support those who may be affected. Indeed, it seems that Cicero's famous injunction to let the welfare of the people be the highest law has gained a new relevance in the age of COVID-19.

As readers will probably know, a significant plank of the Government's legislative response is the [coronavirus Act 2020](#), which received royal assent on 25 March having been fast-tracked through Parliament. This substantial piece of legislation –which consists of 102 Sections, 29 Schedules and runs to just under 360 pages– is intended to deal with the various challenges that may be posed by the coronavirus epidemic. As a result, its provisions are broad ranging, touching on areas as diverse as powers to disperse gatherings, pensions, sick pay, inquests and investigatory powers to name but a few.

Given the scope of this legislation, it would be folly for me to try and consider it comprehensively in one article. Therefore, this is the first of two articles on this subject. In this article I explore why this legislation was considered necessary and consider some general aspects of the Act. In a second article, I will explore some of the more interesting/controversial aspects of the Coronavirus Act 2020.

Why Legislate?

When the Government first produced an [outline of the legislative proposals](#) before the Bill was introduced to the Commons, at least [one law and policy commentator](#) cautioned against knee-jerk legislation and urged that consideration be given to whether existing powers may already be sufficient to deal with the challenges that might arise. In certain respects, the point is well made. For example, the [Public Health \(Control of Diseases\) Act 1984](#) (as amended) allows for wide ranging regulations and orders to be made for the purpose of preventing, protecting against or controlling the spread of an infection.

However, as alluded to above, the 2020 Act encompasses far broader powers than those in the 1984 Act and appears to create powers of more general rather than specific application. Importantly the 2020 Act also creates a unitary legislative scheme for dealing with the pandemic across all of the nations of the UK or, to use what seems to be a popular political term, 'levels up' the response. An interesting constitutional point that arises from this is that, despite the extraordinary nature of the legislation, the drafting appears to preserve the Sewell convention, whereby most changes that may be made under the Act to any legislation dealing with devolved matters will require the consent of the relevant devolved administration.

Another option for dealing with the crisis without the need for new legislation may have been to use the powers under the [Civil Contingencies Act 2004](#). Under this Act, a senior Minister of the Crown (Prime Minister, Secretary of State or Lord Commissioner of the Treasury) is empowered in certain circumstances –which are likely to be deemed met at present– to make very broad ranging emergency regulations. However, regulations under the 2004 Act must be ratified by Parliament within seven days of being made. Furthermore, such regulations expire after 30 days. Thereafter they must then be renewed and re-ratified. This means that for any power granted under the Civil Contingencies Act 2004 to remain in force for the duration of the crisis, Parliament would have to meet at least every 30 days. In the context of an epidemic, this simply may not be possible. On this basis, the Government appear to have decided that more enduring legislation was necessary.

The Sunset Clause

Turning to the Coronavirus Act 2020 itself, the first point to note is that, while it has more longevity than regulations made under the Civil Contingencies Act, it is still clearly intended as temporary emergency legislation. As will be seen in part two, this legislation makes fundamental changes to a range of areas of law and grants very significant powers to the authorities. However, due to the urgency of the situation the legislation could only receive the most cursory of parliamentary scrutiny before being passed. Ordinarily, legislation making some of the changes proposed would be expected to be subjected to significant scrutiny in both houses of Parliament. In this case the Bill was introduced on Monday and received Royal assent on Wednesday.

In these circumstances it was clearly necessary to place a limit on the duration of most of the Act's provisions. To this end, Section 89 of the Act, creates a sunset clause, under which the majority of the provisions will expire after two years. However, this period may be extended by six months or shortened in accordance with Section 90. In the Bill as drafted, these were the only limitations on the longevity of the Act. In circumstances where such significant legislation would be nodded through Parliament, an unchecked legislative lifespan of two – perhaps up to two and a half– years is a very long time. Particularly, considering the Prime Minister's ambition to 'turn the tide on the disease in 12 weeks'.

Understandably, this raised significant concerns among human rights groups, lawyers and MPs from across the political spectrum. To its credit, the Government was receptive to these concerns and ultimately accepted an amendment, which introduced the requirement that the operation of the Act must be reviewed by Parliament every six months (see Section 98). This appears to strike an appropriate balance between the need to maintain parliamentary oversight of the significant powers created by this Act, and the concerns that Parliament may not be able to operate as normal during the crisis. Indeed, a six month review period appears to be more in line with approaches to such legislation taken in other common law jurisdictions.

Human Rights

Before the Bill was published Barrister, Adam Wagner produced a detailed twitter thread in which he set out his observations on any potential legal response to the coronavirus. In the thread, he very compellingly emphasised the importance of keeping human rights values at the centre of any such response.

An important general point arises in this context. Under Article 15 of the ECHR, in times of war or other emergency threatening the life of the Nation, a Contracting State may derogate from many of its human rights obligations under the Convention. Such a course of action appears to be contemplated by at least six Council of Europe Member States as a result of the coronavirus. In contrast, the UK Government has not yet signalled any such intention. Therefore, any action taken under the Coronavirus Act 2020 must necessarily be compatible with all of UK's ECHR obligations in accordance with the Human Rights Act 1998. In Part 2, I will explore certain aspects of the legislation for which this requirement will be of particular relevance.

In general, the drafters of the legislation demonstrate an acute awareness that any measures adopted under the Act must be proportionate. Indeed, the phrase "necessary and proportionate" appears no fewer than 48 times throughout the Act. Furthermore, the Government has explicitly stated:

The measures in the coronavirus bill are temporary, proportionate to the threat we face, will only be used when strictly necessary and be in place for as long as required to respond to the situation.

To support this aim, Section 88 of the Act creates an 'on/off switch' whereby the operation of any provision of the Act may be suspended and revived by regulations as and when the measures are considered necessary throughout the life of the legislation.

As it stands most of the provisions of the Act have been brought into force as of 25 March. The exceptions to this are provisions relating to: Emergency volunteers; modifications to Mental Health legislation; changes to the powers and duties of local authorities in relation to the provision of care and support; changes in relation to the registration of deaths and still births; and provisions relating to food supply. These provisions will be brought

into force as and when they are deemed necessary. In the next post, I will consider the substantive provisions of the Act and highlight some aspects that are particularly interesting or controversial, or indeed both.

This article also appears on the UK Human Rights Blog.

THE CORONAVIRUS ACT 2020: WHEN LEGISLATION GOES VIRAL (PART TWO)

Darragh Coffey

Note:

In Part One (above), I set out what I considered to be the Government's rationale in enacting the Coronavirus Act 2020 rather than relying on existing legislation. In a piece for *Law Society Gazette* Dr Andrew Blick and Professor Clive Walker have sought to rebut this rationale and argued that the Government should more appropriately have used the Civil Contingencies Act 2004.

Introduction

In [Part One](#), I considered the background to the Coronavirus Act 2020 and some general aspects of the legislation. Here, I focus on some of the substantive provisions of the legislation and briefly explore the role that human rights law has to play in the management of the COVID-19 crisis.

At this point it bears repeating that the UK Government has not derogated from the ECHR under Article 15. Thus, any measures introduced in response to the coronavirus must be compatible with the UK's full human rights obligations under the Convention as transposed into domestic law via the [Human Rights Act 1998](#). Jeremy McBride has produced an [excellent piece](#) on the ECHR Blog, in which he analyses the range of various responses to the COVID-19 crisis through the lens of the Convention obligations. Such an exercise is not possible here due to constraints of space. However, towards the end of this piece I will briefly consider the compatibility of the lockdown restrictions on movement with the UK's ECHR obligations.

Aims of the Legislation

According to the [Explanatory Notes](#) that accompanied the legislation as it proceeded through Parliament, the aims of the Coronavirus Act 2020 are to support the Government's efforts in five broad areas:

1. increasing the available health and social care workforce;
2. managing the deceased with dignity and respect;
3. supporting people;
4. easing the burden on frontline staff; and
5. containing and slowing the spread of the virus;

As I have commented in Part One, the Coronavirus Act 2020 is a substantial piece of legislation. Readers may perhaps be relieved that considerations of space prevent me from engaging in a detailed analysis of each and every effective provision. Rather, I will provide an overview of the substantive measures, focusing in more detail on certain aspects.

Increasing the Available Health and Social Care Workforce

In order to increase the manpower available in the health and social care sectors, Sections 2 to 7 and their associated schedules provide for the emergency temporary registration of various regulated healthcare professionals and social workers for the duration of the emergency. Importantly, sections 11 to 13 of the Act make arrangements to provide indemnity against clinical negligence claims for healthcare professionals assisting in the response to the crisis, who would not otherwise be so indemnified.

Another mechanism by which the legislation seeks to increase the pool of personnel who can assist with the response to the crisis, is by providing for Emergency Volunteering Leave. When Sections 8 and 9 of the Act are brought into force, workers will be entitled to unpaid statutory leave in order to act as Emergency Volunteers in

the health or social care sectors. These Emergency Volunteers may also be compensated for loss of earnings and for travel and subsistence.

Managing the Deceased with Dignity and Respect

The Act also introduces measures to manage the increased number of deaths caused by the pandemic. Temporary changes are made to the procedures for registering deaths and still births (Sections 18 to 21) and temporary arrangements are made in Section 58 and Schedule 28 in respect of the transportation, storage and management of the bodies of the deceased.

Temporary changes are also introduced to coronial law under the legislation. For the purposes of any inquest opened after the coming into force of the legislation (25 March 2020), COVID-19 is not a notifiable disease. This means that a jury inquest is not required to be held if there is reason to suspect that a death was caused by the virus. This measure is eminently sensible when one considers that, at the time of writing there have been over 16,000 deaths as a result of COVID-19.

Supporting People

In order to fulfil the aim of supporting people, the Act introduces measures in respect of statutory sick pay (Sections 39 to 44). Included in these measures is the power to disapply the three day waiting period, so that those who are off work sick will be entitled to statutory sick pay from the first day upon which they are absent. The Act also introduces certain protections in respect of tenancies by effectively increasing the notice period for evictions to three months across the board (Sections 80 to 84). Furthermore, under the Act designated authorities may be granted powers to request information that can be used to avoid or mitigate any potential disruption to the food supply chain (Sections 25 to 29).

Easing the Burden on Frontline Staff

Mental Health Law

Section 10 and its associated schedules make temporary modifications to mental health legislation to reduce the demands placed on medical professionals as a result of various administrative procedures. Ordinarily an application for the compulsory detention of a person under the [Mental Health Act 1983](#) must be supported by the opinion of two doctors. However, when these provisions are brought fully into force, if it is impractical to obtain the advice of two doctors or if this would cause undue delay, the opinion of one doctor will suffice. Other modifications include the extension of various periods for which a person may be detained or held on remand under the Mental Health Act; and amendments to procedures for the administration of medication to a detained patient without their consent. Clearly, if brought into force, these changes would represent dilutions of important safeguards that are currently in place in respect of potentially vulnerable individuals. The effects of such changes will require careful monitoring in order to ensure that the interests of vulnerable patients are protected.

Adult Social Care

Sections 14 to 17 of the Act make significant changes in respect of the adult social care regime. The changes essentially suspend the duty placed on local authorities to make an assessment in respect of an adult who may have needs for care and support, or who is receiving NHS Continuing Healthcare but is no longer eligible for such. Furthermore, the general duty to meet the eligible needs of certain adults becomes a power, with a duty only arising if a failure to do so would breach the Human Rights Act. As [Mary-Rachel McCabe and Jamie Burton](#) explain these changes are significant and may have very serious impacts on adults with social care needs.

Oversight of Investigatory Powers

Section 22 and 23 of the Act allow for temporary changes to be made to the [Investigatory Powers Act 2016](#). These changes relate to the appointment of Judicial Commissioners, who are required to carry out certain oversight functions under the 2016 Act; and to certain time-limits in respect of warrants issued pursuant to that legislation –including the ex-post facto ‘urgent-warrant’ process. Section 24 of the Act allows for regulations to

be made extending the time period for which biometric material, such as fingerprints and DNA profiles may be held by the police. Each of these changes represents an erosion – however slight – of the safeguards placed on important and potentially intrusive investigatory powers. While it is of course important that police and other resources are appropriately deployed during the crisis, we should not downplay the trade-offs that may be needed to facilitate this.

Containing and Slowing the Spread

Perhaps the suite of measures under the Act that may have the greatest impact across wider society are those aimed at containing and slowing the spread of the virus. These include: powers in respect of the provision of education, training and child-care (sections 37 and 38 and schedules 16 and 17); powers to suspend port operations (Section 50 and Schedule 20); allowing for the use of video and audio technology by courts and tribunals to facilitate remote hearings (Section 53 to 57); and the postponement of upcoming elections (Sections 59 to 70).

Section 51 and Schedule 21 of the Act contain certain coercive powers in respect of potentially infectious persons. Under these provisions, Public Health Officers are empowered to require a potentially infectious person to submit to screening and assessment and to impose certain restrictions and requirements on such persons. Constables and Immigration Officers are also empowered to direct or remove a person to a suitable place to undergo screening and to hold them there for a period of time in order to hand them over to a Public Health Officer.

In respect of more generally applicable powers, Section 52 and Schedule 22 create powers to issue directions in relation to events, gatherings and premises. Under these provisions, events and gatherings may be prohibited and orders can be made in respect of specified premises imposing prohibitions, requirements or restrictions in relation to the entry into, departure from, or location of persons within them. These are clearly very broad powers with the potential to impinge significantly on the freedom of movement of large sections of the population.

Despite these broad powers in the Coronavirus Act 2020, the current lockdown restrictions – contained in the [Health Protection \(Coronavirus, Restriction\) \(England\) Regulations 2020](#) and their [Scottish](#), [Welsh](#) and [Northern Irish](#) counterparts – were not made under that Act. Rather they were made under the [Public Health \(Control of Diseases\) Act 1984](#). There has been significant debate throughout the blogosphere – [including on the UK Human Rights Blog](#) – in relation to the [lawfulness](#) or [otherwise](#) of these regulations. The arguments have focused on the question of whether the regulations are ultra vires the 1984 Act. As my focus here is the Coronavirus Act 2020, I do not propose to enter into that particular fray. But it is perhaps worth examining briefly the compatibility of the lockdown restrictions with the Human Rights Act 1998.

The UK has not signed up to the Fourth Protocol to the ECHR, Article 2 of which guarantees the right to freedom of movement. The compatibility of the UK's lockdown provisions with the State's ECHR obligations, therefore, falls to be judged by reference to Article 5 of the Convention. Importantly, Article 5 is concerned with *deprivations* of liberty rather than 'mere restrictions.' As the Grand Chamber has pointed out in [De Tommaso v. Italy](#), when deciding whether a measure constitutes a deprivation or merely a restriction on liberty:

"...account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance." [80]

Importantly, this assessment may be made by reference to the context and circumstances in which the measures are imposed (*De Tommaso* at [82]). Thus, when considering whether a given set of measures constitute a deprivation of liberty, a holistic view must be taken of the situation in which those measures are imposed, and of their degree and intensity.

Applying this to the present situation, the lockdown measures have been imposed in order to prevent the spread of a global pandemic and to protect life in accordance with the State's positive obligations under Article 2 of the

Convention. Rather than confining people at home, the regulations prohibit individuals from leaving their homes without a reasonable excuse. A non-exhaustive list of examples is included in the regulations making it clear that activities such as exercise, shopping for essentials, and travelling to work – at least for some people – are reasonable excuses. The restrictions are to be reviewed at three week intervals and the regulations contain no temporal curfew or strict geographic limit on the distance one can travel from their home if they have a ‘reasonable excuse’. It is, therefore, my preliminary view that the regulations as currently drafted would be considered a restriction of liberty rather than a deprivation and are likely compatible with the UK’s obligations under the ECHR.

While the regulations as drafted may be Human Rights Act compliant, a discrete question also arises with respect to the manner in which the restrictions may come to be policed. For the most part the enforcement of the regulations by police so far appears to be relatively light-touch. It would seem that the authorities are doing their best properly and appropriately to impose unfamiliar regulations in a difficult and unprecedented situation. That said, there has been at least one case in which the nature, source and extent of the authorities’ powers to enforce the lockdown have been badly misunderstood. Furthermore, there appear to be some reports of perhaps overzealous individual officers misconstruing the extent of the lockdown. These cases appear to be outliers – though perhaps amplified by social media. However, if such situations are not monitored and corrected, injustices may result. As we continue through the lockdown, vigilance is needed to ensure that the boundaries of what the authorities are empowered to do are not overstepped, and that powers that were granted for valid and worthy reasons are not used arbitrarily or improperly in the confusion of a national crisis.

Conclusion

The spread of coronavirus in the UK has created an emergency the likes of which have not been seen in this author’s lifetime. Such circumstances pose difficult questions for a liberal, democratic society. From a human rights perspective the Government has positive obligations under Article 2 of the ECHR to put measures in place to protect the lives of those in the jurisdiction against any risks of which the State is aware or reasonably ought to be. Clearly such obligations are engaged by the current crisis. Furthermore, the scientific advice upon which the Government relies in designing its response to the COVID-19 crisis and seeking to fulfil these positive obligations, is that drastic and unprecedented measures of social distancing, quarantine and isolation are required to preserve the welfare of the public at large.

This response would appear to be in line with that of other democratic states and indeed less draconian than some. But the fact remains that in response to this emergency, the State’s powers to impinge upon the lives of its citizens have increased significantly. Furthermore, certain safeguards and checks and balances that aim to preserve our fundamental rights and the rule of law have been diluted. Emergencies can be dangerous times for things such as these. In the words of the late Adrian Hardiman, a former Justice of the Irish Supreme Court:

“The cry of emergency is an intoxicating one, producing an exhilarating freedom from the need to consider the rights of others and productive of the desire to repeat it again and again” (Dellway Investments and Others v NAMA and Others [2011] 4 IR 1 at 289).

It is clearly incumbent on the population to support legitimate efforts to control the virus and to deal with the crisis it has created. However, it is also important that a sense of vigilance is maintained. The legitimate scrutiny of the Government’s emergency actions and any encroachments into the lives of the population must continue throughout the crisis. Such scrutiny will ensure that those actions remain lawful and where they intrude on various rights, that they are limited to what is necessary and proportionate for dealing with the threat that we face. In our current circumstances, if we wish to protect the welfare of the public while resisting the intoxicating cry of emergency, we must seek to strike the difficult balance between compliance and vigilance.

This article also appears on the UK Human Rights Blog.

ORDER SEEKING POSSESSION OF A HOSPITAL BED DURING THE COVID-19 PANDEMIC

Rajkiran Barhey

University College London Hospitals NHS Foundation Trust v MB (Rev 1) [2020] EWHC 882 (QB)

The Claimant, the NHS Trust, sought possession from the Defendant, a patient called MB, of a bedroom on a ward of the hospital. The ward was intended for those requiring acute neuropsychiatry care for up to 14 days (sometimes up to 28 days).

The Claimant argued that the possession claim was urgent as the bed was needed for other patients due to the COVID-19 pandemic and because, in any event, MB was at increased risk of contracting COVID-19 and therefore staying on the ward was contrary to her interests. The Claimant argued that MB could be discharged to specially adapted accommodation with a care package provided by the local authority. MB's case was that she wished to be discharged but had concerns about the adequacy of the care package offered by the Claimant.

Background

MB was originally admitted to hospital on 18 February 2019 with a functional neurological disorder manifesting as limb weakness, tremors and speech disturbance. She also suffered from chronic fatigue, migraine, generalised pain, PTSD, disrupted attachment, OCD, possible borderline personality disorder and Asperger's syndrome. She required help with personal care. During her stay in hospital, her behaviour had been exceptionally challenging and aggressive, limiting her progress.

Discussions regarding discharge of MB and a care package had been ongoing for over a year. However MB had declined the care packages offered to her, primarily on the basis that none of the packages included 24 hour care. A 24 hour package was eventually agreed followed by an assessment to determine ongoing need, but this was rejected by MB as she wanted a guarantee of 24 hour care for at least 1 year. At the time of the hearing, she also required some adaptations to be made to the accommodation into which she was to be discharged. MB argued that if her requirements were not met, she would be at risk of self-harm or suicide.

Some of the adaptations had been made, but they were not all deemed to be clinically necessary. Clinical evidence was also presented by the Trust as to MB's mental state, namely her risk of self-harm and suicide. The evidence suggested that MB had, in the past, threatened deliberate self-harm when her needs were not met and that there was no mental health reason to keep her in hospital.

Furthermore, the judge proceeded on the basis that MB had capacity.

Legal framework

The legal framework was set out by the judge at [37] to [39]. He noted that ordinarily the Trust would be entitled to seek an order for possession pursuant to CPR Part 55 but, due to the current general stay on possession claims effected by CPR 51Z PD this was not possible. However, as paragraph 3 of the PD notes, this stay does not affect claims for injunctions against trespassers (i.e. MB).

It was noted that the effect of the injunction would be tantamount to final relief, such that it should not be granted if there was clearly no defence to the action. It was agreed that it would be wrong to grant the injunction if there was an arguable case that the Hospital's decision to cease to provide in-patient care had been taken in breach of its public law obligations.

At [51] the judge also noted: *"Patients have no right to occupy beds or rooms in hospitals except with the hospital's permission. A hospital is entitled as a matter of private law to withdraw that permission. In deciding whether to withdraw permission, the hospital is entitled and indeed obliged to balance the needs of the patient currently in occupation against the needs of others who it anticipates may require the bed or room in question. Unless its decision can be stigmatised as unlawful as a matter of public law, there is no basis for the court to deny the hospital's proprietary claim to restrain the patient from trespassing on its property. Where what is sought is an interim injunction which would effectively determine the claim, it is necessary for the court to be satisfied that*

there is clearly no public law defence to the claim; and the balance of convenience and other discretionary factors must also be considered."

Judgment

MB argued that the judge should adjourn and allow her to obtain her own expert evidence. This was refused for 3 reasons:

1. In judicial review proceedings challenging a decision by a hospital not to provide in-patient care to a patient on clinical grounds, it would not ordinarily be open to the Claimant to adduce expert evidence impugning the clinical basis of the decision. That would go beyond the limited circumstances in which expert evidence was permissible in JR proceedings. Although these were not JR proceedings, MB sought to raise collateral challenges to the Hospital's decision to remove her by way of public law defences and so it was appropriate to apply the same principles.
2. The clinicians' clear view was that MB did not require hospital care and could safely be discharged. Clinicians could not be compelled to provide treatment which they considered to be contrary to their clinical judgment and it would be wrong to entertain evidence with a view to requiring them to do so.
3. Thirdly, and practically, given the COVID-19 pandemic, it was highly unlikely that MB would be likely to obtain independent expert evidence in a reasonable timeframe. The practical effect of the adjournment would be to delay MB's discharge at the exact time her bed was needed, due to the pandemic, thus defeating the purpose of the application. The judge acknowledged that the expert evidence in front of him was not compliant with CPR Part 35 as the doctors were employed by the Trust, but his views represented those of an impressive MDT and were supported by two further clinical witnesses.

As to the risk to MB of discharge, the judge found that there was no dispute that MB's physical needs could be met satisfactorily by the care package proposed. He also found that MB frequently exhibits abusive and challenging behaviour to those providing care for her; that Camden Council had done a great deal to meet MB's concerns but that given her past behaviour it was unlikely they would ever be met; that MB used threats of self-harm and suicide to persuade others to meet her needs but there was no evidence of her actually resorting to self-harm; that the risk of self-harm or suicide to MB was low if discharged; that MB was likely to suffer extreme distress if discharged but it could be managed with the proposed care package.

The judge also considered MB's concerns regarding the care package in turn and concluded that each concern raised could not be met reasonably by Camden and that they had already gone to significant efforts to meet MB's concerns.

The judge then considered whether it was clear that MB had no public law defence to the claim. MB did not argue that the decision to require MB to leave was irrational in the *Wednesbury* sense.

As to Article 3 ECHR, MB's submissions were summarised as follows at [53]: *"if it can be established that, unless her concerns are addressed, discharge will precipitate suicide, self-harm or extreme distress rising to the level of severity necessary to qualify as inhuman or degrading treatment within the meaning of Article 3 ECHR, the Hospital is legally precluded from discharging her until those concerns are met, even if her concerns are, from an objective clinical point of view, unreasonable and unwarranted."*

The judge disagreed, finding that, given the unfortunate nature of MB's condition, where she suffered extreme distress frequently, this would effectively allow MB to veto any action with which she did not agree. Furthermore, where a hospital decides, rationally and in accordance with a lawful policy, to allocate finite resources to patient A over patient B, they are not precluded from doing so by Article 3.

The hospital had made a decision to discontinue in-patient care. This decision engaged the State's positive obligations under Article 3, which were to take all *reasonable* steps to avoid suffering. In the present case, reasonable steps had clearly been taken.

In any event, even if the question were simply whether discharge in current circumstances would lead to suffering rising to the level of severity required to engage Article 3 ECHR, the clinical evidence in the present case did not suggest that such suffering was likely to occur. MB's risk of self-harm or suicide was moderate to low and the provision of a 24 hour care package would be an appropriate safeguard.

As to Article 8, the interference with MB's private and family life was clearly justified in order to protect the rights of others. MB's arguments as to discrimination, based on Article 14 ECHR and the Equality Act, also failed.

The balance of convenience was clearly in the Hospital's favour. MB had access to care if her health deteriorated. If the order was not granted, the Hospital would lose access to a bed which may be needed, and staff would likely spend a lot of time caring for MB when such inpatient care was not necessary.

Chamberlain J granted an order requiring MB to leave the ward by 12pm the next day.

Simon Sinnatt from 1COR Brighton acted for the Claimant Trust in this case. He did not contribute to this article.

CORONAVIRUS, CARE HOMES AND BEST INTERESTS

Rajkiran Barhey

BP v Surrey CC [2020] EWCOP 17

This was an urgent application on behalf of BP, brought by his daughter and litigation friend, FP. BP is 83, suffers from Alzheimer's disease and is deaf but can communicate through a 'communication board.' FP brought an application seeking BP's discharge from his care home and that BP be returned home with an appropriate care package.

The application arose after BP's care home suspended all visits. FP argued that this was an infringement of BP's Article 5 and 8 ECHR rights. BP was assessed in July 2019 as lacking capacity to make decisions about his accommodation and care needs as a result of his cognitive impairment but nevertheless he understood most of the relevant information regarding these decisions.

Hayden J considered in detail the relevant ECHR obligations and BP's rights under the UN Convention on the Rights of People with Disabilities. He particularly made some rather notable comments regarding derogation from the ECHR which are considered in more detail on the [EJIL: Talk Blog](#) for those who are interested in this area.

Hayden J ultimately concluded that it was not realistic to discharge BP home to live with his daughter, FP. A plan was made to teach BP to use Skype and potentially instant messaging. Furthermore, the family could stand near BP's window and wave to him and use the communication board.

Scott Storey from 1COR Brighton appeared in this case. He did not contribute to this article.

CORONERS' INVESTIGATIONS, INQUESTS AND COVID-19

Richard Mumford and Caroline Cross

The coronial jurisdiction has been particularly affected by the COVID-19 pandemic. Death referrals to coroners are up significantly throughout the county, as much as fivefold in some jurisdictions. It therefore comes as no surprise that the Chief Coroner has rapidly brought out further guidance to assist coroners in this unprecedented situation.

On 26 March 2020 the Chief Coroner published Guidance Note 34 for Coroners on COVID-19 ("GN34") which can be found [here](#). He also brought out Guidance Note 35 (Hearings during the Pandemic) on 27 March and

Guidance Note 36 (Summary of the Coronavirus Act 2020) on 30 March 2020. The Guidance Notes address many of the issues relating to the impact of COVID-19 on the coronial service. We set out below some answers to questions those involved with the coronial system may currently have in mind, taken from the Guidance Notes and other sources ("Guidance Note" has been abbreviated to "GN" - GN34 [No.]" refers to paragraph numbers in the Guidance Note).

1) Are Coroners' Courts conducting hearings at the moment?

GN34 [10] provides that *"no physical hearing should take place unless it is urgent and essential business and that it is safe for those involved for the hearing to take place. A particular concern is to ensure social distancing in court and in the court building."*

It is also noted that *"All hearings that can possibly take place remotely (via whatever means) should do so, and other hearings should continue only if suitable arrangements can be made to ensure distancing although the Chief Coroner accepts that in many jurisdictions this may be difficult. Hearings which must continue should be those considered essential business"*

2) Can Coroners' inquests and/or PIRHs be conducted remotely?

The Coroners (Inquests) Rules 2013 rule 11(3) provides:

"An inquest hearing and any pre-inquest hearing must be held in public unless paragraph (4) or (5) applies."

Rule 11(4) provides an exception for hearings being in public where interests of national security are engaged. Rule 11(5) provides an exception for pre-inquest review hearings being in public where the interests of justice or of national security are engaged. There has been no declaration to date that holding PIRHs privately would be in the interests of justice.

GN34 [10] sets out practical steps to be considered and includes the following observations:

"All hearings that can possibly take place remotely (via whatever means) should do so, and other hearings should continue only if suitable arrangements can be made to ensure distancing although the Chief Coroner accepts that in many jurisdictions this may be difficult. Hearings which must continue should be those considered essential business."

Coroners are reminded that such hearings must in law take place in public and therefore coroners should conduct telephone hearings from a court, not their homes or their office. In the light of the statement of the Prime Minister on March 23, 2020 as to gatherings and travel only where absolutely necessary, hearings taking place in public may mean they take place where only a member of the immediate family is present and with a representative of the press being able to be present."

Given the need for coroners to travel to hold telephone hearings from a court (note it does not have to be a coroners court, given that the court may be shut), coroners are considered to be conducting "essential business".

Some pre-inquest review hearings can be done on paper. Coroners are sending out agendas and asking for responses and submissions.

In response to what must have been a myriad of questions on virtual hearings, GN35 [2]-[6] stated:

"2. Various questions have been asked about 'virtual hearings'...

4. In the civil jurisdiction it is possible for certain hearings to take place in private or without the need for a judge to be physically present. This has been the case for some time and utilises the flexibility already provided for in the CPR. It is not the result of the emergency legislation. It does not apply to the coroner jurisdiction.

5. *Why must the hearing happen with the coroner physically present? Simply put absent a coroner, it is not a court. Although all parties who need to be present may do so by phone or any other link, the Chief Coroner's guidance is that, as the law currently stands, a coroner should be present at the hearing.*

6. *Can the coroner be present by Skype or phone? As the legislative provisions currently stand, the answer is no."*

3) Are post-mortems still taking place?

GN34 [24]-[29] discusses post-mortem examination practice in general and the current pressures on the system, concluding that *"The availability or lack of availability of post-mortem examination facilities and pathologists will be a factor for coroners to consider in deciding whether to order an examination (or a particular type of examination) in each case. Coroners may need to consider partial or external examinations by pathologists as well as non-invasive examinations, or no examination at all. Cases of particular complexity and sensitivity may need to be prioritised."* However, given the emergency situation, it may be that post mortem examinations are not possible, either because of infection risk grounds or capacity problems ([23](v)). In such a scenario, coroners are invited to consider other relevant medical and other evidence that may enable a conclusion to be reached – see [23](vii-viii).

4) Does suspicion of COVID-19 as a cause of death mean that the death must be reported to a Coroner?

Not necessarily. GN34 [18] provides:

"COVID-19 is an acceptable direct or underlying cause of death for the purposes of completing the Medical Certificate of Cause of Death (MCCD);

COVID-19 as cause of death (or contributory cause) is not a reason on its own to refer a death to a coroner under the CJA 2009;

That COVID-19 is now a notifiable disease under the Health Protection (Notification) Regulations 2010 does not mean referral to a coroner is required by virtue of its notifiable status (the notification is to Public Health England), and there will often be no reason for deaths caused by this disease to be referred to a coroner"

GN34 [19]-[20] continues:

"19 To restate: COVID-19 is a naturally occurring disease and therefore is capable of being a natural cause of death. There may of course be additional factors around the death which mean a report of death to the coroner is necessary – for example where the cause is not clear, or where there are other relevant factors. This is set out in the Notification of Death Regulations 2019. There may also be cases where an otherwise natural causes death could be considered unnatural.

20. The aim of the system should be that every death from COVID-19 which does not in law require referral to the coroner should be dealt with via the MCCD process. On this matter the Chief Coroner and the National Medical Examiner are in full agreement."

5) How long will hearings be adjourned for?

The Guidance (which refers to Chief Coroner [COVID-19 Note #3](#), circulated on 19 March 2020 but partially overtaken by events) states at [10] that it is likely that the coroner will hold some inquests (non-contentious Rule 23 hearings) over the coming months.

Any jury inquests that are due to start between 31 March and Friday 28 August of any significant length should be adjourned. Cases that are scheduled for 1 September onwards should generally remain in the list. [COVID-19 note #3, page 2]

No new jury trials should take place [according to the HMCTS, which overtakes the COVID-19 note #3, page 2]

Likewise any long or complex inquests not involving a jury, which require a large number of witnesses to attend in person, should be reviewed and may need to be adjourned. [COVID-19 note #3, page 2].

COVID-19 note #3 says that ongoing inquests, including jury inquests, should not automatically be abandoned, and less complex inquests and PIRHs listed to start between now and 31 March should generally proceed. It is unclear whether this has been overtaken by GN34, but in any event it is presumed that this would only be the case if:

- All relevant witnesses are able to attend remotely;
- All relevant witness are available (which they may not be, if they are medical staff, key workers or are suffering from COVID).
- The PIRH cannot be done on paper (see above)

It is advisable to check with the coroners' court as to whether the inquest is proceeding or not.

6) Will juries be required to sit for inquests involving COVID-19?

Not as a matter of course.

The Coroners and Justice Act 2009 ("CJA 2009") section 7 provides that a jury inquest is triggered where the senior coroner has reason to suspect (amongst other things) "*that the death was caused by a notifiable accident, poisoning or disease.*"

On 6/3/2020 COVID-19 was designated a notifiable disease under the Health Protection (Notification) Regulations 2010 and would therefore in principle have triggered jury inquests in cases where the death was reported to the Coroner.

However, section 30 of the Coronavirus Act 2020 (which came into force on 25 March 2020) provides:

"30 Suspension of requirement to hold inquest with jury: England and Wales

(1) For the purposes of section 7(2)(c) of the Coroners and Justice Act 2009 (requirement for inquest to be held with jury if senior coroner has reason to suspect death was caused by notifiable disease etc), COVID-19 is not a notifiable disease.

(2) This section applies to an inquest that is opened while this section is in force (regardless of the date of the death)."

See also the Explanatory Notes to the 2020 at p13 [67]-[70] and p42 [315]-[318] which can be found [here](#).

It is important to note that the Coronavirus Act 2020 is not retrospective (GN36, page 3). Therefore, where the person died before 25 March 2020 and their inquest was opened before that date, there will need to be a jury, but not if the inquest was opened on 25 March or thereafter.

There may, however, be circumstances that do trigger the requirement for an inquest to be held with a jury, such as where the death occurs in custody and the deceased, whilst suffering from COVID-19, dies an unnatural death.

7) What happens to outstanding Prevention of Future Death reports?

GN34 [10] invites coroners to recognise the primary clinical commitments of medical professionals. As far as responses to existing PFD reports are concerned, it is suggested that *“Coroners may wish to proactively review outstanding PFD responses and write to some recipients, as they see appropriate, inviting an extension. However, there should be no blanket policy of extension for all PFD reports – many recipient organisations, individuals or businesses have nothing to do with the COVID-19 response and are continuing to work in as normal a way as possible.”*

8) Can additional coroners be appointed to deal with any increased number of cases?

GN34 [11]-[15] sets out options for the appointment of additional assistant coroners, including re-appointment of retired assistants as well as new appointments (which may not be subject to open competition). GN34 [14] promises an update to senior coroners and local authorities in relation to *“a number of avenues”* being pursued *“to widen the pool of assistant coroners”*.

9) How is COVID-19 likely to be recorded in the cause of death?

GN34 [19] states that *“COVID-19 is a naturally occurring disease and therefore is capable of being a natural cause of death.”* Therefore, where an inquest is held and the cause of death is found to be COVID-19, box 4 on the record of inquest is likely to read *“natural causes”* (see the Record of an Inquest form attached to the [Chief Coroner’s Guidance Note No. 17](#)).

10) What happens to non-COVID-19 deaths?

At present, deaths that are referred to the coroner are going through the usual processes, which can include investigation and inquests. However, coroners and coroners’ officers are under severe pressures due to COVID-19 related deaths, their own illness or self-isolation, or their own care commitments. As such there are likely to be long delays, breaching the Chief Coroner’s 12 month target for completing an inquest. This is recognised by the Chief Coroner [10].

11) What happens if there is a death in prison or otherwise in state detention?

Under s.1 CJA 2009 coroners are required to open an inquest into deaths in prison or otherwise in state detention, even if it is a natural death. Following *R (Tainton) v HM Senior Coroner for Preston and West Lancashire* [2016] EWHC 1396 (Admin) there is no need for a jury when the death is from natural causes. It will be necessary for the coroner to open an investigation but delay the inquest until the pandemic has passed ([38]-[41] and [23](ix)).

The Chief Coroner continues to keep these issues under constant review in a significantly altered –and rapidly changing – legal landscape. It would therefore be helpful to keep a close eye on the Chief Coroner’s Guidance, Advice and Lawsheets website (<https://www.judiciary.uk/related-offices-and-bodies/office-chief-coroner/guidance-law-sheets/coroners-guidance/>) for further updates.

A TRIBUTE TO SIR JOHN LAWS

Matthew Flinn

As we in the legal profession struggle and strive to keep pace with all the legal developments and practical guidance being issued in response to Covid-19, it is vital not to lose sight of the tragic human cost it is exacting across the world. Families from all walks of life, from all parts of our community and all across the country are grieving the loss of loved ones. Recently, that includes the family of Sir John Laws.

Born on 10 May 1945 to parents who were both doctors, Sir John Grant McKenzie Laws studied at Exeter College, Oxford, before pursuing a career at the bar. After being appointed as a judge of the High Court in 1992, he served on the Court of Appeal between 1999 and his retirement from the bench in 2016.

Sir John was, quite simply, a jurist of uncommon ability, who left an indelible mark on the common law. He is rightly known for his contribution to the development and elucidation of the principles of constitutional and administrative law, through his judgments in now-famous cases such as *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin). He also had an enviable ability to capture profound insights with both economy and flare. Contributing to the Cambridge Law Journal in 2012, he wrote:

“Without democracy, law is the puppet of tyrants while, without law, democracy is mob rule.”

Another of his celebrated judgments, this time in a medical context, is *R v Cambridge Health Authority, ex parte B (A Minor)* (1995) 25 BMLR 5. In that case, patient “B” was a ten-year-old girl who had suffered a relapse of acute myeloid leukaemia. A further 2-stage course of treatment had been proposed, but the chances of success at each stage were less than 20%, and it was considered to be “high risk” and “experimental” by the clinicians involved in her care. The cost of the treatment would be £15,000 for the first stage of chemotherapy, and if that was successful, a further £60,000 for a bone marrow transplant. The Health Authority refused to fund the treatment, without which the young patient had 6 - 8 weeks left to live.

When B’s father brought judicial review proceedings to challenge the Health Authority’s decision, Laws J found in his favour. He identified various errors in the Health Authority’s decision, but most memorably, he held that *“where the question is whether the life of a 10 year old child might be saved by however slim a chance, the responsible authority... must do more than toll the bell of tight resources... it must explain the priorities that have led it to decline to fund the treatment”*.

This stemmed from an analysis in which B’s right to life, as protected under Article 2 of the European Convention on Human Rights, assumed central importance. Laws J held that where that right was to be interfered with in such a profound way, there had to be a clear justification on substantial public interest grounds:

“...certain rights, broadly those occupying a central place in the ECHR and obviously including the right to life, are not to be perceived merely as moral or political aspirations nor as enjoying a legal status only upon the international plane of this country’s Convention obligations. They are to be vindicated as sharing with other principles the substance of the English common law.”

This was of course before the Human Rights Act 1998, and so was in some respects ahead of its time. Indeed, his decision was overturned the very same day by the Court of Appeal. However, his bold judgment, in which he eloquently articulated a clear and principled basis for a decision that was clearly motivated by a strong sense of compassion, showed that at least in a human sense, even when he was wrong, he was right.

We are grateful for his immense contribution. He will be missed, but long celebrated, long cited and studied, and long remembered.

Note from the Editor: The Twitter account @CrimeGirl has been tweeting a list remembering solicitors, barristers and other professionals from the justice system who have lost their lives to COVID-19.

APPLICATION FOR ADJOURNMENT DUE TO COVID-19

Rajkiran Barhey

Re One Blackfriars Ltd (In Liquidation) [2020] EWHC 845 (Ch)

At a pre-trial review on 1 April 2020, the joint liquidators of One Blackfriars Ltd applied to adjourn a 5-week trial which was due to start on 8 June 2020. The Applicants argued that the adjournment was necessary due to the restrictions caused by the coronavirus pandemic.

The trial was due to involve 4 live witnesses and 13 expert witnesses. At the outset, it was noted that the earliest that the trial could be rescheduled for was early 2021. Furthermore, the Respondents did not agree that the adjournment was necessary.

The submissions

The submissions were best summarised by the judge at [11] to [12]. The Applicant submitted that:

“a. To proceed with the trial would be inconsistent with the Prime Minister's instruction to stay at home except for very limited purposes, issued on 23 March 2020, and more commonly referred to as the 'Lockdown'.

b. The trial, he submitted, cannot proceed without exposing participants and others working behind the scenes to an unacceptable risk to their health and safety.

c. The technological challenge posed by a five-week trial was too great. Such technology, as exists, he said, was untested.

d. There is a real risk of unfairness or potential unfairness in conducting a remote trial of this claim.”

In response, the Respondent argued that:

“a. Far from being inconsistent with Government instructions, to proceed with the trial would be fully in accordance with both the primary legislation enacted in response to the COVID crisis and specific guidance given to the civil courts, both of which make clear that the appropriate response is to proceed with as many hearings as possible using video and remote technology.

b. A properly arranged remote trial could proceed without endangering the safety of the individual participants or the public.

c. The technology to conduct a fully remote trial is already available and has been successfully deployed already in some cases.

d. Whilst a remote trial will present challenges to all involved, it would not lead to unfairness.

e. The application was in any event premature because the parties have not yet had an opportunity to explore all of the remote technology options for a trial which, after all, is not scheduled to take place for another ten weeks.”

Judgment

As to the Applicants' first argument, that to proceed with the trial would be inconsistent with government advice regarding the lockdown, the judge did not agree with the Applicants. He agreed with the Respondents that the tenor of the Coronavirus Act and the Coronavirus Regulations were that: *“the legislature is sending a very clear message that it expects the courts to continue to function so far as they are able to do safely by means of the increased use of technology to facilitate remote trials.”* [23].

He also referred to the message from the Lord Chief Justice to the judges of the Civil and Family Courts, the Remote Hearing Protocol, the further message from the Lord Chief Justice regarding court arrangements, Practice Direction 51Y and a decision of Teare J in *National Bank of Kazakhstan and Others v Bank of New York Mellon and Others* dated 19 March 2020. He concluded at [37] that:

“If a remote trial is ordered pursuant to Remote Hearings Protocol, then it seems to me that the Coronavirus Regulations permit, for example, a witness to travel to a solicitors' office or to any place equipped with a high-quality video link to give evidence, or for counsel to do the same thing to make submissions. The Coronavirus Regulations would also, in my judgment, permit an employee of a remote trial service provider to travel to any location (including a witness' home) to assist with the set-up and oversight of the operation of a remote trial technology.”

As to the issue of safety, the judge noted that the pandemic was a fast-moving situation and much may change between the date of the judgment and that of trial, such that an adjournment was not yet justified. As to the risk that a remote hearing might pose to those participating who could be classed as vulnerable or had caring responsibilities, the judge noted that no evidence had been presented of any particular difficulties which participants might face and the parties had not yet ascertained whether those difficulties could be mitigated. In so far as difficulties existed, the judge expected the parties to co-operate to try and resolve these and propose solutions. Finally the judge noted that some aspects of preparation could be safely completed in the run-up to the trial which would need to be completed regardless of whether the trial was adjourned e.g. exchange of expert memoranda and agreeing the trial bundle.

As to the technological challenge, the judge noted that two trials had taken place since 16 March 2020. He concluded at [50] to [51] that:

"I am not satisfied, however, that the technological challenges which no doubt will be presented are so great as to make it appropriate to adjourn now. In my judgment, co-operation and planning is essential if a remote trial in this case is going to be possible, and that is why I have ordered the parties to co-operate in seeking potential remote trial platforms and document handling systems. In light of the comments by Birss J cited above I would expect any proposed system to subject to robust testing from as many of the locations from which participants are likely to be giving evidence (or making submissions) not only to ensure adequate video and audio quality but to ensure that documents can be displayed quickly. In particular, careful attention must be paid to the Internet bandwidth available at the locations from which witnesses intend to give evidence...my current view is that it may well be preferable for witnesses to travel to a few locations as close as possible to their home, such as solicitors' offices or other premises, with dedicated servers and IT staff on hand, rather than to dial in from home without any assistance. That also will alleviate the anxiety that many people suffer from, including judges, when it comes to the moment of being dialled into proceedings and to being interrupted in the course of the proceedings by unexpected household events."

As to fairness, the judge found that the challenges of a remote hearing would affect both sides equally, as they were equally well-resourced sophisticated parties.

Finally, as to the overriding objective, the judge noted that the litigation had been hanging over the Respondents' heads since 2011, and it would also not be in the Applicants' interests to delay matters.

Furthermore at paragraphs [56] to [57] he noted, *"I also take account of the fact that virtually every step in this administration was recorded, or appears to have been recorded, in a contemporaneous document.... There are no allegations of dishonesty or fraud. So whilst it is undoubtedly the case that both sides must have the opportunity to put contemporaneous documents to the factual and expert witnesses, it is not, it seems to me, a case in which it can be said that it is essential to have the witness, the cross-examiner and the judge and the other participants in the same physical space."*

Comment

This judgment, whilst not in the medical context, provides some guidance as to how the courts are approaching applications to adjourn trials. The clear message is that, where possible, trials ought to proceed. However, in some cases this may not be appropriate. For example, if there are large factual disputes between the parties or allegations of dishonesty or fraud, it may not be suitable.

In medical cases of any kind, there are likely to be other relevant considerations which do not apply in other cases. For example, witnesses who are medical professionals may not be able to make themselves available to give evidence. The judgment also highlights the importance of obtaining solid evidence of a participant's caring responsibilities or vulnerabilities and efforts taken to mitigate these before relying on this as a reason for adjournment.

A further, more recent decision, which may be of interest to readers is *Heineken Supply Chain BV v Anheuser-Busch Inbev SA (Rev 1)* [2020] EWHC 892 (Pat), considers an application to extend by two weeks the deadline for

reply evidence and to push back the trial start date to outside the trial window. Daniel Alexander QC, sitting as a Chancery Judge, refused the application.

At paragraph 28, the judge noted: *"In considering this issue, it is, however, necessary to bear in mind, particularly in current circumstances, that while lawyers are preparing expert evidence, some of their often much less well-remunerated compatriots may be putting themselves and their families at risk in saving lives, working long hours in inhospitable conditions. The guidance to which I have referred strongly suggests that, where it can be safely done and without risks to the integrity of the legal process, the wheels of justice should keep turning at their pre-crisis rate. It is not unreasonable to expect that lawyers concerned in keeping cases on track may need on occasion to push a little harder to enable that to be achieved. I also bear in mind that the nature of the proposed expert evidence is such that what may be lost in polish as a result of having fewer hours devoted to it by lawyers may be gained in raw authenticity, as well as the fact that a more limited time encourages confining the evidence to that which is truly essential."*

Readers may also be interested to see this [judgment](#) of Sir Andrew McFarlane in the Family Court, in which he deemed a remote hearing to be inappropriate.

In particular, at paragraph 26, he noted:

"The reason for having the very clear view that I have is that it simply seems to me impossible to contemplate a final hearing of this nature, where at issue are a whole series of allegations of factitious illness, being conducted remotely. The judge who undertakes such a hearing may well be able to cope with the cross-examination and the assimilation of the detailed evidence from the e-bundle and from the process of witnesses appearing over Skype, but that is only part of the judicial function. The more important part, as I have indicated, is for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court. It also assumes that the person's link with the court hearing is maintained at all times and that they choose to have their video camera on. It seems to me that to contemplate a remote hearing of issues such as this is wholly out-with any process which gives the judge a proper basis upon which to make a full judgment. I do not consider that a remote hearing for a final hearing of this sort would allow effective participation for the parent and effective engagement either by the parent with the court or, as I have indicated, the court with the parent. I also consider that there is a significant risk that the process as a whole would not be fair."

PRACTICE DIRECTION UPDATES, PROTOCOLS AND OTHER HELPFUL GUIDANCE

Rajkiran Barhey

In this section, we have aimed to set out, or provide links to, the key guidance documents, protocols and practice direction updates of which readers will want to be aware. We have focused on areas which we deem of most relevance to our readers. We have summarised some documents, simply copy and pasted others where necessary, and for others simply provided links if they are covered elsewhere in the publication.

The aim is to collate everything in one place in the hope that it may be helpful, although we appreciate it is somewhat unwieldy! If you consider it would be helpful to include any other documents, please do get in touch, our contact details are on the first page.

The main judiciary.uk page concerning COVID-19 is [here](#). Tribunals guidance is [here](#). The main HMCTS page is [here](#).

[Practice Directions](#)

Practice Direction 51ZA – Extension of time-limits and clarification of practice direction 51Y - Coronavirus – 1 April 2020

This PD is effective from 2 April 2020 and ceases to have effect on 30 October 2020.

Paragraph 2 of the PD amends Rule 3.8, replacing the reference to 28 days to 56 days. The amended Rule 3.8 will therefore read:

(4) In the circumstances referred to in paragraph (3) and unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 56 days, provided always that any such extension does not put at risk any hearing date. [emphasis added].

Paragraph 3 confirms that, for an extension longer than 56 days, parties must make an application which will be considered initially on paper and then, where relevant, reconsidered at a hearing.

Paragraph 4 provides that: *“In so far as compatible with the proper administration of justice, the court will take into account the impact of the COVID-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions.”*

Comment

The Practice Direction will be welcomed by most practitioners, however undoubtedly many will feel that it does not go far enough. Prior to the issuance of PD 51ZA, an open letter, produced by Gordon Exall of the Civil Litigation Blog, called on the Rules Committee to permit parties to agree open-ended extensions of time, not least to avoid the courts from being clogged up with applications for extensions of time and/or relief from sanctions for months, or even years, to come. Readers may also be interested to know that the new PD follows allegedly the ‘first COVID-19 direction’ in which Master Davison granted permission to parties in a high value brain injury case to agree extensions of up to 56 days by consent without further order. It is not possible to know how the situation will develop further and whether any further changes will be made. One can only wait and see.

In practical terms, when considering paragraph 4 of PD 51ZA, parties ought to be ready to explain why COVID-19 has led to the application in question. For example, if it has not been possible to obtain witness statements from treating clinicians, a judge may want more information than simply stating the fact of the pandemic. This is particularly so where the connection to COVID-19 is not obvious e.g. if the treating clinician is a psychiatrist or a maxillofacial surgeon. It may be the case that there has been a significant knock on effect in the hospital leading to unavailability, or clinicians have been redeployed, or they have self-isolated. Parties ought to be ready to provide a context specific explanation of how COVID-19 has impacted on the case, and should not assume that judges will wave through extensions. They may, or they may not – we do not yet know - but it is better to be safe than sorry and collect as much information as possible.

Practice Direction 51Y – Video or Audio Hearings during Coronavirus Pandemic - dated 24 March 2020

This Practice Direction came into force on the day after it was approved and remains in force until the Coronavirus Act ceases to have effect.

The second paragraph of PD 51Y provides that, where the court directs that a hearing is to take place using video or audio technology, and it is not practicable for the hearing to be broadcasted in a court building, the court may direct that the hearing must take place in private where it is necessary to do so to secure the proper administration of justice.

The third paragraph states that if a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings. In this situation, it will not be necessary to make an order under paragraph 2 and such an order may not be made.

Paragraph 4 provides that a hearing held in private under paragraph 2 must be recorded, where that is practicable, in a manner directed by the court. Where authorised under s.32 of the Crime and Courts Act 2013

or s.85A of the Courts Act 2003 (as inserted by the Coronavirus Act 2020), the court may direct the hearing to be video recorded, otherwise the hearing must be audio recorded. On the application [read 'request'] of any person, any recording so made is to be accessed in a court building, with the consent of the court.

Section 32 of the Crime and Courts Act 2013 enables the making, and use, of films and other recordings of proceedings, lifting (in part) the pre-existing absolute prohibition on photographs and recordings in court. The new Coronavirus Act 2020 inserted Section 85A of the Courts Act 2003. This provides that if the court directs that proceedings are to be conducted wholly as either audio or video proceedings, the court may direct that the proceedings are to be broadcast for the purposes of enabling the public to see and hear the proceedings or may direct that the proceedings be recorded for the purposes of keeping a record.

Comment

The judiciary.gov website confirms that this PD sits alongside the rules in Part 39, which permits hearings to be held in private in very limited circumstances. Therefore, a court may direct that a hearing is held in private either on the bases in CPR 39.2, or on the basis set out in the new Practice Direction.

Furthermore, the reference to 'application' in Paragraph 4 is to be read as 'request' and parties are not required to make a formal application under Part 23. This is clarified in Practice Direction 51ZA (above).

The purpose of this Practice Direction is to balance the need to ensure hearings can continue to go ahead, despite being in private, and also ensuring open justice. Early reports from journalists have reported reasonable success in accessing hearings remotely, albeit with some teething problems.

The speed at which the courts have managed to adapt to video/audio hearings has surprised many practitioners and commentators alike, and begs the question of whether the current situation will become the norm, once restrictions are lifted. It remains to be seen. Whilst many would welcome greater use of video/audio technology, particularly for case management and procedural hearings, it is essential to remember the potential challenges this may pose to open justice and legal journalism.

HMCTS

HMCTS daily operational summary on courts and tribunals during coronavirus (COVID-19) outbreak – as at 21 April 2020

- *"We're consolidating the work of courts and tribunals into fewer buildings. Some buildings are open to the public, some buildings are staffed but are not open to the public, and some buildings are temporarily closed. The list was updated 20 April 2020*
- *Where courts and tribunals are closed, we'll contact parties directly to confirm new hearing arrangements. We'll contact those parties whose hearings were scheduled to happen first, and work our way through the list as quickly as possible. Please be patient while we do this, and avoid making contact if you can.*
- *Cloud Video Platform (CVP) will start to be used in some civil and family hearings, as well as Skype. Please see our updated telephone and video hearings during coronavirus outbreak and a guide on how to join a telephone and video hearing.*
- *Our Courts and Tribunals Service Centres will be available from 8am to 5pm Monday to Thursday and 8am to 4pm on Fridays until further notice*
- *Our South East region will only be taking calls between 10am to 2pm in all jurisdictions (with the exceptions on the next line)*
- *Chelmsford, Norwich, Ipswich and Basildon Crown Courts are temporarily unable to answer calls. The recorded message will advise you what to do*
- *We're continuing to avoid physical hearings and arranging remote hearings wherever possible. Anyone who requires technical support for a telephone or video hearing can call 0330 8089405*

- *We've introduced temporary new hours in our Scotland contact centre. [HMCTS Scotland contact centre opening hours 21 April 2020.](#)*

Coronavirus (COVID-19): courts and tribunals planning and preparation

Courts are now divided into 3 categories:

1. open courts – these buildings are open to the public for essential face-to-face hearings
2. staffed courts – staff and judges will work from these buildings, but they will not be open to the public
3. suspended courts – these courts will be temporarily closed

A tracker showing which courts are open, staffed or suspended is [here](#).

HMCTS priorities during coronavirus outbreak

“All our courts and tribunals hear matters relating to urgent and vitally important issues such as the deprivation of liberty, public safety, and individuals’ rights and welfare. Hearings related to such issues will always be prioritised...”

In the civil and family jurisdictions, urgent work will include applications to suspend warrants of possession, injunctions and orders dealing with issues of care, abduction, emergency protection and debt, as well as breaches of injunctions and Court of Protection matters relating to vulnerable people.

There will also be urgent hearings in the Immigration and Asylum Chamber and Mental Health tribunal deal with matters relating to liberty including immigration bail and the status of detained and restricted patients. Appeals relating to asylum or social security matters will often be involving people who are vulnerable or facing exceptional hardship.”

HMCTS telephone and video hearings during coronavirus outbreak

“We are using a number of solutions to enable hearings to take place. These include:

Teleconferencing

We have significantly increased the amount of teleconferences we can run using BTMeetMe. Participants will be sent conference call phone numbers, and no specialist equipment is required other than a phone (and any speakers that you may wish to use).

Videoconferencing

For videoconferencing we have started using Skype for Business on HMCTS and judicial systems. Participants in a hearing do not need Skype for Business to join these videoconferences, however they will need the free Skype meetings app. Each participant will receive instructions and a link to click to join the hearing, as a ‘guest’. Once users click on the link, they should follow the browser’s instructions for installing Skype Meetings App. We recommend doing this as early as possible, to be prepared for your hearing. At the time of the hearing, users go to the Skype Meetings App sign-in page, enter their name, and select “Join”.

We have increased capacity, undertaken testing, and are now introducing our ‘cloud video platform’ (CVP) for hearings. CVP uses Kinly videoconferencing software. These videoconferencing rooms can be accessed through any laptop or video device. We can also use bridging links to communicate with fixed endpoints that use the Justice Video Service, in courts, prisons and police stations. [See this guidance on joining telephone and video hearings](#)

Please note, HMCTS does not currently support the use of other video conferencing applications and therefore Skype and CVP should be used. Hearings heard via Skype and CVP are accessible to all users.

Looking ahead, we are expanding the capacity of our fully video hearings solution, which has been used on a small-scale in specified civil, family and tax tribunal hearing types. We want to make sure this bespoke video

hearing solution is robust and can handle significant volumes of hearings, as quickly as possible. No bespoke software will be needed to join hearings in a CVP room or for fully video hearings.”

Protocols

Remote Hearings Protocol – dated 26 March 2020 (supersedes the version issued on 20 March 2020)

“Introduction to this Protocol

- 1. The current pandemic necessitates the use of remote hearings wherever possible. This Protocol applies to hearings of all kinds, including trials, applications and those in which litigants in person are involved in the County Court, High Court and Court of Appeal (Civil Division), including the Business and Property Courts. It should be applied flexibly.*
- 2. This Protocol seeks to provide basic guidance as to the conduct of remote hearings. Whilst most court buildings currently remain open, the objective is to undertake as many hearings as possible remotely so as to minimise the risk of transmission of Covid-19.*
- 3. The method by which all hearings, including remote hearings, are conducted is always a matter for the judge(s), operating in accordance with applicable law, Rules and Practice Directions. Nothing in this Protocol derogates from the judge’s duty to determine all issues that arise in the case judicially and in accordance with normal principles. Hearings conducted in accordance with this Protocol should, however, be treated for all other purposes as a hearing in accordance with the CPR.*
- 4. It is inevitable that undertaking numerous hearings remotely will cause teething troubles. All parties are urged to be sympathetic to the technological and other difficulties experienced by others.*
- 5. CPR Part 39.9 provides that “[a]t any hearing, whether in the High Court or the County Court, the proceedings will be tape recorded or digitally recorded unless the judge directs otherwise” and that “[n]o party or member of the public may use unofficial recording equipment in any court or judge’s room without the permission of the court”.*
- 6. CPR Part 39.2(3)(g) provides that hearings can (actually must) be held in private if the court is satisfied that it is, for any reason, “necessary, to secure the proper administration of justice”. In such a case, however, a copy of the court’s order to that effect must, under CPR Part 39.2(5), be published on www.judiciary.uk, “[u]nless and to the extent that the court otherwise directs”, and non-parties may apply to attend the hearing and make submissions, or apply to set aside or vary the order.*
- 6A. A new Practice Direction 51Y entitled “Video or Audio Hearings During Coronavirus Pandemic” came into force on 25 March 2020. It provides that: “where the court directs that proceedings are to be conducted wholly as video or audio proceedings and it is not practicable for the hearing to be broadcast in a court building, the court may direct that the hearing must take place in private where it is necessary to do so to secure the proper administration of justice”. Remote hearings accessed by a media representative are public proceedings. But if an order is made under PD51Y, there is no requirement for the order to be published as under CPR Part 39.2(5).*
- 7. There are, therefore, the following legal issues to be addressed before any remote hearing can begin: (i) whether the hearing is to be in public or in private; if in private, on what grounds, and (ii) how is the hearing to be recorded, or can an order properly be made to dispense with recording?*
- 8. As to the first, remote hearings should, so far as possible, still be public hearings. This can be achieved in a number of ways: (a) one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing a media representative to log in to the remote hearing; and/or (c) live streaming of the hearing over the internet, where broadcasting hearings is authorised in legislation (such as the new s85A recently inserted into the Courts Act 2003). The principles of open justice remain paramount.*
- 9. As to the second, the recording of hearings and compliance with CPR Part 32.9 can also be achieved in a number of ways: (a) recording the audio relayed in an open court room by the use of the court’s normal recording*

system, (b) recording the hearing on the remote communication programme being used (e.g. BT MeetMe, Skype for Business, or Zoom), or (c) by the court using a mobile telephone to record the hearing. It is not, however, permitted for the parties to record the hearing without the judge's permission.

What should happen when a hearing is fixed?

10. In the present circumstances, the court and the parties and their representatives will need to be more proactive in relation to all forthcoming hearings.

11. It is good practice for the listing office, judges, clerks and court officials to consider as far ahead as possible how future hearings should best be undertaken.

12. It will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Some witness cases will also be suitable for remote hearings.

13. Available methods for remote hearings include (non-exhaustively) BT conference call, Skype for Business, court video link, BT MeetMe, Zoom and ordinary telephone call. But any communication method available to the participants can be considered if appropriate.

14. Before ordering a hearing by court video link, the judge must check with the listing office that suitable facilities are available.

15. The listing office will seek to ensure that the judge(s) and the parties are informed, as long in advance as possible, of the identity of the judge(s) hearing the case.

16. Judges, clerks, and/or officials will, in each case, wherever possible, propose to the parties one of three solutions:-

(i) a stated appropriate remote communication method (BT conference call, Skype for Business, court video link, BT MeetMe, Zoom, ordinary telephone call or another method) for the hearing;

(ii) that the case will proceed in court with appropriate precautions to prevent the transmission of Covid-19; or

(iii) that the case will need to be adjourned, because a remote hearing is not possible and the length of the hearing combined with the number of parties or overseas parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time.

17. If the parties disagree with the court's proposal, they may make submissions in writing by email or CE-file (if available), copied to the other parties, as to what other proposal would be more appropriate. On receipt of submissions from all parties, the judge(s) will make a binding determination as to the way in which the hearing will take place, and give all other necessary directions.

18. It will also be open to the court to fix a short remote case management conference in advance of the fixed hearing to allow for directions to be made in relation to the conduct of the hearing, the technology to be used, and/or any other relevant matters.

19. The fact that a hearing is to be a remote hearing and, where possible, the technological method to be employed, will normally be shown in the cause list.

The remote hearing itself

20. The clerk or court official, and the parties, will all need to log in or call in to the dedicated facility in good time for the stated start time of the remote hearing. In a Skype, Zoom or BT call, the judge(s) will then be invited in by the clerk or court official.

21. The hearing will be recorded by the judge's clerk, a court official or by the judge, if technically possible, unless a recording has been dispensed with under CPR Part 39.9(1). The parties and their legal representatives are not

permitted to record the hearing. With the court's permission, arrangements can be made with privately paid-for transcribers.

22. The hearing can be made open to the public, if technically possible, either by the judge(s) or the clerk logging in to the hearing in a public court room and making the hearing audible in that court room, or by other methods (see [8] above). But in the exceptional circumstances presented by the current pandemic, the impossibility of public access should not normally prevent a remote hearing taking place (see [6]-[7] above). If any party submits that it should do so in the circumstances of the specific case, they should make submissions to that effect to the judge.

23. The clerk, court official or the judge(s) must complete the order that is made at the end of the remote hearing. The wording of the order should be discussed and agreed with the parties.

Preparations for the remote hearing

24. The parties should, if necessary, prepare an electronic bundle of documents and an electronic bundle of authorities for each remote hearing. Each electronic bundle should be indexed and paginated and should be provided to the judge's clerk, court official or to the judge (if no official is available), and to all other representatives and parties well in advance of the hearing.

25. Electronic bundles should contain only documents and authorities that are essential to the remote hearing. Large electronic files can be slow to transmit and unwieldy to use.

26. Electronic bundles can be prepared in .pdf or another format. They must be filed on CE-file (if available) or sent to the court by link to an online data room (preferred) or email. "

Royal Courts of Justice

The Royal Courts of Justice Operational Update - 20 April 2020

"The Royal Courts of Justice remains open to the public, however some counters and court facilities have temporarily closed (20 April 2020)..."

Court of Appeal (Civil)

- Urgent work (applications and hearings) only; all hearings are being held remotely
- Counter closed, email contact available.

...

High Court

- High Court work is being conducted according to the High Court Contingency Plan.
- Civil hearings continue to be conducted remotely, where possible and as appropriate with reference to the Remote hearings protocol for civil hearings (see judiciary.uk).

Senior Courts Costs Office

- Hearings continue to be conducted remotely, where possible and as appropriate with reference to the Remote hearings protocol for civil hearings (see judiciary.uk).
- New filings on CE-File should be limited to applications with approaching deadlines, any documentation in support of hearings which have been listed and requests for final costs certificates
- Counter remains open.

Central London County Court, Mayors and City Court

- Hearings continue to be conducted remotely, where possible and as appropriate with reference to the Remote hearings protocol for civil hearings (see judiciary.uk).
- Counter appointments only, phone contact available."

Court of Appeal Urgent Business Priorities – dated 17 April 2020

“We are only dealing with urgent applications in the Civil Appeals Office. Urgent work means applications where it is essential in the interests of justice that there be a substantive decision within the next 7 days.

Urgent applications should only be sent by email between 9am and 4.15pm to: civilappeals.urgentwork@justice.gov.uk Within 7 days of the public fees office reopening you’ll need to pay the application fee or complete the relevant “help with fees” application. We’ll acknowledge your application and aim to process it as quickly as possible.

Non urgent applications should be emailed to: civilappeals.registry@justice.gov.uk. Within 7 days of the public fees office reopening you’ll need to pay the application fee or complete the relevant “help with fees” application Your application will be dealt with as we increase our capacity to manage new nonurgent work. All appellant’s notices will be accepted on the basis that they may be rejected at a later date.”

High Court Business Contingency Plan for maintaining Urgent Court Hearings – dated 26 March 2020

“In outline, any business that would be sufficiently urgent to warrant an out of hours application in normal times will be considered urgent business for the purpose of this plan. Business that is not urgent business (“business as usual”) will also continue to be dealt with during this period, as far as possible and in accordance with the contingency plans put in place by the different Divisions and Courts. Urgent business will, however, be given priority.

...

What processes are in place for applications during normal court hours?

7. The process to be followed is similar to that followed in normal times to make an out of hours application in the court concerned.

8. In general terms, applicants should email the relevant email address below. [QBD, including Media & Communications: qbjudgeslistingoffice@justice.gov.uk]. They will then be referred to the duty listing officer who will work with the duty judges in the relevant Division or Court, depending on the nature of the business, to decide what arrangements will be made for a hearing, including a remote hearing, to take place. That email address should also be copied in for all communications to the court.

9. The Divisions or Courts will deal according to their own separate procedures with business as usual.”

Coronavirus – Information for Queen’s Bench Division Court Users (Bulletin 5)

This bulletin concerns foreign courts only – namely service of court documents, requests for taking of evidence from foreign courts and registration of foreign judgments.

Coronavirus – Information for Interim Applications Court (Court 37)

This bulletin notes that the Interim Applications Court is now closed. Interim applications should continue to be sent by professional court users via CE-File. Information for LIPs is also contained in the bulletin.

Coronavirus – Information for Queen’s Bench Division Court Users (Bulletin 4)

This bulletin concerns the Court Funds Office. In urgent cases, deposits and payments can now be made electronically.

Coronavirus – Information for Queen’s Bench Division Court Users (Bulletin 3)

This bulletin contains the updates in Practice Direction 51ZA regarding extensions of time, set out below.

Coronavirus – Information for Queen’s Bench Division Court Users (Bulletin 2)

All QB Masters are now working remotely from home. As to hearings, the bulletin states:

“Hearings before the QB Masters All hearings will now be conducted by telephone conference or by Skype (audio only or audio and video). Telephone hearings are conducted in accordance with PD23A and PD51Y (copy of the latter attached separately) and must be hosted by an approved service provider. Professional representatives will be required to set up telephone conferences and ensure that they are recorded, as has previously been the case. Masters will instigate Skype hearings and invite you to join the conference. You will be informed by the Master or by listing clerks how the hearing is to take place, and please let us know as soon as possible if there are any difficulties (see Communications with the Court below).”

The hearings will be listed as usual in the Cause List and identified as either telephone or video hearings. If parties reach an agreement to adjourn any listed hearings because they are not urgent and they would prefer them to be listed in court when the current emergency situation is lifted please let the Master know as soon as possible. The Master may also reach a decision of their own initiative to adjourn any particular hearing and will communicate with the parties by email or telephone”

Communications with the Court about Hearings

Our court staff have been unable to keep electronic filings up to date as a result of depletion of staff during the present crisis. Please therefore do not rely on electronic filing alone to ensure that a document reaches the Master for a hearing.

Please email with information and all documents relating to a forthcoming hearing directly to the Master. All Masters’ email addresses, as well as those of their clerks and key Action Department staff are in Annex B. As far as possible please send one email with all information and documents for a hearing. Repeated emails are unhelpful and difficult to manage when Masters have many hearings listed every day and are involved more than usual in the administrative arrangements for the hearings.”

As to **documents and bundles**, see the first bulletin, below, save for the following in bulletin 2:

“Do not include skeleton arguments in the electronic hearing bundle but email them separately. Please also bear in mind that working from electronic bundles at a telephone hearing can be more time consuming and cumbersome so please ensure that the bundles contain no more documents than necessary for resolution of the issues in question.”

Information for Queen’s Bench Division Court Users [Bulletin 1]

Much of this bulletin appears to have been superseded, save for the guidance regarding electronic hearing bundles.

“ANNEX A

QB Masters - Electronic hearing bundles

If an electronic bundle is ordered or requested by the court the bundle must be prepared as follows and be suitable for use with Adobe Acrobat Reader:

- 1. The document must be a single PDF.*
- 2. The document must be numbered in ascending order regardless of whether multiple documents have been combined together (the original page numbers of the document will be ignored and just the bundle page number will be referred to).*
- 3. Index pages and authorities must be numbered as part of the single PDF document (they are not to be skipped; they are part of the single PDF and must be numbered).*
- 4. The default display view size of all pages must always be 100%.*
- 5. Texts on all pages must be selectable to facilitate comments and highlights to be imposed on the texts.*
- 6. The bookmarks must be labelled indicating what document they are referring to (best to have the same name or title as the actual document) and also display the relevant page numbers.*
- 7. The resolution on the electronic bundle must be reduced to about 200 to 300 dpi to prevent delays whilst scrolling from one page to another.*

8. *The index page must be hyperlinked to the pages or documents they refer to.*"

County Courts

Civil Listing Priorities – as at 20 April 2020

"Priority 1: Work which must be done ...

Injunctions (and return days for ex parte injunctions)...

Applications to displace under s.29 of MHA...

Any applications in cases listed for trial in the next three months

Any applications where there is a substantial hearing listed in the next month.

All Multi Track hearings where parties agree that it is urgent (subject to triage).

Appeals in all these cases

Priority 2: Work Which Could Be Done

Infant and Protected Party approvals (children could attend by Skype)

CPR 21 approvals

Applications for interim payments in MT/PI/Clin Neg

Stage 3 assessment of damages

...

Applications for summary judgement for a specified sum

Applications to set aside judgement in default

Applications for security for costs

All small claim/fast track trials where parties agree it is urgent (subject to triage)

Preliminary assessment of costs

Appeals in all these cases

...Accordingly these lists relate only to County Court work."

Message for Circuit and District Judges sitting in Civil and Family from the Lord Chief Justice, Master of the Rolls and President of the Family Division - dated 15 April 2020

"Even before the lockdown announced by the Prime Minister on Monday 23 March we had indicated that the gathering emergency would require courts in all jurisdictions to use technology to conduct hearings in circumstances that had not been usual before. Both the Courts and Tribunals have risen to that challenge in a remarkable way...

We hope to provide a short script to be read at the beginning of remote hearings. We will also ask our IT people to explore whether there is a facility for people who misbehave to be muted...

Pending refinement and further discussion (including feedback from you please) the MR and the PFD would suggest the following broad parameters: Generally:

a. If all parties oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing; if parties agree, or appear to agree, to a remotely conducted final hearing, this should not necessarily be treated as the 'green light' to conduct a hearing in this way;

b. Where the final hearing is conducted on the basis of submissions only and no evidence, it could be conducted remotely;

c. Video/Skype hearings are likely to be more effective than telephone. Unless the case is an emergency, court staff should set up the remote hearing.

d. Parties should be told in plain terms at the start of the hearing that it is a court hearing and they must behave accordingly.

...

In Civil Cases in particular:

i. Listing remains a matter for the judge. He or she should not feel under any pressure to list a certain number of remote hearings every day. Video hearings have proved more tiring than ordinary hearings, so lists of about half their usual length may well be appropriate.

j. The best guide to what should be dealt with over the coming weeks is set out in the Civil Listing Priorities, although of course there will always be some cases outside those categories which are urgent and will need to be heard as a matter of urgency.

k. Particularly careful consideration will need to be given to any remote hearings involving litigants in person, or parties (or witnesses) for whom English is not their first language.

We have heard that some judges have been told that they must undertake their full list, as would ordinarily be the case, using phone, video or the internet. We reiterate that this should not be the case. Much can be done, more perhaps if the judge is in a court building. Across all jurisdictions, around 40% of all hearings have continued, some in the traditional way, others using phone, video or the internet. It is easier to continue in this way with some types of court and tribunal cases than others. The overwhelming majority of those have not been long hearings involving difficult evidence or high emotion, and for obvious reasons.

There are unwelcome consequences of postponing hearings of any sort at the moment, and perhaps particularly in the family jurisdiction. It will, nonetheless, be inevitable that many will have to be. As we have said before, the judiciary has risen to the challenge of keeping the machinery of justice functioning across all jurisdictions in a remarkable way. But as the LCJ said at the outset, it is not business as usual (a point also now made by HMCTS) and realistically it cannot be until the emergency subsides."

Updates from the Lord Chief Justice

Review of court arrangements due to COVID-19, message from the Lord Chief Justice – dated 23 March 2020

"Civil and Family Courts

6. Guidance has already been given about the use of remote hearings. Hearings requiring the physical presence of parties and their representatives and others should only take place if a remote hearing is not possible and if suitable arrangements can be made to ensure safety.

This guidance will be updated, as events develop."

Coronavirus (COVID-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts – dated 19 March 2020

"The default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely... It is clear that this pandemic will not be a phenomenon that continues only for a few weeks. At the best it will suppress the normal functioning of society for many months. For that reason we all need to recognise that we will be using technology to conduct business which even a month ago would have been unthinkable. Final hearings and hearings with contested evidence very shortly will inevitably be conducted using technology. Otherwise, there will be no hearings and access to justice will become a mirage. Even now we have to be thinking about the inevitable backlogs and delays that are building in the system and will build to an intolerable level if too much court business is simply adjourned."

Further useful guidance is set out relating to hearings involving live evidence and prioritisation of work.

Coronavirus (COVID-19) update from the Lord Chief Justice – dated 17 March 2020

"The latest guidance from government on how to respond to COVID-19 will clearly have an impact on the operation of all courts in every jurisdiction. It is not realistic to suppose that it will be business as usual in any jurisdiction, but it is of vital importance that the administration of justice does not grind to a halt.

We continue to work closely with others in the justice system, including the Ministry of Justice and HMCTS, to work through the implications of the developing medical position for the operation of the courts.

Given the rapidly evolving situation, there is an urgent need to increase the use of telephone and video technology immediately to hold remote hearings where possible. Emergency legislation is being drafted which is likely to contain clauses that expand the powers in criminal courts to use technology in a wider range of hearings. The Civil Procedure Rules and Family Procedure Rules provide for considerable flexibility.

Our immediate aim is to maintain a service to the public, ensure as many hearings in all jurisdictions can proceed and continue to deal with all urgent matters.

In all things Judicial Office Holders are advised to liaise with leadership judges and HMCTS."

Coroners' Courts

Guidance Note 34 – Chief Coroner's Guidance for coroners on Covid-19 – 26 March 2020

Guidance Note 35 – Hearings during the pandemic – 27 March 2020

Guidance Note 36 – Summary of the Coronavirus Act 2020 – Provisions Relevant to Coroners

Chief Coroner COVID-19 Note #3

These are summarised in the piece by Richard Mumford and Caroline Cross, above.

Revised Notification of Deaths Regulations 2019 guidance

"This guidance to medical practitioners on notifying deaths to the coroner is an amended version of previous guidance to reflect the temporary changes made by the Coronavirus Act 2020."

Guidance from professional bodies, associations, etc.

The Personal Injuries Bar Association (PIBA) is collating COVID-19 guidance [here](#).

The Association of Personal Injury Lawyers (APIL) and the Forum of Insurance Lawyers (FOIL) have [agreed a set of best practices](#) which they recommend members adopt.

The APIL Coronavirus page is [here](#).

The Inns of Court College of Advocacy has published its *Principles of Remote Advocacy* [here](#).

The latest Bar Council updates are [here](#).

BSB updates are posted [here](#). The equivalent SRA page is [here](#).

The Law Society is providing information [here](#).

NEWS

- Not COVID-19 related, but on 6 April 2020 a number of amendments to statements of truth came into force – these are covered in Issue 4 by Jo Moore.
- Mostyn J recounts the experience of conducting a sensitive trial by Skype in the Court of Protection [here](#).
- HHJ Mark Lucraft QC, currently Chief Coroner, [has been appointed](#) as the next Recorder of London. He will take on some of these responsibilities immediately but will remain Chief Coroner.
- An [update](#) on how justice is being delivered at present, focusing on the SEND Tribunal and the Tax Chamber of the FTT.

- *Swift v Carpenter*, having been adjourned, will now be heard remotely in the week commencing 22 June 2020.
- The Grenfell Tower Inquiry is consulting with Core Participants as to whether to resume hearings remotely, whether to continue to adjourn until ordinary hearings can be restarted, or whether to resume hearings in person in a ‘skeleton’ format with observation of social distancing.

1COR INFORMATION FOR CLIENTS

COVID-19 Outbreak – Information for Clients

The following information provides outline guidance on Chambers’ current position with respect to COVID-19. If you have a question that is not covered below please do not hesitate to contact our clerks using the contact information below.

Chambers absolute priority must be to follow government guidance to safeguard the health and wellbeing of clients, staff, Members and the wider community. However, at the same time we are doing all we can to maintain services to clients as far as possible. All our telephone and IT systems have been cloud-based since September 2019 which means that there is effectively no difference in systems availability at home (or elsewhere) compared with in Chambers.

Most of our Members are already working from home and from close of business on Friday March 20 all of our staff will be as well – except where attendance at Chambers of a ‘skeleton team’ is absolutely necessary (for example, to support urgent conferences which must still take place face-to-face). To assist us in minimising social interaction, please do everything possible to send us papers in digital form rather than hardcopy and to enable conferences to happen virtually (by phone or video-conference) rather than in-person.

If you wish to contact us for any reason please do so via our clerks using the following contact details.

To instruct us, confirm tele-conference details, rearrange current appointments or discuss anything, please contact our clerks on 020 7797 7500 or via london@1cor.com.

Our clerks are contactable as usual **for emergency assistance** outside normal business hours on: 07885 745450.

For marketing matters (such as events) please contact our Marketing Manager [Olivia Kaplan](#). Keep up to date with our podcast [Law Pod UK](#), [Quarterly Medical Law Review \(QMLR\)](#) and [UK Human Rights Blog](#).

If you have any concerns at all about our service which cannot be addressed by our clerks, please do not hesitate to email our Chambers Director via andrew.meyler@1cor.com.

Law Pod UK - Podcast

EP 108: Renewed lockdown, new guidance: new episode - Dominic Ruck Keene & Darragh Coffey

Rosalind English talks to two barristers who happen to have served in the armed forces before going to the law, so they know something about emergencies and personal protective equipment. Dominic Ruck Keene and Darragh Coffey consider the probable attitude of the judiciary to any challenges regarding the government’s responsibility for preparedness, lockdown, and their obligations under Articles 2 and 5 of the European Convention on Human Rights, as well as Article 11. How are we as a society, and the government, going to regard the question of “judicial activism” in this unprecedented situation in a post-pandemic UK?

Further news and events information can be found [on our website](#).

UK Human Rights Blog

There are a number of interesting pieces relating to COVID-19 [on the UK Human Rights Blog](#).

Letters to the Editor

Feel free to contact the team at medlaw@1cor.com with comments or queries. Previous issues can be found on our website under [News & Events > Newsletter](#). You can also follow us on Twitter [@1corQMLR](#) for updates.

EDITORIAL TEAM**Rajkiran Barhey (Call: 2017) – Editor-in-Chief**

Rajkiran accepts instructions in all areas of Chambers' work and is developing a broad practice, particularly in clinical negligence, personal injury, inquests and public law and human rights. Kiran joined Chambers as a tenant in September 2018 following successful completion of a 12-month pupillage. She is currently instructed by the Grenfell Tower Inquiry and has recently undertaken a secondment at a leading clinical negligence law firm.

**Jeremy Hyam QC (Call: 1995, QC: 2016) – Editorial Team**

Jeremy is a specialist in clinical negligence, administrative and public law, inquests, public inquiries, and professional regulatory work. He has particular experience in all aspects of health law and has appeared in a number of leading cases in the field at all levels including in the Supreme Court and Privy Council.

**Shaheen Rahman QC (Call 1996, QC: 2017) – Editorial Team**

Shaheen Rahman QC specialises in public law, clinical negligence and professional discipline. Recognised by the legal directories as a leading practitioner in multiple areas, she is instructed in complex and high value clinical negligence matters including catastrophic brain injury cases, has particular expertise in judicial review challenges to healthcare funding decisions, appears at inquests involving detained or otherwise vulnerable patients and acts for healthcare professionals in regulatory and MHPS proceedings.

**Suzanne Lambert (Call: 2002) – Editorial Team**

Suzanne has a broad practice, with a particular focus on healthcare/medical law. She has experience mainly in clinical negligence and inquests, but also in disciplinary law and judicial review. Suzanne is instructed by claimants and defendants in a wide variety of cases involving serious and catastrophic injuries e.g. cerebral palsy, spinal injuries, loss of fertility, and delayed diagnosis of cancer. She has experience with complex legal issues such as contributory negligence, apportionment between defendants, and consent.

**Matthew Flinn (Call: 2010) – Editorial Team**

Matt's practice spans all areas of Chambers' work, including clinical negligence, personal injury, public law and human rights. He is developing particular expertise in inquests, and clinical and dental negligence claims, acting for both claimants and defendants. He undertakes a wide range of advisory and court work. He also has experience in information law and has advised in private litigation stemming from the Data Protection Act 1998.

**Dominic Ruck Keene (Call: 2012) – Editorial Team**

Dominic has considerable experience of acting in clinical negligence claims for both claimants and defendants: drafting pleadings, advising on merits, quantum and settlement; successfully representing parties at RTMs and at mediation; as well as appearing in case management hearings, application hearings, and at trial in both the county and High Courts. As a result of his background in the Army, Dominic has a particular interest and expertise in all nature of cases involving service personnel and National Security. He is on the Attorney General's C Panel.

CONTRIBUTORS**Richard Mumford (Call: 2004) – Contributor**

Richard Mumford's healthcare work is focused on claims relating to medical accidents of all descriptions (including product liability claims arising from medical devices) but also encompasses regulatory proceedings and contractual claims relating to the provision of healthcare and related services.

In addition, Richard regularly deals with personal injury claims ranging from serious road traffic injury and industrial injuries to physical and sexual abuse. Richard also advises and represents clients in relation to costs arising from litigation.

**Caroline Cross (Call: 2006) – Contributor**

Caroline Cross has a diverse civil and public law practice with particular interests in inquests, human rights, clinical negligence, mental health and personal injury. She represents both claimants and defendants.

Caroline is also the co-editor of, and contributing author to, 'The Inquest Book: The Law of Coroners and Inquests' (Hart Publishing, 2016). She is also Consultant Editor of Halsbury's Laws for Coroners and Cremation & Burial.

She is Assistant Coroner for Southwark.

**Gideon Barth (Call: 2015) – Contributor**

Gideon has a busy practice spanning all areas of Chambers' work including clinical negligence and personal injury, public and human rights law, inquests and public inquiries, and tax.

Before coming to the Bar, Gideon obtained a First Class degree from Cambridge University where he read History, before achieving a distinction on the GDL.

**Darragh Coffey (Call: 2018) – Contributor**

Darragh Coffey accepts instructions in all areas of Chambers' work and is working to develop a broad practice. He appears in courts and tribunals on behalf of both Claimants and Defendants in a range of civil hearings.

Before to coming to the Bar, Darragh spent four years at the University of Cambridge where he is pursuing a Ph.D. in the area of human rights law. Prior to that, he served for six years as an Army Officer in the Irish Defence Forces.