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# Open Justice, Participation and Materiality: Virtual Hearings and the Court of Protection

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## Abstract

There has been much discussion about the use of technology in the justice system as a result of measures introduced by the UK government to respond to the Covid-19 pandemic. In this paper I articulate my own thoughts on the use of virtual hearings in light of the pandemic, specifically focusing on their use in contexts concerning potentially vulnerable participants, such as in the Court of Protection. In doing so, I highlight a number of challenges, opportunities and reflections on how we might respond to their use. I argue that in coming to analyse the use of virtual hearings, we should focus on the extent to which open justice is secured, the material differences between the virtual and physical court hearings and the participation of those affected by proceedings.

## Key words

Open justice, virtual hearings, participation, Court of Protection

This article first appeared in the UKAJI blog at <https://ukaji.org/2020/04/08/virtual-hearings-participation-and-openness-in-the-court-of-protection/>.

## I. Introduction

The swift adoption of virtual technology across the justice system of England and Wales has been a necessary response to the measures introduced by the UK government to respond to the Covid-19 pandemic. As widely publicised, the first fully virtual Court of Protection (CoP) trial was carried out by skype in mid-March<sup>1</sup> and many other hearings have similarly gone ahead virtually. Posts setting out the views of lawyers, of families and their supporters, and of researchers have appeared online and research is rapidly being undertaken to evaluate how those virtual hearings impact on access to justice.<sup>2</sup>

In this paper I set out my own views on the use of virtual hearings, focusing on three main areas: open justice, the loss of materiality caused by virtual justice and participant involvement in virtual hearings. These three issues must, I suggest, form the basis of rigorous and independent analysis of the use of virtual hearings post-pandemic. I specifically explore these issues in the context of the jurisdiction of the CoP, highlighting a number of challenges, opportunities and reflections.

### ***a) Virtual hearings: A response to a pandemic or the future of justice?***

Before I set out my reasons for focusing on the CoP, some context about the use of virtual hearings is required. What impact does a virtual hearing have on justice? Do virtual

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<sup>1</sup> Catherine Baski, 'First all-skype trial tests crisis working at the Court of Protection', *The Law Gazette*, 19 March 2020, <https://www.lawgazette.co.uk/practice/first-all-skype-trial-tests-crisis-working-at-cop-/5103541.article>, accessed 6 May 2020.

<sup>2</sup> For example, research by the Civil Justice Council, 'Rapid consultation: The impact of COVID-19 measures on the civil justice system', 1 May 2020, <https://www.judiciary.uk/announcements/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system/>, accessed 6 May 2020.

hearings change the outcome of the case? Does virtual justice provide an equivalent experience for participants? Are particular participants disadvantaged by virtual hearings compared to others? How do we maintain the majesty and solemnity of the legal process through virtual hearings? These are all questions that were raised about virtual hearings even before the pandemic. Her Majesty's Courts and Tribunals Service (HMCTS) in England and Wales has been involved in a major court reform programme since September 2016<sup>3</sup> and a central part of this was the incorporation of technology.<sup>4</sup> Virtual hearings have been a long time coming and are the inevitable future of justice:<sup>5</sup> there is greater flexibility of process; no travel time or costs associated with attending a distant court; they are arguably less intimidating; and, possibly more comfortable for participants as they dial in from their own home. Prior to Covid, though, the pace with which we were moving towards virtual justice was, relatively speaking, slow and measured.

Given the scale of the change involved in the movement to virtual justice, the cautious approach was the right one. However, the Covid-19 pandemic has changed all of that. Notwithstanding some opposition to the use of remote hearings,<sup>6</sup> in my view it was the right response for the courts to move to the virtual realm. The alternative would have been to either stop all but the most urgent hearings completely, or participants in proceedings would have been placed at risk of contracting the virus by continuing with in person hearings. Neither of these would seem to be an appropriate response in the circumstances. The judiciary have, commendably, been flexible and responsive to the needs of different participants.<sup>7</sup> The challenge, now, is to ensure that the movement towards virtual justice because of the pandemic does not undermine the careful and rigorous analysis of the potential impact of virtual hearings on the justice system.

### ***b) The Court of Protection***

I now turn to the context for my discussion in this paper. The CoP is a court with a lengthy history but now deals with disputes that arise under the Mental Capacity Act 2005 (MCA). These cases often concern vulnerable participants (referred to as "P") and section 2 MCA requires 'an impairment of, or disturbance in the functioning of, the mind or brain' as part of the test for a finding of incapacity, highlighting the complex issues at the intersection of disability, vulnerability and human rights. I focus on this court for two main reasons. First, as the CoP has been the focus of my research on access to justice and courts.<sup>8</sup> I am aware of the many challenges that will be posed by virtual hearings in this context. From the wide

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<sup>3</sup> HM Courts and Tribunals Service, 'The HMCTS reform programme', last updated 6 February 2019, <https://www.gov.uk/guidance/the-hmcts-reform-programme>, accessed 6 May 2020.

<sup>4</sup> Ibid.

<sup>5</sup> Richard Susskind, *Online courts and the future of justice* (Oxford: Oxford University Press, 2019).

<sup>6</sup> For further discussion of the different perspectives on the use of remote hearings in response to Covid-19 see Natalie Byrom, Sarah Beardon and Abby Kendrick, 'The impact of COVID-19 measures on the Civil Justice System', The Civil Justice Council and the Legal Education Foundation, May 2020, <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf>, accessed 12 June 2020.

<sup>7</sup> See Mr Justice Macdonald, 'The Remote Access Family Court', Version 3, 3 April 2020, <https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-3-Final-03.04.20.pdf>, accessed 6 May 2020.

<sup>8</sup> Jaime Lindsey, 'Testimonial injustice and vulnerability: A qualitative analysis of participation in the Court of Protection', (2019) 28 *Social and Legal Studies*; Jaime Lindsey, 'Competing professional knowledge claims about mental capacity in the Court of Protection', (2020) 28 *Medical Law Review*; Jaime Lindsey, 'Protecting vulnerable adults from abuse: Under-protection and over-protection in adult safeguarding and mental capacity law', *Child and Family Law Quarterly* (forthcoming).

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range of professionals involved to participants with disabilities, CoP users are some of the most varied and potentially most vulnerable court users. Bringing together a range of contributors - professional participants, family members, friends, the person at the centre of the proceedings and others – is uniquely challenging. Second, the cases the CoP hears are of fundamental importance. They engage with individual liberty, human rights and questions about life and death. Even in times of Covid-19 these cases must go ahead, and, in fact, the work of the CoP is arguably even more important now; it is dealing with some of the most challenging and sensitive legal and ethical issues directly arising out of the pandemic, from decisions about life saving medical treatment to decisions about where a person can live and access to family members in care homes.

This includes two very recent cases heard during the pandemic, *BP v Surrey County Council & RP* [2020] EWCOP 20 and *VE v AO, The Royal borough of Greenwich and South East London CCG* [2020] EWCOP 23. *BP* concerned access by family members to a relative in a care home during the pandemic and *VE* concerned an application that it was in *VE*'s best interests to leave her care home to move in with her daughter. Both cases are deeply moving and I set out the facts of the latter case here to provide some context to the discussion. *AO* was an elderly lady, with a history of paranoid schizophrenia, who, in late 2019, was diagnosed with advanced terminal ovarian cancer. She was at risk of Covid-19 given both her terminal diagnosis and that she lived in a care home. Had *AO* remained in the care home, due to restrictions in place because of the pandemic, she would likely only have been allowed a short visit in her final dying moments from one relative.<sup>9</sup> The case reached the CoP because *AO*'s daughter, *VE*, wanted *AO* to move in with her. Whereas the local authority and CCG thought that further assessments of *AO* were needed before that happened. The case proceeded on the basis of agreement by all that *AO* lacked the mental capacity to make her own decisions about where to live, with the dispute before the CoP being about best interests. By all accounts, *VE* and her family were committed to *AO*'s care and it was said that 'I have no doubt that *AO* is happy and content with *VE* and her family and it is highly likely that if she was in a position to express a choice she would want to live with them.'<sup>10</sup> Ultimately the court held that it was in *AO*'s best interests to leave the care home and to move in with *VE*. *AO* did so immediately following the judgment on 20 April 2020 and, according to the judge, she 'sadly died on 22 April 2020 with her family around her. I do not know what she died of and whether she had, indeed, contracted Covid 19.'<sup>11</sup> The strain placed on families like *AO* and *BP*'s during the pandemic is unimaginable, but the judgments are important. They highlight that the courts are there to hear these disputes and can step in and provide families with protection in their times of need. These cases must continue to proceed virtually, but the impact of the virtual on the justice system must also be carefully considered.

## II. Analysing Virtual Hearings

In this paper I highlight three issues which, I argue, should be the focus of any analysis of virtual hearings: open justice; materiality; participation. Whether in the CoP, family, criminal or commercial, whether research arising from the pandemic or for research that was already underway, these three areas of focus provide a useful starting point for analysing the use of virtual hearings in the justice system.

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<sup>9</sup> *VE v AO, The Royal borough of Greenwich and South East London CCG* [2020] EWCOP 23, para. 35.

<sup>10</sup> *Ibid*, para. 14.

<sup>11</sup> *Ibid*, para. 45.

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## a) Open Justice

Open justice means a court, tribunal or decision-maker being transparent and accessible. For certain courts, openness may not be absolute, but transparency and accessibility should be guiding principles. Even in times of crisis, maintaining open justice should be a priority. Yet difficulties are being experienced by the public, press and researchers who wish to attend virtual hearings. The courts may wish to be open and accessible, but without a physical space that people can *attend*, courts are struggling to make the virtual hearing a 'destination'. The daily cause list and CourtServe website provide a useful starting point.<sup>12</sup> However, these websites so far have only provided information on the type of case, judge, type of hearing and similar administrative information. They do not provide, for example, a link to attend the hearing. In April 2020 I submitted an application to the HMCTS Data Access Panel<sup>13</sup> and the Judicial Office for consideration of my own research request to observe virtual CoP hearings. I have now received approval for this research, but the time taken from submitting the application to observing my first virtual hearing was 51 days, highlighting that vital research opportunities are potentially being missed because of a lack of speed and clarity with which people can get involved.

Furthermore, how can we know whether justice is being done unless it is also seen to be done? This involves being able to scrutinise the conduct of hearings. I understand that CoP hearings, for example, will be recorded and it will be interesting to see if they will be accessible for research purposes in future. The Transparency Project<sup>14</sup> has provided useful recommendations as to how these recordings might be methodically and carefully stored for future analysis, an approach which should be considered by the CoP and other jurisdictions too.

Openness does not just serve instrumental ends, though. Open justice reflects the wider values of public space, democracy and accountability.<sup>15</sup> As Thomas de la Mare has recently written 'the role and exclusivity of the physical courtroom has been embedded as a cardinal principle or assumption of English open justice'.<sup>16</sup> By keeping our courts open and accessible, we uphold these values and enable the public to engage with the justice system rather than view it as secret or separate from their shared public space. This perception of openness is particularly important for an institution such as the CoP, which had a reputation for secrecy and only opened up access to the public (and others) following a transparency pilot in 2016 and the subsequent implementation of Practice Direction 4C of the Court of Protection Rules 2017. Despite this increased openness in recent years, the pandemic has resulted in the suspension of Practice Direction 4C, meaning that CoP hearings are, once again, routinely being held in private.

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<sup>12</sup> HM Courts & Tribunals Service, 'Daily court lists', <https://www.justice.gov.uk/courts/court-lists>, accessed 6 May 2020; CourtServe, <https://www.courtserve.net>, accessed 12 June 2020.

<sup>13</sup> Further detail on this process is available here: HM Courts & Tribunals Service, 'Access to courts and tribunals for academic researchers', last updated 19 June 2018, <https://www.gov.uk/guidance/access-to-courts-and-tribunals-for-academic-researchers>, accessed 6 May 2020.

<sup>14</sup> The Transparency Project, 'The remote family court – where does transparency fit in?', 2 April 2020, <http://www.transparencyproject.org.uk/the-remote-family-court-where-does-transparency-fit-in/>, accessed 6 May 2020.

<sup>15</sup> See Linda Mulcahy, 'The unbearable lightness of being? Shifts towards the virtual trial', (2008) 35 *Journal of Law and Society* 464; Linda Mulcahy and Emma Rowden, *The democratic courthouse: A modern history of design, due process and dignity* (London: Routledge, 2019).

<sup>16</sup> Thomas de la Mare QC, 'Coronavirus and public civil hearings', 30 March 2020, <https://coronavirus.blackstonechambers.com/coronavirus-and-public-civil-hearings/>, accessed 6 May 2020.

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As I have made clear in the previous sections, the justice system must continue, even in times of crisis. Conceptually, though, the values of privacy and security on the one hand, and openness and transparency on the other, will come into conflict as virtual hearings become more commonly used. I suggest that the latter must be prioritised over the former. When evaluating the impact of virtual hearings, as researchers we must remember to reflect on our own experience of how accessible the justice system was, rather than focusing solely on the substance of what we discover.

### ***b) The virtual versus the material court room***

The virtual nature of remote court hearings raise a number of challenges,<sup>17</sup> not least what I describe here as the “loss of materiality”. By this I mean that individual interaction with the court systems, buildings, processes, and people, has a material effect on that individual court user. The intra-action<sup>18</sup> between all of the material factors involved in ‘going to court’ is different in the virtual contrasted with the physical realm. Virtual hearings change the materiality of the intra-action between court and user. Navigating the justice system is often a lengthy and complex process, but doing so virtually can lead to a loss of some of the material aspects of that navigational experience. The so-called “majesty of the law”, the role of judicial awe and prestige, the value that court room spaces hold in our culture, and the ritualistic experience of going to court all play a part in this perception of “having your day in court”. For many it will involve a metamorphosis, which incorporates the procedural history, getting prepared on the morning of the hearing, travelling to the court building, long periods of waiting, sitting in the room before the judge enters, hearing and seeing the range evidence often only a few metres away, and, ultimately, waiting for judgment. All of these aspects materially change a person, maybe only in subtle ways, but many aspects of this material process are missing, or at least different, in the virtual hearing.

Furthermore, in the virtual realm, some people are more materially present than others, with often only the barristers and judge on screen, unless a person is giving evidence. Others attending typically only do so via audio. This limits the visual aspects of their involvement and can be contrasted to the physical court room where all of those in attendance can at least be physically seen by the judge and each other. For example, Celia Kitzinger has written about her experiences supporting Sarah,<sup>19</sup> the daughter of a man who was the subject of CoP proceedings. She writes that, for her, ‘there was a marked lack of empathy displayed for Sarah throughout this hearing’. The reason for this, she suggests, is that ‘except when Sarah was giving her witness statement and being cross-examined, she was not visible to other participants ... This meant it was easy for lawyers to forget that Sarah remained in the virtual courtroom throughout the hearing.’

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<sup>17</sup> For further reading see Mulcahy (n. 15); Linda Mulcahy, *Legal architecture: Justice, due process and the place of law* (Abingdon: Routledge, 2011); Emma Rowden and Anne Wallace, ‘Remote judging: The impact of video links on the image and the role of the judge’ (2018) 14 *International Journal of Law in Context* 14; Jo Hynes, Nick Gill and Joe Tomlinson, ‘In defence of the hearing? Emerging geographies of publicness, materiality, access and communication in court hearings’, *Geography Compass* (Forthcoming).

<sup>18</sup> Drawing on the work of Karen Barad who has emphasised the material effects that happen when we interact with the world around us, see Karen Barad, ‘Posthumanist performativity: toward an understanding of how matter comes to matter’, (2003) 28 *Signs: Journal of Women in Culture and Society*, 815; Karen Barad, *Meeting the universe halfway: quantum physics and the entanglement of matter and meaning*. (London: Duke University Press, 2007).

<sup>19</sup> Celia Kitzinger, ‘Remote justice: a family perspective,’ 29 March 2020, available at: <http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/>.

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This is a powerful article and one that reminds us of the need to balance more carefully judicial and legal perspectives on the justice process against the experiences of the “lay user” or those who the case directly impacts. As Linda Mulcahy has articulated, there is a ‘fear of the laity’<sup>20</sup> which can be seen in court room design with the public being restricted and contained to ever smaller areas. Such an approach is being replicated, and arguably exacerbated, by the virtual hearing, as material spaces are giving way to even smaller (or in some cases absent) virtual spaces. Similarly, virtual hearings can change the neutrality of that court room space, with each participant having a different set up, backdrop and technological savviness. Further, the use of virtual hearings may limit the legal representatives’ interactions with their own clients, who, for example, cannot so easily pass notes forward or have a quick discussion in the break. These micro-interactions shape the social dimensions of our justice system and it is not so easy to replicate these via the virtual medium.

The perceived coldness and distance of the virtual space from a human perspective is also clear from reading the reflections of non-legal professionals on the recent virtual CoP hearing.<sup>21</sup> Something material and experiential is patently missing from the virtual court room, not least the ability to pick up subtle cues of behaviour which extend beyond audio. This resonates with much of the socio-legal research on the social spaces of justice and this must be accounted for in any weighing up of the value of the virtual hearing. While these challenges are no reason to abandon the virtual hearing altogether during the pandemic, they require thinking about the virtual hearing differently and considering the implications of this loss of materiality head on.<sup>22</sup> In the longer term, technology must be seen as an enabling device, rather than an end in itself. Meaning that if it is not enabling in a specific case or particular types of case, then it ought to be abandoned.

### **c) Participation**

The final issue I explore here concerns who participates in virtual hearings, and how. Here, I focus on the participation of those directly affected by the proceedings. In general civil and commercial litigation this will be the claimants and defendants, in CoP proceedings it will be the person whose capacity or best interests is in dispute, in criminal proceedings it could be the complainant and the defendant, and in family proceedings the child, husband, wife or other interested party. In the CoP specifically, research has shown that P’s participation in proceedings has been limited, despite rule changes which attempted to remedy this.<sup>23</sup> I have argued elsewhere that this is a cultural, rather than legal or policy problem.<sup>24</sup> It is the paternalistic assumptions (which are perhaps heightened at times of crisis) about P’s ability to participate, caused primarily by well-meaning concerns about P’s welfare.

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<sup>20</sup> Mulcahy, ‘The unbearable lightness of being?’, (n. 15), 95.

<sup>21</sup> Kitzinger (n. 19).

<sup>22</sup> For further discussion see David Tait, ‘Rituals and spaces in innovative courts’, (2018) 27 *Griffith Law Review* ; Mulcahy and Rowden (n. 15).

<sup>23</sup> See, Court of Protection Rules 2017, rule 1.2 and Practice Direction 1A. For further discussion see, Paula Case, ‘When the judge met P: The rules of engagement in the Court of Protection and the parallel universe of children meeting judges in the Family Court’, (2019) 39 *Legal Studies*; Lindsey, ‘Testimonial injustice and vulnerability’ (n. 8).

<sup>24</sup> Lindsey, *ibid*.

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In the context of the virtual hearing, Hayden J has made clear that P's participation in virtual proceedings is something about which '[i]maginative ideas are welcome to ensure that P participates in their proceedings where they are able to do so safely and proportionately'.<sup>25</sup> He, perhaps optimistically, goes on to say that once the court returns to physical hearings, 'it will be necessary for the momentum not to be lost and for parties to be imaginative about bringing P into the process'. While it is important that the CoP is now prioritising P's participation, what they mean by participation appears to be quite narrow.

Attendance at a hearing is defined as 'participation... by listening and/or viewing the hearing...'. I am surprised that P's involvement in hearings is viewed so conservatively. Would it not be possible to secure P's direct participation in virtual hearings too? Of course, in some cases this will not be appropriate perhaps where, for example, P has a disorder of consciousness or does not wish to be an active participant. But in others, P may well have something to contribute and want to take a more active role. Furthermore, this approach frames P's involvement in hearings in one direction – that P can listen or view the hearing – rather than recognising the benefits to the *other participants* of seeing or hearing P. There is value in judges, lawyers and other professionals seeing P, to hear her speak, see her interaction with others or simply understand her embodiment and materiality more acutely. These aspects of P's participation in virtual hearings seems to have been missed with the current approach.

Yet now, when Ps are likely to be facing real challenges,<sup>26</sup> is when we most need the courts to hear the voices of P, as well as her family, friends and those close to her. Across all legal proceedings people affected by decision-making ought to be heard,<sup>27</sup> a right which should not depend on their particular capabilities or willingness to fight to be heard. It is commendable that the CoP have provided guidance on the issue of P's participation and the need to secure it. However, it is challenging enough to secure P's participation at 'normal' times, such that it is questionable whether this aim will be achieved in times of crisis.

There are, however, ways of improving the participation of those impacted by proceedings. For example, where participants have support needs, the use of communication aids and technology specific to their needs can be incorporated if enough time and thought is given to the issue. Practical solutions could be adopted such as: the use of virtual break out rooms during hearings; simply asking the person if they want to be seen on screen and/or speak, and if so, when, without assuming that their silence or invisibility is chosen; scheduling hearings at a time of day suitable for individual Ps. There are many ways of facilitating participation, but the cultural barriers that existed prior to Covid-19 will simply be reinforced and potentially exacerbated by the move to virtual hearings if participation is not placed centre of the debate.

### III. What Next?

The legal landscape will be changed by our chosen response to this pandemic, and in ways that provide many opportunities to incorporate the virtual. We must do so, though, with a thought for those people directly affected and for the wider values of the justice

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<sup>25</sup> All of the guidance issued to date is available at: <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/family-law-courts/court-of-protection-guidance-covid-19/>.

<sup>26</sup> See for example the earlier discussion of recent CoP case law.

<sup>27</sup> See *Shtukaturov v Russia* [2012] 54 E.H.R.R. 27, paras. 72, 91.

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system. None of the challenges raised by virtual hearings are impossible to overcome and the use of technology is both inevitable and a hugely beneficial enabling device for the administration of justice. With thought, time and resources, most of the issues can begin to be resolved to harness the positive potential of technology as an aid to the justice system.

As with any radical developments, we must be cautious, consistently evaluate, and subsequently respond to the weight of evidence. In this article I have emphasised three core issues that I think ought to be given priority in analysing the use of virtual hearings: open justice; loss of materiality; participation. Researching virtual justice with these factors in mind will better enable us to understand the true impact of Covid-19 on the justice system.