Sanitised Perspectives from below the Bench: Coordinating COVID Safe Proceedings at the Supreme Court of Tasmania

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Abstract

At the Supreme Court of Tasmania, the primary function of a judge's associate is to coordinate proceedings in court and in-chambers. There are many moving parts to any given court proceeding, and it is an associate's job to ensure that all the parts are in the right place at the right time. Pre-COVID (indeed since 1824) the majority of court proceedings would take place in court—that is to say, in a court room full of people including judges, security staff, a judge's attendant, a judge's associate, lawyers and their assistants, public spectators, witnesses, defendants, and prison officers. This commentary speaks to some of the changes in court proceedings one judge's associate observed at the Supreme Court during the height of the COVID-19 pandemic in Tasmania.

I INTRODUCTION

On Monday 2 March 2020, Tasmania's Director of Public Health, Dr Mark Veitch, confirmed that Tasmania had recorded its first known case of COVID-19.[1] At this point, 30 cases of the virus had been confirmed in Australia and around 90,000 cases had been recorded globally.[2] That same day the Premier of Tasmania told Tasmanians that they 'should just go

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[1] Director of Public Health, 'Coronavirus case confirmed in Tasmania' (Media release, Tasmanian Government Department of Health, 2 March 2020) <https://www.health.tas.gov.au/news/2020/coronavirus_case_confirmed_in_tasmania>.

[2] John Hopkins University, 'COVID-19 Global Map', *Coronavirus Resource Centre* (Map, 18 November 2020) <https://coronavirus.jhu.edu/map.html>.

about their normal daily lives',[3] and so it was that the Court of Criminal Appeal convened at 10am that morning *in person* at the Supreme Court of Tasmania to hear oral arguments in an appeal against sentence.[4]

I emphasise 'in person', because for my part, that week was the last in which I recall coordinating proceedings in court where the primary issues for my attention were the transportation of prisoners between Risdon Prison Complex and the Court's Hobart home in Salamanca Place, and whether or not the judges of the appeal had access to bound volumes of hard copy appeal books.

Ordinarily, coordinating such proceedings was quite simple. Courts are places immersed in tradition: tradition necessitates repetition, and repetition is a precursor to a practice. When I arrived at the Court in August 2018, it was apparent that lawyers, judges, court staff and recidivists alike had each grown quite accustomed over the years to the practice of appearing in person at the right place and—for the most part—at the right time. In that sense my job was quite easy. Without intending to degrade the position of judge's associate, I can quite accurately distill my pre-COVID coordination duties down to the transmission to relevant parties of the following message:

Dear all. Court starts at 10. Be there.

Whilst the job was innately more complicated than that (and I assure you I was more professional), the point remains that prior to the onset of COVID-19, court proceedings would be organised and executed in much the same way as they had always been done before—inflexibly. Notwithstanding the immense struggle and tragic consequences of the pandemic in 2020, I for one am grateful for the changes that the legal profession, particularly the courts, have been forced to adopt.

II Y2K20 CANCELLED

For many Tasmanians, the first sign that our island lives were actually going to be affected by COVID-19 was the 11 March 2020 announcement that the Dark Mofo Festival had been cancelled.[5] Once again, MONA and its associated entities were leading the way in Tasmanian public policy—albeit this time to the dismay of many in the community. But, as his Honour Justice Estcourt said to me at the time, the horse had already bolted,

[3] 'First coronavirus case confirmed in Tasmania, after man who travelled from Iran tests positive for COVID-19', *ABC News* (online, 2 March 2020) <https://www.abc.net.au/news/2020-03-02/coronavirus-postive-test-in-tasmania/12017662>.
[4] *Director of Public Prosecutions v J S P* [2020] TASCCA 3.
[5] David Walsh, 'Dark Mofo 2020 Statement' (Media Release, Dark Mofo, 11 March 2020) <https://darkmofo.net.au/statement>.

COVID-19 had well and truly arrived in Tasmania, and the time to act was now.

On Sunday 15 March 2020, the court published a media release stating that no jury trials would commence that week.[6] It was proposed that jury trials would resume on Monday 23 March 2020 with new health and safety arrangements in place. At that time, the Court had just finished a two-week term of appeals and no trials were underway, and it would, in theory, be able to implement the necessary precautionary measures to enable jury trials to safely proceed come the 23rd. We know now how optimistic that thinking was, but what it really shows is the great unknown with which we were dealing at the time, and the rate at which the situation was changing.

That same day his Honour texted me to say that he had been to chambers to collect some files from my office and some artefacts from his. Whilst he hadn't officially determined that he would be working from home indefinitely, it would be some months before I would see him at the Court again.

By Tuesday 17 March a public health emergency had been declared;[7] by Thursday 19 March, Tasmania was in a state of emergency,[8] and by midnight on Friday 20 March all non-essential travelers departing for Tasmania were required to quarantine for 14 days, effectively seeing the Tasmanian border closed.[9]

III Adapting to a new Practice

That same Friday the Honourable Chief Justice Alan Blow AO published the Court's first practice direction of the year with the stated objectives of limiting 'the risk of the spread of [COVID-19] through court users and staff, and to reduce the risk of substantial disruption to the conduct of the civil business of the court'.[10] It effectively mandated: that telephone directions hearings in all civil matters and audio-visual appearances would

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[6] Supreme Court of Tasmania, 'Supreme Court of Tasmania – Coronavirus Response' (Media Release, 15 March 2020) <https://www.supremecourt.tas.gov.au/publications/media-release-sunday-15-march-2020/>.

[7] Acting Director of Public Health, 'Public Health emergency in Tasmania declared' (Media release, Tasmanian Government Department of Health, 17 March 2020) <https://www.health.tas.gov.au/news/2020/public_health_emergency_for_tasmania_declared_-_17_march_2020>.

[8] Director of Public Health, 'Coronavirus Update – 19 March 2020) (Media release, Tasmanian Government Department of Health, 19 March 2020) <https://www.health.tas.gov.au/news/2020/coronavirus_update_19_march_2020>.

[9] Director of Public Health, 'Additional Coronavirus Update – 20 March 2020) (Media release, Tasmanian Government Department of Health, 20 March 2020) <https://www.health.tas.gov.au/news/2020/additional_coronavirus_update_20_march_2020>.

[10] Supreme Court of Tasmania, *Practice Direction No 1 of 2020: Coronavirus (COVID-19) Response – Civil Litigation and Appeals*, 20 March 2020.

be the new norm; the provision of full written submissions in all civil matters where only a written outline had been expected in the past; full contemplation of whether witnesses could give evidence in a written statement or by audio-visual link; and reemphasis of the need for effective mediation and negotiation of disputes between practitioners prior to the matter being listed in court. Parties to civil proceedings were directed not to make applications to the Court until after they 'have made serious endeavours to resolve the matter with a view to the making of orders by consent or without opposition'.[11]

By Tuesday 24 March 2020, a new practice direction had been published which stated, inter alia, the following:

> In both the criminal and civil jurisdictions, to the greatest extent possible, *cases will be dealt with without face-to-face appearances*.
>
> Where possible, *judges will preside in cases without entering a courtroom*, participating by telephone or by some form of audio-visual link, such as Skype.
>
> As a general rule, *legal practitioners will be permitted to appear in Court by telephone or by means of audio-visual technology*. Land lines should be used in preference to mobiles.
>
> So far as possible, steps will be taken to avoid the need for accused persons to attend Court.
>
> Judges will continue to deal with pleas of guilty, when they are ready, as much as possible. Otherwise, steps will be taken by individual judges to identify and adjourn as many cases as possible.[12]

Prior to COVID-19 the Supreme Court of Tasmania facilitated video-links so that the Court could operate across Tasmania as one. The Court's technological infrastructure relied upon a Polycom network and enabled direct audio-visual connection between the Supreme Courts in Hobart, Launceston and Burnie, as well as Magistrates Courts around the State. The existing technology also enabled direct connections with various locations within the Department of Justice, including custodial centres. It was commonplace for people in custody to appear for directions hearings from prison, or for lawyers at the bar table in Burnie to make submissions to a judge sitting in Launceston.[13] From my perspective, it was also quite easy to coordinate—the fundamental practice of appearing in person from within the Court remained.

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[11] Ibid.

[12] Supreme Court of Tasmania, *Practice Direction No 3 of 2020: New Arrangements relating to COVID-19,* 24 March 2020 (emphasis added).

[13] It was also common practice for the Associate Judge to conduct civil directions hearings in Court 2 over Skype—however permission needed to be obtained and the reason was usually because a practitioner resided interstate.

Under the new arrangements, all matters were to be conducted and heard via some form of audio-visual link, be it Skype, Polycom or their associated desktop and mobile conferencing application Realpresence, or, if need be, by good old-fashioned telephone. The Magistrates Court of Tasmania preferred using Zoom, as did Risdon Prison, but Zoom was not a technology that the existing digital recording system at the Supreme Court could safely interface with. Physical attendance at court was actively discouraged.

The Court did not mandate which technology was to be used, but rather allowed practitioners some choice. As is usually the case in any court however, the peculiarities of appearing should be adapted to the peculiarities of the judge. Particular judges had preferences for certain technologies, and some practitioners would find that particular technologies wouldn't work on certain devices. Troubleshooting video-conferencing technologies quickly became my most important daily task. All staff at the court were forced to upskill with immediate effect.

By the end of March, working from home was very much the norm, at least in the Tasmanian legal profession. Practitioners did not want to come to court, and consistent with the prevailing health advice, nor were they expected to. State servants who were not required in front line roles were also being encouraged to work from home. The Supreme Court staff had been working relentlessly to ensure that the judges were equipped to comfortably preside over matters from their studies—or garden rooms, as the case may be.

At this stage I was feeling very lucky to be working for Justice Estcourt—for many reasons I might add—but particularly because he is an excellent user of technology and readily adapted to the new way of doing things. His Honour was uniquely positioned to not just work from home, but, without the distraction of me bothering him in chambers, to actually thrive upon the opportunity.

However, in order to coordinate remote court proceedings, there was still a requirement for an associate to be physically present in the courtroom to facilitate videocalls, operate the digital recording system, and generate any documents that needed to be distributed with immediate effect. Coordinating proceedings was further complicated by the fact that not all courts across the Supreme Court were equipped with the same technological infrastructure, which meant that technical idiosyncrasies and limitations existed.

For example, some courtrooms allowed eight participants to a Realpresence call, whilst others only two. Because the Court did not use Zoom, we could *only* connect with the prison via Polycom. Defendants on bail may have only provided a telephone number, which meant proceedings regularly involved connecting to a judge and a lawyer at their homes via

Realpresence, a prosecutor and the defendant on their mobile, and perhaps a co-accused in custody via Polycom. All of this went through an associate controlling a computer based in the court itself.

Technological teething was rife during the early days in the lead up to Easter—I recall one occasion when his Honour and I were the only ones 'in the court'. This was because licensing limitations meant that only two participants could be party to the call—beyond the host-associate and judge, no one else was permitted to join conference. It was frustrating, but this is why Practice Direction 3/2020 required practitioners to provide phone numbers for back up. Perhaps it was envisioned that 21st century technology might fail, but the telephone never will. I frantically tried to dial everybody on their mobiles, but new hygiene practices necessitated the wiping down of all surfaces after their use with sanitiser. I do not believe the sanitiser used was intended for disinfecting keyboards, and, accordingly, try as I might, all of the keys were stuck, rendering the in-court telephone useless.

I suspect mishaps such as this were commonplace across the courts during the pandemic, and indeed workplaces of all kinds. Whilst such blunders would usually reflect quite poorly on an associate in a court room full of people—and by extension on a judge, I was fortunate that most of the embarrassments I caused during this time were not witnessable. I was also very cognisant of and grateful for the patience, understanding and cooperation emanating from practitioners, judges, court staff and defendants. It was a very challenging and stressful time to be coordinating court proceedings. I think that the local legal profession ought to be congratulated on the way that it collectively faced up to the challenge.

IV Circuit and the Effective Integration of Civil and Criminal Sittings

Ordinarily, the judges of the Supreme Court of Tasmania are allocated a workload which is determined by the annual court calendar, which is divided into eight periods of sittings of four-weeks each and six terms of appeal of between one and two weeks. The judges further split their time equally between the criminal and civil jurisdictions. Judges will often go on circuit to another Supreme Court in the State once or twice a year. Justice Estcourt and I were due to travel to Burnie for circuit between 27 April and 22 May 2020. Needless to say, that trip was cancelled as around Easter the North-West of Tasmania had become a 'hot-spot' after a breakout in the North-West Regional Hospital on 2 April.[14] The region was effectively 'locked-down' for the month.

[14] Tasmanian Government Department of Health, *COVID-19 North West Regional Hospital Outbreak – Interim Report* (Report, 29 April 2020).

Although the trip to Burnie was cancelled, the sittings were not. As a result, an extra judge was based at the Court in Hobart for the foreseeable future, presiding over matters in Burnie from afar. Ordinarily during any given period of sittings, judges are allocated a courtroom and the court is theirs to use for the entire sittings. However, given that not all court rooms were created with equal technological capacities, and the fact of an additional judge in Hobart, we were confronted with a shortage of available court rooms. There was also a clear hierarchy as to which courtrooms were best for coordinating COVID-safe proceedings. The associates were charged with devising a satisfactory workaround.

It was simple enough. There were five judges based in Hobart, and there are five days in a work week. Court 8 was the best courtroom because it had all of the technological capabilities and the maximum number of licenses available for Realpresence participation.[15] Each judge was allocated a day a week where Court 8 would be theirs, and then the rest could fight over the scraps. I chose Fridays for Justice Estcourt, and we proceeded to list all the criminal matters on Fridays for the months of April, May and June.

At this stage, all criminal matters that were going to trial had been adjourned to 20 July 2020, as this would be the date of the earliest possible resumption of criminal trials. It was proposed that the judges would only deal with pleas of guilty during the partial shutdown, as these could be readily facilitated by way of written submissions and audio-visual link. His Honour was regularly sentencing three to four offenders each Friday, provided that written submissions and supporting documentation had been provided to me via email by the preceding Monday. It was no longer of consequence whether it was a Burnie matter or a Hobart matter—audio-visual court proceedings had removed the perception of geographical constraints that the court had been adhering to up until that point.

Given there were no jury trials, it was also no longer of consequence whether judges were sitting in the civil or criminal jurisdiction. For his part, his Honour was capitalising on the requirement for civil practitioners to provide written arguments in full, in lieu of oral submissions. Civil matters were being finalised without the need for oral argument, and there were even occasions when matters would proceed to a 'hearing' without the lawyers ever actually ever being heard.

V RETURN TO TRIALS, RETURN TO A 'NEW-NORMAL'

The Supreme Court of Tasmania resumed jury trials on 21 July 2020 with very strict social distancing requirements and hygiene measures in place. This was about the time that I finished working at the Court, and about the

[15] Oddly, there are only five courtrooms in the Supreme Court of Tasmania at Salamanca Place.

extent of the commentary I can provide. However, I can make the following reflections based on my time coordinating COVID-safe court proceedings. I've been involved in the law for about six years now. I must admit it has been a little disconcerting as a millennial to see how slow the law, and the profession generally, are in adapting to change, especially during a time of such rapid technological advancement. I accept that it is a natural and predictable consequence of having the profession led by many who began their careers at a time when digital technology was nascent.

Yet the last few months have given me cause for optimism as the courts and the profession have been forced to adapt to circumstances out of necessity rather than choice.

Aside from general judicial satisfaction for how court proceedings were being coordinated, and appreciation of written submissions, the general and anecdotal feedback that I received from practitioners was that they were not looking forward to returning to 'normal'. Somehow, I don't think we ever will. The gains have been too great—for example, providing more comprehensive written submissions in electronic form as a matter of course will streamline court proceedings, reduce the costs involved in litigation, and provide judges a better frame of reference for writing the ultimate decision.[16]

I also hope that such adaptation continues to evolve. Remote working, adaptable hours and flexible conditions have not been the norm in the legal profession. They have been in 2020. In this sense, I am glad to be embarking on the next stage of my legal career during the time of the 'new-normal'.

[16] See Hon. Justice Stephen Estcourt AM, 'Hitting the right note' (2020 Autumn/Winter) *Law Letter* 16.