

# Mamma mia! What's up with virtual hearings?

Virtual hearings are so much easier than ones that take place in person – no hassle of getting to court (or even the office), no delays at security, ready access to whatever you need. Or at least, that is the theory. In practice, they can be exhausting affairs. If the technology breaks down that is understandable, but normally it works well. So what is up with virtual hearings?

In part the answer to that question turns on two aspects of communication: the way the human brain deals with it, and the somewhat different way that the internet handles it.

Developing a mechanism whereby the two can work more in harmony could make all our days a little less exhausting.

# [Sir Abraham] never had time to talk, he was so taken up with speaking

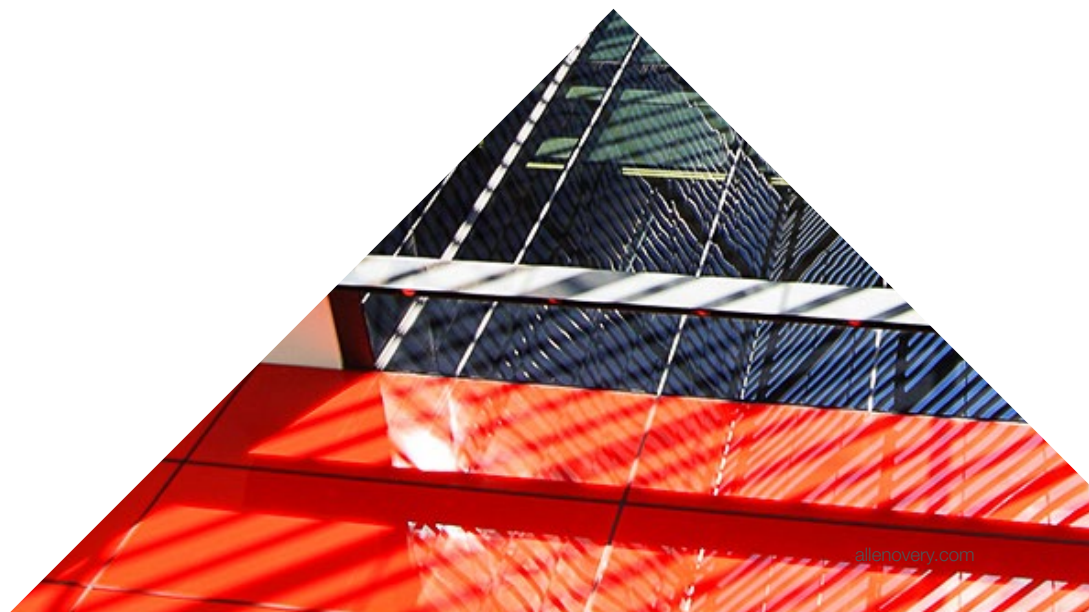
So far as we are aware, only humans are capable of complex communication. Other forms of life, both plant and animal, communicate with one another, but on a simple level: true speech is uniquely human. That capacity has come at some cost. Our nearest primate relatives, the chimpanzees, have mental skills that we can only dream of. Anyone who doubts that should search for videos of chimpanzee memory tests to see how far superior their short term recall is compared to that of even highly educated humans.

The result of that sacrifice is a remarkable system. Most cultures display a “no gap, no overlap” culture, a constant flow, back and forth, of conversation. The average delay between speakers is no more than 200 milliseconds. Yet the human brain takes around 500 to 600 milliseconds to formulate an idea and determine how that idea should be articulated. Put another way, to take one’s turn in a conversation, the brain needs to know well in advance of the gap that it is coming in order to have time to determine what will be said in response.

One of the key ways that the brain does this is by identifying tone. Some are obvious – a rising tone at the end of a sentence implies a question, for example – but many are very subtle. So subtle, we are not necessarily aware of them on a conscious level. Our brains, however, detect them and respond to them. Equally, when people hmmm or erm, that sends a message that the speaker has not finished what he or she has to say, deterring the other party from interjecting.

When we deal with someone who has an unfamiliar use of tone, breakdowns can occur. Most obviously, we may be dealing with someone who is speaking in what is, for them, a foreign language. The same issue can arise with native speakers, though. Margaret Thatcher was frequently interrupted by her (male) interviewers. Initially this was thought to be nothing more than sexism – high profile female politicians were rare, and the men were talking down to her. Early in her career there was almost certainly a good measure of truth in that. But as a Prime Minister with commanding majorities, more female interviewers and a number of mangled male interviewers in her wake it was less obviously true in all cases. Subsequent analysis has shown that her use of tone was, in some ways, somewhat unusual. There were presumably cases where the brains of interviewers picked up the signal that a gap was coming when none was intended; the result was a breakdown in the flow of communication.

Communicating, then, is as much about perception as it is about projection. A lot of data is being transmitted and we are consciously aware only of some of it. The more we can pick up, though, the better the quality of the communication will be. If we want to talk to someone we need to know not just how to speak but also how to listen. For that reason, despite his scintillating talents, Sir Abraham Haphazard, the Attorney General in Anthony Trollope’s novel “The Warden”, would have struggled with a remote hearing.



# You'll be dancing once again like a pendulum

Nor is it simply tone or even just sound that matters. The brain deals with communication as a package, so any additional data can help. Non-native speakers of a language, however fluent, often find it much easier to work face to face than over the phone because they can see the way the mouth moves. Anyone who has watched a dubbed film knows how odd it seems that the sound does not correlate with the lip movements – it is the same issue.

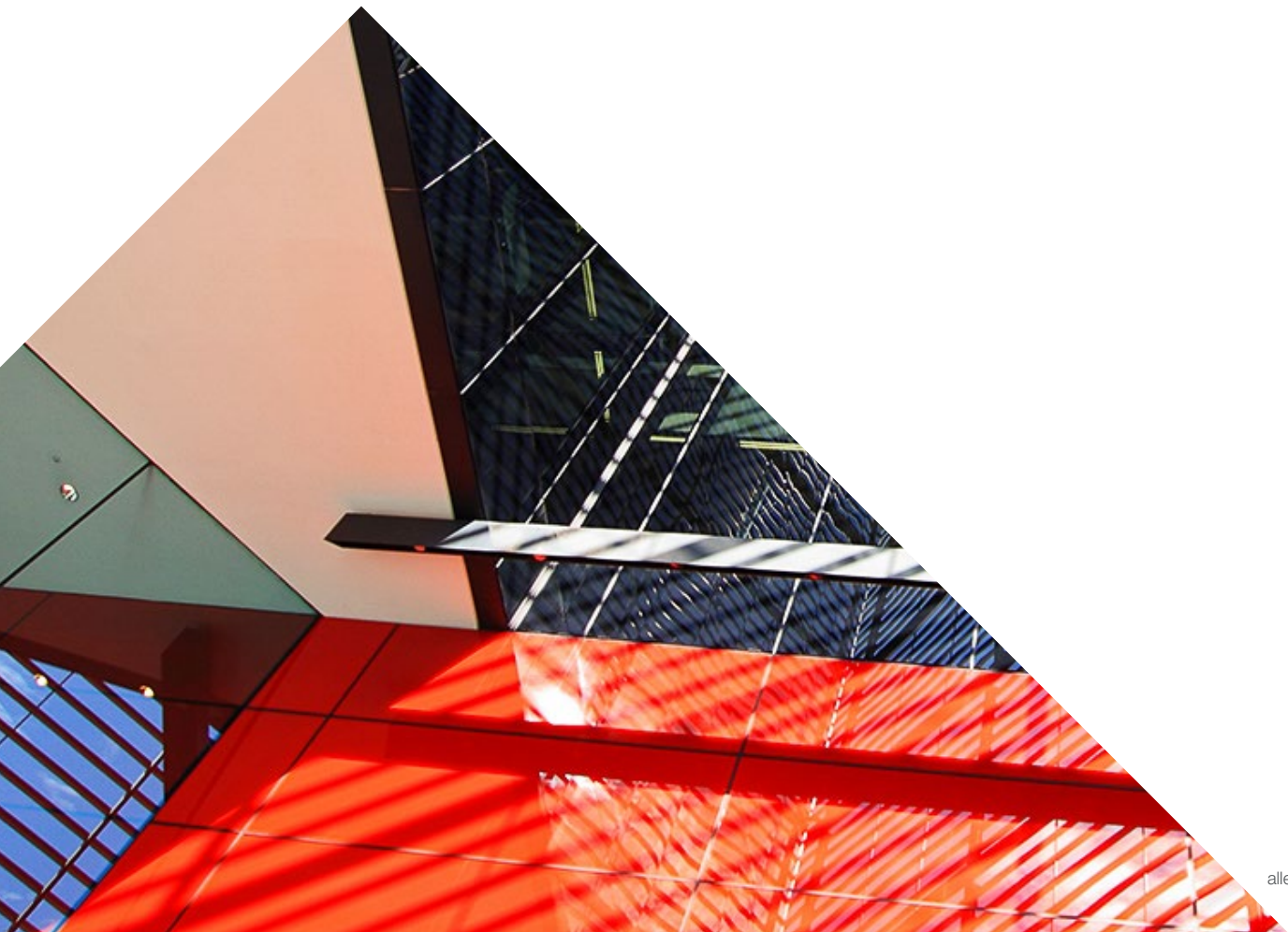
Part of communication is experience – what makes sense. As Lord Hoffmann observed in *Mannai Investment v Eagle Star*, when Mrs Malaprop refers to “allegories on the banks of the Nile” we know, from the context, that she means to say “alligators” (and actually is referring to crocodiles, alligators being native

only to China and the United States). Pop lyrics are often mangled because the object is not to communicate an idea but to have the sound of the words harmonise with the music.

Put brutally, they often make fairly limited sense even when heard correctly (and before I am accused of elitism, the same is also true of opera). For whatever reason, ABBA are particularly prone to be misheard – the actual lyrics for my subheading are “You'll be dancing once again / And the pain will end”.

Neither version necessarily makes so much sense. Indeed, as anyone who has been to a wedding or office party can attest, the pendulum version may actually better reflect reality.

Without meaningful context, problems can occur.



# Chiquitita tell me what's wrong

DARPA, the Defense Advanced Research Projects Agency, is one of those famous agencies most people have never heard of. Created by President Eisenhower in response to the Soviet Union's launching of Sputnik, its role is to develop new defence technologies. Many of them, as it transpired, have actually been at least as useful in civilian life. GPS, hypertext, virtual reality mapping and SIRI all had early contributions from DARPA. As did the internet.

Being a military agency, one of DARPA's key priorities was security of transmission. It was important that enough of the message got through, and also that the whole of the message could not easily be intercepted. Packet switching addresses both issues: essentially, the message is chopped into bits and sent along different paths; it is then reassembled at the other end. It remains a feature of the modern internet.

Normally, it does not matter if there is a slight delay in getting all the data to the destination. Most of the work we do is not actually in real-time. If there is a slight delay in your "instant" message, the chances are you will not even notice. Activities like e-mail and streaming by definition involve most of the processing being done after receipt. Video-conferencing is an exception, of course: large amounts of data have to be transmitted and, as we have seen, if any of it is

missing, potentially important nuance is lost. Moreover, it has to work in real-time because, again as we have seen, "no gap, no overlap" deals in periods of milliseconds. Zoom works to achieve a lag of 150 milliseconds – even if there is one speaker and it works, that consumes 75% of the maximum gap that the brain would expect to experience in conversation. Long pauses are particularly problematic because once the delay in answering a question extends much beyond 700 milliseconds, we start thinking the speaker may not be trustworthy.

So the approach tends to be speed above accuracy, leaving the brain to fill in the blanks on the basis of experience and guesswork. That is particularly challenging in hearings because of the issues with context. As lawyers, we work hard to make our submissions more coherent than the average pop song (or operatic aria). But we equally try not to telegraph our points to the other side in advance of the hearing. The groundwork is laid with the aim of developing the arguments to crystal clarity at the hearing itself. If the transmission mechanism does not lend itself to such clarity, hearings become, at the very least, harder work.



# Fly once more like you did before, sing a new song chicken tikka!

Covid-19 is not going away. Nor is global warming, and nor are court closures. In any event, physical courts do not always serve parties well; for many claimants and defendants they can involve lengthy travel and considerable expense and can be intimidating places to go. Virtual hearings are likely to be a part of the new normal for any number of reasons. How do we make them work?

One answer will be the improvement of technology, which has already been rapid. Even in the recent past, video calls involved dedicated technology and significant expense. Now, most people use an app which is often free at the point of use. Packet switching, though, is deeply embedded into the architecture of the internet. The technology will improve, but it can only go so far.

The good news is that the brain is very adaptable: think of how readily most people, regardless of age, have adapted to making the internet and mobile technology a central part of their lives. We quickly become good at knowing what to look and listen for. Pauses by witnesses may seem unusual now, but if all witnesses pause it rapidly becomes the new normal (and rapid answers may start to look glib).

As the use of virtual hearings becomes more widespread, it will also become easier. In the interim, there are things we can all do:

- Especially when putting questions to witnesses, keep sentences short and avoid compounding. The judge and the witness are having to devote more focus than normal to receiving the data; saving some energy on processing will mean you are better understood.
- Leave longer gaps before you start speaking. One of my partners is especially effective at Zoom conversations, simply for that reason.
- Listen for the hmms and erms, which are better indicators of what is coming next than a pause caused by a technology glitch.
- As an advocate, if you are not speaking, turn your camera and microphone off. It will reduce data transfer (speeding everything up) and avoid you flicking back onto centre stage every time you cough (which is a further distraction for already busy brains).
- A little tolerance goes a long way. We will all make mistakes in the new era; if your opponent does so before you, just move on. As Prospero concludes in *The Tempest*, “As you from crimes would pardon’d be / Let your indulgence set me free”. Only if it becomes a pattern of disruptive behaviour is it likely to become a problem.

**With a bit of work from all parties, the practice of virtual hearings may well match the theory.**

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