

Reflections on Litigation in the time of COVID-19

By Robert Sheldon SC

In my experience, something is not quite right about conducting a barrister's work across the internet. Not everything comes down the line. We need to think about why and what that is. Recourse to audiovisual technology during the COVID-19 pandemic caused me to reconsider the extent to which our unconscious impression determines our view of a case.

In *Blink* Malcolm Gladwell considers 'adaptive unconscious' and 'thin slicing' as explanations for the survival of the human race. We needed to be capable of making very quick judgments based on very little information. Gladwell says that when we meet someone for the first time, interview someone for a job, react to a new idea or are faced with making a decision under stress we use our adaptive unconscious. Apparently we switch between that and our knowing conscious.

Most of our clients are met for the first time in the stressful context of a court case. In a sense we are interviewing them for a job – as a potential witness in their own case. We interview witnesses with a view to deploying them in aid of our client's case. No doubt our clients are interviewing us for the job. This mostly takes place in person, in our chambers.

Usually, the detail of every case will confront us with a new idea, legal or factual and often the precise combination will present a novel problem. We will need to assimilate newly acquired information and make decisions about the presentation of the case. Some of those decisions will need to be made spontaneously, on our feet. Our conferences are more or less a dry run of the courtroom process.

Of course, the tribunal hearing the case seldom has the familiarising dry run to fall back on. It sees and hears the speakers in the tale of woe for the first time if they enter the witness box. There is no chit chat and, short of perfunctory name and address questions, none of the traditional softening up period in which a judge can make a leisurely assessment of the witness. Perfect context for thin slicing and adaptive consciousness.

The tension between our laborious fact finding processes in running cases in the oral tradition of the common law and our innate adaptive unconscious and thin



slicing should be apparent. They are never absent. They are hardwired. We rely on first impressions and instinct, after all we are animals, albeit animals with the capacity and urge to rationalise our decisions.

Implicit recognition of the theory, and the tension, is to be found, I think, in appellate reference to the subtle influence of demeanour when allowing for the primacy of a first instance judge's impressions of witnesses and also in the rules surrounding the giving of reasons, the latter, perhaps, an attempt to cloak the residual irrationality of decision making with a less primitive, fathomable process.

The giving of reasons, more or less, usurps the function of a jury whose deliberations lay at the adaptive consciousness end of the spectrum. A jury's impression was largely inscrutable on appeal – it could not yield to rational unpicking.

With the demise of the civil jury the tendency of lawyers is to think all can be reduced to rationality. The judge, though human, will ultimately be able to, and must, reduce his or her decision to logical prose arranged according to tradition. The cut of a person's jib is deprecated as a basis for judicial decision making.

Although the audiovisual link might capture most facial expressions it seems to miss something. The tone of the audio feed seemed to be the largest variable. Subtle differences in emphasis are difficult to appreciate. And all this applies to exchanges with the bench too.

I was driven to the conclusion that a good deal of what we do in court is based on adaptive unconscious perception and thin slicing, where scant snippets of information are relied on to make important judgments.

The technology filters out some of the cues we are programmed to receive to form our views and we are left with no 'feel' for our clients, their witnesses or the witnesses called in answer to them. And judicial interest or disinterest in a particular point is even harder to detect.

I found the process of AVL preparation and hearings wearing and unsatisfactory.

So much was lost in the medium, in which few of us are trained. My rational self assumed, I think, that because I could see and hear I was receiving the whole story, or as much of it as I would have received had I been in a courtroom. At the end of every occasion of my using the technology I felt something, more than usual, had been missed in the process.

I found that clients and witnesses whom I had met in person prior to the pandemic were much easier to communicate with. Presumably some residual rapport assisted the process.

Even when the AVL did not break down mid stream, it was impossible to get a rhythm in cross examination: the audio quality and the risk of mishearing an answer necessitated even more than the usual caution.

If one thinks of judges called upon to decide cases using AVL they could never have the advantage of prior familiarisation with the witnesses. Musing on what the lost demeanour might say about the probabilities would, of course, be impermissible speculation.

Will the Court of Appeal hold that a trial judge hearing a case by AVL enjoys no advantage over an appellate court? Are there echoes, or is it feedback, of *Pell*?

In litigation the medium is not the message (contrary to the premise of *Understanding Media: The Extensions of Man*) and we should be astute to denounce any suggestion that the mode by which a case is presented is immaterial to the quality of the decision which emerges.

The not so subtle influence of demeanour has served us better than we knew and long may it do so.

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