

SUPREME COURT OF QUEENSLAND, CAIRNS
EXCHANGE OF CHRISTMAS GREETINGS
FRIDAY, 4 DECEMBER 2020
THE HONOURABLE JUSTICE J D HENRY, FAR NORTHERN JUDGE

At the Bar Table

- Mr Michael Jonsson QC, North Queensland Bar Association
- Mr Joshua McDiarmid, Far North Queensland Law Association

HENRY J: Greetings, legal profession and guests. On the occasion of this ceremonial sitting of the court for the traditional exchange of Christmas greetings between the court and the profession, I welcome to the bench our local judicial colleagues, his Honour Judge Morzone QC and her Honour Judge Fantin, and our circuiting colleague, Judge Farr SC, to the bench. I also welcome Magistrates Pinder, Pearson, Browne, Acting Magistrate Warrington, members of the practising profession, Regional Director Rob White, Senior Operations Manager Stephen Tillett, Registrars and court staff. I also welcome Magistrate Spencer, recently retired, who is joining us by video link.

This year's ceremony is different in at least three respects from our ceremonies of previous years. Firstly, it is not being held in conjunction with admissions. Secondly, the invitations to today's ceremony were limited to the legal profession and did not extend to other community representatives, and, thirdly, there will be no morning tea when I adjourn. Those departures from convention are part of the Court's response, you would appreciate, to the public health risk posed by the COVID-19 pandemic. The challenges associated with the pandemic have dominated our working and personal lives in ways we could not have imagined when we embarked upon this extraordinary year. Its impact upon the court's work is a subject which will dominate my observations this morning.

As public health restrictions took hold in mid-March, an unheralded pause was placed on the commencement of new jury trials, and practitioners were given the court's blanket leave to appear by telephone or audio-visual link in procedural appearances and applications in which viva voce evidence was not required. Curiously, that step did not have the desired effect of keeping the majority of legal practitioners from appearing in person in court before we judicial officers, which I can only attribute to the practitioners' endearing affection for us.

So on 27 March 2020, the superior courts of Cairns decreed it was the default position, with some exceptions, that legal practitioners and parties must, not merely may, appear before the court by audio-visual link or telephone in all procedural appearances, hearings of applications, sentences and breaches at which oral evidence would not be adduced in person at Court. On 24 April, at an admissions ceremony in this room, where only three people were physically present, I admitted eight new legal practitioners. They, their movers and supporters all appeared remotely. I told the admittees that was a first, which, therefore made their special occasion extra special. It is hard to see and read people's non-verbal responses over a digital transmission, but they looked less than convinced.

Other directions were issued to the profession relating to the operation of the court's preferred audio-visual link application, the physical presentation of indictments through a courthouse drop box, the preservation of an open court by allowing journalists and persons with a special interest in proceedings, such as victims of crime or close relatives of a party, to observe proceedings remotely,

the appearance of prisoners in correctional institutions by audio-visual link and decision-making as to whether the sentence of a defendant on bail should be listed for hearing or be delayed.

That latter consideration threw up the thorny question of whether a defendant who was to be sentenced was likely to go to jail. This was relevant in two ways. Firstly, if a prisoner was likely to go to jail, that may have provided a reason to delay listing the sentence, because, at least during late March and for much of April and May, the Courts were concerned whether prisons, grappling with the appropriate means of mitigating the spread of COVID-19 in jails, were yet able to manage normal incoming rates of new prisoners. The second relevant issue was whether the prisoner needed to be sentenced when physically present at Court, in order to be taken into custody in the event of a custodial sentence, or whether it was appropriate for the prisoner to be sentenced by video link, at their lawyer's office or even their own home, if they were not going to be sent to jail.

Imagine, if you will, that you are a defence lawyer at a listing mention, acting for a client who, when the day of sentence comes, you hope to argue should not be sent to jail but who you are well aware might be sent to jail. Having imagined you are that person, now imagine how you would deal with this question from the bench, which came often, "Look, your response won't bind you or be held against your client on the day of sentence, but is it likely that your client will be sent to jail?" This was new territory indeed for defence counsel. Some would respond evasively, "Well, your Honour, it depends what your Honour means by 'likely'." Some would respond in the negative, integrated with a hint of Uriah Heep: "Oh, your Honour, respectfully, I cannot foresee my client being sent to jail by a sentencing judge such as your Honour". Some would simply make a virtue of necessity, "Well, your Honour will inevitably sentence my client to jail and that, of course, is why he should not yet be sentenced".

The conduct of trials remained the greatest challenge to us in the pursuit of our joint mission with the profession in delivering justice according to law. While most civil trials do not involve juries, they still involve witnesses. Some of them live in states from which travel was difficult or forbidden. While a greater willingness to proceed with trials where the witness is giving evidence via video link was apparent, the issue of witness transportation seemed to gradually pale in significance as the year progressed, and it became apparent parties in civil cases were also reticent to list their trials for other reasons connected with the pandemic's impact, including financial uncertainty. So while civil applications certainly continued at a pace, it is really only in recent times that there has been a pick-up in the number of requests for civil trials. That is a healthy sign for the profession for next year.

Criminal jury trials were, of course, the greatest challenge. How, in a time of social distancing, could we get a jury panel of 40 to 50 people in a courthouse with two small public lifts, empanel a jury from them, sit jurors together in a jury box built for economy flight with Jetstar or Tigerair, and eventually move them into a small jury room to deliberate upon a citizen's fate?

The answer at first was that it could not be done. Indeed it was suspected, had we pressed the point at the height of concerns for public health in April and May, that we would encounter difficulty with the cooperation of the public in being willing to attend and do jury service. To assuage those inevitable concerns we needed to develop a plan to manage risk for jurors and other participants in a criminal jury trial.

On 8 May, the judges and court staff met to discuss the minutiae of how to develop such a plan. It was a meeting for which my Associate and I prepared not merely by extracting every piece of legislation we thought we could conceivably apply to solve the dilemma which presented itself. We also measured courtrooms armed with measuring tape and witches hats to manoeuvre about the rooms as substitutes for each player in a trial. In hindsight, there was something like a cabin fever

induced mania about us, as we wandered and measured empty courtrooms pretending there were people in them. We initialled each player's witch's hat to identify them and referred to them accordingly, in much the same increasingly obsessive way that Tom Hanks did to the soccer ball Wilson in the movie *Cast Away*. On the plus side, my associate was able to fill what I found to be a surprising gap in his practical legal learning by receiving lessons from me in this very room on the effective use of an apparently complex device called a tape measure.

Judges and court staff met again as a group on 20 May, this time enlarging our committee to include a representative of the watch-house, and more particularly representatives of the bar and solicitors' branch, with Joshua Trevino, Stephanie Williams, Nathan Crane, Ken Cuthbertson and Trish Price. On 28 May 2020, we brainstormed our developing protocol with Dr Richard Gair, the Director of Public Health Services in Cairns, along with various Queensland Health officers.

Further meetings ensued, a draft protocol was refined, and in July the protocol was published and jury trials were resumed in our superior courts. Indeed, if memory serves correctly, it was visiting Judge Farr who did the first one.

The protocol was tweaked as the second half of the year wore on, and we gradually increased the number of jury trials to a rate not far removed from our pre-COVID-19 capacity. This could not have been done without the patience, cooperation and support of the judges, associates and representative members of the profession who contributed to the planned return. All are deserving of the Court's thanks. Most deserving of thanks are those unsung heroes of our local return to jury trials.

Those unsung heroes are the Registry staff, including the bailiffs. You see, the additional logistical demands placed upon Registry staff by the jury protocol were very onerous in ways I suspect the broader public and indeed the broader profession would not appreciate. It was a very significant impost upon them to absorb those additional obligations without significant relief from the need to fulfil their other duties. On behalf of all the judges, I record the court's thanks publicly to them for the admirable patience, cooperation and support they exhibited during a time of very prolonged challenge to them.

Our challenges are, of course, ongoing. There remains, for example, a COVID-19 enlarged backlog of cases likely to plague many courts in at least the coming year.

We can, at least for the moment, though, enjoy the results of the most recent easing of restrictions on 17 November. That allowed us to suspend the operation of the jury trial protocol. We have not yet returned court proceedings entirely to normal, and it remains necessary for us all to be vigilant in managing risk and avoiding complacency. In the entirely possible event that restrictions again increase, the good news, at least, is that we have the protocol and we have our other experience in place to ensure hearings can continue, and indeed to ensure the profession can continue to earn a living as practising lawyers in the courthouse.

Most public aspects of the court's and the profession's collegiate life went into hibernation for much of this year. There was no NQLA conference. There was no ball. There was no Opening of the Law Year ceremony in early July. Those in attendance here last year will recall I announced that event to open the law year would be held in our courthouse forecourt as a ceremony in which the traditional owners of the land upon which this courthouse is located would make a significant contribution and at which practitioners and judges would be invited to recommit, through one of their representatives, to their oaths of admission to office. While COVID-19 precluded that initiative this year, it will, COVID willing, proceed in early July next year.

One initiative which did survive the ravages of this year was the Cairns Judiciary CPD Series, though, admittedly, the last session of the 2019/2020 series in March, involving Dr Ben Grimes, did involve him and a substantial contingent of attendees attending by telephone or video link. The new CPD Series for the year commenced this week with Judge Fantin's session in respect of the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act. While that event could not be followed by networking drinks, it is likely, if restrictions do not tighten again, that we will return to hosting such drinks after sessions 2 and 3 to be held in February and March 2021. Those session's topics will be, respectively, "Advocacy by Telephone and Video Link", and "Effectively Using Comparative and Principle Authority to Support a Sentence Range". I am confident I join with all of you in hoping that there will be a return to our other traditional collegiate events and perhaps some new ones in 2021.

In closing, I record the court's particular thanks to the profession for its ongoing support, this being an exchange between bench and profession. That support was more important than ever in managing the Court's work in the midst of a public health crisis. The court, indeed the broader local community, are fortunate to have a local legal profession so committed to practising law to a high standard of expertise. We are fortunate it is a local profession in which willing leaders, educators and mentors abound, setting a fine example to those around them of what it truly means, as all newly admitted Practitioners promise, to truly and honest conduct themselves in the practice of a lawyer of this court according to law to the best of their knowledge and ability.

One such lawyer is Joshua Trevino of Counsel, whose appointment as Queen's Counsel was recently announced. That we now have a record three local silks in practice here is a product of the fertile collegiality and support of our local legal profession and emblematic of the high quality of legal services it provides to our community.

On behalf of all the bench present, judges and Magistrates alike, I wish all present, your family and friends, a peaceful and refreshing festive season, and a happy, fulfilling and virus-free 2021. Goodwill to all. Mr Jonsson?

ADDRESSES ON BEHALF OF CAIRNS BAR AND SOLICITORS IN FNQ

HENRY J: I note, before adjourning, mention has been made of the retiring Magistrates Spencer and Comans. I will not repeat what I have said at a number of recent functions about their admirable contribution to the busiest Courts, indeed the engine room Courts, of our building, the Magistrates Court. But can I add – and I was informed only the other day by Mr Lanza of Counsel, who I see at the Bar Table – that this is his last year in practice - - -

MR LANZA: Next year will be the last - - -

HENRY J: And on behalf of the Bench and Profession, Mr Lanza, we wish you all the best in your liberation.

MR LANZA: Thank you, your Honour.

HENRY J: The Court records its thanks to our Secretary, Ms Turner, our Associates and Registry staff for coordinating today's ceremony. Let these proceedings be recorded and transcribed. Adjourn the court.
