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CIVIL JUSTICE AFTER JACKSON

CONKERTON MEMORIAL LECTURE 2018

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Introduction[1]

1. It is a great privilege to have been asked to deliver this year's Conkerton Memorial Lecture. Although I never had the privilege of knowing John and Mary Conkerton personally, many have told me of their exceptional contribution as educators of successive generations of students of law. In addition, I am delivering this lecture in this great city with its rich history in so many different spheres, social, economic and cultural, and in this most magnificent Town Hall.

2. This year is a significant one those of us with more than a passing interest in the operation of the civil justice system. Just over a week ago Sir Rupert Jackson, the architect of the Jackson reforms, retired from the Court of Appeal. Since 2008,

[1] I wish to thank John Sorabji for his help in preparing this lecture.

when he was first appointed by Sir Anthony Clarke MR to carry out a fundamental review of the costs of civil justice, Sir Rupert has been indefatigable.[2] Everyone who supports effective access to our courts – as the Conkertons did throughout their careers as law lecturers –owes him a great debt. He will be sorely missed.

3. Civil justice reform is, however, a subject that never rests. That this is the case should not surprise us. Costs reform continues, not least through further consideration of Sir Rupert's fixed recoverable costs recommendations.[3] As you will know, he has recommended the introduction of a general fixed recoverable costs regime for the County Court fast track as well as the introduction of a new, intermediate County Court track for claims between the value of £25,000-100,000. This new track will also operate on a fixed recoverable cost basis.[4] The essential rationale underpinning both recommendations, as well as costs management generally, has recently been expressed in rather philosophical terms by Chief Master Marsh. As he put it in *Sharp v Blank*

'*To adapt SØren Kierkegaard's well-known words: "Litigation can only be understood backwards; but it can only be litigated forwards".*'[5]

This is, I should imagine, the first time that a Danish philosopher has found his way into a costs judgment or for, that matter, any other judgment in England and Wales.

[2] Sir Anthony Clarke MR, *The Woolf Reforms: A singular event or an ongoing process?*, in D. Dwyer, *The Civil Procedure Rules Ten Years On* (OUP, 2009) at 47-48.
[3] Sir Rupert Jackson, *Review of Civil Litigation Costs – Supplemental Report: Fixed Recoverable Costs*, (2017) <https://www.judiciary.gov.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-3.pdf>.
[4] Sir Rupert Jackson, *Review of Civil Litigation Costs – Supplemental Report – Fixed Recoverable Costs* (July 2017), at 9 <https://www.judiciary.gov.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-3.pdf>.
[5] [2017] EWHC 3390 (Ch) at [25].

4. If costs are to be controlled effectively, there needs to be a far greater degree of certainty for parties and their lawyers than has previously been the case. They need to be managed and controlled prospectively. Costs management achieves that greater certainty and rigour. Fixed recoverable costs does so too, and does so proportionately. We await the Ministry of Justice's consultation on Sir Rupert's recommendations.

5. Sir Rupert's recommendations for fixed recoverable costs are not the only ones which are currently being considered. The Department of Health has suggested the introduction of fixed recoverable costs in clinical negligence claims.[6] Sir Rupert in his report was supportive. He recommended that this initiative should be considered by a joint working party of the Civil Justice Council ("the CJC"), which I chair, and the Department of Health.[7] In early February of this year the CJC established that working party. It is chaired by Andrew Parker, who is both a CJC member, a highly-experienced solicitor and a partner in DAC Beachcroft. Its vice-chair is David Marshall, managing partner at Anthony Gold and a representative of the Law Society on the working party. It is to report towards the end of this year, and will provide recommendations concerning a structure and process for fixed recoverable costs for clinical negligence claims of a value of £25,000 or less. It is important work both for litigants and for the health service.

6. As you can see from this continuing work, reform of litigation costs will not be slipping from the agenda post-Jackson.

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[6] Department of Health, *Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims – A Consultation* (January 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/586641/FRC_consultation.pdf>

[7] Sir Rupert Jackson ibid at 118.

7. If we are to ensure that our civil justice system is as effective and as accessible as it can possibly be, reform must be, and will continue to be, a very high priority. In this evening's lecture I will consider some of the ways in which we will continue to reform the system.

Recent and current reform efforts

8. My starting point is recent and current reform initiatives. In addition to its work on costs, the CJC has been heavily involved in a number of these initiatives. It is, for instance, looking at the future development of alternative dispute resolution.[8] It established an expert working party in early 2016 in order, among other things, to review current approaches to ADR in civil claims, consider how ADR could be encouraged more effectively and make recommendations for reform.[9] The working group published an interim report on proposals for reform in this area in October 2017, including one which called for greater consideration of the possibility of mandatory pre-action ADR.[10] This has been a hot topic for some time. There are many different views. That was well understood by the working party but, in the light of developments, such as MIAMs in family proceedings and greater familiarity and use of ADR generally, it considered that the time was ripe to reconsider the issue. This and its other proposals were subject to consultation last year. Earlier this month the CJC held a work shop to enable further consultation and discussion to take place. I anticipate that the final report of the working group will be presented to the full CJC by the end of July.

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[8] Civil Justice Council, *ADR and Civil Justice – Interim Report*, (October 2017) <https://www.judiciary.gov.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf>.
[9] Ibid at 4-5.
[10] Ibid at 56.

9. A further CJC working party has also recently been considering the question of reforms to litigation funding. Its particular focus has been the availability and use of before-the-event (BTE) insurance as a way of increasing access to justice. Reducing the cost of litigation is only half the story. It remains the case that for very many in society the means to fund litigation remains a substantial barrier to entry to the civil justice system even if the costs are proportionate costs. BTE insurance is a potentially important source of funds. It remains one that has not developed as broadly as it might have done. I have commented previously that this is a matter of regret. In a number of jurisdictions this form of insurance, which very many people have through their car insurance and home insurance policies, forms a major part of available litigation funding.[11] In Germany, where it goes hand-in-hand with fixed recoverable costs, it plays such a role. Common law jurisdictions, such as Canada, are also looking keenly at increasing its availability and use.[12]

10. The CJC working party set out its findings in its "Information Study". The Study provided a comprehensive and up-to-date picture of the BTE market, and how it might develop. It contains a range of information, interviews, case studies, BTE policy analysis, and insights drawn from the marketplace. It should provide a strong basis for the development of future policy proposals by government and others to increase the use of BTE.[13] I very much hope this is an area in which further

[11] Sir Terence Etherton, *LawWorks Pro Bono Awards Lecture* (December 2016) at [15] <https://www.judiciary.gov.uk/wp-content/uploads/2016/12/law-works-lecture-mr-20161205.pdf>.
[12] S. Choudhry et al, *Growing Legal Aid in Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance*, in M. Trebilcock et al, *Middle Income Access to Justice*, (University of Toronto Press) (2012).
[13] Civil Justice Council, *The Law and Practicalities of BTE Insurance – An Information Study*, (November 2017) <https://www.judiciary.gov.uk/wp-content/uploads/2017/11/cjc-bte-report.pdf>.

work will be done. The initiative should also provide a good basis for those in the advice sector to raise awareness among the public of the availability of BTE.

11. Moving away from the initiatives of the CJC, important work on disclosure in litigation is being carried out by a disclosure working group, which I established whilst Chancellor of the High Court. The project began after disquiet was raised with the then Master of the Rolls, Lord Dyson, by the GC100 group - group general counsel to FTSE 100 companies - about the huge costs being incurred by their companies due the way in which disclosure and e-disclosure were continuing to be carried out. Despite both the Woolf and Jackson reforms, the cost of disclosure remains disproportionately high, particularly in litigation conducted in the Chancery Division, the Commercial Court and the Technology and Construction Court in the Rolls Building in London, and their equivalents in the District Registries, now together called the Business and Property Courts.

12. The working group, which is chaired by Lady Justice Gloster, the Vice-President of the Court of Appeal's Civil Division, and contains a wide range of experts and representatives of businesses and professional associations, identified significant problems with the current disclosure regime.[14] It concluded, among other things, that the menu of disclosure options introduced post-Jackson is not being used effectively. Too often the default position for courts and parties remains standard disclosure with its attendant cost and delay. A properly tailored, and proportionate, approach to disclosure has not become the norm.

[14] Membership of the working party can be see here: Proposed Disclosure Pilot Briefing Note, Annex 1 <https://www.judiciary.gov.uk/wp-content/uploads/2017/11/dwg-guidance-note-2-nov-2017.pdf>

13. The working party concluded that in order to achieve improvements there needs to be 'a wholesale cultural change'[15] in respect of disclosure. This, it went on to say, could

> 'only be achieved by the widespread promulgation of a completely new rule and guidelines . . . [and] a change in professional attitudes and a shift towards more pro-active case management by judges.'[16]

Such a culture shift, the working party concluded, would not be achieved by further refinement of the present rules or by further exhortation. It said that what is needed is a new CPR Pt 31 providing for a new form of disclosure process, in respect of which a new, more proportionate and e-disclosure focused culture can develop.

14. The proposed new approach involves two forms of disclosure: Basic and Extended Disclosure. Basic disclosure is to be limited to those documents on which a party relies and other documents necessary to enable all other parties to understand the case put against them. Disclosure is to be provided with the statements of case. If further disclosure is wanted, Extended Disclosure must be sought. The court might order no disclosure or what used to be standard disclosure, and also, in exceptional circumstances, train of enquiry disclosure.[17]

15. These proposals have been subject to a recent consultation, which encouraged comments being co-ordinated via relevant professional associations.[18] It is hoped

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[15] Disclosure Working Party, *Disclosure Pilot Scheme – Business and Property Courts, Briefing Note*, (November 2017) at [5] < https://www.judiciary.gov.uk/wp-content/uploads/2017/11/dwg-guidance-note-2-nov-2017.pdf>
[16] Ibid.
[17] Ibid at [12].
[18] See <https://www.judiciary.gov.uk/announcements/disclosure-proposed-pilot-scheme-for-the-business-and-property-courts/>

that later this spring the working party's proposals, having been considered in the light of the consultation responses and finalised, will form the basis of a two-year pilot to be tested in the Business and Property Courts.[19] That pilot, through breaking the hold of the prevailing disclosure culture on the part of both courts and lawyers, ought to make serious in-roads into the cost and time spent on disclosure.

Delivering justice in a digital world

16. The disclosure proposals take me to a broader reform theme: the delivery of justice in a digital world. It is that world which will increasingly shape reform post-Jackson. One of the problems identified by the disclosure working party is that the process of disclosure is currently predicated on paper-based disclosure being the default. As the working party put it:

'The existing rule is conceptually based on paper disclosure and is not fit for purpose when dealing with electronic data.'[20]

We now live, work, shop, and relax in a largely digital world. That our justice system is still predicated upon a pre-digital paradigm is increasingly anachronistic. By way of example, in 2014 a leading expert posed the following question,

'Think about the smartphone in your pocket or purse: it navigates an environment that is constantly ratcheting up in terms of complexity. Yet it does so in ways that grow ever simpler, more elegant, and less costly. Why doesn't that happen in our court systems?'[21]

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[19] Disclosure Working Party, *Disclosure Pilot Scheme – Business and Property Courts*, (November 2017) <https://www.judiciary.gov.uk/announcements/disclosure-proposed-pilot-scheme-for-the-business-and-property-courts/>.

[20] Disclosure Working Party, *Proposals for a Disclosure Pilot for the Business and Property Courts in England and Wales*, (November 2017) at [2(v)] <https://www.judiciary.gov.uk/wp-content/uploads/2017/11/press-announcement-disclosure-2-nov-2017.pdf>.

[21] G. Hadfield, *Innovating to Improve Access: Changing the Ways Courts Regulate Legal Markets* cited in E. Katsh & O. Rabinovich-Einy, *Digital Justice*, (OUP, 2017) at 149.

As John and Mary Conkerton might have said when they were teaching in the 1960s and 70s, our civil courts and their procedures are in many respects not very different from those of the 1870s. It is probably true to say, as has recently been said of the US civil courts, that

> '. . . A judge of a century ago who found himself in [court] today would need some orientation, but the process being used would not be totally alien.'[22]

17. That, however, is becoming less so. Fundamental change is taking place and will increasingly take place. Those changes will enable our court processes to be simpler and less costly. Two questions arise at this point. First, why is this important? Secondly, how are we doing it?

The importance of digital reforms

18. The obvious answer to the first question is that our systems must be simpler and less costly in order to make them more accessible. Our civil justice system will, of course, necessarily continue to match process to the type of claim. It will remain the case, for instance, that to deliver properly justice for complex, commercial disputes we will still need court buildings and physical hearings. For simpler cases, just as the small claims track today provides a more proportionate process, a more streamlined primarily online approach will apply. While maintaining appropriate differentiation, we must ensure that our processes change so that our civil justice system can appropriately meet the demands made on it. Those demands are increasing. There are four reasons for this.

[22] E. Katsh & O. Rabinovich-Einy (2017) at 154-155.

19. First, and most obviously, we see the continued growth in litigants-in-persons as a result of changes to legal aid provision and the cost of litigation. A significant amount has already been said about this, and about the obstacles which litigants-in-person face in securing both procedural and substantive justice. It is an issue that has been highlighted recently by the Supreme Court in respect of the rules on service in the *Barton v Hassall* case.[23] It is one which, perhaps surprisingly to many, is of concern even in my own court, the civil division of the Court of Appeal, where the number of permission to appeal applications brought by litigants-in-person stood at 42% in the 12 months ended 31 January 2018. The comparable figure in 2007/2008 was just under 28%. Reform is needed to ensure that we can deliver justice effectively for this increasing group of litigants.

20. The second reason concerns changes to society that the growth of the digital economy is creating. It is obvious that the spread of the internet has created, amongst other things, new ways of working and new ways of buying and selling. In doing so it has created new ways in which disputes can arise. In this respect, two experts in digital justice have recently pointed out that,

> 'It has been estimated that disputes occur in 3 – 5 percent of online transactions, leading to over seven hundred million e-commerce disputes in 2015. If one considers every Airbnb rental or Uber ride an e-commerce transaction, this is not an unreasonable estimate, which leads to the further estimate that the number will rise to a billion disputes in a few years.'[24]

Before we all panic at the idea of a billion disputes coming to the courts, the authors of that statement make clear that vast numbers of these disputes will be defused

[23] [2018] UKSC 12.
[24] E. Katsh & O. Rabinovich-Einy (2017) at 67.

before litigation even begins to be contemplated. Online dispute resolution systems can and do resolve large numbers of such disputes easily.[25] We nevertheless need to ensure that our civil courts are open to such disputes. We need a civil justice system for today's society and today's disputes, and particularly low value e-commerce disputes. That is a point particularly noted by, and underpinning recommendations made in 2015 by, the CJC's ODR Advisory Group, which was chaired by Professor Richard Susskind.[26] I will return to its work in a moment. This necessarily links to the concerns arising from the growth in litigants-in-person. The type of disputes that the digital economy is noted as generating are, generally speaking, the type of low value, consumer disputes that are most likely to be pursued by litigants-in-person.

21. The third reason is obvious enough. Litigation is expensive and time consuming. Even with costs budgeting and fixed recoverable costs, it is expensive for litigants and will become increasingly so. It is also expensive for the state and the taxpayer to facilitate with buildings, staff and all the other resources required to provide a courts system. It is important to pursue a continuous, never-ceasing effort to provide the necessary and adequate court system in the most cost-effective and efficient way.

22. The fourth reason, which is connected to all the earlier ones, concerns currently unmet need.

[25] Ibid at 48, 67. 60 million disputes are resolved worldwide by e-bay annually: SJC Advisory Group ODR Report

[26] CJC ODR Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (February 2015) <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version.pdf>

There are some who think that society is too litigious and that we have a compensation culture. The evidence in respect of the United States actually points in exactly the opposite direction to that of the received wisdom. As a U.S. academic, who has analysed the available data, has concluded, rather than being an overly litigious society, the U.S. is actually one where nine out of ten personal injury victims do not make a claim.[27] It therefore seems that there is a reservoir of individuals whose rights have arguably been infringed, but who, for a variety of reasons, never make a claim.

23. We can speculate whether the position is here as it is in the United States. Analysis of detailed empirical studies might help us to answer that question. What perhaps we can say for present purposes is that – at the least – there may well be a reservoir of such disputes here that are never brought before our courts, and that the reasons for that include the cost and complexity of our civil processes and the time they consume; and perhaps also a certain perceived inaccessibility of our courts. The majesty of our law and law courts may emphasise the importance of the law and the rule of law, but for some it may make them appear intimidating and out of reach. One of the reasons behind our current digital reforms is to make our civil courts more accessible for individuals who do not bring claims currently. It is to bring those claimants within the law's protection.

24. Finally, it must surely be entirely sensible to take advantage of the latest technology, just as any public and private body would do, to update and thereby improve our

[27] D. Engel, *The Myth of the Litigious Society*, (Chicago, 2016) at 5.

systems. As technology continues to develop, the need for reform and the nature of such reform will inevitably continue.[28]

Achieving digital justice

25. Having outlined the reasons underpinning the need for digital reform, I want to look at some of ways in which we are implementing it. The starting point here was the work done by Richard Susskind and the CJC's ODR Advisory Group in 2015. Drawing on developments from a wide range of jurisdictions, the Advisory Group set out proposals for what it called Her Majesty's Online Court. Those recommendations then underpinned reform proposals in Lord Justice Briggs' Civil Courts Structure Review. Those proposals were to have been buttressed by the statutory creation of an Online Procedure Rules Committee. The original conception in the Civil Courts Structure Review was of a single online court encompassing civil, family and tribunal claims with common procedural rules (so far as possible) for all claims. It would have required primary legislation but the then Government declined to promote such legislation. What is now envisaged is that the separate jurisdictions will remain but be accessed via a single digital platform. There is still to be a new Rules Committee for online court claims, the online procedure rules committee, whose purpose will be to formulate new rules specifically applicable to online dispute resolution, with an emphasis on simplicity of language appropriate for litigants-in-person and so far as possible common rules for all three jurisdictions.

[28] I have previously considered this, see Sir Terence Etherton MR, *The Civil Court of the Future*, (14 June 2017) <https://www.judiciary.gov.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf>.

26. The new rules committee will require primary legislation, which was originally to be contained in the Prisons and Courts Bill last year. Due to the general election that Bill fell and so was not enacted.[29] The Queen's Speech following the election made clear that replacement legislation was to be promoted.[30] It is, of course, a matter for Government when and in what form such statutory proposals will be brought before Parliament.

27. In the meantime, a shadow Online Procedure Advisory Group, chaired by Mr Justice Langstaff, is considering what would be appropriate rules for online dispute resolution generally, having regard particularly to litigants-in-person. In addition, the Civil Procedure Rule Committee has established a sub-committee under Mr Justice Birss, which is carrying out the critical task of formulating proposed rules for the online civil claims project, to which I will refer shortly.

28. Work on digitising court processes is progressing ever more quickly. This is taking a number of forms. First, there are what may be called business-as-usual reforms. An example of this type of reform is the CE-File system in the Rolls Building. It provides an efficient and easily accessible electronic filing and case management system. It replaces our traditional paper-based approach to proceedings with one fit for the digital age. It was introduced during my time as Chancellor of the High Court and was intended to apply to all the Rolls Building jurisdictions. Having been piloted to test its design and functionality, it became mandatory in October 2017

[29] Prison and Courts Bill 2017.
[30] Her Majesty's most gracious speech to both Houses of Parliament, (2017) '*Legislation will also be introduced to modernise the courts system . . .*' <https://www.gov.uk/government/speeches/queens-speech-2017>.

for represented parties in the Business and Property Courts. It remains optional for non-represented parties.[31]

29. Secondly, a number of pilots are in place to test more wide-ranging IT reforms. These are not confined to the civil justice system. They form part of the £1 billion investment in the courts and tribunal reform programme.

30. By way of example, pilot online schemes are running for probate claims and uncontested divorce claims. The probate pilot has been under way since June 2017. It is currently operating on a limited basis, but is intended to move to a national pilot stage later this year. It provides a wholly digital process for probate applications, and one that is intended to be both simpler, quicker and more economical to use than the established paper-based process. In this digital service the average processing time is 9 days between receiving supporting documents and issuing a grant. So far, all the last count, just over 1659 applications have been made using it, generating approximately £336,000 in court fees. Probate has been granted in 1072 of those cases. Feedback has been very positive. 91% of users found it easy to use. 96% found it easy to understand. A quarter used it via their smartphone.

31. The online divorce pilot has been running since July 2017 for uncontested divorces. The pilot has moved from a "print and post" service to a one which is entirely digital. This means that applicants can submit an application, pay, and attach documents such as a marriage certificate online. It is anticipated that the pilot will also move

[31] CPR PD 510 para.2.2.

to a national trial later this year. Over 1500 have requested links to the service. As with online probate, the online divorce pilot has received significant positive user feedback. What is particularly interesting, and bodes very well for the efficiency, cost effectiveness and appropriateness of online services, is that the rejection rate for errors in applications for uncontested divorces has reduced dramatically under the online pilot. The rejection rate for the old, paper based service was 40%. As at 31 January 2018 the online submission rejection rate is a mere 0.5%. It takes users 60 minutes to complete the paper based form, and only 25 minutes to complete the online form. Once again, the feedback from users has been very positive.

32. Pilots are also being run in the Tribunals system. For instance, a pilot scheme has been running this last year in which individual tax payers can appeal via an online process from tax decisions made by Her Majesty's Revenue and Customs. There has just begun a pilot to test whether the technology available is suitable to enable an entire appeal hearing to take place by video link with all parties and the tribunal judges. This would have the great advantage of enabling individuals to take part in hearings without having to travel to court or take more time than necessary off work.[32]. This will be of particular assistance for litigants-in-person.

33. Within the civil courts system the principal digital development is the civil money claims project. This is currently a pilot which was launched in August 2017 and will end in November 2019. It is presently in what is called "Private Beta", enabling invited claimants who wish to make a small claim below £10,000 to issue their claim online. Some of those participating are litigants-in-person and some are

[32] HMCTS Press Release, *Virtual hearing pilot launched*, (18 February 2018) <https://www.gov.uk/government/news/video-hearing-pilot-launched>.

legally represented. They use an online claim form. Service is effected by the court in the traditional, paper-based, way; we have not yet reached the stage where e-service is the default. Any response from a defendant may then be made either online or in the traditional way. 65% of those defendants choosing to engage at all have done so online and not on paper. A greater percentage of claims are defended online than would otherwise be the case, and this has meant that the default judgment rate has dropped from 53% under the ordinary paper processes to 24% in the online pilot.

34. Since last August 1828 litigants-in-person have used the online system, resulting in the issue of 1035 claims. Eight legal firms and 70 legally represented users have also issued claims, with 72 claims served. Some of the advantages are already coming to light. Claims can now take 7-8 minutes to complete before being issued immediately through the online system. We have seen up to a 40% reduction in the time taken for claims to move from being submitted to being sent for a first hearing. On the face of it, therefore, the online system is providing significant benefits for claimants and defendants and also the court administration. User feedback shows that 80% of users have either been satisfied or very satisfied with the online system. That is not a call for complacency. 9% report that they are dissatisfied or very dissatisfied. The reasons for that discontent plainly need to be investigated.

35. It seems that one reason for user dissatisfaction is an inability to upload evidence to the system. This is an area where future work will need to be done. As a complaint it is, however, as paradoxical as this might seem, a positive one. It means that users

of the pilot want it to do more; that they want more access to digital processes. It is a call for more digital process.

36. Another aspect which is currently under consideration, but not yet implemented, is the facilitation of settlement of online claims. At present, claimants and defendants are informed online, when completing their claim or defence, that they can settle the case by agreement. They are also informed of the availability of mediation services. It would not be a large step for a court officer to intervene online or by telephone to facilitate settlement. A more sophisticated way of achieving this might be through some software programme which would provide a structured framework online to assist the parties to reach a compromise. This is important. As I have said before, we need to ensure that – as the CJC ODR Advisory Group intended – we embed ODR processes into our online court practices and procedures.[33]

37. All that would neatly complement the County Court Mediation Pilot Scheme, which is currently being run in a few selected locations. If the parties agree to use that scheme, their dispute is referred to mediation. Where this occurs, and claims then settle, the pilot scheme has shown that the time taken from the claim being issued to settlement is reduced on average by a half.

38. It is hoped that the civil money claims online pilot will move into the so-called "Public Beta" phase in the not too distant future, that is to say it will be open for participation by all members of the public.

[33] Sir Terence Etherton MR, *The Civil Court of the Future*, at [25].

39. The issue of how to comply with the fundamental constitutional principle of open justice when there are digital litigation processes is a very important one, which is currently under continuous review. The problem arises in a range of situations, from telephone hearings, to potential video court hearings, to online dispute resolution. A number of potential solution are under consideration. In the civil division of the Court of Appeal open justice is to be furthered by the introduction of a facility for live streaming in up to three court rooms.

40. Another issue constantly under review is the assistance that many users do and will require to engage with new digital services because of their lack of skills and confidence or for other reasons. Recent analysis shows that there are 15.2 million people in the UK who are either non-users or limited users of the internet. 7.8 million non-users do not have access to the internet at home or elsewhere or do not currently use the internet even if they do have access. The expression "assisted digital" support is the expression used by HMCTS to describe the various support mechanisms to be put into place to help end users interact with the new digital services. The support currently envisaged includes assistance over the telephone, webchat and face to face support.

41. It is intended that these will be delivered through what are to be called Courts and Tribunals Service Centres, where much of the courts administration will be located. At present the online money claims pilot is enabling evidence and experience to be garnered about the need for assisted digital support.

42. It appears that just under a quarter of users in the pilot have required some form of assisted digital help. This was much lower than anticipated, possibly because

those choosing to make an application online are more likely to have good digital skills. The pilot is also showing that the type of assistance called for is predominantly procedural – 75% of queries related to procedure. Only 12% were solely IT related. The remainder were a combination of procedure and IT. Moreover, just of half of all assistance then given took the form of reassurance. In a third of cases light guidance was given. Only in 10% of cases was significant assistance needed.

43. These figures are early ones as the pilot is still in its early stages. Already, however, we can start to consider what needs to be done. If the majority of assisted digital queries are procedural and not IT related, we can start to consider what changes need to be made to the procedures to eliminate the source of these queries. We need to learn from the feedback and adapt our systems in the light of it. That way we can much more straightforwardly than in the past adapt our systems to ensure they are better able to deliver access to justice.

44. In any event, online dispute resolution is not compulsory. Litigants will still be able to use conventional processes if they wish.

45. This takes me to a much broader point. One of the reasons why ODR systems have proved so effective is that they have been able to draw on data concerning their operation. They are able to collect such data and analyse it effectively, and they draw lessons from it. One of the problems that has historically affected our civil justice system is a lack of data concerning its operation. It is a problem that has been highlighted on a number of occasions by, for instance, Professor Dame Hazel

Genn.[34] As we move our civil justice system online we have the opportunity to ensure that it is designed to enable the effective collation of data concerning its operation and, importantly, the extent to which it is securing effective access to justice. It is important that we take this step.

46. Finally, I want to touch on another significant element of the reform programme, which was anticipated in the Civil Courts Structure Review, the use of case officers to take over some of the routine civil work in the county court. It is envisaged that some of these may be legally qualified and others may not. It is still a matter for decision precisely what tasks they will carry out and where, in the court buildings or in the Service Centres. The judiciary will be heavily involved in that decision. What is agreed and clear is that, insofar as they are undertaking any work bearing on dispute resolution, they will be under judicial supervision and control.

Conclusion

47. I have only been able to touch upon a number of ongoing and future reforms. There are, of course, others, not least the ongoing development of our Business and Property Courts across the country, which is improving the delivery of justice for business disputes. The Business and Property Court in Liverpool had its own very successful launch on 9 February this year.[35] Taken together the reforms should make it clear that reform post-Jackson is not only going to continue, but that it will do so at a not inconsiderable pace. It is perhaps too early to come to a conclusion concerning how exactly our civil courts will look in the future.

[34] See for instance, H. Genn, *Judging Civil Justice*, (CUP, 2010).
[35] It opened on 9 February 2018 <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/the-business-and-property-courts-bpc-in-liverpool/news/>.

48. What ought to be apparent is that the current reform programme will not result in a one-size fits all approach to the delivery of civil justice. The idea at the heart of the Woolf reforms that process should match the dispute will continue to guide our approach. For some disputes this will mean that we will have an entirely online process. For others, it will mean we have a more traditional court-based process, albeit one with all the advantages that the digital revolution provides such as paper-less hearings with virtual bundles on flash drives (as is already the case in the Supreme Court). As justice after Jackson increasingly becomes digital justice, it will be a form of justice that can be more tailored to the needs of the dispute and the parties. As such it should be an increasingly accessible, efficient and cost effective form of justice.

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