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Wider lessons from north America

The UK government is spending up to £1bn on reforming the courts and tribunals of England and Wales. There are many parallels between that reform programme and the developments outlined in this paper. What lessons should HM Courts and Tribunals Service learn from north America? Here are my thoughts.

Data capture

The retention and, where appropriate, disclosure of user data is vital to the success of any reform involving public money. Those responsible for change need to know whether their reforms are working as intended. If not, they must be able to adapt those reforms effectively. Trying and failing to get things right is forgivable; failing and not trying to put things right is inexcusable.

We saw that British Columbia's Civil Resolution Tribunal was designed so that its operators could retrieve user data in real time. User satisfaction data was described as a "treasure-trove" that could be used to make improvements. The tribunal was open to requests from academic researchers. It was confident in its dealings with the media.

US immigration courts were less accessible. But they responded appropriately to a freedom-of-information request. The US Executive Office for Immigration Review, part of the US Justice Department, keeps records of more than six million cases going back to 1951. The data was transferred to Ingrid Eagly in comma-delimited format and could then be analysed.[1] Although she examined only the two years from 2011 to 2012, her research and analysis depended on proper record-keeping and access to those records.

Professor Dame Hazel Genn is a founder and co-director of the Judicial Institute at University College London. As the UK's leading authority on socio-legal studies, she is widely respected for her research on the responsiveness of the courts to the needs of their users. Delivering the Birkenhead Lecture at Gray's Inn in October 2017,[2] Hazel Genn said that she and her colleagues had always been hampered by a lack of data about the civil and family courts. With the development of online courts in England and Wales, there was an opportunity for data to be collected. That could allow academics to learn about the dynamics of disputes, processing, outcomes, dispositions and trends over time.

She outlined the areas that needed examination. This is my summary of her questions:

- Who will use the courts in future? Will the courts encourage people who currently excluded?
- Will existing users be deterred by online processes?
- Will the system encourage recreational litigants?
- Will litigants-in-person perceive the system to be fair and just?
- Will users find the system manageable?
- Will they like online courts?
- Would they choose to litigate online, given the choice?
- Will they think the process delivers substantively just outcomes by means of a fair process?
- Will online systems make it easier and quicker for judges to deal with litigants-in-person?
- Will the imbalance of power between litigants be unaffected, reduced or magnified by online processes?
- Is an online court more able or less able to deliver justice?
- What will be the measure of success for online dispute resolution? Will it be just a settlement? Or a just settlement?
- Will the parties to online and virtual hearings perceive them to be fair?

At the time Hazel Genn was speaking, it looked as if the court software was not being designed with a view to facilitating research. More broadly, it was difficult for any outsider to find out how the reform programme was going. As she said, "the lack of a clear flow of communication has been a cause of some complaint among the profession, the judiciary and academics".

By January 2018, there were signs that HM Courts and Tribunals Service was slowly beginning to emerge from the information blackout of the previous six months.[3]

Support for vulnerable users

It is a fundamental principle that the courts must be open to all. "Like the Ritz hotel," a cynic might add,[4] pointing out that many people can't afford the entry fee. But those who can satisfy the admission requirements must not be denied access to an online court on the grounds that they are unable to manage the technology.

There are two ways of supporting people who do not use computers. Existing paper-based processes can be retained for their use. Or they can be helped to apply online.

In my view, the latter is a much better solution. It cannot be efficient to retain paper processes for a few users. And the Canadian experience suggests it would be very few indeed.

Shannon Salter told me that she and her team were surprised at how few people chose non-standard way of interacting with the tribunal. In more than 3,000 claims lodged by December 2017 — involving, by definition, at least 6,000 parties — only three people had asked the CRT not to contact them by email. Applications submitted on paper rather than online amounted to significantly less than one per cent.

"There seems to be such a high demand for online services that a person who is not particularly comfortable with a tablet computer would rather sit down with a friend or a family member in the evening and go through our online form than go to the post box and mail us a form," the CRT chair said.[5] Users could save the information they had provided and log back into the system later at a friend's home if they wished.

In England and Wales, there have been promises that court staff who are no longer needed to file written documents could be retrained to assist those who are unfamiliar with computers and smart phones. Arrangements of this kind are essential if the most vulnerable are not to be denied access to justice. Proper provision should be made for them when staffing levels are being decided.

However, the cost of a helpline is unlikely to be huge. Many people can interact with a smartphone app these days. The sort of people who cannot do so will not, in any events, manage to bring or defend proceedings without the help of a friend or family member.

If defendants in criminal cases or immigration detainees are required to appear in court by video link, it is essential that the significance of the hearing is explained to them in a way they can comprehend.

Public confidence in the courts

There is a healthy dose of public scepticism about major public IT projects. Many of them have cost too much and delivered too little.

Once they are seen to work, though, we seem happy to adapt. When email was first introduced, the idea that lawyers might use it to communicate with each other — and with their clients — was regarded as outrageous, even a breach of professional etiquette. Now it is routine.

There are risks, of course. We all know that our computers may be hacked. If that happens to us, it will cause great inconvenience if not financial loss. But it is a risk we are prepared to take, just as involvement in a road accident is the risk we take if we travel by car. The benefits outweigh the perceived risks.

And those benefits may be considerable. On the whole, we find sending electronic communications preferable to writing letters and putting them in the post. Emails are quicker and much cheaper than letters. Those advantages apply to court forms completed online.

Some of us may even prefer to receive guidance from expert systems rather than from experts. We are less likely to be embarrassed by our mistakes if we are corrected by a machine.

On the other hand, we are likely to be concerned at the idea of being judged by an algorithm.[6] Until we are persuaded that computers are cleverer than humans, we need reassurance that our disputes will be decided, ultimately, by a living person.

And that promise is fundamental to the design of the Civil Resolution Tribunal in British Columbia. The early stages, in which parties can explore solutions to their disputes, involve no interactions with humans at all. Although the system is friendly enough, some might find that

disturbing. Others, though, may regard it as helpful and unthreatening.

The essential safeguard to preserving public trust in an online court system is the promise that every user will, ultimately, have access to a judge. These judges need not be particularly senior; but they must be what in England and Wales are called "judicial office-holders". Their decisions must be subject to appeal or review.

That seems to be what the government intends. Even if it is not, the senior courts will usually find a way of ensuring that injustices are put right. But it is far too early to tell whether the courts reform programme in England and Wales will preserve public confidence. The only thing people are likely to know about it is that it involves closing courthouses. Logical though that may be, it's a policy that most people will not welcome.

Open justice

Open justice is both a challenge and an opportunity for online courts. The challenge is obvious: how can proceedings be open to scrutiny by press and public when there is no hearing to attend? But there is also an opportunity: putting information online ensures it is available to many more people than can visit a court in person.

When I first started covering the higher courts, most reserved judgments[7] were handed out on paper. You had to be in court to pick one up[8] and there were sometimes not enough copies. These days, judgments are generally published online, sometimes minutes after they are delivered. Everyone can read them.[9]

On the other hand, there are far fewer reporters to cover these rulings. Although the day's judgments are available to all, few people will have the time to read through them in the hope of finding they will find interesting. Whether or not a ruling gets picked up by the media is a hit-and-miss affair.

The principle of open justice is respected by the courts. They employ press officers who do their best to spread the word, using social media and other resources. Explanatory notes are provided, particularly in high-profile cases

The UK Supreme Court live-streams its hearings, allowing them to be watched online. Recordings can also be viewed later. That arrangement may be extended to the Court of Appeal in England and Wales.

In practice, though, only a small proportion of the available material is likely to reach the wider public. But the principle is clear: information must be available to those prepared to look for it. Courts that currently make their rulings available to visitors must continue to do so when they are online.

The same principle must be available in the case of online courts. If a physical courtroom is open to the public now, its online replacement should be equally accessible — if necessary by live-streaming its proceedings to somewhere where they can be viewed.

There may be practical problems. At present, it is an offence to take pictures in the lower courts of England and Wales. That law could be changed to allow court authorities to live-stream or record the proceedings. But if these feeds and recordings were freely available through the internet they could be used inappropriately. Current thinking is that the hearings should be available for people to view, but not record, in controlled circumstances — for example, under supervision in a court building.

Sitting in public may be something of a chore, especially if there is nobody in a public courtroom to follow the proceedings. That can happen at preliminary hearings, such as one I attended at a Crown court in 2016.[10] For scheduling purposes, the judge wanted to know whether an expert witness at a forthcoming jury trial would be giving evidence in person or merely in writing. That depended largely on whether his evidence was likely to be contested. Normally, the judge would have held an oral hearing and asked the senior counsel who were prosecuting and defending. In practice, the two QCs would have been too busy to attend such a hearing — each was taking part in a trial in another part of the country — and they would have sent junior counsel instead. Those barristers would not have had the authority to take a decision and so the judge would be left none the wiser.

So the judge decided to conduct the hearing by telephone. She sat at 9.45am, at a time when the two QCs were not likely to be in court elsewhere. Each barrister was called on his mobile and a conference call was arranged so that they could speak to each other and the court. The matter was soon resolved to everyone's satisfaction.

A hearing such as this would normally take place in open court. To ensure that anyone who happened to be in court could listen, the telephone call was made from a speaker-phone installed on the judge's bench. Everyone could hear the conversation, myself included. That involved certain formalities: the judge had to wear her robes and counsel were meant to address her as "Your Honour" rather than the less formal "Judge". But that is how it must be: technology should not make the courts any less open.

Some people fear that the courts will become too open. Convictions for minor offences are unlikely to be reported these days unless the offender is well known or the circumstances are unusual. Putting the names of all convicted defendants into a public database would make it much easier to discover a person's criminal record.

I suspect that some users of the Civil Resolution Tribunal in British Columbia do not realise that it publishes all the decisions it takes.[11] Take a recent example I selected at random.[12] It was a case that would never have made the law reports because it depended entirely on the evidence. The claimant, Joseph Whiteside, complained that a flooring company called End of the Roll had agreed to install his living-room carpet in no more two sections, rather than as six pieces stitched together. The tribunal was not persuaded there had been any agreement on the number of pieces to be used and Mr Whiteside was unable to recover his $125 tribunal fee.

I wrote to the only Joseph Whiteside I could find online in British Columbia and received the following reply:

> The case was brought by my father, but I have not discussed it with him in several months. I do not know if the case has even been resolved. Sorry I cannot be more helpful. Dad is of very independent mind — especially when he believes that he did not get the quality of service he paid for. I would say that when I filled out the first set of forms online for him, I found it extremely frustrating. If I had not drafted them, there is no way he could have filed anything. He is elderly; does not type; and tries his best to use his laptop.

Litigant engagement

A major concern for anyone designing an online court is how it engages with its users, the litigants. That's not a problem for traditional courts, which generally deal with litigants through their lawyers. But online courts are designed to be used by unrepresented litigants — also

known as litigants-in-person — who may never have used a court before in their lives.

Hazel Genn has aptly summarised the problem:[13]

> Thinking about a system tailored to the needs of users, we want something different for the alleged offender than for the bewildered benefit applicant, the consumer wanting his goods replaced, the parents wanting access to a child, the small trader suing for his payment, the indebted householder being sued by his utility company, the represented personal injury claimant, the non-English-speaking asylum seeker or the sophisticated taxpayer contesting a VAT penalty.

True though this undoubtedly is, court systems have common features and must be seen as fair to both sides in every dispute. A consumer suing a utility company for missing an appointment will use the same court as a utility company suing thousands of consumers for not paying their bills. That's not to say they will access the court in the same way: the utility company will not have to answer the preliminary questions asked of consumers and will be able to upload a series of claims in bulk. But neither side should feel that the odds are stacked against them.

Litigant engagement with an online court will generally involve a series of web pages. It would also be possible to access a court via a smartphone app. But a website, if properly designed, can be accessed on any type of device and is therefore easier to maintain and update.

We can see that the courts and tribunals of England and Wales and the Civil Resolution Tribunal of British Columbia have taken different approaches to designing their web pages. The CRT illustrates its pages with friendly images suggesting inclusiveness and diversity. The online courts of England and Wales use a template common to all UK government websites. Its layout is clear and dignified but there are no images.

The CRT certainly seems more approachable. But the web pages designed for courts of England and Wales seem more business-like. Their main problem is that they have no design features to tell users that they are accessing a court. Worse still, pages are headed "GOV.UK" — implying that the courts are part of the government rather than an independent arm of the state. That heading should never be used.

What's needed for online court services in England and Wales is a logo. These are notoriously difficult to design, which may be why the CRT has chosen one that that has no obvious meaning or symbolism. But it is important that litigants know that the body that they are engaging with is a court. Every page for which HM Courts and Tribunals Service is responsible should make that clear.

More generally, I regard clarity and dignity as more appropriate than overfriendliness. Online courts should provide help at all stages for those unfamiliar with litigation. But they must take care not to appear patronising.

Users are likely to be particularly confused when they discover that they are being encouraged to settle their disputes rather than litigate them. That's not what you go to court for, some might say. In British Columbia, the clue is in the title: if it's called the civil resolution tribunal, its aim must be to *resolve* claims — not necessarily to decide them. No such clue has been provided for those who will use online courts in England and Wales.

If courts are becoming mediators, where does that leave the judges? Hazel Genn quotes,[14] with approval, concerns raised by Professor Judith Resnik:

> The foundation of the authority of judges is that their power to impose judgment comes from the structure of adjudication, its constraints, and its public character. If the task of adjudication is replaced with that of shepherding parties toward private conciliation, the independence of judges becomes a goal without a purpose or a constraint. The result is the decline of adjudication's potential to serve and to support democracies.[15]

The answer to this concern must be to separate the roles of mediator and adjudicator within the court structure.

Earlier in this paper I discussed the difficulties of litigant engagement by video link in criminal and immigration cases. If justice is to be done, it is essential to engage the attention of the person facing criminal charges or deportation.

Although video links are used for preliminary hearings and appeals in the criminal courts of England and Wales, defendants are usually present in court while on trial. An exception was made for Barry Bennell, a former football coach whose trial on sexual abuse charges opened in January 2018. He appeared by video link. The jury was told that this was because of an illness that required him to be fed through a tube.[16]

Hazel Genn has also written about the implications of procedural changes — such the iterative process favoured by Sir Ernest Ryder, the senior president of tribunals. This means the parties will no longer be at the same place at the same time. Indeed, they will not even be in different places at the same time. Instead, they will be in different places at different times.

As I understand the way this is meant to work, one side will make written submissions to the tribunal. The tribunal judge will then invite the other parties to respond. This process will continue until the judge has all the evidence needed to decide the case.

Hazel Genn thinks this may lead to more efficient and, indeed, more accurate decision-making:[17]

> Indeed, it has recently been suggested that asynchronous processes help unrepresented parties, who are often flummoxed at hearings by allowing them to amend as they go along.[18] But it shifts the balance of responsibility, impacts the independence of the judge and increases the scope for bias. Moving to a sequential, iterative process of determination at the same time as transferring to online communication introduces quite a few simultaneous changes to traditional process.

These changes will require careful thought and their effectiveness must be properly researched.

So long as the fees are not too high, more people are likely to use online courts than have used traditional courts in the past. Users will no longer be deterred by the huge cost of legal fees. On that basis, the introduction of online courts in England and Wales is likely to increase litigant engagement. And that must surely be in the interests of justice.

References

1. *Remote Adjudication in Immigration*, above, pp 1001-19.

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

3. While Dominic Raab MP was the minister of state at the Ministry of Justice responsible for court reform.

4. "In England, justice is open to all — like the Ritz Hotel." Sir James Mathew, 1830-1908, quoted in R. E. Megarry, *Miscellany-at-Law* (1955).

5. Interview with the author, Vancouver BC, 7 December 2017.

6. See *Software 'no more accurate than untrained humans' at judging reoffending risk,* The Guardian, 18 January 2018, https://www.theguardian.com/us-news/2018/jan/17/software-no-more-accurate-than-untrained-humans-at-judging-reoffending-risk

7. A reserved judgment is one delivered after — often days or weeks after — the oral argument is concluded. Some judgments are delivered *extempore* — spoken aloud at the end of the hearing and transcribed for publication (usually, after minor corrections have been made).

8. Coverage of judgments from the European Court of Human Rights required an overnight stay in Strasbourg, which was less of a hardship during the asparagus season.

9. A few are published by the judiciary — https://www.judiciary.gov.uk/judgments although a charity — http://www.bailii.org — is left to publish the rest. It's an odd way to propagate the common law but it generally works. When I draw attention on Twitter to selected judgments — particular in family cases — and sentencing remarks, non-specialist readers are often surprised at how much care has gone into writing them.

10. Reading Crown Court, 15 December 2016.

11. https://decisions.civilresolutionbc.ca/crt/en/nav.do

12. https://decisions.civilresolutionbc.ca/crt/crtd/en/item/304873/index.do, issued 15 January 2018.

13. Professor Dame Hazel Genn DBE QC (hon), Birkenhead Lecture, Gray's Inn, 16 October 2017: https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf

14. Genn, Birkenhead Lecture, as above.

15. Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of The Public's Role in Court-Based ADR*, Nevada Law Journal, 2015, 15(3), page 1687.

16. http://www.bbc.co.uk/news/uk-42623499

17. Genn, Birkenhead Lecture, as above.

18. Ayelet Sela (2016) *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, Cornell Journal of Law and Public Policy: Vol 26, Issue 2, Article 3. Available at: http://scholarship.law.cornell.edu/cjlpp/vol26/iss2/3