

A brave old world? Managing health claims and inquests in 2021

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As with every other area of our lives, those involved in the world of litigation and inquests are all too aware that 2020 was a year of re-thinking, re-assessing and innovation to keep the show on the road. Whilst it may be some time before “normality” is restored, recent developments and changes in working practices may well be here to stay. We consider below what a new normal might mean for health litigation and inquests.

More change to come?

Entering 2021 with ongoing national restrictions means that hearings, be they interlocutory hearings, trials or inquests will likely continue to be remote, but whether that will be the case in the longer term remains to be seen. Many areas of the country will continue to be asked to adopt an individualised approach dependent upon particular Coroners or Judges’ preference.

For the time being at least, we can expect remote hearings where it is in the interests of justice to do so. The most recent guidance from the Lord Chief Justice confirms that keeping footfall in the Courts to a minimum is a priority and that remote attendance at hearings is currently the default position.

It is undeniable that the new virtual world of litigation has universally led to time and costs savings in the litigation process but each circumstance must inevitably be taken on its facts.

In the civil courts, 2020 saw many Judges determining applications on the papers where possible. Going forwards we may expect the Courts to continue to do so in certain circumstances and this could potentially be achieved by development of more standardised working practices within the Courts looking at certain criteria that may make Orders on the papers more of “the norm” in the future.

The situation with regards to clinical negligence trials is less clear. By their nature, these hearings are often lengthy with numerous factual and expert witnesses called to give evidence; the evidence often concerns complex issues. Whilst necessity has mandated that some clinical negligence trials have taken place remotely and have been deemed a success in the circumstances, we anticipate that when circumstances permit, the preference will be for trials to take place in the Courtroom.

The decision to hold a remote inquest tends to be very much dependent upon the individual Coroner’s Court, with consideration to the nature of the evidence and of course, the wishes of the family. Some Coroner’s Courts have already developed a “triage” system as a benchmark for those cases deemed suitable to take place remotely. Whilst the Coronial system may be seen as more traditional than some civil courts, we anticipate that, having established a workable system of technology in many Courts, Coroners will be keen to utilise remote inquests going forwards.

Prior planning and preparation

We have seen real benefits in terms of investigation and preparation being undertaken through electronic means. There will of course continue to be circumstances in claims and inquests where face to face personalised contact is preferable, or indeed required, however there is something to be said for the adapted working practices brought about by Covid-19.

For example, where evidence is required from clinical staff we have found that removing the requirement for travel time for meetings and conferences has resulted in compromising less clinical time for the witness in particular, which is a paramount concern at any stage, but even more so in the current climate. Utilising online platforms has freed up the time of all involved and frequently avoids diary clashes which in previous times meant meetings were often significantly delayed with potential implications for the Court's timetable.

Many involved in litigation/inquests may find the process from start to finish to be less intrusive and stressful with the accessibility that online platforms provide.

Remote hearings have also resulted in an increased acceptance and willingness to hear evidence virtually from those who have now moved abroad and would have difficulty attending in person in any event, notwithstanding the current environment.

When planning for this eventuality, or indeed any setting and in particular where your witnesses are giving evidence in a setting that is separated from the advocate and Judge or Coroner, ensuring all parties are working from a previously agreed paginated bundle of documents and records is essential for the smooth running of the hearing.

As we become more used to conducting meetings and advocacy remotely however, careful consideration should be given to your own personal working facilities to ensure that when participating in Court hearings in particular that your setting demonstrates an appropriate respect to and extension of the Court; and when in conferences or meetings to take care to mitigate against inadvertent interruptions from those around us at home, particularly ensuring that the virtual hearing/meeting will remain private and confidential to participants

No “one size fits all”

Litigation has many stages and each stage may benefit from a different approach.

The injured party or family at the heart of the Court process may find remote attendance is less stressful, in what is undoubtedly a stressful process, when the need to attend Court in person is not required. Others however will understandably feel that their day in Court is the best way to secure justice and get closure from often highly sensitive and challenging events. It remains the case that it is far more difficult to assess body language and the mood of the Court when attending hearings remotely.

Our experience and the feedback we have received thus far has been that many of those placed at the heart of the process have found that remote ways of conducting dispute resolution/inquests have been beneficial and positive. In particular we have found that the process has been expedited by working remotely, removing delay for all involved, in particular the injured person and/or their families.

What's next?

We consider that there is unlikely to be resounding appetite to return to a world where all hearings, trials and inquests proceed in person. The benefits of the new virtual world are likely to continue to prevail in most circumstances.

Ultimately, each case must be analysed and decisions made by a process of collaboration between the parties, the witnesses and the Court. There will be an ongoing and continuing balancing act to determine whether remote litigation/inquests best serve the interests of justice in each individual circumstance.

We would be pleased to advise further in relation to any issues that arise from this article.

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