

What can the pandemic teach us about the costs of civil litigation?

Association of Costs Lawyers Online Seminar

Lord Briggs, Justice of the UK Supreme Court

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I would like to speak to the question of what the Covid-19 pandemic can teach us about the costs of civil litigation. Today, when you are facing grave restrictions on your working and social lives and I am shielding at home with only a dodgy broadband connection with the outside world, it is easy to say that Covid just adds another time-consuming and therefore expensive element to the cost of representing clients in the defence or vindication of their civil rights. Normal channels of communication have had to close down. Court offices are empty or have skeleton staff, and the window for a face to face encounter and enquiry is closed. Getting a case heard or dealt with at all is a major challenge. Getting it ready, using unfamiliar virtual and electronic methods, rather than fixing a hearing and turning up with the documents, is all new, strange, hit and miss (at least from a technological perspective) and largely unregulated. All of this is then exacerbated by shortcomings in internet coverage which can sometimes very frustratingly make the whole process break down despite everyone's best efforts.

But I want to present the pandemic to you also as a major opportunity to meet the greatest challenge of all: access to justice. Over the last 10 years, I have come to regard access to justice as the greatest challenge facing us lawyers: how can we, as skilled practitioners with years of dedicated expensive training and experience, provide access to justice to ordinary people at a cost which is both affordable and proportionate to the value at risk in their disputes? We may have the finest legal system anywhere, to which people and businesses come from all over the world for resolution of disputes which have no connection with the UK, other than choice of law and jurisdiction. English law may be the law of choice for businesses all over the world. Yet we are failing to provide those unique benefits to many, probably a majority, of our own people, certainly in relation to civil disputes, and increasingly in other areas such as private family disputes and inquests, as Legal Aid continues to contract and the law becomes ever more complex.

And it's no good just saying that Legal Aid should be restored to its former glory. Not only is that most unlikely to happen in a post-Covid age of austerity, but also if a civil dispute worth £25,000 typically costs £50,000 or £100,000 to litigate, why should the taxpayer pick up the tab for such a wildly disproportionate cost? It is up to us lawyers to find ways of curing this disproportionality before we can expect clients to pay for our services, or for society as a whole to do so through taxation.

Why do I say that the pandemic provides a major opportunity to meet this challenge? After all, its immediate effect has been to make waiting lists for scarce court hearings even longer, both in the Crown Court and the County Court. Let me explain.

From 2015 onwards when I was conducting the Civil Courts Structure Review, I came to appreciate that moving dispute resolution online offered the best way of getting this disproportionality between cost and value at risk under control. I recommended the establishment of a civil online court as the way forward for small cases. It would be a new, more investigative, court-designed system capable of being navigated largely without lawyers. The HMCTS Reform Programme has been working on that project, not just for civil money claims, but for divorce, probate, and for some types of tribunal cases. I understand that steps are also being taken in the criminal courts as well. The Government has backed this Reform Programme with substantial funding, and real (but many would say slow) progress was being made when the pandemic struck.

But the online court idea had not really sunk in. Certainly, it had not yet gripped the legal profession with much enthusiasm. Was it a government plot to get rid of lawyers? Would it sound the death knell for oral advocacy, that jewel in the crown of English procedure? How could those challenged by the need to use computers take advantage of the new offerings? How could justice remain open and transparent if moved from a public courtroom to the internet? Further, an online court presupposed the digitisation of the kinds of documents typically forming the trial bundles. Since senior lawyers have most of the influence on how things happen, the love of using paper files rather than screens (or just the long familiarity with paper) was slowing the pace of the move to electronic communication at every stage. I suspect you will remember how long it took for the new electronic bill of costs (for assessment) to take root,

until it was made mandatory.

But look how the pandemic, and then the lockdown, has changed all that. If we put aside court proceedings for a moment, have we not all had to learn how online video conferences can replace face to face meetings? By as early as Easter Sunday, my small local parish church had a completely virtual service using the Zoom platform and 73 screens, with over 100 people in attendance, none of whom had any prior training in Zoom or video conferencing, and many of whom were able to participate using mobile phones or tablets rather than laptops. I expect that we can all think of similar examples outside legal proceedings where this revolution occurred almost overnight, under compelling necessity. This event is just another example, although we are talking about the law. How much would it have cost you to attend a conference like this in person? How many of you would have been able or willing to spare the extra time involved?

Have we not also discovered that, in so many areas, digitisation and electronic file storage can replace paper, with real advantages once you take the plunge? I have, and I'm only 5 years from retirement. Just consider the ability to search vast documents, and stores of documents, electronically. I am sure most of you are much more computer-literate than me, or at least better able to learn new tricks than this old dog.

The phrase "we're never going back to the old ways" pervades many aspects of our expectations about life after lockdown, even if we may be nowhere near escaping from it yet. I very much hope that it will also be true of legal life. It certainly is in the Supreme Court where I work. Before Covid struck, we already broadcast all of our hearings live online. We had just started to use video conferences for hearing some appeals in the Judicial Committee of the Privy Council, to make them affordable for the often cash-strapped litigants who might have to travel from far afield, such as a small island in the Caribbean. We could, and some of us did, replace paper with electronic screens and filing, both in and out of court, although we were still using a hybrid system where all documents had to be both in physical bundles and e-files. We had just given notice of going digital for permission to appeal applications. But paper and face to face hearings were still the norm.

Within a week of lockdown, all judges were working and hearing cases from their respective homes. All documents were on screen and hearings were virtual, using multiple screens in different locations. Yet the whole process remained fully transparent, being broadcast simultaneously on the internet, as before. And we didn't have to adjourn a single hearing for more than a day or two, except where parties asked to do so for Covid reasons. Our support team - Judicial Assistants, Personal Assistants, administrative support, the Registry and Listing Office staff - almost all worked from home. The Supreme Court building was almost empty. And almost all of the IT infrastructure worked, almost all of the time.

We can take mediation as another example. My wife is a commercial mediator at the Bar. Large commercial mediations used all to be face to face, using paper bundles often of very large size and complexity. Each party and its lawyers holed up in a separate room in the same building, with the mediator shuttling between them. From the start of lockdown, she and many of her mediator colleagues transferred from face to face over to remote mediations using Zoom or something similar, and from paper to e-bundles. As a result, there was no problem when she needed to do a virtual one the other day while in self-isolation. It took clients (professional and lay) a little time to realise that a virtual mediation can be as good as one face to face. But the savings in time, travel costs and (sometimes) the hiring of a suite of hotel rooms are huge, even if the mediator can no longer literally provide a sympathetic shoulder to cry on. And the logistical difficulties in getting all the stakeholders and their lawyers to the same physical place, sometimes from all round the world, are completely eliminated.

Now I can hear some of you saying, or thinking, what has all this shiny IT got to do with making litigation more affordable? And the short answer is nothing, necessarily. If all we do is replicate paper-based and face to face processes with electronic documentation and video hearings, sticking slavishly to the same old procedural models as far as possible, then apart from printing and delivery costs and a few plane, bus and train fares, the cost may remain much the same. Solicitors don't charge less for an email than for the same words in a letter, even if they save a stamp or two. Leading Counsel will probably not charge less for a virtual brief than for a face to face encounter in the Royal Courts of Justice. And mediators won't charge less for a virtual mediation than a face to face mediation (or at least, from a purely personal perspective, I hope not!).

But moving online from paper, and to video from face to face, will unlock enormous cost savings if we can use it as the impetus to analyse our dispute resolution processes from a completely new starting point, and one which takes full advantage of the benefits which e-working makes possible for the first time. This is a subject on which I have written and spoken a great deal, and on which I could easily bore for Britain. And there's no substitute for just trying it, for example by using the online Traffic Penalty Tribunal (although this pre-supposes that you get a parking ticket to appeal against, which I obviously don't endorse). Here are a few highlights which ought to save costs.

First, by moving online from paper, you can eventually get rid of the Civil Procedure Rules and the White Book. When online procedure consists of filling-in electronic 'smart' forms (like a tax return or a mortgage or passport application) then there is only one rule: follow the guidance in the form. This doesn't only reduce the cost of the procedural game, invented by lawyers for use solely by lawyers, but it removes a big barrier to the active participation in litigation by lay litigants, reducing their need for legal help (in simple cases) to the occasions when the lawyer adds most value. Examples that spring to mind here are preliminary bespoke advice on the merits, cross-examination, or specialist advocacy in the rare case which goes all the way to trial. I am sure you can think of more. This potential revolution will be far more fundamental than the change from the Rules of the Supreme Court to the Civil Procedure Rules, if only we can summon up the imagination to undertake it, and if Parliament can find the time to legislate for an online rule committee, after several attempts were timed out. At the moment, the civil online court is authorised under temporary pilot rules within Part 51 of the Civil Procedure Rules. Having to shove changes into Part 51 (for transitional arrangements and pilot schemes) is a cracking example of putting new wine into old bottles, although I am lost in admiration at the hard work and imagination of the small team who draft the pilot rules. But the sad fact is that the necessary procedural revolution is, sadly, stillborn at the moment.

Second, the smart forms could link users to standard online legal advice (such as that provided by AdviceNow) which may often answer their questions for free. For more 'bespoke' advice, the online advice agency can then direct the user to routes to obtain more focussed, 'live' advice from a real person (barrister or solicitor) who has a direct access or unbundled practice, at a fraction of the current cost. This excellent new avenue is at present constrained by the modest (mainly charitable) funding of the pioneering groups involved, and by the still slow progress of

direct professional access (at the Bar) and unbundled legal services (by solicitors).

Third, online forms (modelled on decision trees) can help a lay litigant articulate their grievance into something which lawyers and judges can understand. To use an example from the Civil Courts Structure Review, suppose that A has a dispute with her builder B relating to works carried out at her house. A would be asked to identify the object of her grievance by reference to a series of tick boxes which might include her bank and her builder. Having ticked 'Builder' the software would present new questions designed to elicit the essential nature of the dispute, for example whether it was about the quality of the work, the amount charged or delays in completion. Clicking the appropriate box would reveal further successive pages, such as the details of the dispute and an electronic copy, scan or photograph of any relevant documentation. The result of this process would be for the system to generate a document on screen broadly approximating to particulars of claim as we know it. Did you know that the move from paper to digital form filling in online divorce reduced the return rate of incorrectly completed forms from over 40% to less than 1%? I rest my case.

Fourth, an online system can transform the current procedure where you only encounter the judge at a trial or formal hearing into a process of discontinuous 'chat-line' engagement, enabling more investigatory judging, and a much quicker progress towards the identification and resolution of the key issues. This is already being tried in the Social Security and Child Support Tribunal.

Fifth, and more generally, online case management can enable a court Case Officer to manage each case along a route best calculated to bring resolution, whether early neutral evaluation, mediation, discontinuous engagement or, where necessary, an old-fashioned trial.

Sixth, the replacement of paper and face to face hearings with e-files and video conferences hugely frees up resources, in terms of real estate required, judicial resources, lawyer resources, and the busy lives of the clients. At the moment, the only way to have a hearing and be sure that all of the documents will be available is in the local court where said documents are stored. How many times have we arrived at a court to find that the papers, or even the judge, have been delivered somewhere else? And even hybrid solutions are not the perfect answer - video

conferences for taking evidence get derailed because some necessary paper document hasn't reached the witness.

Finally, the sheer cost and time involved in photocopying, sorting, bundling and delivering papers is an industry in itself in a litigation law firm. It is often charged out to clients per sheet, and could all be swept away by going digital, where there need be no photocopying at all, automated bundling and where delivery is (when the IT works) at the press of a button.

But it doesn't do away with oral advocacy, nor should it, where it is needed. Nor with a real face to face encounter where that is necessary or appropriate. And, as the Supreme Court experience has shown, it maintains transparency. If the use of e-files makes it possible to put the court's core bundle on the internet alongside the live broadcast of the hearing, as I fervently hope, it will utterly transform it. Members of the public, including press, students and academics, will then have better access to the case (and no doubt a concomitant increased engagement with the arguments). They can themselves actually read documents which counsel usually asks the judges to read to themselves. And they can even pre-read.

I could go on ad nauseam, but time prevents me. If you are interested in this area, as I suggest we all should be, I would encourage you to read my Civil Courts Structure Review reports, or my chapter on the online court in *'Principles, procedure, and justice : essays in honour of Adrian Zuckerman'* (edited by Rabeea Assy and Andrew Higgins, 2020).

How do we move forward from a dim perception that our enforced adoption of greatly increased electronic communication and remote working, in a chaotic environment caused by the pandemic, might actually lead to cheaper ways of doing civil litigation in the long term? I would like to offer five practical answers to that.

First, I think we need to find ways to talk to each other and share experiences, of what might work to save money long term and what won't, of what could be a base for improvement and what we should tactfully leave behind when the pandemic is over. You could perhaps start by

using the breakout sessions later today.

Second, let's not just go (I would say sink) back to the old ways once the pandemic is over, however comforting it may be to do so. By old ways I do not just mean working face to face in offices and physical courtrooms, and a partial return to that would be both welcome and beneficial to the justice process. I mean let's not design new online methods of communication just as slavish copies of the old paper forms and procedures they are intended to replace. Let us, as far as possible, start from scratch, asking every time what the reformed procedure is actually seeking to achieve, and then getting to the objective as efficiently, and cost effectively, as possible. In particular, let us not become subservient, ever again, to the tyranny of paper. I don't mean that paper should be banned altogether. Many find that there are certain benefits of paper such as for proof-reading or annotating key documents, and I still use paper for my notes in court (largely due to my rudimentary typing skills). But let's finally do away with huge bundles of documents or authorities, only a tiny fraction of which ever get looked at. We would even be striking a blow for the planet.

Third, let's support the reform process, by joining engagement groups, going to hackathons, and encouraging the government to continue funding digital transition and online courts, especially as public money will probably be tighter than ever.

Fourth, let's think what other cost saving advantages might become available through digitisation and the appropriate use of technology. One of these I have already mentioned: vast searching capabilities across electronic documents. Another, still lying mainly in the future, but in use by some online dispute resolution platforms such as eBay, is the use of artificial intelligence and machine learning techniques. I am not recommending the disintermediation of judges and their wholesale replacement by robots (at least not until I have retired!), but there can be no doubt that outcome prediction derived from the application of algorithms to a sufficient database of previous decisions could be much cheaper than getting advice from Leading Counsel, or going to court for a decision. It's already happening in medical diagnosis, and to good effect. But we first need to build the database.

Finally, let's not be put off by what I will call the hybrid problem. You don't have to be Jeremy Clarkson to appreciate that a hybrid car is more expensive, heavier and has less performance, than the purely petrol or diesel powered car it is designed to replace, or the purely electric car which will follow it. The same is true of evolutionary reform to court procedures. We need to be able to look through the current chaos of the pandemic, and through the often necessary and expensive transitional stage of hybridisation, to imagine and then to design what the full digital process might look like at the far end and how much more efficient, and therefore cheaper, it can be made to be. Forgive me if I use the Supreme Court again as a case study. When the Supreme Court was founded, parties only had to compile and file paper bundles. Then, for at least five years before the pandemic, we had been 'going digital' in a hybrid sort of way, but gradually. At first, parties had to file both paper and e-bundles. Then we began to limit the scope of the paper bundles, reducing the number of paper copies of the authorities bundle. That hybrid process was more expensive than before, and counsel had to announce a hard copy and an e-bundle reference for every page to which they wished to refer in court. But now, or very soon, and driven by the pandemic, the paper filing requirement will be gone, for ever. Now I appreciate that for many court users, the pandemic will have only set the wheels of the hybridisation phase in motion, rather than enabled emergence from the other side of the tunnel. I have recently been told about a four-day county court virtual trial where the directions required full paper and full e-bundles - and even then they all ended up in the wrong court building. That's because the digitisation of the ordinary county court processes had yet to start when the pandemic hit. The county courts and the Supreme Court are probably at the opposite ends of a spectrum in this regard, with the other civil courts somewhere in between.

I would expect the Association of Costs Lawyers and its members to have a very special role in all of this. You are experts in the costs consequences of everything that moves, or even twitches, in the legal world. I would like to see a costs expert on every relevant committee, engagement group and rule-making body charged with bringing this coming revolution to pass. Too many of those currently engaged, and I am no exception, are easily carried away on clouds of starry-eyed enthusiasm, and need those with real-life costs expertise and experience to keep our feet firmly on the ground.

I think that the very fact that we are having today's conference online, using a remarkable platform which actually replicates a conference room by putting us on tables and moving us

around, is an immediate demonstration of how the pandemic can transform the way we work, and how it can make the service which we provide more cost effective. I'm most grateful for having been asked to participate. Of course, online interaction is no substitute for meeting friends and colleagues face to face, and the day when that ceases to be an essential part of lawyering is the day when I will want to retire and do something with real social content. I really miss seeing all your faces today, and the lost chance to be with you face to face. That is, and will continue to be, what makes us human.