Joshua Rozenberg QC (hon)

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Problems foreseen?

> **Andrew Langdon QC had never been a fan of HMCTS reform. Speaking as incoming chairman of the Bar in December 2016, he said that "justice has a human face and it's not a face on a screen".**

Arguing against what he believed would be "virtual reality" courtrooms, the Bar chairman said barristers should not be "shy of standing up for the value of traditional human, physical, real, face-to-face contact in the delivery of justice by one of Her Majesty's judges, seated one hopes not in a pop-up or a mobile court but a place where the majesty of the law is still discernible".[1]

His audience could not have failed to notice that real courtrooms would require real barristers. Unsurprisingly, the barristers' leader thought that this would be money well spent.

On a personal level, too, barristers are wary of change. One leading advocate, who described himself as a supporter of courtroom IT, said he found it easier to make notes with pen and paper while addressing a court. The barrister believed it would always be helpful for advocates and juries to have a paper copy of the core bundle — the most important documents and arguments in the case.[2]

But another defence counsel I spoke to in 2016 had invested in two pieces of equipment that offered the best of both worlds. One was an Apple MacBook — a laptop computer that allowed access to the online digital case file and anything else online. That was always open in front of him. Alongside it in court was an iPad Pro with an Apple Pencil — a stylus that enabled the barrister to make handwritten notes in the electronic equivalent of the distinctive blue courtroom notebooks that barristers like to use. Each case had its own such notebook. When the case was over, its notebook was uploaded to the defence area of the appropriate digital case file.

There are still many outdated systems in use and, I fear, some outdated individuals. But sit in on a hearing of any significance in the High Court or above and you will see junior counsel tapping away on their laptops, taking full notes of the proceedings. It is by no means unusual to see lawyers and judges touch-typing in court — something that would have looked very eccentric just a few years ago.

Digitising the courts is going to happen; indeed, as I have tried to show, it is happening already. But that does not mean that HMCTS should be allowed escape public scrutiny. Delivering the Birkenhead lecture at Gray's Inn in October 2017,[3] Professor Dame Hazel Genn raised some important concerns.

Effective access to justice means more than the ability to complete an online form, she said. "It requires the ability to engage, to participate, to be dealt with by fair procedure and to receive a substantively just outcome."

In her view, deciding cases in public benefits society. It reinforces respect for the law and can provide a framework for settling similar disputes in future. Although mediation may resolve cases, it does not necessarily deliver justice.

Hazel Genn then turned to the "iterative" process proposed for tribunals, under which processes normally dealt with at a single hearing could be spread out over a period of time. On the face of it, this made good sense: why wait for everyone to turn up in the hearing room on a pre-arranged date only to find that a crucial piece of evidence was missing? She accepted that the iterative process might lead to more efficient and possibly more accurate decision-making.

But there was a downside. "It shifts the balance of responsibility, impacts the independence of the judge and increases the scope for bias," she claimed.

She was also concerned about virtual hearings. Were claimants and witnesses more likely to be believed when they could be seen and heard by the judge? Were defendants more likely to engage with a court if they were physically present rather than merely watching the judge on television? And how would judges feel a system in which they would receive no help on the law from the parties? As Lord Justice Briggs observed, the judge would have to become "his or her own lawyer"?[4]

To assess the advantages and disadvantages of the reform, she called for academic research — not just into whether claimants and defendants could use the online court but whether they felt they had participated effectively and achieved substantially just outcomes.

As she pointed out, though, agile development was designed to collect only the minimum data — just enough to see whether or not a particular process was working as intended. "This is entirely understandable from an operational perspective," she said, "but not from the perspective of the need to evaluate the impact of the new system and to be in a position to judge whether it is achieving its access-to-justice objectives."

In what may have been a direct response, the HMCTS chief executive Susan Acland-Hood promised to "build excellent data systems into all our new systems – so that we can keep track of how well they and we are working; learn and improve; and measure the right things (for example, finding ways of measuring and then reducing other people's wasted effort, not just our own use of buildings or speed of resolution)".[5]

Another researcher who raised concerns about virtual courts was Penelope Gibbs, director of a campaign group called Transform Justice. Her report on the increasing use of video-links in criminal cases concluded that "virtual justice may not be more efficient, may not deliver the cost-savings it is meant to do, and may compromise human rights and confidence in our justice system".[6]

Much of the criticism in her report was about the poor quality and unreliability of existing live links. There were also concerns about the difficulty of arranging consultations with lawyers from prison before, during and after a hearing.

These are valid concerns but not objections of principle: given more resources, the arrangements can be improved. And prisoners themselves sometimes prefer not to go to court for preliminary hearings or appeals. They avoid early starts, long waits in court cells and the risk that they may end up in a new prison that evening because their cell has been allocated to another prisoner. Trips to court can also disrupt education or training course that may lead to release on licence.

Video links are here to stay — but that's not to say they cannot be improved. Like Hazel Genn, Penelope Gibbs calls for more research.

"The unanswerable question is whether virtual justice does make any difference to justice outcomes. Bar the 2010 study on virtual courts, we have no research in England and Wales which assesses the impact on court decisions. With no data collection since video hearings were launched on the number and type of defendant who appears on video, we are all working in the dark. But the Ministry of Justice study and the weight of anecdotal evidence suggest video hearings are prejudicial. Given this, it seems foolhardy to press ahead with a major expansion of virtual justice — an expansion which can be implemented with or without new legislation."

HMCTS accepted that there was bound to be some tension between developers and researchers. The former were committed to changing things quickly when they went wrong; the latter were more concerned with why things had gone wrong in the first place.

Some researchers wanted to track individual users of online court services, given that a user with debts might have housing and family problems as well. The Legal Education Foundation told me in March 2018 that it had become increasingly concerned over the past year that HMCTS had no plans to develop a consistent data collection policy across all of the court processes being digitised. The foundation wanted HMCTS to collect and publish aggregated, anonymised data — both about the users of the online court and the outcome in individual cases. The data would include information about individuals (such as age, race, sex, disability, religion, sexual orientation) and details of how far they had progressed through the system.

The Legal Education Foundation thought that data collection should be built into the system. Data was needed in order to understand whether the online court was meeting the aspirations of senior judges. Sir Terence Etherton had said we had "the opportunity to build a civil court that will not just be fully accessible: it will be one more capable of securing equal justice for all".[7] Sir Ernest Ryder had said the court's aim was "quite simply, to strengthen the rule of law".[8]

Data about court users is certainly needed if we are to assess the court's effectiveness. But there must be concerns over how personal data is used. It may be very useful for a judge to know whether a witness in a civil case has convictions for dishonesty. But there is also a risk of prejudice.

HMCTS is case-based rather than person-based, a source told me: "we should not default to knowing everything about everybody". Subject to that, though, HMCTS would be willing to give researchers more information than they were currently receiving.

But there was very little sign that HMCTS was willing to engage with specialist legal academics and writers. Dr Judith Townend, lecturer in Media and Information Law at the University of Sussex and one of the few specialists in this area, told me she believed HMCTS has not consulted adequately on important issues such as media and public access to digital proceedings. That conclusion was endorsed by the NAO report in May 2018.

References

1. http://www.barcouncil.org.uk/media/509125/final_version_inaugural_address_2017.pdf

2. Paul Keleher QC, quoted in Counsel magazine, July 2016, p27
http://www.counselmagazine.co.uk/articles/the-digital-drive

3. https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf

4. https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf paragraph 6.15.

5. https://insidehmcts.blog.gov.uk/2017/10/26/susan-acland-hood-sets-out-our-priorities-for-the-next-phase-of-courts-and-tribunals-reform/

6. http://www.transformjustice.org.uk/wp-content/uploads/2017/10/TJ_Disconnected.pdf

7. https://www.judiciary.gov.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf paragraph 60.

8. https://www.judiciary.gov.uk/announcements/speech-by-sir-ernest-ryder-raising-the-bar-innovation-and-global-opportunity-for-a-forward-thinking-profession/