applicant was never unaccompanied within the Cathedral, also unchallenged. This should have raised a question of reasonable doubt in the minds of the jury and been identified by the Court of Appeal majority. Additionally, the forensic disadvantage arising from a delay of 20 years was required by the *Jury Directions Act 2015* (Vic) to be used in favour of the applicant rather than to his disadvantage as applied by the majority.

There is little by way of general principle that can be taken from the High Court judgment. The compounding improbabilities identified by Weinberg JA in dissent arising from the unchallenged evidence of the opportunity witnesses should have led the jury to entertain a reasonable doubt as to the applicant's guilt. The failure of the Crown to challenge this evidence was fatal to its case.

The rule in *Browne v Dunn* (1893) 6 R 67 required the prosecution, before seeking to ask the jury to reject the evidence of the opportunity witnesses, to challenge them in the witness box; this was not done.

The established practice of the Court of Appeal to view the video recorded evidence of witnesses on such appeals was undesirable and unnecessary for an appellate court to make an independent assessment of the evidence. The High Court stated that an appeal court should only view such videos in exceptional circumstances and where there is a specific need. An appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of witnesses where that assessment is dependent on the evaluation of the evidence of the witness in the witness box. Judges of appeal do not perform the same function in the same way as the jury or with the same advantages that the jury enjoys. All such appeals proceed on the premise that the complainant was assessed by the jury to be credible and reliable.

The case attracted wide media interest for obvious reasons. By the time of the trial the applicant had attained the rank of Cardinal and was Australia's most senior Catholic. He was the most senior Catholic cleric ever to have been convicted of such crimes here or elsewhere. The applicant enjoyed a controversial public reputation. The public attention assured wide public discussion and much public controversy amongst his proponents and opponents. Publications including books fuelled the public discord.

Certain sections of the media embarked on a sustained and unrelenting campaign proclaiming the applicant's innocence likening the trial to that of Alfred Dreyfus.

> "An hour or so after verdict I received an email from the Philippines advising me of the verdicts and the world's press immediately reported the verdicts."

The media coverage was entirely uninformed and written in the main by those who had not heard the evidence or examined the record and few of those writing had any legal training. There was extensive criticism of Victoria Police, the Director of Public Prosecutions, who had carriage of the matter once charges were laid and, of the complainant, witness A, whose identity was suppressed.

An examination of the critiques serves little purpose at this time. The allegation that Victoria Police conducted a biased investigation was based on the allegation that complaints against the applicant were intentionally solicited and that there is evidence that the open and unbiased character of a police investigation was lacking. The Director of Public Prosecutions was accused of failing to exercise proper prosecutorial discretion prior to indicting; the verdicts confirm that the reasonable prospects of conviction test was satisfied.

Perhaps the most egregious example of gutter journalism followed the High Court decision and continues to this day where certain commentators continue to refer to the complainant as a liar notwithstanding the statements of the High Court that the decision "…proceeds on the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable" and that "… the Court of Appeal majority did not err in holding that A's evidence of the first incident did not contain discrepancies, or display inadequacies, of such a character as to require the jury to have entertained a doubt as to guilt," while finding it unnecessary to opine on the second incident. The complainant was a dignified witness and the media criticism is unfair and unjustified.

Finally, the trial throws into question the efficacy of the *Open Courts Act 2013* (Vic) and the situation in Victoria as the suppression capital of the common law world. The trial was subject to a suppression order to protect its integrity from the surrounding mountain of public commentary. Undoubtedly such an order was necessary. The verdicts came late one afternoon. An hour or so after verdict I received an email from the Philippines advising me of the verdicts and the world's press immediately reported the verdicts. The following day Australian media reported the verdicts. There are now prosecutions on foot against some thirty media organisations for contempt of court arising from breaching the suppression order which remained on foot. We shall have to await the outcome of these prosecutions; however, they certainly raise for discussion the absurd situation seeking to restrict the access of the Australian public to information available world wide and via the internet within Australia.

What will courtroom justice look like in the future?

JACQUI HORAN*

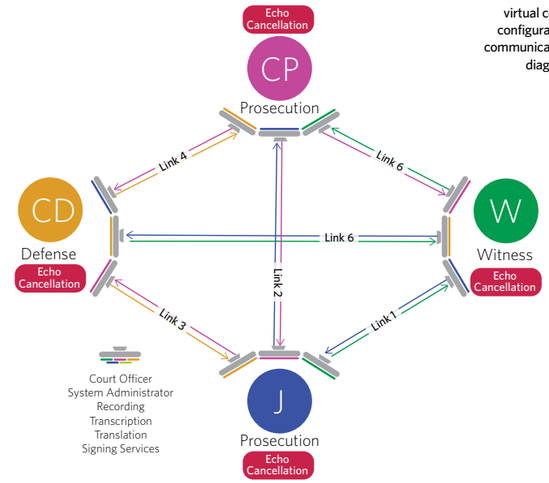
COVID-19 court closures have turbo-charged the need for justice systems to embrace technology. Justice delayed will ultimately result in justice denied, so the imperative for the application of technology-based solutions to ameliorate the pandemic delays has been placed at the forefront of government and court agendas.[1] As the pandemic has made it too risky to conduct hearings in person, the Victorian legal profession has been agile and has adjusted well to online justice. Online justice has rescued the court system from being at a stand-still. Whilst new technologies have been a god-send in 2020, will they, and should they become part of the 'new normal', post-pandemic?

One of the reasons that the Victorian justice system did not grind to a halt in 2020 is because, unlike many other legal systems around the world, we had already begun to harness new technologies to our benefit. For example, vulnerable witnesses can give evidence remotely; the Supreme Court webcasts trials, judgments and sentencing hearings in high profile cases; some juries have been given iPads to assist with their comprehension and deliberations. The innovations are numerous and varied. New technologies have the potential to improve our justice system and cut the time and expense of court work, which ultimately translates into greater community access to justice.

However, there is a gaping hole of understanding of the overall impact of online hearings on the quality of justice. Perceptions of justice are important for citizens (defendants, victims and plaintiffs) who need to feel as if they have been heard. Whether their 'day in court' requires attendance at a physical courthouse or whether a virtual courtroom is a satisfactory alternative is an unknown and will preoccupy researchers for the next few years. Whether online hearings are a satisfactory substitute for in-person hearings depends upon the atmosphere created around the online experience for users. As Tait and Rossner assert, "[i]ntroducing monitors into the courtroom requires a reimagining of courtroom spaces, social cues, symbols and performances"[2] in order to ensure that the quality of justice is not compromised.

Online justice v in-person justice—what does the research tell us?

Whilst we need to increase our factual understanding of the impact of online justice on perceptions of justice, the little research that is available is instructive. In a recent simulated Australian criminal trial study, where the defendant appeared 1) online, 2) in the dock or 3) seated next to his lawyer, the results concluded that defendants appearing on screen were no more likely to be found guilty than defendants seated next to their lawyer.[3] However, defendants in the dock were more likely to be found guilty. One US study found that defendants who appear online from jail are more likely to have higher bail and sentences imposed than those defendants that sit behind their lawyer in the courtroom.[4] Another US study concluded that asylum-seekers appearing remotely online are more likely to be deported than those that attend the courtroom.[5]



Immersive virtual court configuration communication diagram

The first ever online UK tax tribunal trials were conducted in 2018. Appellants and representatives from the tax office attended remotely from their home or office. Despite frequent technical glitches, the parties considered the format to be appropriately formal. The Court set up a virtual waiting room where the parties were regularly informed about the timing of the case. Parties could be productive at their desk, whilst waiting. The Court also conducted a 'dry run' before the hearing to ensure that sound and visual quality was satisfactory.[6] Research tells us that the space used for online appearances does impact upon the user's experience. If a party feels isolated from the process then it is more

One unit (or pod) of an immersive virtual court configuration prototype

likely that they will not perceive the process as fair.

In order to replicate the court hearing experience as closely as possible and avoid a sense of online isolation, researchers from Australia, Canada and the US have developed a system designed to immerse the participants in the online hearing. Rather than having all court participants appear on the one screen, these immersive court hearing pods feature three screens with a camera attached to each screen. For example, the judge, prosecutor, defence (with the defendant in the same room) and witness will be able to connect from their unit to each other in order to conduct court business.

A custom-made and secure 'Zoom meeting'-style panel will ensure that the court maintains control. Laptops, iPads or iPhones can be used to message, share documents and manage files. These pods have been tested under lab conditions and will be showcased at the Monash City Chambers early next year.

The challenges of resuming jury trials

Jury trials did grind to a halt in 2020 as they are a physically intense experience which cannot be sustained during a pandemic. Social distance issues begin in the jury selection process and persist through to verdict. Assembling the jury is problematic. The Institute of Transport Studies determined that pre COVID-19, 220,000 Melburnians took public transport to the CBD every weekday. With social distancing rules in place, this will have to reduce to 22,000 commuters.[7] Car travel is still possible but it is unreasonable to expect that every citizen can afford the cost of a taxi/uber or the cost of city car parking. Some jury trials in NSW have had to be aborted due to juror and counsel fear over contracting COVID-19.[8]

In Texas, civil jury trials are being run online.[9] Whilst we have not chosen to go online for jury trials, Victoria has introduced a raft of new jury trial processes to deal with pandemic conditions. The Victorian Juries Commission Office has sensibly undertaken some of the jury panel induction processes online to alleviate the need for up to 200 citizens to attend in person. Nevertheless up to 45 citizens may still be required to attend for one empanelment. The courts will foot the bill for the cost of empanelled jurors avoiding public transport and requiring pandemic-friendly lunch options.

Victorian jury deliberation rooms are too small to run socially-distanced deliberations. This has forced the courts to use two courts per jury trial; the second is converted into a jury deliberation room. Other jurisdictions, such as the UK, have resorted to pop-up courts in order to provide enough venues for all of their judges to sit. Whilst this is a sensible solution, the chosen venues have not always been ideal. For example, in England and Scotland, they are running jury trials in entertainment venues like cinema complexes. Juror expectations of being entertained with popcorn and a riveting court-room drama that rivals *A Few Good Men* does not sit well with the gravity of the subject matter of a criminal jury trial.

The above examples of the challenges facing the resumption of jury trials highlight how problematic and expensive it is for the justice system to persist with running jury trials during a pandemic. However, jury trials must remain a firm feature of our justice system, despite their hefty price tag. The low take-up of the offer to defendants to have their trial heard more quickly by a judge suggests that a jury trial is integral to defendants' perceptions of a fair trial. Furthermore, citizen participation in the legal system is considered central to a healthy democracy. Research shows that juries are an effective PR machine for the courts;[10] first-hand experience of jury duty plays an important role in the community's positive perception of their justice system.

So, what will our justice system look like post-pandemic?

In 2020, we were plunged into a new world of virtual justice. This period of unprecedented technological innovation will place litigators in an ideal position to intimately understand the benefits and disadvantages that technology has to offer the courts. Whilst the intensity of this experience is not ideal, the technological innovation that the courts are introducing promises to remove many of the access to justice barriers that have plagued our system for decades. Thoughtfully applied online justice should become part of the 'new normal' post-pandemic. As long as we reflect, systematically study and learn from this unique experience, the justice system is likely to emerge better for it.

**Associate Professor Jacqui Horan is a courtroom communication researcher and academic member of the Victorian Bar. She leads the Future Courts Research Platform at Monash University.*

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