Cross-examination and remote access technologies: a changing calculus?

By Dr Carolyn McKay

Ever since audio and audiovisual link (AVL) technologies were first introduced into Australian courtrooms in the 1990s, the courts have had broad discretionary powers regarding directions for taking evidence by AVL. In exercising such discretion, the courts have had to contend with balancing the efficiencies afforded by witnesses appearing remotely with other considerations such as fairness and the loss of traditional forensic benefits, which is said to accompany in-person cross-examination. These forensic benefits are often described in terms of a chemistry, solemnity, formality, or some other intangible atmospheric of the live, co-present courtroom environment. Of course, what has transpired since the beginning of the COVID-19 pandemic in 2020 has profoundly challenged these courtroom balancing acts.

The usual approach to applications to adduce witness evidence by AVL applied during the pre-pandemic and early pandemic phases changed in later pandemic case law due to 'the changing calculus' in 2021. This changing calculus recognised the confidence the courts had developed in taking evidence, even contentious and critical evidence, using a range of remote access technologies. Cases across the New South Wales (NSW) Supreme Court and Federal Court of Australia (FCA), in both civil and criminal law matters, demonstrate a shift in assessing the risk of injustice and the balancing of various considerations against the need for the continued administration of justice in the face of a public health emergency. However, a recent 2022 case suggests that this shift was merely transitory with the decision signaling a possible return to pre-pandemic evaluations.

Evolving perspectives on AVL

Even before the extraordinary events of 2020, there was a developing body of literature that explored the increasing use of AVL in courtrooms and the implications for participants in the justice system.[1] However, the onset of the COVID-19 pandemic had a dramatic impact on the delivery of essential court services, leading

to what Michael Green SC refers to as, 'the Great Pause'. Green observes that many courts and tribunals acted pragmatically, doing 'their best to keep the doors of justice open, just as they did during the Black Death almost 700 years ago'.[2] The resulting rapid uptake of remote access technologies provides renewed impetus for examining, not only the immediate challenge of running a courtroom virtually, but also, the fundamental assumptions that underpin existing case law. The evolving pandemic scholarship clearly demonstrates how courts and the profession have been adapting to the digital environment.[3]

Pre-pandemic case law

AVL's functionality for taking evidence was well established leading into the COVID-19 crisis, with a substantial body of authority on the court's discretion to permit the technology's use. This pre-pandemic case law establishes that the court's power to take evidence via AVL is both broad and discretionary.[4] However, the primary judge is not at large in exercising this discretion. In NSW, the court is prohibited from exercising the discretion if, among other factors, it would be unfair to any party (noting that 'unfairness' is circumscribed) and must only exercise the discretion if it is satisfied that the direction is in the interests of the administration of justice.[5]

At the federal level,[6] the pre-pandemic case law demonstrates competing views as to whether adducing evidence and cross-examination via AVL fosters the administration of justice or generates a forensic disadvantage.[7] For Buchanan J in *Campaign Master*, who described in-person courtroom interaction as having 'a 'certain' chemistry' that enables effective cross-examination through the immediacy of the interaction, judicial supervision, and the courtroom's solemn atmosphere, the loss of such was indeed a forensic disadvantage.[8] Subsequently, Perram J affirmed these observations, finding

> [a] trial is, in fact, a public event in which witnesses are confronted by their cross-examiners and in which they give evidence in front of the very people who are involved in the case. The giving of evidence by video link is unsatisfactory in a number of ways. That is not to say that in some cases it is not appropriate.[9]

This strongly suggests that the pre-pandemic case law in the FCA considered cross-examination in-person to be superior to cross-examination via AVL, outweighing the utility of AVL.[10]

Early pandemic case law

As the legal system fell into lockdown, the issue of administering justice via court AVL and third-party remote access technologies and whether this brought about unfairness, came into sharp relief. Perram J in *Capic*, a case with a 'tortured procedural history', had to balance the possibility of adjourning the trial for an indeterminate period against proceeding virtually. While he thought that such a mode of trial would ordinarily be considered 'unsatisfactory', he went on to say that 'these are not ordinary circumstances ... [and] we must try our best to make this trial work'.[11] Similar tensions faced Lee J in *GetSwift* who stated that, while AVLs might be sub-optimal, nonetheless,

> [j]ust because one cannot have a hearing conducted in accordance with traditional practices and procedures, does not mean that the Court's judicial function cannot be performed effectively where it is necessary to do so. As Voltaire observed, one must ensure the perfect does not become the enemy of the good.[12]

This pragmatic, 'the show must go on, approach stands in contrast with the more cautious view seen in *Wilson No 1* and *Quince* that reflect the pre-pandemic reticence of *Campaign Master* regarding adducing evidence via AVL.[13] *Wilson No 1* involved the assessment of whether the evidence of a key witness could be given via AVL without practical injustice to the defendant. ASIC had applied for evidence to be adduced remotely because COVID-19 measures restricted their witnesses' ability to attend in-person. The defendant opposed the application, arguing he would be unfairly prejudiced if cross-examination in-person was denied. Jackson J observed that injustice does not 'point in only one direction' and he was left in an 'invidious' position as he considered that either one or other party would suffer some degree of injustice. In ruling against the AVL application, Jackson J acknowledged the competing risk assessments were so finely balanced that he granted ASIC a general liberty to renew the application at a future time.[14]

A changed calculus!

Twelve months later, in 2021, ASIC renewed their application, in *Wilson No* 2, and in this instance the AVL application was granted.[15] This was not due to a change in Jackson J's view of the law, but because his Honour accepted ASIC's argument that changes in circumstances amounted to a change in the 'calculus' for assessing the risk of injustice. One notable change during the intervening period was the courts' increased confidence in the efficacy of various remote access technologies and widespread experience in facilitating remote cross-examination of important witnesses, which lessened concerns that the defendant would suffer injustice. It is noteworthy that the language used by Jackson J suggests he still did not consider that cross-examination via AVL equated to in-person cross-examination. His Honour speaks in terms of *lessening* rather than *removing* those concerns and still found 'some risk of injustice' remained, which was 'real and not far-fetched or fanciful'. However, it was not merely the fact that the court had gained experience in taking contentious evidence by AVL that changed the calculus but also that ASIC's submissions clearly specified the prejudice that they would suffer if their application was denied. Arguably, it was this elaboration on these prejudicial circumstances that, when combined with increased certainty for a further year's delay to hear witness testimony in-person, moved Jackson J to adopt the change in calculus terminology and find that this risk assessment calculus had changed 'considerably'.[16]

It is important to note that, although the change in circumstances altered the risk of injustice calculus, three elements remained constant. The first was the central importance of the need for effective cross-examination. The second was recognising the gravity of the allegations and the possible consequences for the defendant. The third was the prejudice that delay, especially indefinite delay, can render to the party seeking to adduce evidence via AVL.[17] By the same token, considerations that once influenced courts against the use of AVL, may 'take on a different complexion when in-person evidence becomes a matter of practical impossibility for an indefinite time', particularly during the extraordinary pandemic circumstances.[18]

A changing calculus?

But have the assessment and balancing processes changed completely? In the 2022 case, *Palmer No 2*, Lee J took the opportunity to reflect on the lessons learned since 2020 to revise his opinion of remote hearings. As discussed above, in *GetSwift*, Lee J stated that AVL technology, although 'suboptimal', was nonetheless sufficient for the task of receiving and, more importantly, conducting effective cross-examination of witnesses. However, in *Palmer No 2*, his Honour commenced with the *prima facie* view that, at least in the circumstances of a high-profile defamation case, in-person *viva voce* evidence is preferable. His reasons included that it is best to assess evidence of hurt and distressed feelings by observation of claimants in close physical proximity and to facilitate the centrality of cross-examination.

While Lee J acknowledged his earlier enthusiasm for technologies such as Microsoft Teams, his subsequent experience accumulated throughout the pandemic had awakened an awareness of the technology's limitations. His Honour considered that there were subtle yet material influences on how a judge might engage with advocates and witnesses. Further, the dynamic between witness and cross-examiner in an 'orthodox' in-person hearing can be better appreciated compared with the casual, 'leisure wear' informality of video hearings. Finally, there was the 'nagging disquiet' that remote evidence diminishes the 'subtleties and nuances' of evidence and impacts the assessment of the evidence of a witness by reference to the tone of voice or nonverbal signals.[19] These changed opinions of Lee J appear to be more in keeping with those expressed in the pre-pandemic case law, by Buchanan J, in *Campaign Master*. This suggests that whatever the change in calculus amounted to during the pandemic, that it is far from a permanent change.

Conclusion

The last two years of COVID-19 jurisprudence has seen the courts adapting and gaining experience in using technologies for taking key evidence and conducting cross-examination, noting that fair process remains critical.[20] There was a cognate shift in the calculus in assessing the risks of unfairness in using AVL technology in *Wilson No 2* at a time that still necessitated remote proceedings. However, as the sting of the pandemic subsides, it is time to reflect on how much that calculus has actually changed. At least for certain types of matters, *Palmer No 2* heralds a possible return to Lee J's 'antevirus world'[21] in which live confrontation, in-person testimony and cross-examination in a public courtroom are privileged. BN

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ENDNOTES

1 For instance, Carolyn McKay, *The Pixelated Prisoner: Prison Video Links, Court 'Appearance' and the Justice Matrix* (New York: Routledge, 2018).
2 Michael Green, 'Innovation in a pandemic: Reflections from the Great Pause', *Bar News* (Winter, 2020): 12–13.
3 Michael Legg and Anthony Song, 'The Courts, the Remote Hearing, and the Pandemic: From Action to Reflection,' *UNSW Law Journal* 44, no.1 (2021): 126-166; Adam Zwi and Aaron Irving, 'Cross-examination by video in the COVID-19 context,' *Law Society of NSW Journal* 70 (September 2020): 76-77.
4 *KN v R* (2017) 95 NSWLR 767, 778; *Kirby v Centro Properties Ltd* (2012) 288 ALR 601(*Kirby*); *Australian Securities and Investments Commission v Rich* (2004) 49 ASCR 578, 581.
5 *Evidence (Audio and Audio Visual Links) Act 1998* (NSW); *R v Ngo* (2003) 57 NSWLR 55; *Antov v Bokan (No 2)* (2019) NSWLR 142, 153; subsequently followed in *David Quince v Annabelle Quince* [2020] NSWSC 326, (*Quince*) and *R v Al Batat & Ors (No 1)* [2020] NSWSC 967.
6 *Federal Court of Australia Act 1976* (Cth), ss 37M-37P, 47-47F.
7 *Kirby*, 603-605 [3]-[11]; *Federal Court of Australia Act 1976* (Cth).
8 *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 3)* (2009) 181 FCR 152, 171 [78] (*Campaign Master*).
9 *Blackrock Asset Management Australia Services Limited v Waked (No 2)* [2011] FCA 479, [45]-[46]. (*Blackrock*).
10 *Australian Competition & Consumer Commission v World Netsafe Pty Ltd* [2002] FCA 526; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2007] FCA 1502; *Campaign Master*, 171; *Blackrock*, [46].
11 *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486 (*Capic*), [1], [25].
12 *Australian Securities and Investments Commission (ASIC) v GetSwift Limited* [2020] FCA 504 (*GetSwift*), [7], [25].
13 *Australian Securities and Investments Commission v Wilson (2020) 146 ACSR 149 (Wilson No 1); see also Quince.*
14 *Wilson No 1*, [36]-[41].
15 *Australian Securities and Investments Commission v Wilson [No 2]* [2021] FCA 808 (*Wilson No 2*).
16 *Wilson No 2*, [34]-[35], [39], [44].
17 *Wilson No 2*, [31]-[32], [44].
18 *Wilson No 1*, [20]; see also *Universal Music Publishing Pty Ltd v Palmer* [2020] FCA 1472, [31] (*Universal Music*).
19 *Palmer v McGowan (No 2)* [2022] FCA 32 (*Palmer No 2*), [12], [14], [44]-[46]; see also *Palmer v McGowan (No 3)* [2022] FCA 140.
20 *R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 11)* [2020] NSWSC 382.
21 *Palmer No 2*, [30].