

Your presence is required

By Elizabeth Welsh

There are some things in life that have to be done in person. Or at least had to be done in person before COVID-19. Things like going to church, getting married and giving evidence in your own court case fell into that category.

As soon as the COVID-19 shut down occurred everyone was expected to automatically operate effectively via a computer screen.

It was immediately apparent that it is very hard to be 'present' as a litigant or legal representative on a computer screen. It is one thing to interact with someone who you know and trust in that way because you can rely on that person's words, rather than wondering whether you can believe them given their shifty countenance on the computer screen because they don't know where the camera is, or their evasive appearance because they are not looking directly at you and you cannot make eye contact, or your inability to read their facial expression in sufficient detail to pick up on non-verbal cues. Rather than dragging issues out into the light and dealing with them through direct interaction in a Court room I found the indirect and artificial meeting via the



computer screen draining.

Fortunately the COVID-19 restrictions were fairly short lived.

Litigants pay Court fees to have their day in Court. They should be entitled to be present in the true sense of that word for the proper administration of justice.

Section 5B(2) of the *Evidence (Audio & Audio Visual Links) Act 1998* (NSW) restricts the use of audio or audiovisual links where:

- a. The necessary facilities are unavailable or cannot be reasonably be made available, or

- b. The Court is satisfied that the evidence or submission can more conveniently be given or made in the Court room or other place at which the Court is sitting, or
- c. The Court is satisfied that the direction would be unfair to any party to the proceeding, or
- d. The Court is satisfied that the person in respect of whom the direction is sought will not give evidence or make the submission.

Under subsection 2A an accused detainee in any criminal proceedings cannot be made to give evidence or a submission by audiovisual link.

Under subsection 3 the Court may not make the direction unless the party making the application satisfies the Court that it is in the interests of the administration of justice for the Court to do so.

In my view civil litigants should be given the same protection. In the ordinary course, before COVID-19 a litigant would never be permitted to give evidence remotely except in a very unusual case.

Now that we have all had a trial run of audiovisual evidence it is clearly no substitute for the real thing. **BN**

5B Taking evidence and submissions from outside courtroom or place where court is sitting—proceedings generally

- (1) Subject to any applicable rules of court, subsection (2A) and section 5BAA, a NSW court may ... direct that a person ... give evidence or make a submission to the court by audio link or audio visual link ...
- (2) The court must not make such a direction if—
 - (a) the necessary facilities are unavailable or cannot reasonably be made available, or
 - (b) the court is satisfied that the evidence or submission can more conveniently be given or made in the courtroom or other place at which the court is sitting, or
 - (c) the court is satisfied that the direction would be unfair to any party to the proceeding, or
 - (d) the court is satisfied that the person in respect of whom the direction is sought will not give evidence or make the submission.

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