

The Virtual Medical Negligence Trial

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You should not be daunted by running a medical negligence trial remotely. Whilst there are challenges, once you are familiar with the video platform chosen by the court for the hearing, there are many benefits. For a start, no time, expense or energy is spent travelling.

Transporting papers across the country or the world is a great burden. Moving them at the end of each day back to chambers or to a hotel room for further preparation overnight drains still further energy which is better devoted to preparation.

Provided you are assiduously careful in setting up all you may need and ensuring it is immediately to hand, the process can be enjoyable, if no less intense. It is helpful to have an assistant off stage right to call upon for practical support.

This month I concluded a two-week virtual medical negligence trial in Trinidad. The parties still have sequential written submissions to do in the New Year and the Judgment will not be delivered until May 2021. The high court judge reminded us all that we were to behave as far as possible as though we were actually in court. This included wearing robes. With a 4 hour time difference, lunch time in Trinidad is going home time here. Having taken my

gown and court coat off, I was relaxing for a moment just in my court waistcoat and eating sandwiches. After all, it was 5.00 pm GMT. When we resumed at 2.00 pm local time, I was unaware that I was improperly attired until it was remarked upon by a local SC (senior counsel). The judge could “not hear me” of course so it was with considerable embarrassment and profuse apologies that I left my chair quickly to gown up properly.

The court used Microsoft Teams. These are tips which you may find helpful.

Internet

It is essential to have a reliable and high speed connection to the internet with a minimum download speed of 40 mb/s and upload speed of 20 mb/s. If the internet fails, it must be failure of the court or of your opponents – not yours. Lip synchronisation and the sound should be of good quality.

Screen

I have found a high resolution screen of about 42 inches to be best. A larger one is problematic on a desk and too much head movement is involved looking at individual participants. Smaller screens, when there may be 10 or more participants, make individuals more difficult to see. Conference room large screen videos I find are ideal for conferences, but not for trials. I need to have the sense of proximity. It has more impact: the witness should “feel” the heat and presence of the examining advocate.

Background

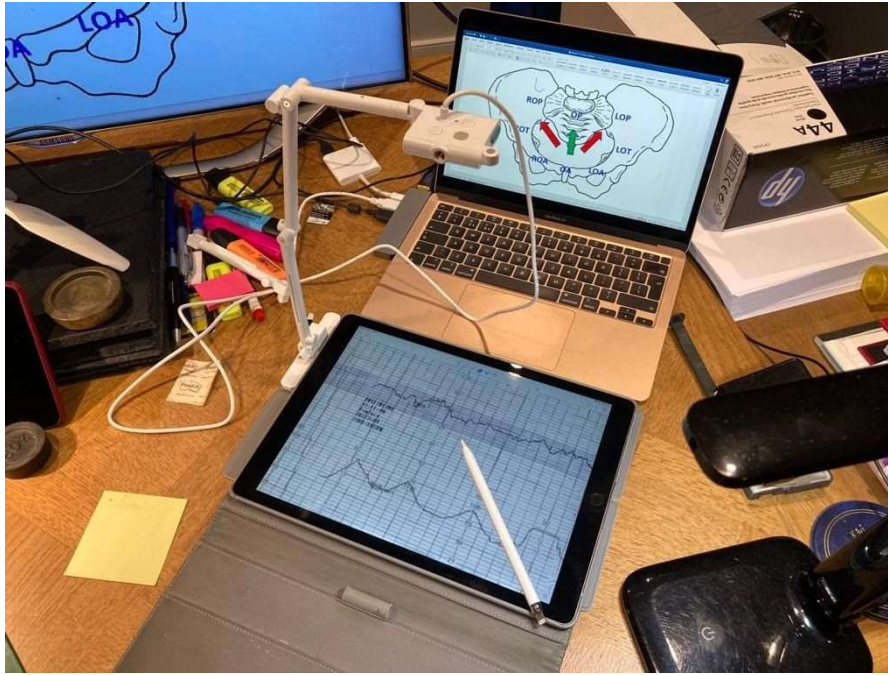
Most video platforms offer virtual backgrounds. They should be avoided for trials as there may be a halo effect with movement of the head and, indeed, with the arms of advocates who choose not to follow sound advocacy advice and gesticulate in their excitement. The essential message I wish to convey is that there should be no distraction from you as advocate. Haloes, sunny beaches or even a backdrop of chamber’s library serve only as

distractions. You want the witness or the judge to concentrate only on you. Even a powerful advocate's audience may be tempted away to read the headline of the newspaper you may have on your desk. As a keen photographer, I use a totally black screen for my portraits, so I use this setup behind me for virtual hearings. Suitably illuminated, I am prominent against the background. For those who may not be able to set this up, second best is to find the feature on the video platform which will put the background out of focus. However, it still suffers from the halo effect.

Cameras

In court, the advocate should address the judge eye to eye. So, too, with the witness who is inclined to avert his gaze unless fixed in this way. Video linkage makes this practically impossible as you cannot both appear to be looking at the person (by looking directly into your own camera) and see that person on the screen at the same time. The best arrangement is to have an HD camera on its own stand or small tripod positioned in the middle of the screen. Whilst this obscures some of it, there is a significant benefit in terms of impact at the receiving end. As this camera is likely to be lower than those inbuilt on computers care must be taken not to position it so that the recipient can endoscope your nasal hairs with the speculum you have inadvertently provided.

Whilst most video-platforms enable document sharing and uploading they have the disadvantage of slowing the process down. I have found a separate overhead document camera extremely useful. It is easy to switch cameras on Microsoft Teams and Zoom.



Not only can loose documents be instantly displayed so can photographs, books and three dimensional objects. Using an iPad and an Apple Pencil, attention can be drawn to a graph or particular parts of the image. In other words the evidence can be “handled” in examination of witnesses in a manner better than that usually available in real court and the advocate keeps control. Preparation is a *sine qua non* if this sort of performance is to be effective and impress.

You must remember where the microphone is when using two cameras. If it is on the main camera, as far as possible you should continue to direct your voice towards it even though the image comes from camera number 2. Most systems also allow for a change of microphone, but without assistance this is an unwanted additional task.

Communication

In court, the advocate can turn to the junior advocate/solicitor/attorney and make a request for something. It could be anything such as chasing a reference or collaborating on a tactic. The junior/client may wish to communicate with the lead advocate who is on his/her feet by a tug on the gown or the passage of a note. I strongly discourage this in court as it both distracts the court and me as an advocate. Fortunately these means of communication are not

available in the virtual hearing unless other members of the team are in the same location. In my recent trial I had my client in one location, an instructing attorney in Trinidad and a junior counsel in New York. I also had experts on different continents.

My legal team set up a WhatsApp Group, running on separate computers and linked to smart phones. This enabled each of us to use a keyboard (rather than fuss finger typing on the screen of a mobile phone) to type short messages to each other in the group. This second computer was used to display the stream of typed communications whilst being silent and invisible to the court and others in the virtual trial. I had a “repeater” message display on my iPhone below my camera such that it was almost as good a head-up display. I could still keep my eye on the ball.

I had some concern that the expert witnesses I was examining may have had a similar advantage in being “fed” answers to tricky questions in like manner. The solution to that is to plan cross-examination so that the witness is tied in to providing the answer you require. It does not matter then what help might be surreptitiously to hand. It is not a memory exercise for the witness. Answers improperly fed to a witness are often inadequately considered before they are uttered in evidence providing still more fruit for the examining advocate and embarrassment to the witness.

Speaking slowly and clearly is good advice at any time. More so in virtual trials where sound transmission may not be perfect. The judge in my recent trial had to remind everyone to enunciate clearly, to be heard without the need for repetition and to enable efficient note taking. As witnesses wore face masks (sometime face shields as well), speech which was already less easy to follow because of local accents and idioms occasionally became almost impossible to follow. Clarity is essential, remembering the first rule of good advocacy is to be heard.

A real bonus is facial expression communication. The judge sees a lot from the bench which is not usually seen by individual members of the Bar. In a virtual hearing, you have the advantage not only of seeing the reaction of the judge and the witness but also the reactions of your opponents. This works both ways! Never hang your head in your hands when your own witnesses are not coming up to proof. With a jury you might just get away with nodding your head in agreement and muttering something about it being an important point in support

of your case, puzzling though that reaction might seem. It will definitely not work in a virtual hearing before a judge.

Third Computer

Sorry, but necessary. Virtual trials have increased the use of electronic documentation. Judges more than advocates in my experience are looking at evidence, documents and pleadings on screen. I prefer to have marked-up hard copies of everything to hand. Cross-references are then easily made on each document to each other document and to notes in preparation for examination of the witnesses. Nevertheless, it is absolutely necessary also to have a computer dedicated to accessing those documents. Moreover, you should use at least one additional screen such that two documents can be seen simultaneously side by side. Often cross-examination and submissions depend upon these comparisons. Switching screens is not good enough. These screens, of course, are not part of the video for the virtual hearing, but they assist the advocate in the presentation of the evidence. The third computer also serves to receive download documents during the trial for saving and printing off.

Microphones and Speakers

Be careful when your microphone is on as you can be heard by all in the virtual trial. So, make sure that it is switched off to begin with. It also has to be off when you, as advocate, are not speaking. Sometimes, because of disrupting feed-back, it is necessary to switch the speaker on your system off whilst you are making a submission or asking questions. You must remember to toggle it on and off however, otherwise you will not hear the answer or any intervention. An eye to the video stream will quickly alert you to a problem.

Interventions

If you or anyone wishes to intervene, the hand up procedure works well. If you don't see it whilst speaking, someone else will and stop you speaking. I do not favour pressing the

button to do this. A wobbling yellow hand tends to ridicule. It is easier to raise your real hand - as we used to do in class; it is quick and effective. Needless to say, you should keep a particular eye on the judge. If she puts her hand up – stop immediately. For your own sake it is best to keep her happy rather than to keep her waiting. Besides, it may simply be because she has not heard you and the good point you are driving home against the witness may be lost at an important moment.

Comfortable Chair

You should be comfortable for long sessions in front of the screens. Whilst you would look wimpish were you to take cushions into court, this is no problem in a virtual hearing. As in court, water needs to come from a glass and not from a bottle. A virtual hearing is not an excuse for it to be a casual one.

Time and again advocates have to struggle, if not fight, to get enough space in Court for their files. Boxes of papers, carousels or racks for files, surfaces which may not be flat, space for the lectern, computer, authorities, White Book, counsel's note book and so on make a heavy demand on surface area. None of this presents a difficulty in the virtual hearing. You can arrange tables to the front and to the side of you with easy access to everything.

Finally ensure you have a clearly visible clock showing the time in the zone in which the virtual court sits. A virtual time shift also helps you organise your day, eat your sandwiches without self-consciousness and find an appropriate time to sleep.

30th November 2020